Design by Catharina Veder

The legal protection of cultural heritage in international law

And its implementation in Dutch Law

Lucky Belder

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De juridische bescherming van cultureel erfgoed in internationaal recht en de implementatie in Nederlands recht (met een samenvatting in het Nederlands).

Proefschrift

Ter verkrijging van de graad van doctor aan de Universiteit Utrecht op gezag van de rector magnificus, prof.dr. G.J. van der Zwaan, ingevolge het besluit van het college voor promoties in het openbaar te verdedigen op vrijdag 27 september 2013 des middags te 2.30 uur.

door

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te 's Gravenhage

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Preface

The Buon Governo frescoes are part of a cycle in the Sale di Novi in the Palazzo Publico in Siena. Lorenzetti painted this allegory of good and bad government between 1337 and 1339 in commission by the Council of the Nine, the ruling officials of the merchant oligarchy that governed the community of Siena. The cycle contains a narrative on the effects of good and bad government on life in the town and in the countryside. In the allegory on Good Government we see the symbolic figures Justice and Peace looming over a score of small scenes depicting the effects of good governance on the daily lives of the citizens. There is building, teaching, dancing and commerce providing welfare and harmony for all stakeholders in the city community. In the Italian early renaissance, frescoes containing worldly scenes should be seen as allegories that are not only to please the eye, but also to educate the public. Their moralistic tone not only serves to confirm the position of the patrons, but are also a lesson to those that are to submit to their power. But most of all these pictures serve to underscore the values that were considered worthy of protection and elementary to good governance. These wall paintings belong to the cultural heritage of the city of Siena, and are a symbol of its rich political, social, and artistic history. When I saw them for the first time, I was fascinated by the fact that they have existed undisturbed for the duration of such a long time. Thinking of all the historic events that happened during that time and the people involved, I realised that this particular place is part of the network of the whole of European cultural heritage. Since then, I have seen the frescoes at least five times, and I find that I also have a stake in the preservation of and the access to these moralistic scenes of city life, as I think of them part as part of my personal history.

To be enabled to write a dissertation on the legal aspects of the protection of cultural heritage has been a privilege. It brought together the two topics that are important to me: art and law. After my studies in the History of Art and Archaeology at the University of Amsterdam and after I moved

to Limburg I started law at Maastricht University, where I was introduced to the field of Art Law by Prof. Hildegard Schneider. This led to the idea of working on a dissertation on the legal protection of cultural heritage. Subsequently I was introduced to the new developments in this field of research regarding the relation between protection of intangible cultural heritage and the global reach of the international treaties on intellectual property law by Professor Willem Grosheide of the University of Utrecht, and the Research Project started under their joint supervision. In a later phase of the research project the supervision was continued by Prof Madeleine de Cock Buning and Prof Hildegard Schneider. For their support, advice and wisdom I thank them sincerely.

I am endebted to the members of the reading committee, Prof. T.J.C.A. van Engelen, Prof. E. Hondius, Prof. C. Flinterman, Prof. I. van der Vlies and Prof. S. de Vries.

I also am grateful to Vincent Wintermans and Carol Westrik of the Dutch UNESCO Committee, and Cas Smithuysen of the Boekman Foundation.

Thanks are also due to my colleagues past and present at the Law Department and especially the Molengraaff Institute, and most in particular my friend and roommate Roeland de Bruin, for his great support. His cheerful presence brightened some of the darker hours. Special thanks also for my daughter Catharina Veder who designed and formatted the manuscript.

There is work and there are my friends and family. My friends I thank for their support when necessary and also for sometimes turning a blind eye. Most important, always, is my family. I cannot thank them enough. My daughters Maria and Catharina are the jewels in the crown I share with Aart Veder, who is, was and will always be the sun in my life.

I.
INTRODUCTION

1.1. Introduction

This research project considers the legal protection of cultural heritage in international law against the backdrop of the legal protection of cultural rights. This legal protection has come to cover the prevention of illicit trade in cultural property, the protection against loss or decay of cultural heritage, the safeguarding of intangible cultural heritage, the protection and promotion of conditions to ensure the diversity of future cultural heritage as well as the protection of access to cultural heritage. This means that the protection of cultural heritage today has become an important subject-matter in a network of policy fields, which makes it necessary to understand the most important objectives of these legal instruments, to discuss how they interrelate and how they may support each other. This book therefore is to provide an account of the major developments in the legal protection of cultural heritage in public international law since the 1960s. This account is intended to present a general outline of the network of relations between the major interests that are involved in these developments, not only in the protection of cultural heritage itself, but also in the protection of the rights to access, enjoy and share the benefits of cultural heritage. The research project will be guided by three sub- questions concerning the protection of the interests of the national state in relation

to the international community, the protection of the rights of individual right holders, and the protection of the position of communities in relation to their cultural heritage. This will lead to the concluding chapter, which will provide a comprehensive assessment of the major tendencies in the legal protection of cultural heritage. The final aim of this project is to contribute a comprehensive framework for the Dutch implementation of the major Heritage Conventions in law and cultural policies.

1.2. The background of the research project: the networked society

Why is this necessary and why now? While the world is confronted with the effects of globalisation, it is increasingly clear that this period in history is a period of transition, in which social and cultural structures are changing rapidly. The process of globalisation is carried by two parallel developments, one is the realisation of the information and communication society, made possible by digital communication technology and the internet.[1] At the same time, the economic development of world trade turns the world into a global network in which economic, social and cultural exchanges bring change to societies.[2] Van Dijk first described the network society as based on individuals and communities that are linked by networks which "shape the form and the organisation of modern society".[3] The concept of society as a network, was adapted by Castells, who defines a network as a set of interconnected nodes.[4] In fact, Castells describes the effects of globalisation as the making of a network society: "a social structure based on networks operated by information and communication technologies based in microelectronics and digital computer networks that generate, process, and distribute information on the basis of the knowledge accumulated in the nodes of the networks."[5] Castells, thus, takes Van Dijk's theory a step further by stating that the network society is basically the content of modern society. Whether networks are the form or content, what it means is that the structural framework of our society today is changing in a way that we have to come to terms with. An important aspect of this development is what Castells sees as the *transformation of sociability,* as in the ways we communicate and interact with others.[6] This causes new modes of social relations, as is demonstrated by the use of Internet leading to more social interaction, as people become more and more engaged in a wide variety of social media.[7] This leads to a society in which networked individualism is dominant, meaning that we have developed into a society in which the social structure is based on self-selected communication networks, which are created and used dependant on the needs and activities of each individual.[8]

The question that follows is what this means for society. In network theory, societies are cultural constructs.[9] As the network is global, it integrates the

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[1] Van Dijk 1991, 1999 pp. 4-15; Barney 2004, pp. 7-10.
[2] Barney 2004, p. 19-25.
[3] Van Dijk 1991, 1999 p.24.
[4] Castells 2009, p.19.
[5] Castells 2005, p.7.
[6] Castells 2005, p.8.
[7] Castells 2005, p. 11.
[8] Castells 2005, p.12.
[9] Castells 2009, p. 19

multiplicity of cultural communities and identities with their historic and geographical origins. The global network serves as a unifying mechanism, as it exists in real time, specifying itself in every society. Thus, at the same time, the networked global society makes for commonality as well as singularity, leading to a world that is at the same time more homogenous as well as more diverse.[10] Latour explains that the traditional juxtaposition of the individual and society in the social sciences is a misconception. If we understand the individual as existing in a network of relations and contacts, it becomes clear that the individual and society are "two sides of the same coin".[11] For Latour this means that whenever you want to understand an entity, you have to consider its network. The one cannot exist without the other.[12] Thus the new global society consists of networks of individuals. At the same time cultural identities are part of the global network but may remain 'a rallying point of self - identification'.[13]

Sovereign national states are in a process of adaptation to the global networked society also. Increasingly, they form alliances and associations, sometimes leading to the sharing of sovereignty like in the European Union. At the same time, we see the development of an ever increasing network of international and supranational organisations to address global issues, like the United Nations and its agencies, or the International Criminal Court. Another development, that is emerging, at least in the context of the European Union, is that national states, alone or in their capacity as state party in an international treaty are increasingly seeking to share powers with regional and local governments, as well as connecting with NGO's in order to ensure the connection with individual citizens and gain political legitimacy.[14]

Castells explains the global networked society as a realm of communication, in which information is exchanged, processed and redistributed by (mass)media. Increasingly, these media are organised around global conglomerates, which are global and local at the same time, and consist of radio and television stations, print press, music recording companies and other online commercial entities. These media together constitute our public space, described by Castells as "the cognitive space where people's minds receive information and form their views by processing signals from society at large."[15] This formative position makes it important to support the structure and the dynamics of these media as well as contribute to the information feeding into the networks of communication. If we understand individuals as connecting within networks, we should take care

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[10] Van Dijk 1991, 1999, p. 3.
[11] Latour, 2011, p. 802.
[12] Latour 2011,p. 800.
[13] Castells 2009, p. 36-37.
[14] Castells, 2009, p 38-42.
[15] Castells 2005, p.12; Castells 2009, p. 76-78.

that the fabric of the network is strong and resilient. This book concludes that the protection of cultural heritage provides for an important contribution to the strengthening of the network of social and cultural relations between individuals and communities in modern society.

The value of cultural heritage lies in its contribution to the social and cultural relations in the networked society in which networks are virtual communities, that are no longer bound by geographical limitations. As such, cultural heritage is not only an instrument for the presentation of national glory or as a resource for economic development through tourism. The contribution to the network society lies more in particular in the intangible capacities of cultural heritage. In today's information economy intangible heritage contributes to the wealth of resources and cultural exchanges, and is as such a resource of continuously renewed cultural heritage.[16] At the same time cultural heritage contributes to international relations as the global economy facilitates the global exchange of cultural heritages, which may lead to the adaptation of cultural references on the one hand, but also to more understanding for safeguarding of the traditional cultural heritages.[17]

In 2005, the Council of Europe adopted the Framework Convention on the Value of Cultural Heritage for Society, affirming that cultural heritage is to be considered as a valuable contribution to society.[18] As such, the right to cultural heritage is considered as inherent to the right to take part in cultural life.[19] The Convention articulates the right of the individual to be part of a 'chosen cultural community', independent of nationality, race, or gender.[20] In fact, an individual may be part of multiple communities at the same time.

The above means that the protection of cultural heritage is not only a worthy objective, but is also a means to an end. We need a legal normative framework protecting cultural heritage that is designed to cope with the challenges that the global society brings. It is therefore necessary to provide an overview of which legal instruments are in place, and see how these instruments contribute to the fabric of global society in a network of obligations, rights and freedoms.

The traditional art law perspective

In the traditional art law perspective, the legal protection of cultural heritage concerns the protection of tangible cultural heritage against illicit trade and

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[16] Greffe, 2009, p. 104.
[17] Greffe, 2009, p. 104.
[18] ETS No 199. The Convention was signed in 2005 and entered into force on 1 June 2011.
[19] Article 1. See also Chapter 4B paragraph 1.2.
[20] Article 2.b. See also Dolff-Bonenkämpfer, 2009, p. 71.

the protection against loss by destruction or by decay. Regarding protection against illicit trade the recent case of the complaint by the Iranian Republic against the internationally operating Barakat Galleries in the UK merits further attention.[21] The English Court of Appeal granted the Government of Iran the right of recovery with regard to 18 antique objects (dating from 2000-3000 BC) from the Barakat Galleries which had offered these objects for sale in London. The Gallery claimed good title to these objects as they had been purchased in auction houses in Switzerland, France and Germany. Iran based its claim on its National Heritage Protection Acts of 1930 and 1979, which granted Iran the right to confiscate antiquities that have been excavated from Iranian soil without notifying the Iranian authorities and without prior permission from the State as well as antiquities that are exported from Iran without obtaining proper permission.[22] In this case we can see that the UK court considered the national public interest of another sovereign state in protecting national cultural heritage to be more important than the legal protection of the private property rights of the Gallery, which considered that the purchase of cultural objects in European auction houses had resulted in securing a title that could be upheld in court. This is in contrast to earlier similar cases in which UK judges had decided that public law provisions of other states could not prevail over legitimate private property rights in the UK courts.[23]

We may understand this case as a first illustration of the development of the networked society, that reaches beyond the confinement of the interests of national states, because it represents a new attitude towards recognising the importance of public control over cultural heritage, even if it means upholding foreign public law. Two main issues surface from this case. The first issue concerns the balance between protecting the interests of the national state versus the protection of international interests. The public international law on the protection of cultural heritage is to balance the interests of the national state to protect the cultural heritage that is situated in its territory, or that is related to its citizens and local communities, and the international interest in the preservation of cultural heritage as a contribution to international cultural heritage. The second issue is the scope of the protection of the interests of the individual in relation to the protection of public interests. In this case this leads to the choice between the interests of the national state that is to protect the cultural heritage on its territory, and the individual private property rights holder that seeks to have his rights protected.

The emerging issue of cultural communities

For decades, indigenous communities have demanded the recognition of their

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[21] Government of Islamic Republic of Iran v. The Barakat Galleries Ltd., 2007.

[22] Regulations of 3 Nov. 1930 (Iran National Heritage Protection Act), articles 17, 18, 25, 41 and 51.

[23] Attorney General of New Zealand v. Ortiz 1984, King of Italy v. de Medici 1918.

rights to their cultural heritage. An early, and seminal case was decided in 1976 by the Australian courts. In this case the Pitjantjara people sought an order from the Court to prevent the sale of a book written by the anthropologist Dr. Mountford containing details of their tribal objects, communal legends and totemic geography. This book was based on information given to him by this people in a research project in 1940. The court held that the publication of this information, which had deep religious and cultural significance for the Aboriginals, amounted to a breach of confidence, and that the publication of the book would lead to the revealing of secrets that might "undermine the social and religious stability of their hard-pressed society".[24] So, although the information in the publication had been willingly provided by this aboriginal community more than thirty years previously, the information on indigenous knowledge and secrets that is sacred or intended to be kept secret was decided to be subject to what would later be called 'cultural privacy', and should not be published.[25]

This case relates to another emerging issue in the protection of cultural heritage. This concerns the increasing attention for the position of communities in which individuals create and experience their cultural heritage. Cultural rights ensure the right of every person to take part in his own culture.[26] The post-WW II process of decolonization and the effects of globalization in trade relations have resulted in a concurrent development of cultural rights. The protection of cultural heritage is increasingly considered as an important aspect in the protection of cultural rights. Cultural heritage is an essential factor in the identity of individuals as social beings and as members of a community. Cultural rights are therefore of key importance to protecting the interests of communities in the global society. This has resulted in initiatives to develop new models of governance and legislation to accommodate the cultural rights of communities to their cultural heritage.[27]

In 1993, the UN International Year of the World's Indigenous Peoples, the Mataata Declaration called for the right to take further steps to protect indigenous cultural heritage.[28] It was stated that the major part of indigenous

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[24] Foster v. Mountford, 1976, 14 ALR 71, See also the Report on "Recognition of Aboriginal Cuystomary Laws, ALRC Report 31, paragraph 468; Anderson 2009, p.117.118.

[25] Peter Yu 2008, p. 455-459; Hilty 2009, p. 901.

[26] Cultural rights : art. 27 Universal Declaration of Human Rights (UDHR), art. 1 and art. 15 Covenant on Economic, Social and Cultural Rights CESCR and art. 1 CCPR. From there they have been addressed in a variety of human rights instruments, like the 1981 African Charter on Human and Peoples Rights (AfCHPR) art. 17, participation in cultural life; art. 22, the right to equal enjoyment of the common heritage of mankind and art. 29: the duty to preserve African cultural traditions; 1989 ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (that only a few countries have ratified) particularly art. 2.2 (b) "promoting full realization of social, economic and cultural rights…; art. 5 (a) as groups and as individuals and art. 13.1 dealing with respect for the collective. The European Convention on Human Rights does not explicitly recognise cultural rights.

[27] See http://www.wipo.int/tk/en/ , last accessed October 2010.

[28] The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, June 1993.

cultural heritage did not consist of monuments and artefacts alone, but is also expressed in customary knowledge and cultural traditions. The Western system of intellectual property rights was considered to be unable to provide sufficient protection for indigenous interests in this intangible cultural heritage, as they provide only limited protection under the narrowly defined conditions of intellectual property rights.

Moreover, there was increasing concern for the effects of the commercialisation of indigenous cultural properties in the public domain.[29] This caused Michael Brown to note that 'from the indigenous rights perspective, the public domain is the problem, not the solution, because it defines traditional knowledge as a freely available resource".[30] The Mataatua Declaration was the start of the consultative process with respect to new legislation on the cultural and intellectual property rights of indigenous peoples, that resulted in the UN Declaration on the Rights of Indigenous Peoples of 2007, which affirms that "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions...".[31]

However, indigenous communities are not the only relevant communities. Migration because of economic or political conditions results in the founding of new minority communities of immigrants from former colonised territories, economic immigrants or refugees that are more or less adapting to their new environment. Often, the cultural confrontation between the immigrant communities and the established community causes tensions that give rise to questions regarding the degree to which adaptation, or assimilation.

The impact of globalisation has also resulted in an increasing interest in the economic exploitation of cultural heritage and the effects of the liberalisation of the trade in goods and services with regard to the effects of the global market economy on cultural identity and cultural diversity. On the other hand, cultural heritage is increasingly being recognised as an instrument in sustainable development, and as an important tool in the economies of developing countries. Because of the combination of developments in international trade, the media and technology, local cultures are being increasingly confronted with new influences. At the same time the mass communication media lead to an accelerated process of cultural adaptation in which the traditional values connected the cultural heritage are not always recognised.

The three issues presented above regarding the position of the national state,

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[29] Mataatua Declaration article 1.8a.
[30] Brown 2003, p. 237.
[31] United Nations Declaration on the Rights of Indigenous Peoples, (DRIPS), A/61/L.67, Add.1, Adopted by General Assembly Resolution 61/295 on 13 September 2007, article 31.

the position of the individual and the role of the community are closely related and influence each other. Thus, the discussion on the protection of the rights of minority communities by national states in the context of international law raises new questions on the position of the national state in relation to the international community. Also the restricted access to the traditional cultural expressions of indigenous communities provides a new perspective on the balancing of public and individual interests in the protection of cultural expressions.

1.3. The research task and its delineation

Since the beginning of its existence, UNESCO, as a specialized agency of the United Nations, has developed a network of normative instruments regarding the protection of cultural heritage. This research will focus on the objectives and the historical background of the main normative instruments of the UNESCO, and its implementation sofar in Dutch law. The 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, followed by the World Heritage Convention of 1982 and the Safeguarding of Intangible Heritage Convention of 2003 and, finally, the Convention on the Protection of the Diversity of Cultural Expressions together form a comprehensive normative system that covers the state of the art in the protection of cultural expressions, and are also, each in their own distinctive way, related to all of the issues presented above. After the entry into force of the Covenants on Civil and Political Rights and Social, Economic and Cultural Rights in 1976, the new Conventions refer to their close relation with these human rights instruments. Each successive Convention presents a further development of the network of cultural heritage conventions, in which all the nodes are connected. Together they provide a framework for cultural policies by national governments.

The main research task in this project is first to discuss the major developments in the legal protection of cultural heritage in international law as realised in the UNESCO Conventions mentioned above in the context of the development of cultural rights. The discussion of these Conventions, their history, their background, their contexts and relations with other contemporary instruments leads to insights into the common aspects of these Conventions to see how they are connected.

What follows is the task is to see how these connections may contribute to Dutch policies on the legal protection of cultural heritage protection in the years to come. The final aim is to contribute informed recommendations on the legal protection of cultural heritage in Dutch law.
The discussion of the developments in the legal protection of cultural heritage will be guided by three questions:

i. What is the position of the national state in relation to the international community?;
ii. What is the the legal protection of the interests of individual right holders?; and
iii. What is the position of communities in the protection of cultural heritage and cultural diversity?

These questions will be investigated from the perspective of the protection of cultural heritage in public international law aimed at preventing the illicit trade, loss, decay, or abuse of cultural heritage and to provide the necessary conditions to ensure a diversity of future cultural expressions contributing to cultural heritage and the protection of cultural rights. The international governance of these issues is the result of collaboration between states on matters they consider to be of international concern. The development of this law is in itself an important indication of the consensus on the role of the national state in the protection of cultural heritage since the 1960s.[32] In public international law instruments, a balance is sought between the position of the national state in the protection of the cultural heritage that is situated in its territory or that is related to its citizens and local communities, and the international interest in the preservation of cultural properties as a contribution to international cultural heritage. National states are thereby committed to the implementation of public international law and this law will thereafter shape the laws and policies of these national states.

Although the Netherlands was active in the preparation of the UNESCO Conventions, it was not a frontrunner in the ratification of these Conventions. The 1970 UNESCO Convention on the prevention of illicit trade in cultural goods was only ratified by the Netherlands in 2009. And the UNESCO Convention on the protection and promotion of the diversity of cultural expressions was ratified in 2009 as one of the last countries in the European Union to do so. The process of the ratification of the UNESCO Convention on the protection of intangible heritage was realised in August 2012. This is partly due to the fact that the Netherlands is also part of the European Union, and as such under the obligation to adhere to the relevant EU Law. Although EU law as such is not the object of research in this study, the developments in EU law as relevant to the subject matter of the international law instruments will be discussed as far as it provides the context of the Dutch implementation.

Overview of the chapters
Chapter 3A describes the main normative instruments regarding the trade in tangible cultural objects as regulated in the 1970 UNESCO Convention on the

[32] Merryman, 2000, p. 300-311.

means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property. This chapter will also discuss the closely related 1995 UNIDROIT Convention on stolen or illegally exported cultural objects. Chapter 3B provides an overview of its implementation in Dutch Law in the context of European Union law. This part will only refer to the relevant amendments in the "Wet tot Behoud Cultuurbezit" and the Dutch Civil Code and not provide an in depth discussion of the civil law aspects that are the result of the system of the Dutch Civil Code. hapter 4A describes the main developments in the protection of cultural heritage as regulated in the 1972 UNESCO World Heritage Convention. Chapter 4B follows with an overview of the protection of cultural heritage in Dutch Law in the context of the Council of Europe's Culture Conventions. Chapter 5A will discuss the 2003 Convention on the safeguarding of intangible heritage, and the WIPO discussion on the protection of traditional cultural expressions, while 5B will focus on the normative framework in the Netherlands. Chapter 6A concentrates on the 2005 UNESCO Convention on the protection and promotion of the diversity of Cultural expressions, committing national states to implement an active policy on the protection of cultural diversity, and 6B will concentrate the Dutch approach.

While chapters 3, 4, 5 and 6 regard the legal protection of cultural expressions in international law from the perspective of the protection and preservation of the cultural heritage itself, chapter 7 has the focus on the position of the individual right holder to this cultural heritage. The protection of right holder to cultural heritage has been articulated in the development of cultural rights. The Universal Declaration of Human Rights, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights have set the standard for the protection of cultural rights. Chapter 7 will discuss the background of these instruments, followed by a discussion of the 2007 UN Declaration on the Rights of Indigenous Peoples.

Chapter 8 will provide an answer to the research questions by discussing how the three leading issues are made apparent in the UNESCO Conventions, and provide a model that will clarify the relations between the international legal instruments, and support the recommendations that follow from this research project.

What will not be discussed

This outline of the research would not be complete if it were not to provide a reference to an important aspect of the legal protection of cultural heritage that will not be dealt with in this project. The looting of art during World War II and the restitution of objects to the former owners has become a distinct body of international law, soft law and case law. Although this has become an important subject in the legal literature on the legal protection of cultural heritage, there are specific aspects that set this subject apart. In my view, the particular moral and political considerations that are part of these claims for restitution are part

of a process that is influenced by circumstances that are time-specific and merit a focused discussion. In her recent Thesis "Contested cultural property", my colleague and friend Dr. Katja Lubina extensively discussed the legal framework on the return of cultural objects including the civil law aspects of de-accession and the sale of works in public collections and I gladly refer to her work..[33] In her study she has tied the discussion on the return of Nazi plundered art to the return of human remains from Western public collections to indigenous communities. She bases this link on the notion that there is a close similarity in the sensitivity of the subject-matter, a process of recognition within international legal fora and a demand for respect on the part of the claimants. This has resulted in the development of a body of law that is, although it is part of the process of the development of the law on the protection of cultural heritage and cultural rights, a separate subject, as it specifically deals with the law and policies of the restitution of objects to individual right holders.

Another limitation on the scope of this research is that it concentrates on formal law. It is important to realise that this does not cover the context of these Conventions completely. Increasingly, the legislator depends on regulatory measures that leave its operationalisation to self-regulation. At the same time, stakeholders in the protection of cultural heritage have organised their own institutions that operate on the basis of codes of conduct and internal guidelines, like Sotheby's Code of Business Conduct and Ethics or the Ethical Code of the World Archaeological Congress. The operation, influence and the effects of such codes in themselves merit a separate study.

1.4. Methodology

Classical legal research amounts to the text-based analysis of legal texts, preparatory documents and explanatory notes, comments and doctrine. This project follows this practice and is based on the integration of reflective work and personal observations. This means that the research is based on the corpus of publicly available documents related to the legal instruments as available in research libraries in the Netherlands and Paris and on the internet. The research has also benefited from the increasing availability of policy documents through search engines in the UN and UNESCO databases. The discussion of these instruments in the legal scholarship provided an important contribution, but also the discussion of the underlying social and cultural issue by cultural anthropologists and social scientists have provided for important information on historic background and context. The reflective dimension of the project therefore draws upon the study of documents, the literature and critical analyses

[33] K. Lubina, Contested Cultural Property, Maastricht University 2009.

of the public law instruments. For the empirical work I could benefit from the invitation of the Dutch UNESCO Commission to attend, as an observer, the Extraordinary Sessions of the 2005 UNESCO Convention on the protection and promotion of the diversity of cultural expressions and this contributed to an exploratory field study on the awareness of cultural diversity in civil society in the Netherlands, which was the basis of the Dutch UNESCO Commission's recommendation to the Dutch Government on the Convention.[34] In 2008 and 2009 I attended the Convention's Committee on the Operational Guidelines of the Convention. Likewise, I was given the opportunity to attend the Fourth General Conference of the UNESCO Convention on the Protection of Intangible Cultural Heritage in 2009, during which the first nominations of elements of intangible heritage were officially accepted. The experience of attending these meetings and the communications with numerous representatives and other observers have been of great value in understanding how the actual work in these Conventions is being carried out. In addition, attending these meetings has been important in lifting the veil to some of the political relations and, sometimes hidden, to the interests and the agendas of the participating parties.

1.5. Terminology

A first introduction to the terminology is necessary here. The following definitions have served as a guide in this project.

a. Cultural heritage
Definitions of cultural heritage change over time and depend on perspective. Today the concept encloses both tangible and intangible cultural heritage. The glossary of the ICOM Code of Ethics of 2004 defines cultural heritage as " Any thing or concept considered of aesthetic, historical, scientific or spiritual significance". A more elaborate definition in the Council of Europe's Framework Convention on the Value of Cultural Heritage for Society of 2005 seeks to define cultural heritage as :

> "... a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. (...)[35]

[34] Belder, Smithuijsen 2007.

[35] Council of Europe 2005, article 2 further reads: (...) It includes all aspects of the environment resulting from the interaction between peoples and places through time; b. a heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations.

[36] Merryman, 2005, p. 276. John Henry Merryman was the advisor to the United States Government in the drafting of the 1970 UNESCO Convention and initiated the first legal course on the protection of cultural property at Stanford Law School. In his handbook 'Law, Ethics and the Visual Arts', compiled with his co-author, at the art historian Albert Elsen (4th edition 2004), the term cultural heritage is carefully avoided.

b. Cultural property

Leading authors like Merryman persist in speaking of cultural property with reference to cultural heritage.[36] In his perspective cultural property is a more neutral term, as it does not involve the ethical, historical and political implications that he considers to be present in the heritage debate.[37] Lyndl Prott, on the other hand, advocates the use of the term cultural heritage as opposed to cultural property when referring to cultural expressions. In her eyes the term ' cultural property' is loaded with 'the baggage of associations and implications of ownership and property, exclusivity, alienation and exploitation' that is being contested in the recent body of protective normative legislation as is being developed by the UNESCO and other international institutions.[38] Her implicit support for a more cosmopolitan perspective of cultural expressions is supported by authors like Brown and Mezey, who emphasize the dynamic and fluid nature of culture and contest the development of proprietary claims to cultural expressions in the public domain.[39] With all of these opinions in mind, the concept of cultural property has come to cover cultural objects and cultural manifestations which people regard as representing a value that may or may not be accorded an economic value.[40]

c. Cultural expressions

This book recognises the broad definition that was used in The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions on cultural expressions in Article 4 paragraph 3 as leading, because it is the result of long debates between a large number of national states and informed by a large number of NGO's. Thus cultural expressions are considered as "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content".

d. Communities

If one thing has become clear in this study, it is that in the context of culture there are many interpretations and definitions of a 'community'. A definition that covers all other subcategories and became a guiding factor in this project is the one formulated by Wim van Zanten in his glossary on intangible heritage:

> "people who share a self-ascribed sense of connectedness. This may be manifested, for example, in a feeling of identity or common behaviour,

[37] See also the editorial by Shapiro 2005, p. 5.

[38] This discussion between Merryman and Prott was started in 1989 in the first issue of the International Journal of Cultural Property, founded by Merryman. The first issue included an essay by Prott and O'Keeffe in which they justified their objections against the term cultural property. This journal has since been at the forefront of the discussions on developments in cultural property and cultural heritage. After some problems with a change of publishers in the period 2003-2004 the journal started to appear once again in 2005, with in the first issue a statement by Merryman that repeated his initial liberal views and, in the second issue, Prott's reaction thereto, repeating her statements on cultural heritage. See also Sarah Harding, Defining, p. 511; and Janet Blake, 2000, p. 65.

[39] Brown 2003; Mezey 2007. See also chapter 8.

[40] Odendahl 2005a, p. 386.

as well as in activities and territory. Individuals can belong to one or more communities". [41]

Communities are sometimes also specified as indigenous communities. Jose Martinez Cabo provided a working definition of "indigenous communities, peoples and nations":
"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system."[42]

Another important category of community is the minority community, which is defined in the UN discussion on the protection of the cultural rights of minorities. It is to be distinguished from the definition of indigenous communities, as minority communities are not linked to a specific territory, but to a social group, and may therefore also include immigrant or religious communities.

"numerically inferior to the rest of the population of the State; that are in a non-dominant position; whose members – nationals of the State of residence - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population; and that show – if only implicitly – a sense of solidarity, directed towards preserving their culture, traditions, religion or language." [43]

e. Cultural rights
This book is based on the premise that cultural rights refer to the right of individuals and sometimes communities to rely on the state to respect, protect and fulfil the right to freely participate in cultural life, to enjoy the benefits of scientific and cultural progress and the right to the protection of the moral and material interests resulting from one's cultural heritage.[44] Cultural rights were first codified in Article 27 of the UN Universal Declaration, article 27 of the Covenant on Civil and Political rights and Article 15 on the Covenant on Economic, Social and Cultural Rights, and over the years have become increasingly articulated in the General Comments as well as in dedicated UN instruments like the UN Declaration on the Rights of Indigenous Peoples of 2007.

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[41] Netherlands UNESCO Commission, 2002, p.4.
[42] United Nations Workshop on Data Collection and Disaggregation for Indigenous People. The Concept of Indigenous People Working Paper. New York: UN, 2004.
[43] Capotorti, 1979 p. 96, Thornberry 2002, p. 52.
[44] See also footnote 26 of this chapter, chapter 7 paragraph 2, and Chapter 2 footnote 31.

II.
DEVELOPMENTS IN THINKING ON THE PROTECTION OF CULTURAL HERITAGE

2.1. Introduction

This chapter aims to provide the reader with an overview of the major developments in thinking on cultural heritage as it developed in the modern Western society. However, understanding thinking on cultural heritage is trying to capture a moving target. This chapter will therefore be based on the organising principle of two major axes on thinking on cultural heritage in the perspective of international law. These two axes will provide the matrix that will serve as the backbone for the next chapters on the major legal instruments. The horizontal axis is based on a time line, and the second, vertical axis is based on the range between thinking of cultural heritage in terms of goods and services or as a public good.

The timeline will represent phases corresponding with proportionally more dominant perspectives on culture in general and cultural heritage in particular. The protection of national interests in the protection of cultural heritage has its origins in the nineteenth century roughly runs into the second half of the twentieth century. The second phase is that of growing internationalism and covers most of the second half of the twentieth century, and the third phase, globalisation, will be assumed to start in the period of the introduction of the internet and the world wide web and the institution of the World Trade Organisation.

Regarding the second, vertical axis in the matrix, the discussion of the legal protection of cultural heritage is often connected to the discussion of the private interests to this cultural heritage. As will be described in the next paragraphs, distinguished scholars like Merryman have made it their principle to discuss cultural heritage as cultural property.[t] This perspective on the protection of cultural heritage against illicit trade deals of course

in particular with objects of property as goods in trade. At the same time, thinking on protecting cultural heritage by protecting the diversity of cultural expressions as (cultural) goods and services also reflects a property approach. On the other hand, the developing thinking on cultural heritage demonstrates an increasing tendency to discuss cultural heritage on a more abstract level, as a public good. In the context of legal property rights, however, this is a confusing term. As a concept, it was introduced to provide a tool in the analyses of public expenditure.[2] 'Public goods' is an economic concept which refers to entities that are considered to be subject to some form of institutional arrangement, but are, by the nature of these provisions, not susceptible to the standard characteristics of private goods: that of excludability and substractability. It is difficult to exclude others to 'education' or 'military defense' or 'clean air', and the use of these provisions by some does not lead to scarcity for others. Although they are necessary, the market will not provide adequate incentives to provide and maintain these provisions, and it is therefore necessary to provide some form of public governance. The availability of these public goods is to the benefit of all, which reflects the double meaning of the word 'good' in all the Roman and German languages.

The chapter will begin with providing the reader with some context to the matrix: a short overview of thinking on culture and cultural heritage in three approaches. Starting with essentialism as an object-oriented approach with a focus on the objective description of cultural phenomena, the second, instrumental approach concerns the role of culture in society and its effects on people. This approach gains momentum in the phase of internationalisation. With a start in the same period, but becoming increasingly important in the phase of globalisation, the critical approach is described as having a focus on the formative aspects of the interrelation between cultural identity and the social environment.

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[1] Merryman 1986.

[2] Paul A. Samuelson (1954). "The Pure Theory of Public Expenditure". Review of Economics and Statistics (The MIT Press) 36 (4): 387–389.

2.2.1. Approaches to culture and cultural heritage

In the past three decades, the UNESCO has frequently presented the following definition of culture which dates back to the World Conference on Cultural Policies (the Mondiacult) in 1982:

> "Culture is the whole complex of distinctive spiritual, material, intellectual and emotional features of society or a social group and encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[3]

The 1982 Mondiacult definition broadens the definition of culture as a collection of 'tangible' expressions of art and literature that was commonly accepted until that time. New developments in anthropological and social studies had led to new insights into the role of culture and cultural heritage in society. The following subsections will present a brief account of the interpretations of culture and its manifestations. The thinking on culture is presented by describing three approaches; first, the essentialist, object-oriented approach regarding the objective description of cultural phenomena. The second, instrumental approach concerns the role of culture in society and its effects on human beings. Finally, the reflective, critical approach is occupied with the relation between cultural identity and the social environment.

2.2.2. Essentialist approach

The essentialist approach concentrates on the description of cultural phenomena. Until the Enlightenment, culture was considered in terms of a process of learning, of cultivation as in Cicero's famous quote : "Cultura anima philosophia est".[4] Scientific anthropological research, describing and classifying foreign cultures, developed hand in hand with the growing economic interest in non-Western countries. In 1871, Tylor published "Primitive Culture", analysing culture as the collection of its expressions.[5] These expressions were presented as a series of developing stages in one continuous process, from primitive towards civilized culture. His research into the conditions of 'crude and early tribes' was to explain

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[3] UNESCO Doc. CLT/MD/1, 1982, p. 12-14. This definition has since been repeated in various instruments such as in the preamble to the unesco Universal Declaration on Cultural Diversity, 2001, replacing the words 'the whole complex of' with 'a set of'.

[4] Philosophy is the cultivation of the mind. Cicero, Tuscelanorum Disputationem, book II, chapter V, 13.

[5] E.B. Tylor, 1871, See also Rampley 2009, p. 446-462.

and understand the historical process towards civilization. Culture with a capital C was identified with expressions of art and literature of Western origin while, on the other hand, the 'primitive cultures' presented a lower grade of development, mostly from non-Western countries. Thus Western Culture was identified with historical monuments and important works of art and science. This classical interpretation of culture prevailed for the most of the twentieth century.

After the world wars the wide support for the Bill of Human Rights presented a more egalitarian view of other cultures. This coincided with the development of more attention for the individual. At the same time, the post-colonial era was marked by developing policy objectives in the international community regarding the sustainable social and economic development of the Third World. The creation of new cultural policies acknowledging the manifold ways in which culture is manifested was to contribute to these objectives. Article 27 of the United Nations Declaration on Human Rights and article 15 paragraph 1 of the 1966 International Covenant on Economic, Social and Cultural Rights (CESCR), in force since 1976, provided the 'cultural rights' in the Bill of Human Rights.[6] With the codification of cultural rights the Western world confirmed a concept of culture as manifest in Julian Huxley's 1946 essay, written on the occasion of the institution of the UNESCO:[7]

> "The word Culture too is used broadly in our title. First of all it embraces creative art, including literature and architecture as well as music and the dance, painting and the other visual arts; and, once more, the applications of art, in the form of decoration, industrial design, certain aspects of town-planning and landscaping, and so forth. Then it can be used in the sense of cultivation of the mind directed towards the development of its interests and faculties, acquaintance with the artistic and intellectual achievements both of our own and of past ages, some knowledgement of history, some familiarity with ideas and the handling of ideas, a certain capacity for good judgment, critical sense, and independent thinking. In this sphere, we can speak of a high or a low level of culture in a community. And finally it can be employed in the broadest sense of all, the anthropological or sociological one, as denoting the entire material and mental apparatus characteristic of a particular society."

This quote reveals a threefold concept of culture, analyzed by O'Keeffe as 'distinct but equally valid concepts', with separate layers of meaning. He distinguished (quote):

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[6] Hansen 2002, pp. 283-285; Donders 2004.
[7] Huxley, 1946, p. 5.

"1. 'culture' in the classic highbrow sense, meaning the traditional canon of art, literature, music, theatre, architecture and so on;
2. 'culture' in a more pluralist sense, meaning all those products and manifestations of creative and expressive drives, a definition which encompasses not only 'high' culture but also mass phenomena such as commercial television and radio, the popular press, contemporary and folk music, handicrafts and organized sports: and;
3. 'culture' in the anthropological sense, meaning not simply the products or artefacts of creativity and expression (as envisaged by the first two definitions) but, rather, a society's underlying and characteristic pattern of thought - its 'way of life'- from which these and all social relations spring." [8]

The anthropological perspective of culture was consolidated in the above-mentioned 1982 World Conference on Cultural Policies in Mexico (Mondiacult).[9] This was the final meeting in a series of UNESCO regional Conferences on aspects of cultural policies from 1970 onwards. The Mondiacult Report on Cultural Policies should be seen in the light of the rise of the development agenda for the less developed countries. At first sight it may seem an elaborate inventory of the potential wishes of the newly emerging nations in the global economy. But, at the same time, it was also the moment when the international community agreed on the importance of a diversity of cultural expressions, and that this diversity is a vital contribution to the accumulated heritage of mankind. Moreover, in the final Mexico Declaration on Cultural Policies the concept of cultural identity was accepted as being instrumental to the liberation of peoples. Furthermore, it was emphasised that the preservation of cultural identity was inseparably linked to cultural diversity and cultural pluralism.[10] The Mondiacult Conference embraced the idea that culture is not only a collection of tangible cultural expressions, but that it is a living and dynamic concept that is part of an organic system in which different subcultures exist within a symbiotic relationship. In that light, the Mondiacult definiton both refers to the creative aspects of culture as well as its social character; on the one hand, it contains the concept of culture as the product of human creativity, art and literature. On the other hand, this definition fits within the anthropological approach, observing the social aspects of culture as the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups. Thus, culture is here defined as a complete system of values and symbols as well as a set of practices.[11]

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[8] O'Keefe, 1998, p. 905.
[9] UNESCO Doc. CLT/MD/1, 1982, p. 12-14.
[10] UNESCO Doc. CLT/MD/1,1982, paragraphs 7 and 9. See also Sthenou 2007, pp. 29-37.
[11] Stavenhagen, 2001, p. 87-89.

2.2.3.1. Instrumental approach, introduction

The second, instrumental approach to culture analyses how cultural heritage functions in society. The following subsections will first show how cultural heritage is presented as a potential resource of economic value, and second, as an instrument for the construction of identity and social cohesion.

2.2.3.2. Cultural heritage as a resource of economic value

The understanding of cultural heritage as a resource of economic value is based on the idea that cultural objects and manifestations may also be regarded as goods and services. Cultural heritage may be materialised in material cultural expressions: moveable and immovable objects, as well as manifested in intangible cultural expressions, elements and manifestations of folklore and traditional knowledge.

The idea of tangible and intangible cultural heritage as a resource of economic value is the result of developments in industry, information technology, global trade and the process of globalisation.[12] The development of a global network of communication and trade relations has altered the way communities, societies and cultures interrelate.[13] The potential economic benefits of cultural goods and services have turned culture into a commodity, into capital.[14] These economic benefits can be the result of the economic exploitation of cultural expressions in tourism. But it can also have a wider impact such as in the function of cultural expressions as a source of inspiration and the provider of building blocks for development, creativity and innovation in cultural industries.[15]

Tangible cultural expressions as well as elements of folklore and traditional knowledge are important resources for the tourist industry. Travelling to places of cultural interest has become the object of the 'heritage' industry. The tourist attraction of these places also has an important role in the preservation of these places, as the revenues from the tourist industries are instrumental in creating both the goodwill to preserve these places and the funding to realise their conservation. [16]

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[12] Brown, 2005, pp. 40-61.
[13] Stiglitz, 2002; J. Friedman 1999; T. Friedman 2005.
[14] Howard, 2003.
[15] See, for example, the EU Council conclusions of 10 May 2010 on the contribution of culture to local and regional development, 2010/C 135/05.
[16] This List is essential to the success of the UNESCO World Heritage List, as will be described in chapter @. See also van der AA, 2005.

The development of cultural industries is important for both the developed Western countries and for the developing countries. In the Western countries, it is generally acknowledged that cultural industries will be of increasing importance to economic production.[17] At the same time, cultural industries are also considered as one of the principal assets of developing countries in view of the development of their economy.[18]

The idea that cultural heritage can contribute to economic development was manifest in the UNESCO World Decade for Cultural Development (1988-1997). The leading idea was that there can be no sustainable economic development without a cultural policy dedicated to respect for and a sensibility to cultural factors.[19] The promotion of international cultural co-operation was also in harmony with that other pillar of the United Nations: the promotion of global trade as a way to weave a close web of international relations that should lead to welfare for all.

The concept of culture heritage as an economic resource is also reflected in the growing concern over the position of indigenous peoples and minority communities. It is increasingly apparent that a great wealth of traditional knowledge and folklore exists within these communities and is in danger of being lost when these communities are dissolved or lose contact with their original environment. The (economic) control over these traditional cultural expressions is now one of the major issues in the debate within WIPO and UNESCO on the future and scope of intellectual property and this will be further discussed in the following chapters.[20]

2.2.3.3. Cultural heritage as instrumental in the construction of identity and social cohesion

The instrumental approach to cultural heritage is apparent in the Western debate on cultural identity. First developed against the background of the codification of human rights, this debate centres on the relationship between the individual and his culture, his rights and his privileges. At the extreme ends are the philosophical theories of liberalism and communitarianism.

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[17] Pricewaterhousecoopers 2009 projects a global growth rate in the Media and Entertainment industries from $1.3 trillion in 2004 to $1.8 trillion in 2009 (p. 11).
[18] UNESCO, 2005.
[19] Zaragosa 1988, p. 4.
[20] Hilty, 2009, p. 883-911.

The leading paradigm after the Second World War was liberalism with, as its main goals, the development of human rights and a global system of free trade. After two world wars, the individual citizen was to be protected by a system of human rights.[21]
The three common assumptions constituting the core of liberalism have been described by Kukathas as:

- individualism, the moral primacy of the individual against the collective;
- egalitarianism, all human beings have the same moral status; and
- universalism, affirming the moral unity of the human species, while 'the specific historic circumstances and historic conditions' are of secondary importance.[22]

These three principles are all derived from the categorical imperative of the inherent value of individual human beings.

While those who tend to lean towards the liberal camp emphasise the position of the individual, the communitarians highlight the role of the community in the creation of individual identity. In the communitarian perspective, identity is the result of a dialectical process between the self and the other. Individuals are defined by their relations with others, and groups are defined by their boundaries with other groups.[23] In the ideas of Charles Taylor[24] the liberal tendencies in the work of Rawls[25] and Nozick[26] are 'atomising the individual' and it would be better to emphasise the importance of the cultural environment and the role of the community in the creation of individual identity. [27] In this sense, the community can provide the framework for 'authentic' living, and give meaning to human existence.

Regardless of liberal or communitarian theories, the importance of the cultural environment for human identity is, as Kymlicka recognised, that things have worth for us in so far as our culture grants them significance, and in so far as they fit into a way of living in a community.[28] Whether or not the individual or the community is given primacy, cultural expressions are "a form of mediation", and a "perspective, a gaze, which connects the present moment of identity to the past

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[21] In general: Alston, 1992; Riedel, 1999, p. 34-35; Wagner, 2001, p. 18.
[22] Kukathas, 1995, p. 231.
[23] See Barth,1996.
[24] Taylor, 1989 and 1992.
[25] Rawls, 2001.
[26] Nozick, 1974.
[27] Compare MacIntyre, 1984. However, these political philosophers are not to be confused with the more practical communitarist theories of Etzioni, emhasizing the social responsibility of the individual, that has gained influence in political Christian Democratic circles.
[28] Kymlicka, 1989, p. 165-166.

moment of heritage by giving heritage a presence in that present moment".[29] On the other hand, Amartya Sen criticises the emphasis on the cultural environment as a decisive factor in the existence of the individual. The individual should not be seen as determined by his given cultural group because people are not (or should not be) passively living their destiny, but are involved in a constant process of change and choices, in different contexts and involving different choices of groups. In this perspective the promotion of the diversity of cultural expressions as the protection of weaker cultural expressions may be considered as a conservative policy to keep individuals in their present situation.[30]

2.2.4. The Critical theory approach in the study of culture and cultural heritage

The critical theory approach in the analysis of culture and cultural heritage developed in the sphere of social studies. Influenced by the Marxist theory on the operational factors within capitalist society, the method of critique adopts the Hegelean concept of dialectical reasoning. After the First World War this method of analysis was further developed by the Institute of Social Studies in Frankfurt. Led by Horkheimer since 1930, its Journal for Social Research became the forum for critical thinkers like Georg Lukacs and Adorno. In their analyses of modern Western society, the individual is but a product of social, cultural and political conditions.[31] In French postmodern theory the focus is on the constructive function of language an discourse. Authors such as Julia Kristeva, Foucault, Derrida, Bourdieu and Deleuze seek to present alternatives to the 'accepted' narratives of history or culture, and concentrate on alternative narratives, from the perspectives of class or gender.[32]

An important subject-matter of critical analyses is the reification of culture. The 19th century Marxian analysis of capitalism regarded the nature of the different classes as being reflected in their relation to things, the commodities that circulate in the marketplace. While the workers were seduced by the festive appearance and entertaining atmosphere of the 19th century World Exhibitions as 'a universe of commodities', they allowed themselves to be transformed into customers. Walter Benjamin would later describe these exhibitions as not only a

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[29] Wagner, 2001.
[30] Sen, 2006; Appiah, 2006; and Cuno, 2008, p.121-145.
[31] Bronner, 1993.
[32] Barney 2004, 16-19.

festive divertissement to amuse the working classes, but as also the 'glorification of the exchange-value of commodities'.[33] In sociological critical theory, cultural expressions are analysed as a range of commodities, produced by an industry that will seek to maximize its profits. The distinction between more elitist expressions of culture as in literature and art, on the one hand, and mass culture, like fashion or car design is false ideology as they both serve to obscure class differences.[34] To Bourdieu culture is the expression of class differences.[35] His empirical research on cultural taste and the relation to different classes is influenced by the work of the sociologist Max Weber. For Bourdieu the different classes have internalised their economic needs in such a way that it is projected in their taste for certain kinds of commodities.

The work of theorists of the Frankfurt School concentrated on Western Society, but their critical observations were of great influence on others who saw themselves confronted with the relation between Western and non-Western Cultures. The main influence is the approach that cultural phenomena are not to be separated into independent subjects, but that they should be analysed in the context of their economic, social and political environment. Thus culture is re-examined as "a flexible repertoire of practices and discourses created through historical processes of contestation over signs and meanings".[36] These relative perspectives denote culture as not only the predominant way of life of a group, but also formed and constantly arranged by changing perspectives of individual participants, and closely related to social, political, religious, and territorial processes.[37] As Coombe stated, critical analysis is dedicated to unveiling the hidden factors in the law, in not taking a liberal perspective of objective law for granted, but instead in reading between the lines, regarding the law as a social construct, a discursive production as the result of signifying practices in cultural relations. [38]

An important element in critical theory is the discussion of agency, the way cultural expressions are used to further the interests of the dominant groups. The essentialist idea of a singular, leading culture in a given society has changed because of the results in sociological and anthropological research that differentiate between different social groups within society.[39] An example: the Palestinian author Said described the confrontation between Western culture and the Orient from the perspective of the imperialist ambitions of the West. Said explains how Western literature, as the cultural expression of the ruling class, influenced the

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[33] Benjamin, 1992, pp. 165-166.
[34] Lukacs,1971.
[35] Piere Bourdieu, 1986.
[36] Merry, 1998.
[37] Stavenhagen, 2001, p. 89; Hansen, 2002, p.285.
[38] Barney 2004, p. 17; Coombe 2005, p. 28, 29.
[39] Barth, 1989.

Western interpretation of Oriental Culture from the 17th century onwards. Said presents Orientalism as the way the West observes the East: a construct of an idea of a particular ´other´ culture, with dark and non-rational values. His work has been criticised as it was thought to reflect a simplistic binary approach and suffering from linguistic and structural simplification.[40] However, his conceptualisation of the aspect of agency in cultural expressions is an important contribution to the culture debate.

2.2.5. Interim concluding remarks

This section has presented a brief overview of three different approaches to culture and cultural heritage. Starting with a general introduction to the essentialist approach, which understands culture as the collection of its expressions, the instrumental approach was introduced as emphasising the functioning of cultural heritage while the critical approach is described as reflecting the dialectic interface between subjects and their cultural environment. The latter two approaches are to be considered as an illustration of how the concept of culture expanded in anthropological, social and cultural studies from culture as a collection of cultural expressions into a concept reflecting the dynamics of manifestations of social life in particular societies. Culture is therefore both the origin and the object of the study of all these disciplines.

2.3.1 Phases in thinking on the protection of cultural heritage

The horizontal axis in the matrix in this chapter represents the developments in thinking on cultural heritage as a timeline, with three markers representing a dominant perspective. Obviously, these phases flow into each other, and in each subsequent phase elements of the former phase may be recognised. The developing normative framework on the protection of cultural heritage in the first phase is dominated by nationalist interests. The Nineteenth century, as the era of industrialisation, budding colonialism, and a series of violent wars and struggles, also saw the first steps towards legal instruments regarding the protection of cultural heritage. The protection of national cultural heritage was dominant well into twentieth century, with an increasing focus on the protection against

[40] Porter, 1982, as cited in Mackenzie, 1995, p. 22.

illicit export and trade in the sixties and seventies.The second phase started in the sixties and seventies of the 20th century, also as a reaction to the nationalist sentiments in the discussion of protecting cultural heritage and demonstrates an increasing awareness of the international interests that are involved in the protection of cultural heritage, not only in the protection against illicit trade, but also in the protection of cultural heritage at large. With the technological developments leading to the introduction of the personal computer and the World Wide Web in 1991, as well as the consolidation of a system of world trade agreements and the institution of the World Trade Organisation in 1995 the era of globalisation set in.[41]

The following subparagraphs will present a brief introduction to this timeline, starting with an introduction of the major contributions made by Ruskin, Morris and Riegl to the research into the preservation of monuments in the 19th century, followed by a short overview of the discussion on protecting either national or international interests in cultural heritage, and an introduction to the new developments in the period of globalisation that we are witnessing today.

2.3.2. Thinking of cultural heritage in the nineteenth century

An early example of the national protection of cultural heritage dates back to the period after the Napoleonic plundering of the city of Rome. In 1802 the Edict Sulle Antiquita, e Belle Arti in Roma, e Nello Stato Ecclesiastico of Pope Pius VII [42], prohibited the taking of objects that were listed outside the territory of the city of Rome and the Ecclesiastical State. Moreover, it laid down the prohibition of the demolition, in part or in total, of antique buildings, either in Rome or outside, whether the buildings were public property or privately owned. Thus, the Edict combined the two major developments in the 19th century heritage protection: the concern for the preservation of monuments and historic buildings and protection against potential threats from armed conflicts.

The Peace of Vienna in 1815 consolidated a political and economic order that would stimulate the Industrial Revolution and allow for the development of a civil society. Nationalism was flourishing and there was a growing interest in material objects that symbolized a sense of historic development and provided

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[41] Barney 2004, pp. 19-25.

[42] Reprinted in Pinelli, 1989, p. 171-187. The Papal State had a long tradition of regulating conduct towards property as in the Edict Cum Almam Nostram Urbem, promulgated in 1462 by Pope Pius II. See Weber, 2002, pp. 219-223. In the 14th century City States such as Florence, Venice and Sienna had an elaborate system of legislation on (the details of) buildings, Fechner 1996, p. 11.

a new perspective on rapid social developments. In European countries like Italy and France national laws governed the preservation of historical buildings that were singled out as 'monuments classé'. After they were selected for their historical, artistic or cultural value they were classified as objects under public care.[43] Bacher emphasises the political role of monument preservation at that time, pointing out that the selection of objects was motivated by their interest in strengthening the national states of that time.[44] The nineteenth century witnessed the emergence of cultural heritage as the symbol of political power, a nation state or a specific community. Artists like Rubens, Durer and Rembrandt became symbols of their national states, with statues dedicated to their memory in the years between 1840 and 1860. Heritage preservation, meanwhile, was focused on the preservation of national archives and state documents.[45]

In the course of the 19th century historical research generated a more scientific approach to monument preservation. Authors like Ruskin and Morris in Great Britain and Riegl in Austria have further contributed to this field. In Great Britain, where the industrial revolution resulted in unprecedented building activity, Ruskin promoted the ideals of 'Gothic' architecture , the perfect Christian Style of the mediaeval and early Renaissance churches. In his essay "The Lamp of Memory" he opposed the contemporary custom to reinvent old buildings by taking out worn pieces and replacing them with newly-made elements. Sometimes this would even mean reconstructing a building into an ameliorated version of the original. Ruskin criticized this practice of 'restoration' as it was called at that time and instead promoted preserving buildings by careful maintenance and protection against the influence of time. Ruskin advocated that heritage objects were only held in trust, and were to be kept in good condition for the benefit of future generations because: "it is again no question of expediency or feeling whether we shall preserve the buildings of past times or not. We have no right whatever to touch them. They are not ours. They belong partly to those who built them, and partly to all the generations of mankind who are to follow us".[46] He would later inspire the socialist and Arts and Crafts front runner William Morris to establish the Society for the Protection of Ancient Buildings in 1877, the first organisation to be dedicated solely to the preservation of old buildings, which is still active today.[47]

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[43] Weidner, pp. 46-70.

[44] Bacher 1995, p. 21; Engstler discerns the early 19th century 'Betreffprinzip', reflecting the political situation at that moment from the 'Provenienzprinzip' that would take over in the second half of the 19th century, reflecting the awareness of the historic background and direct bond between archives and their place of origin. Engstler, 1964, p. 230, p. 273.

[45] Engstler, 1964.

[46] Ruskin, 1992, p. 215-229.

[47] Bradley, 1978, pp.70-71.

A few year later, in Austria, Alois Riegl's work as a curator of the Vienna Museum of Art and Industry concentrated on folk art and ornaments from rural areas. The Habsburg Empire covered a huge part of Central Europe and hosted a wide ethnic and cultural variety. This resulted in his major study 'The Problems of Style' in which he discussed the development of Western art from antiquity through mediaeval art into the Renaissance as a development in different 'styles'.[48] Riegl became one of the most important art historians of his time and influenced the thinking on heritage protection for generations to come. In 'Der moderne Denkmalkultus' (1903) Riegl discussed monuments as having 'Age Value', which to Riegl was the symbol of the whole complex of historical elements that are part of the object, the evidence of the traces of time that are witness to the process of creation and decline. This Age Value is an important element of the Memory Value (Erinnerungswert) of monuments. At the same time these historical monuments have a Historical Value in which a monument represents a specific event or aspect of the past. In a later essay Riegl discussed 'new currents' in heritage conservation and the necessity of heritage conservation in a multi-ethnic state which should serve the public interest independently from nationalist sentiments.[49]

2.3.3. From the protection of national interests to the protection of international interests

The debate on the protection of cultural heritage in the 20th century wavered between nationalism and internationalism. The need to protect the cultural heritage in national territories, the need to protect the free exchange of or trade in cultural objects and the need to protect the international interests in protecting cultural heritage.

Important result of the debate on the necessity to protect cultural heritage of a particular nation state was the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property considered moveable heritage objects as cultural property belonging either to the State or public bodies or to private bodies or individuals. The purpose of the 1970 Convention was to prevent the loss of cultural property in a particular national state. Article 4 thereby states that the Convention is

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[48] "Stilfragen: Grundlegungen zu einer Geschichte der Ornamentik" first published in 1893.

[49] Riegl,1905, "Neue Stromungen in der Denkmalpflege", reprinted in Bacher 1995, p. 226, see also Rampley2009.

to protect against the loss of cultural property that is created by the individual or collective genius of nationals of the State concerned, or within its territory even when created by foreign nationals or stateless persons as well as cultural property found within the national territory. By including cultural property that has its origins in other states the Convention also includes cultural property that has been acquired with the consent of the competent authorities of the country of origin of such property by scientific missions, cultural property which has been the subject of a freely agreed exchange and cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property. [50]

In the meantime an increasing number of non-Western countries came to realise that many objects in major Western museums originate from their territories, and were at the time taken without consent by the owners. In view of the increased protection of 'national' cultural heritage, it may come as no surprise that 'source' countries increasingly make demands for the return of these objects.[51] In an attempt to counter the demands from source countries, James Cuno, the Director of the Art Institute of Chicago,[52] rallied the international museum community into signing the "Declaration on the Importance and Value of Universal Museums" in 2002.[53] This Declaration voiced the opinion that objects that had come into their collections decades or centuries ago have become part of the cultural heritage of the nations which host them. This heritage is part of the universal heritage of mankind and the international museum community is to be considered as agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation for the benefit of the international public who visit the major museums. The International Council of Museums (ICOM) subsequently held a general discussion on their Codes of Ethics, which then led to the revised Code of 2004.[54] The ICOM Members Meeting demonstrated that not all representatives agreed with the Declaration,

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[50] The 1970 Convention will be further discussed in detail in chapter 3.

[51] Shyllon, 2000, p. 224. Not only non-Western countries, but also a source country like Italy is active in seeking the return of specific objects.

[52] Cuno is also the former director of the Courtauld Institute of Art in London and the Harvard University Art Museums. See also his Who Owns Antiquity? Museums and the Battle over Our Ancient Heritage, Princeton University Press 2008.

[53] Signed by the directors of The Art Institute of Chicago; Bavarian State Museum, Munich (Alte Pinakothek, Neue Pinakothek); State Museum, Berlin; Cleveland Museum of Art; J. Paul Getty Museum, Los Angeles; Solomon R. Guggenheim Museum, New York; Los Angeles County Museum of Art; Louvre Museum, Paris; The Metropolitan Museum of Art, New York; The Museum of Fine Arts, Boston; The Museum of Modern Art, New York; Opificio delle Pietre Dure, Florence; Philadelphia Museum of Art; Prado Museum, Madrid; Rijksmuseum, Amsterdam; State Hermitage Museum, St. Petersburg; Thyssen-Bornemisza Museum, Madrid; and the Whitney Museum of American Art, New York. The British Museum in London published the declaration on its website but its name is not among the signatories.

[54] Lewis,2006, ICOM Code of Ethics for Museums. Paris: International Council of Museums/ICOM. The full text of the ICOM Code is accessible on the ICOM website http://www.icom.museum.

or, as formulated by the ICOM vice president: "Instead of being preoccupied with the 'Universal Museums Declaration' as a misjudged political event that did more harm than good, ICOM is interested in an approach that moves beyond attack or censorious repression of the discourse of universalism. A more considered response is required – namely, to challenge the discourse itself to move out of the eighteenth and nineteenth centuries (where it remains atrophied) and to extend its continuing legacy and potential of self-transformation in twenty-first-century terms."[55] The ICOM Code of Ethics of 2004 instead declares that Museums should be prepared to initiate dialogue and build affirmative and beneficial relationships with source communities. [56] This reaction of representatives from a number of the most important museum collections demonstrates how national, international and universal interests are mixed in order to prevent the loss of objects from specific collections. And it also makes clear that through the decades international contacts have become an important asset in the protection of cultural heritage. International collaboration is therefore the fundament of the success of UNESCO's 1982 World Heritage Convention, which has, as will be described in chapter four, as it foremost objective the construction of an international forum to support the protection of cultural heritage.

2.3.4 From protecting international interests to protecting global interests

The process of globalisation has resulted in a shift in power relations, meaning that when formerly the relations between national states were the major decisive factor in global powers, today the networks of global corporations as well as local communities have become increasingly important as stakeholders in power structures. Castells describes this process as the inevitable outcome of the technology of the World Wide Web, turning the world into a network society that is no longer defined by territorial boundaries.[57] The technological capabilities of this network provides a global structure for the communication of information. Castells' conclusion is that technology and information are the key factors in this process of shifts in power.[58] Who has control over information is who has the power to control society. As Castells observes, this does not lead to a homogeneous global culture, but rather to fragmentation, as specific cultural communities

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[55] Gosswald, ICOM Statement on reclaiming cultural property, Museum International Vol. 61, nos. 1-2. UNESCO meanwhile accepted Recommendation 44 of the 34th General Conference of UNESCO (2007), according to which digital access to cultural heritage cannot replace the enjoyment of the original in its authentic form.
[56] ICOM Code of Ethics 2004, article 6.
[57] Castells, 2009, pp. 19-24.
[58] Castells, 2009, p. 27.

become 'communes of identity' to collectives and individuals seeking to protect their identity.[59] It is therefore necessary to support structures to communicate with each other.[60] The important implication of this analyses works two ways. It means that the protection of cultural heritage may provide a platform for communication on shared values. And, if we think of cultural heritage as carrier of cultural information, cultural heritage becomes cultural capital, and the protection of cultural heritage becomes important as the protection of a fundamental asset in the globalised world. Then it not only becomes a moral imperative to protect the more vulnerable intangible cultural heritage of non-western communities, but also an economic necessity to protect the diversity within cultural heritage.

UNESCO policies focused on the promotion of cultural pluralism and cultural diversity, as a way to unite the global community to support the cultural heritage of non-Western countries. As will be further discussed in the next chapters, increasingly, local communities were to occupy a central position in the protection and safeguarding of cultural heritage. The 2003 Convention on the Safeguarding of Intangible Heritage and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions emphasised the link between cultural heritage as a cultural right, thereby making a deliberate move towards the realm of human rights.
This 2003 Convention first demonstrated the increasing tendency towards the use of vocabulary that underscores the specific ties between the subject-matter and specific "communities, groups or sometimes individuals" that are recognised as the creators of this intangible heritage. Intangible cultural heritage is defined 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 recognise as part of their cultural heritage." (Article 1). This provision further notes that intangible cultural heritage is transmitted from generation to generation, and "... 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…"
Likewise the 2005 UNESCO Convention on the Diversity of Cultural Expressions states in its Preamble that "cultural diversity ...is a mainspring for sustainable development for communities, peoples and nations" while "taking into account the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit their own development".

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[59] Castells, 2009, p.37.
[60] Castells, 2009, p.37.

2.3.5 Concluding remarks

All of the above mentioned international instruments have one common feature. Whether they represent a bias towards a nationalist approach, as in the 1970 UNESCO Trade Convention, or an international approach, as in the 1972 World Heritage Convention, the implicit statement is that cultural heritage is important to a distinct people or community, and that each community, by contributing their creations to their cultural heritage, contributes to the "cultural heritage of the world". At the same time, national states, by protecting the cultural heritage in their territory, enrich the cultural life of the communities. [61] Cultural heritage is therefore not only considered as a collection of assets, as goods and services with a cultural value, but, increasingly as global public goods in need of a regime of protection in the public interest.

2.4.1. From the protection of cultural heritage as the protection of private interests in goods and services towards the protection of cultural heritage as public goods

The former paragraphs described thinking on cultural heritage as a timeline with phases developing from nationalist thinking towards an internationalist focus turning into a global perspective. It is now time to turn to the second axis in our matrix which represents on one end the approach to thinking of cultural heritage as goods and services as was central in UNESCO's 1970 Illicit Trade Convention and is also relevant in the UNESCO's 2005 Diversity of Cultural Expressions Convention and on the other end the thinking of cultural heritage as a public good in UNESCO's 1982 World Heritage Convention and also in the 2003 Intangible Cultural Heritage Convention.

Nationalist or internationalist thinking on the protection of cultural heritage is often linked to a discussion of the protection of private property rights. Together with the development of the growing body of public international law and human rights law on cultural heritage, the discussion on private property rights in the context of the protection of cultural heritage has become increasingly important. The debate on the value of the legal claims of indigenous communities resulted in further debate on the scope of private property rights regarding these objects.[62] At the same time, some have even come to regard the rights to objects and manifestations of cultural heritage are to be considered as a new type

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[61] Preamble 1970 UNESCO Illicit Trade Convention.
[62] WIPO/GRTKF/IC/14/4.

of property rights. The following subparagraphs will present the different viewpoints in this discussion: the function of private property rights in the protection of cultural heritage (2.4.2.), the social theory perspective of those who want to factor cultural values into private property rights (2.4.3.), and the newly emerging perspective in the common law countries that presents a new regime of private property rights, taking into account the rights and claims of non-owners as well as the rights of cultural communities and the protection of cultural heritage as a public good (2.4.4.).

2.4.2. The function of private property rights in the protection of cultural heritage

In recent decades leading scholars have come to prefer "cultural property" as an alternative term to cultural heritage.[63] Merryman persists in speaking of cultural property with reference to cultural heritage.[64] In his opinion cultural property is a more neutral term, as it does not involve the ethical, historical and political implications that he considers to be present in the heritage debate.[65] Lyndl Prott, on the other hand, advocates the use of the term cultural heritage as opposed to cultural property when referring to cultural expressions. In her eyes the term 'cultural property' is loaded with 'the baggage of associations and implications of ownership and property, exclusivity, alienation and exploitation' that is being contested in the recent body of protective normative legislation as is being developed by the UNESCO and other international institutions.[66]

Merryman advised the US delegation during the negotiations on the 1970 Illicit Trade Convention.[67] In the negotiations on the 1970 UNESCO Convention on

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[63] See also Reichelt, 1985, p. 42; Weidner, 2001, p. 6. See also Bauer, 2008, and Katja Lubina 2010 pp.40-41.
[64] Merryman, 2005, p. 276. John Henry Merryman was the advisor to the United States Government in the drafting of the 1970 UNESCO Convention and initiated the first legal course on the protection of cultural property at Stanford Law School. In his handbook 'Law, Ethics and the Visual Arts', compiled with his co-author, the art historian Albert Elsen (4th edition 2004), the term cultural heritage is carefully avoided.
[65] See also the editorial by Shapiro, p. 5.
[66] This discussion between Merryman and Prott started in the first issue of the International Journal of Cultural Property in 1989. This journal was founded by Merryman and included the seminal essay by Prott and O'Keeffe in which they opposed the term cultural property. This journal has since then been at the forefront of developments in cultural property and cultural heritage, and after some problems with a change of publishers in the period 2003-2004, it started to appear once again in 2005, with in its first issue a statement by Merryman that repeated his initial liberal views with an emphasis on trade, and in the second issue Prott's reaction thereto, repeating her statements on terminology regarding cultural heritage. See also Harding, p. 511; Blake 2000, p.65.
[67] See also Bator, 1982, p. 275- 384; Cuno, 2008, pp. 1-20.

illicit trade in cultural objects state parties were either in favour of protecting the cultural objects within their territories and restricting international trade, or in favour of advocating free trade with as little impediments to the international traffic in cultural objects as possible. Merryman regarded free trade and the protection of the interests and rights of the private property right holder as the best instrument to protect cultural objects. Private property rights benefit the public interest in the preservation of cultural objects. And, more importantly, property rights are independent from national interests.[68] Many cultural objects are not sufficiently taken care of in their countries of origin. The state in which their value is most appreciated would be the best way to preserve these objects and keep them available for access and the quest for knowledge.[69] This perspective is part of the Western liberal tradition which grants a central position to the individual and his rights. The national state is to protect these rights, including private property rights. An important aspect in this argument is the assumption that national states should not be encouraged to engage in protectionist nationalism that fosters policies aimed at the safekeeping of their cultural heritage which would restrict dynamic international exchanges in trade and culture. To emphasise this viewpoint, Merryman strictly refers to cultural property and not to cultural heritage. This position is also defended by James Cuno. His book 'Who owns Antiquity?" has fuelled the debate on the need to return cultural objects from museum collections to claimant countries of origin.[70] Merryman's and Cuno's viewpoint was supported by the law and economics scholar Eric Posner, who elaborated on the position of property rights related to cultural expressions. In his view, the international regime on the protection of cultural objects, which is based on the assumption these are distinctive or special, is misconceived. [71]

In the analysis of Posner the arguments related to cultural objects as part of a historic past and the view that therefore a particular community may have a right of possession over these objects, as well as arguments based on the moral rights of present local populations to objects dating back thousands of years are unrealistic and under defined. Moreover, Posner considers the 'anthropomorphization' of peoples as a moral error.[72] If certain 'peoples' think they have a strong enough bond with a specific object, they should be willing to purchase it.[73] However, a light regime of regulation regarding cultural objects may be of use, like the requirement to register sales of certain cultural objects, which could ensure that, for instance, antiquities are not lost to scholarly research. This viewpoint is rather extreme to the extent that it does not take into consideration that

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[68] Merryman, 1995, p. 13-60.
[69] Merryman, 1985, p. 83; Merryman, 1994, p. 61-76.
[70] Cuno, 2008.
[71] Posner, 2006, p. 2.
[72] Posner, 2006, p. 10.
[73] Ibid.

the institution of the regimes on the protection of cultural objects is the result of consensus reached among the representatives of a significant number of state parties, which in turn represent the dominant view of their national policies. However, it is clear that considerations based on the mere economic viability of the allocation of rights to scarce resources and their external effects do not lead to a better understanding of the close relationship people may have with their cultural heritage. This will be discussed in the next section.

2.4.3. The social relations theory perspective on rights to cultural heritage

The 'social relations' theory in the work of Underkuffler and Sunder provides a new perspective on the rights to cultural heritage. Underkuffler develops a comprehensive view of private property rights, in which property rights embody and reflect the inherent tension between the individual and the collective. She concludes that private property rights in common law jurisdictions are to be considered as a constellation of elements, correlatives, and opposites combined with a specific of standard incidents of ownership and other related but powerless interests; and a catalogue of "things" (tangible and intangible) that are the subjects of these incidents.[74] Furthermore, she considers property rights as existing within a framework of other rights like human rights or environmental rights which represent collective interests protected by the state. [75] In this framework, property rights have 'operative power', because they are the result of a socio-political and cultural dynamic process to establish a legally protected sphere regarding the relation between an individual (the citizen) and a specific object. Therefore, it is assumed that if, in a specific case, the interests of a title holder are in conflict with the public interest, i.e. some public law, the property right of the title holder will have presumptive authority.[76] However, increasingly, defined groups of people articulate identifiable interests in tangible or intangible property, or *"*… certain tangible or intangible things which are of such importance to a defined cultural group that they should be subject to that group's claims to disposition and control…The reason for legal recognition of such group interests are diverse, but have coalesced around the idea of "cultural property"."[77] These interests in cultural heritage are often inconsistent with the bundle of rights that individual title holders traditionally enjoy, but are increasingly recognised in pub-

[74] Underkuffler, 2003 p. 12-13;See also Munzer, 1990, p. 23.
[75] Underkuffler, 2003, p. 94-106.
[76] Ibid. p. 85-87.
[77] Ibid. p. 110.

lic law and human rights law. Underkuffler then concludes that although the claims of the title holder often prevail over conflicting public interest claims, this is increasingly not so in cases concerning cultural heritage.[78] Underkuffler notices an 'apparent weakness' in private property rights when conflicting with cultural heritage protection and suggests that when the competing public interest is the historic preservation of historic structures, and therefore being in the interest of neighbouring owners/title holders, this is increasingly considered of equal importance as the contested private property right, "because of the role those structures play in restoring or maintaining the vitality of the community of which they are part".[79] She recognises the same effect when there are conflicting claims between title holders and the public interest concerning archaeological artefacts, or intangible cultural property.[80]

The idea that interests in cultural heritage are public interest values and therefore have an impact on private property rights is also present in Margalith Sunder's work on a theory of a 'New Enlightenment'.[81] Sunder concentrates on intellectual property rights, as the legal instrument to provide an incentive for creation and innovation. In her perspective, intellectual property rights have become an important instrument to mould social and cultural relations.[82] Her analysis of the convergence of intellectual property, identity politics and the internet protocol, ("IP3") regards the debate on intellectual property in the globalised network society. The internet protocol is considered as the platform for 'digital architecture' empowering democratic cultural participation. These new technologies enable everyone to use as well as to create and ' mix, rip and burn' new cultural expressions.[83] Therefore, the old utilitarian balance between economic interests and access should be adapted in a way that enables internet technology's democratic potential. The way to achieve this would be the understanding that people develop their autonomous selves 'through and within a cultural discourse'. In a cultural discourse that surpasses the ideology of colonialism, liberty and equality can only be achieved by the recognition of autonomy within culture and the right for everyone to have access to the 'discursive space', the digital world in which global culture is created and exchanged. Everyone is to be allowed to participate equally in the network of social and economic processes of cultural creation.[84] Sunder therefore proposes a 'cultural theory of intellectual property' that understands intellectual property in a context of cultural development and social relations.

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[78] Ibid. p. 110.
[79] Ibid. p. 114.
[80] Ibid. p. 115.
[81] Sunder, 2001; 2003; 2006.
[82] Sunder, 2006, p. 316.
[83] Sunder, 2006, p. 318.
[84] Sunder, 2006, p. 320.

2.4.4. Cultural property rights as a new regime of private property rights

Increasingly, commentators interpret claims and rights by indigenous communities to cultural heritage as the making of a new species of private property rights. Ironically, this must be a turn of events that Merryman did not foresee when he first presented his views on cultural property. While his objective was to protect the existing catalogue of private property rights, the new perspective is aimed at developing the concept of private property into a regime that includes claims based on affiliation with a particular culture by owners as well as non-owners.[85]

Scafidi, in her discussion on legal protection for cultural objects and intangible 'cultural products' created by indigenous communities, describes cultural heritage as a category of intangible property on the same level as intellectual property, distinguishing cultural heritage, or cultural property as "the old and the venerated" from intellectual property as "the new and innovative". [86] After analysing modern culture as being subject to a process of commodification and appropriation - in themselves terminology with connotations in private property rights - she describes an 'emerging legal framework' that is based on the template of intellectual property rights, and is to include cultural expressions or manifestations that are not covered by intellectual property rights and to protect 'source communities' against misappropriation. [87] To this end, this new 'sui generis regime' would have to reconceive the concept of authorship to include the reality of group collaboration in creating and inventing cultural products. Moral rights would also have to be equally available to source communities as well as to individual genius. References to authorship and authenticity would be replaced by a right of attribution. In short, source communities would have to 'receive a bundle of property rights similar to those of their individual counterparts', combined with a firm regime of exceptions to protect fair use.[88] In addition, temporary limitations would have to be adjusted to the life span of the community, with the reservation that exclusivity of use 'should be established in rough inverse proportion to the duration of the protection'.[89] Finally, the restrictions on the types of objects to be protected as in intellectual property law would have to be revised, so as to accommodate the 'longstanding preferences and practices regarding intangibility and orality'.[90]

All of the above issues are under debate in the WIPO discussions on the protection of folklore and traditional knowledge. In the WIPO the objective is to

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[85] Gerstenblith, 1995, p. 562; Pearlstein, 2005, p. 9; See also FitzGibbon, 2005, p. 3.
[86] Scafidi, 2005, p. 51; see also Wilff, 2001, p. 171.
[87] Scafidi, 2005, p. 148.
[88] Scafidi, 2005, p. 149.
[89] Ibid.
[90] Ibid.

investigate the possibilities of a future 'sui generis right' for indigenous cultural expressions to amend certain shortcomings in existing intellectual property law.[91] The WIPO discussion, as will be demonstrated in chapter 7, corresponds with the discussion in the UN on cultural rights. But in the WIPO, the discussion centres on a sui generis right, while Scafidi situates this right as referring to an emerging distinct regime of property rights, which affects the whole system of private property rights. Scafidi's approach has caught on in scholarly circles in the US, such as in the work of Carpenter, (with co-authors Katyal and Riley), who have incorporated her ideas into the discussion of property law. In this approach they intend to react against a 'narrow model of individual ownership' and to introduce an approach that situates the metaphorical bundle of rights in the hands of non-owners as well as owners. This bundle contains duties, rights and obligations to tangible and intangible goods, regardless of title and possession.[92] They thereby introduce a 'stewardship model of rights' that refers to the transition of property rights as rights pertaining to exclusive uses towards a model of rights that also encloses rights denoting other relations to objects. The corner stone in their theory is the significance of relations as in the relations between indigenous communities and their culture and its expressions. These relations provide a bridge to the allocation of property rights. In this line of reasoning they refer to the property theory of Hohfeld, who presented a model of relations in property rights.[93] They argue that "cultural property reflects, in part, the now pervasive view that property is a bundle of *relative* [cf. Carpenter] rather than absolute entitlements.[94] Indigenous communities hold rights and interests to the preservation of their cultural property "irrespective of title", which may also be considered as entitlements. These entitlements should also be considered as private property rights because private property law functions as a system of 'social relations' providing a structure to the relations between persons with respect to things.[95] In addition, they find support in the property theory of Radin who postulates a distinction between entitlements based on the nature of the relation between persons and objects. Some objects are of specific significance to a person, while fungible objects might be easily replaced. Radin therefore suggested that legal actions available to an original owner should accommodate this distinction, and either restitution or damages should be awarded according to this relation.[96] This theory centres on the concept of 'personhood' to indicate the domain of personal, individual interests. Carpenter sees in the personhood model a 'striking

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[91] See Draft Analyses EC/GRTKF/ 8/13.

[92] Carpenter, (and Kayal and Riley, references refer to Carpenter), 2009, p. 45.

[93] Carpenter, 2009 supra footnote 202; see Hohfeld, 1923.

[94] Carpenter,2009, ibid. The reference to 'entitlements' is of course reminiscent of Calabresi's and Melamed's property theory, Calabresi, 1972.

[95] Carpenter, 2009, supra footnote 203.

[96] Radin, 1982, 1014-1015.

[97] Carpenter,2009, supra footnote 103.

vehicle' for bringing indigenous conceptions of property into legal discourse.[97] Because indigenous communities are so closely connected to their culture their relations to expressions and manifestations of their culture is one which is based on stewardship. Their duty of care transcends ordinary property rights, because their interests are like the ones protected in the 'personhood' model.[98] Carpenter therefore introduces the concept of 'peoplehood', recollecting Radin's suggestion that sometimes 'individuals may find self-determination only in groups'.[99]

All this results in a model of relations and entitlements that is conceived of as a new model in property law. This theory builds on Smith's analysis of intellectual property rights as a system of balancing rights of exclusion with rules of governance concerning rights of use by others. [100] Smith presents copyright as the product of a classic model of common law property law, with the addition of policy choices regarding the most effective way to govern the interests and entitlements to the abstract information contained in creative works: 'copyright, the rights themselves tend to be built up stick by stick, …, and modifications (most prominently the fair use doctrine) focus on particular uses. In addition to these off-the-rack rules, supplied by the law, a package, a governance regime might emerge privately through licensing…with royalties to be paid for different amounts of use".[101] We can see that his model stands firmly in the common law tradition of property rights as a bundle of sticks, a collection of rights and privileges.[102] For Carpenter this model provides the point of access for cultural heritage to enter into the private property regime. The system of private property law is considered flexible and adaptive, enclosing policy choices as well as exclusive rights. This flexibility is also recognised in the developments from property rights in real and personal property into private property rights in intellectual property. And building on that, the theory is that while property rights are a flexible bundle of rights and entitlements, in the case of objects of cultural heritage the rights of indigenous communities may fit in as well. [103]

It may be clear that this interpretation of rights to indigenous cultural heritage in the context of existing private property law is based on the common law concept of private property rights as a bundle of rights. In this interpretation of 'cultural property rights' as a distinct set of private property rights, the theoretical distinction between private property rights in civil law and private property rights in common law comes to the surface. We may be reminded that there is a fundamental conceptual difference due to the genealogy of private property

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[98] Carpenter,2009, referring to examples in Indian law.
[99] Carpenter, 2009, supra footnote 117, quoting Radin, 1982 p. 978.
[100] Smith, 2007, p. 1782-1798. See also Smith, 2004.
[101] Smith, 2007, p. 1786.
[102] Munzer, 1990, pp. 22-31.
[103] Carpenter, 2009, p. 45.

rights in these systems; while common law property rights developed organically from a system of a collection of privileges and rights of exclusive use to certain objects as a bundle of rights, the civil law system is based on the post-revolutionary systemic approach of delineating private law rights against public law rights. This system situates private property rights as absolute rights of exclusive use by individual right holders, which include limitations that allow certain uses by others.[104] Furthermore, public policies based on public law, in certain specific circumstances, may determine external limitations to private property rights by allowing certain uses by others, or limiting certain uses by right holders. It is true that recent solutions to conflicting interests in access to and control over indigenous cultural expressions have resulted in prerogatives for these communities that resemble the rights of private property right holders. But still, as also mentioned by Carpenter, in the case of Indian rights of use over land, in many cases the federal government holds title to Indian property, while the tribes act as beneficiaries.[105] However, as Carpenter states, they wish to distance themselves from a 'narrow model of individual ownership' and include the rights based on the model of stewardship into a new concept of property rights.

From the perspective of civil law, this model raises concerns. It goes against several of the basic principles underpinning private property rights in the civil law tradition. As was mentioned before, property law in civil law countries is devised as a system which includes a catalogue of legally defined rights and the obligation to allow for certain exceptions and limitations. To present rights to objects or manifestations of cultural heritage as a new category of property rights would not be consistent with the civil law tradition, because:

- It would cut into the basic elements of private property rights: the idea of the protection of the private sphere of the individual right holder against interference by all others, with a specific catalogue of rights regarding a standard set of objects;
- It would expand the domain of private property rights and thereby weaken the system of private property law. The granting of exclusive property rights to individual right holders is an important instrument in the organisation of any society. Because of the fundamental role of private property rights, it is important to have a clear, transparent and defined system of private property law.
- It would weaken the element of publicity, which is a significant aspect of private property rights in both the common law and civil law, and ensures that one is aware of the fact that certain categories of objects are objects of private property rights, and second, that the right holder to these objects can

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[104] Mattei, 2000, pp. 18-21.
[105] Carpenter, 2009, supra footnote 265.

be identified. Furthermore, one can expect that this right holder has a certain spectre of prerogatives, including the right to allow for certain uses. This tells the non-owner to cease certain uses, and at the same time it may inform him what he is allowed to do. Cultural property as an object of property is not sufficiently defined and the system of private property rights is thereby weakened.

- It is based on developments that are contingent to the position of the indigenous groups and communities in relation to the dominant political structure of their territory. The conditions and circumstances of these developments are situation-specific and dependant on historical, political and social conditions. Moreover, the purpose of the institution of a regime of private property rights is to define an area of law that exists independently of certain specific circumstances, but can adapt on a case by case basis to certain specific circumstances by allowing for restrictions based on public law, constitutional rights and human rights.
- And lastly, it is not necessary, because, in the public law instruments on the protection of cultural objects and expressions, private property rights in the civil law allow for temporary adjustments based on public law policies in the public interest, which may also accommodate the interests of indigenous communities. When it is in the public interest as well as politically feasible, certain communities can be granted certain rights of control, or even exclusive use. On the other hand, private property right holders may be prevented from making use of their prerogatives when this is contrary to public order. At the same time, human rights interests may be protected either by constitutional law or by the application of human rights.

2.5. Concluding remarks

As described above we saw that Merryman, Cuno and Posner agree on the approach of the protection of cultural heritage by protecting private interests in property rights. On the other side, academics like Prott and O'Keeffe prefer the approach of protecting cultural heritage as a public good.[106] They state that cultural heritage ought not to be discussed in terms of property rights with 'the baggage of associations and implications of ownership and property, exclusivity, alienation and exploitation'.[107] Instead they prefer to focus on cultural heritage as a public good, emphasising the bond between objects and those related to these objects by a shared tradition, history or cultural background. This latter approach

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[106] Prott, O'Keeffe, 1992, p.307.
[107] See chapter 1 section 4.

is also more in line with the expanding concept of (intangible) cultural heritage. As was demonstrated in the discussion on the scope of private property rights in common law, the rights of its stakeholders have become increasingly difficult to define in terms of private property rights. Intellectual property rights may refer to intangible objects, but these are still narrowly defined objects. The more fluid concepts like style, tradition or practice, although part of the intangible cultural heritage concept, are not objects of protection in the international intellectual property regime.[108] On the contrary, these general concepts are kept out of the regime of private property rights because they are considered to be outside the scope of what a private property right holder should be able to have exclusive control over.

While the Western debate on the protection of cultural heritage appears to centre on private interests and property rights, indigenous communities on their part are increasingly concerned by the ways their cultural heritage is being exploited as a result of developments in international trade. There are many situations in which indigenous communities have made efforts to claim exclusive control over expressions of their culture, like the use of images or the performances of rituals and dances.[109] Also, indigenous communities state their claims as cultural rights in terms of exclusive control regarding uses and manifestations, leading to a confusing use of terminology with specific legal connotations in private property rights. A complicating factor with regard to indigenous cultural heritage is that some of these traditions and rituals are not ever intended to become public, which requires other modes of control than property rights can offer. [110]

Increasingly, cultural heritage is considered not only as being related to economic interests, but also to cultural rights. Thus, the protection of cultural heritage is sometimes more associated with cultural goods and services, and sometimes more with public goods. Together with the horizontal axis of the timeline, this spectrum represented in the vertical axis will provide the backbone to the presentation of the major normative instruments in international law on the protection of cultural heritage and the developments in cultural rights in the following chapters.

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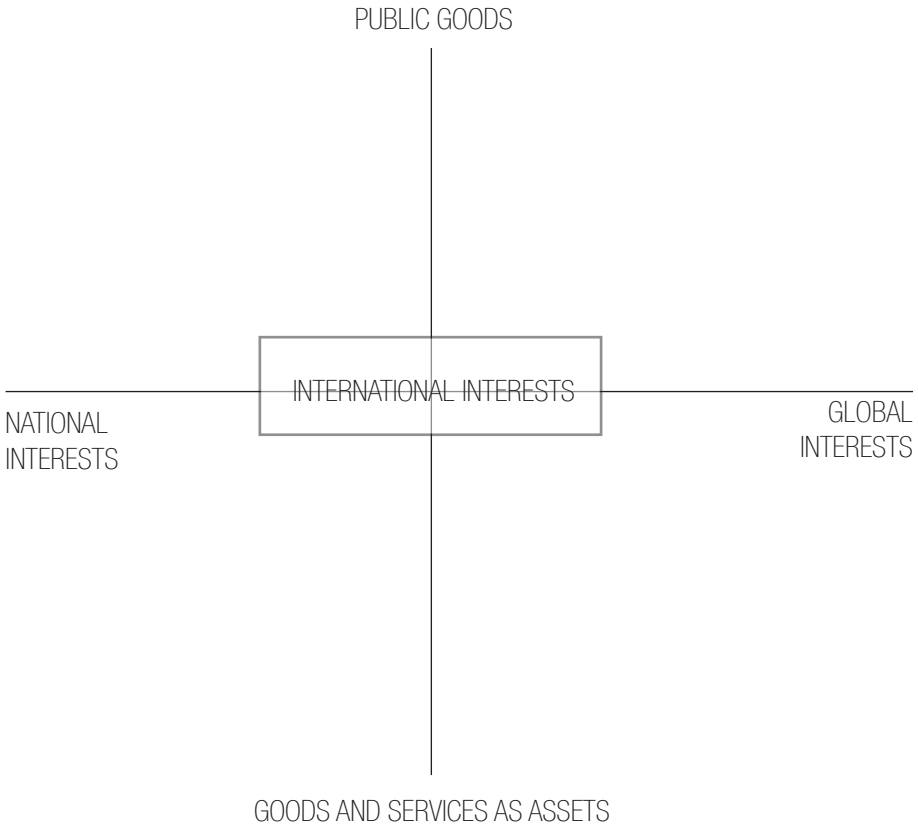
[108] Coombe, 1998; Scafidi, 2005, p. 17; Arewa, 2007, p. 7-11.
[109] Brown, 2003 pp.43-68; Mezey, 2007, pp. 2004; Carpenter,2009, p. 57-67.
[110] Brown, 2003, p. 234-237.


PUBLIC GOODS
INTERNATIONAL INTERESTS
NATIONAL
INTERESTS
GLOBAL
INTERESTS
GOODS AND SERVICES AS ASSETS

III.
THE PROTECTION OF CULTURAL PROPERTY AGAINST ILLICIT TRADE

3.1 Introduction

The illicit trade in cultural goods is one of the major physical threats to national and international cultural heritage. Measures to protect against this threat need to balance national and international interests, the legal interests of the right holder against the interest of the original owner, as well as protecting the economic and social interests of local communities.

After discussing the general aspects of international trade in heritage objects and the issues that are relevant in public law and in private property law Section A of this chapter will focus on the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995). Section 3 B will focus on the legal measures against illicit trade of cultural property in the Netherlands in the context of the European normative framework and the ratification of the 1970 UNESCO Convention.

III.A.
THE PROTECTION OF CULTURAL PROPERTY AGAINST ILLICIT TRADE IN INTERNATIONAL LAW

3.A.1.1. Developments in international trade in cultural property

The 2005 report on the international flow of cultural goods and services by the UNESCO Institute of Statistics presented cultural heritage as part of the so-called 'core cultural goods', comprising of 'collections and collector pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, paleontological, ethnographic or numismatic interest'[1], and 'antiques of an age over 100 years'.[2] The figures relating to the legitimate trade in art are impressive. In 2002 the legal trade in cultural property was 3.7% of the sum total of 'core cultural goods' and represented a value of 1,807.4 billion US $ in exports and 2,644.2 billion US$ in imports.[3] Dominant countries in both imports and exports are the Western high-income economies, controlling the market with a 98 % share in 2002. Of interest is the fact that the European Union is the market leader in both the imports and exports of heritage goods. In 2005 the European Union was reported to represent a share of 87 % of exports and 38.5 % of imports, while the US represented a share of 9.4 % of the exports and 54 % of the imports of heritage goods. [4] Within the European Union the United Kingdom is dominant with 1,052.6 billion US$ in exports and 673.2 billion US$ in the imports of heritage goods.[5] The TEFAF 2010 Report stated that in 2008 the total sales in the global market for fine and decorative art reached just over €42.2 billion, down over 12% from its peak in 2007 of €48.1 billion. In 2009, sales were estimated to have dropped by about 26% to €31.3 billion as an effect of the global recession.[6] However, in 2010, the art market was considered to be increasing once again, with an increasing important role for China, accounting for 6 billion Euros or 23% of the global market in auction sales.[7] Meanwhile, the Internet has become an important new platform for the art trade. A number of studies on the internet trade in cultural goods demonstrate that in the last decade there has been an exponential growth in the trade in cultural objects and there is reason to assume that part of these goods for sale are of illicit origin, as they fall within the categories of cultural objects that are subject to export licences.[8]

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[1] UNESCO Report 2005, the data in this report are based on figures on the trade flows provided by national customs authorities.

[2] UNESCO Report 2005, paragraph 3.

[3] UNESCO Report 2005, paragraph 3.5.1.

[4] UNESCO Report 2005, Table II-1 Exports of core cultural goods by region, 2002, p. 64, Table II-IV, Imports of core cultural goods by region, 2002, p. 66.

[5] Table V-1 Top 20 importers and exporters for the main cultural goods categories, UNESCO Report 2005, p. 76.

The rise in the value of cultural goods, supported by the developments in means of transport and communication contributed to a substantial increase in the illicit export of antiquities and artifacts.[9] The demand for the possession of cultural goods has been motivated by a convergence of cultural and speculative reasons.[10] Carducci, in his international law study on the traffic in international art, referred to higher standards of living, with more room for appreciating objects of beauty. Moreover, he sees that the whole of society is pervaded with a general sense of appreciation for art and culture.[11] Carducci notes the active cultural policy of states in education and subsidies to encourage people to engage in cultural activities, and the rise in the numbers of museums to display cultural goods. The other pillar in the increase in the art trade to which Carducci refers is the attraction of speculation. First, there is the factor of price increases as objects become rarer or satisfy a certain taste or fashion. Second, there is the element of chance in that cultural goods may be more valuable than the seller estimates. There is always a possibility to discover a masterpiece in a provincial sale or the recognition of the hand of a master by the connoisseur. Third, and this element is partly the result of the attractions of the former two, there is the element of illicit speculation. Buying and selling art objects are a simple way to launder money. It should be noted that cultural objects are a category of valuable commodities that requires no official documents of title. Estimates of this new form of illicit global industry are that it represents an annual value of more than 1 billion US$. Interpol estimates that this illicit international market is second only to drug trafficking and illegal arms.[12]

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6 Macandrew 2010, p.15-1.

7 Macandrew2011, conclusions.

8 B. Bieleman e.a. 2007 p. 37; D.C. Lane e.a. 2008, T.v. Ham e.a. 2011, Bijlage 2.

9 Kowalski 2002, p.145.

10 Byrne-Sutton, 1988, p. 35-40.

11 Carducci 1997, p. 21-39.

12 http://www.interpol.int/en/Crime-areas/Works-of-art/Frequently-asked-questions, (last accessed 1 July 2012) states that illegal art trafficking is often considered to be the third or fourth most common form of traficking, but that exact data are not available. The EU 2011 Report on Illicit trafficking assumes ilegal art trafficking to be amongst the biggest criminal trades,p.17.

3.A.1.2. Legal issues concerning the protection of cultural property against illicit trade

This section presents a brief, general introduction to the legal problems at hand in the protection of cultural property against illicit trade. First, it has to be noted that the legal protection of cultural property falls primarily within the competence of the national state. However, the significance of public international law for the protection of cultural property became apparent when international trade proved to be insufficiently regulated to serve the interests of the protection of the cultural interests of nation states. The trade in cultural goods used to be dealt with as if it as just another form of trade. When a cultural object was moved from one state to another in breach of the public law provisions of the country of origin, the sovereignty of nation states in legal matters often led to conflicts of law with regard to property regimes and the enforcement of public law provisions. However, the specific nature of cultural goods called for measures that are appropriate for the cultural value of these objects.

The Case of The Attorney General of New Zealand v. Ortiz & others (UK, 1982) may serve as an example.[13] In this case Lord Denning asserted that under international law no sovereign state has sovereignty beyond its borders and no state has to enforce the laws of other states. New Zealand had demanded the return of a Maori art object: a sculpted wooden door dating back many centuries, with an estimated value of 300,000 US$. Under New Zealand Law, all heritage objects exported without a licence are automatically subject to forfeiture by the state. The question in this case boiled down to whether, according to New Zealand Law, the object had thereby become the property of the State and whether a sale in the United Kingdom could thus be prevented, or whether New Zealand law could only reach so far as to declare that the object would be forfeited when it was actually seized by the New Zealand customs authorities. Denning then concluded that as the New Zealand law on the export of cultural objects was a public law regulation of a foreign sovereign state, he could not enforce these rules. Lord Denning considered that "most countries have legislation to prevent the export of their historic Articles unless permitted by licence. This legislation may provide for automatic forfeiture of export or attempted export. It might be very desirable that every country should enforce every other country's legislation on the point - by enabling such Articles to be recovered and taken back to their original home. But does the law permit of this?". The answer at that time was "no", and in his dictum he specifically stated that "Best of all, there should be an international convention on the matter where individual countries can agree and pass the necessary legislation. It is a matter of such importance that I hope steps can be taken to this end". This case is a good example of the impor-

[13] Attorney-General of New Zealand Appellant v. Ortiz, UK, 1982.

tant issues regarding cultural expressions in public law at that time. First, there is the growing trade in international art, because tangible cultural objects from other countries represent a significant value and are therefore desirable objects of trade. The expanding international art market calls for regulatory measures.[14] Which leads to the second issue: the relationship between cultural heritage and the nation state. In this relationship cultural heritage is conceived of as more than property, but also as a symbol of the cultural context and the history of a nation state. It may therefore be in the public interest to keep objects of cultural heritage within national borders. [15] Third, criminal activities concerning cultural objects have increased significantly. As art objects are not fungible goods, they can be kept in hiding until regular time limitations run out. The trade in tangible cultural objects is an attractive way to launder criminal funds, as these are not registered goods, and can represent great value. This results in a growing demand on the illegal market, with a significant increase in illegal exports.[16]

The export of cultural objects is also illegal when the owner does not fulfil national requirements regarding export licences. These international exports may also take place after thefts, or, increasingly, after illegal archaeological excavations. The serious threat of illegal excavations to cultural heritage first came out in the open with reports from archaeologists who recognised objects they had documented in the original excavation sites in public museum collections.[17] The subsequent case against the Californian art dealer Clive Hollinshead concerning the trade in Guatamalan artefacts caused a storm in the international museum community, as it became clear that this particular case was only the tip of the iceberg.[18] The dealer was convicted of taking part in an elaborate international network of smugglers. This case was a clear illustration of the willingness of art dealers (as well as public institutions) to trade in objects with sinister provenance.[19]

At the same time, it was the starting point of a discussion on the true consequences of illegal excavations.[20] The incentives for illegal tomb-raiders are high as the profits that may be made were very great. But archaeology is not only the study of individual objects, but also the interpretation of the use of objects, and removing these objects from their original environment means the loss of certain information that can never be retrieved. Once an object is isolated and taken away, the remaining site itself is contaminated with the effects of the often hasty

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[14] See the conclusions in theTefaf Reports by Macandrew 2010 and 2011.
[15] Gerstenblith 2001, p. 197. a.
[16] Slattery 2012, p. 834; http://www.interpol.int/en/Crime-areas/Works-of-art/Frequently-asked-questions, last accessed 1 July 2012.
[17] United States v. Hollinshead, 1974. P.Bator 1982, pp.333-335; Brodie 2006, p. 52; Vrdoljak 2006, pp.191,192.
[18] Coggins, 2005, p.221.
[20] C. Renfrew, 2000,183-188.

and unprofessional digging, and is altered beyond reconstruction, as the essential elements are missing. Both these aspects involved serious damage not only to national heritage, but also to the common heritage of mankind, as these objects can now no longer be understood within their original context.

The point of view that damage to national heritage was also damage to international heritage became the basis for further thinking on international collaboration on the protection of cultural heritage against illicit trade. A recent example of a successful claim for restitution after illegal excavations is the transfer of title of 6 items, including 16 silver pieces, by the Metropolitan Museum in New York to the Italian Government. These items had been excavated from Sicilian soil without permission from the Italian Government. Noteworthy is the fact that the final agreement also contains, as a favour, stipulations on the return of a long-term loan of antiquities to the museum. [21]

A special situation occurs when a state declares itself to be the owner of all antiquities excavated from its soil. This was the issue in the Schultz Case where an American art dealer was confronted with Egyptian Law no. 17. [22] Furthermore, in some states, when objects are illegally exported they are subject to forfeiture and are deemed to become the property of the state, as was the case in Attorney General of New Zealand v. Christies. These cases both concern the right of the State to create public law to govern their cultural property.

Export regulations are governed by public law, and the general rule used to be that no nation is obliged to enforce the public law of another nation.[23] For that reason there was growing international consensus on the necessity of an agreement on the recognition of export regulations of other countries and to ensure cooperation in returning illegally exported objects to the state of origin, and possibly to the bereft private owner. In tandem with this international willingness to come to solutions regarding these issues was the policy of developments towards a single market of the European .[24] As a result, the trade in cultural objects were subject to the general rules of the custom union and the single market.[25] Nevertheless, national policy on culture and the protection of cultural heritage were thought to be matters which were exclusive to the national state. The har-

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[21] Press Release Metropolitan Museum New York, 21-02-2006.

[22] United States of America v. Frederick Schultz, US District Court for the Southern District of New York, 2002.

[23] As stated in :The King of Italy and the Italian Government v. Marques Cosimo De Medici Tornaquinci, Marquis Averardo de Medici Tornaquinci, and Christie, Manson, and Woods, 1918, affirmed in: Attorney-General of New Zealand Appellant v. Ortiz and Others Respondents 1982, Islamic Republic of Iran v. Barakat 2008.

[24] From the Single European Act 1986 on the creation of a single European Market towards the projected date of the European Union Treaty (the Maastricht Treaty) in 1992, effectively abolishing all trade restrictions between the member states. EU Report 2011, pp 39-40.

[25] Articles 26, 28 and 34-36 of the TFEU. (corresponding with Articles 14,23 and 28-30 of the EC Treaty). See also Case EC 7/68 Commission v. Italy, 1968.

monisation of these potentially conflicting issues was considered to be a serious problem and it was therefore a matter of urgency to develop a European Union framework for the regulation of exports tailored to the protection of cultural objects of national interest and the return of cultural objects that have been exported without the consent of the exporting state, without interfering with the basic freedoms determined by the European single market. The export in cultural objects was regulated in the Council Regulation of 1992 and the Council Directive 93/7/EEC of 1993 regulated the return of cultural objects unlawfully removed from the territory of another Member State. [26]

The thinking on claims for the restitution of cultural goods in the period after time limitations normally end the period for legal claims has been considerably influenced by the cases concerning cultural objects that were taken, either by forced sale or by forfeiture, during the Nazi era.[27] First, the practice of the American courts in developing jurisprudence where the threshold for the claimant was lowered, as the time allowed for a legal claim was to start to run only after the location of the object became known to the claimant and the return of the object was demanded. [28] More recently, heirs to the possessions of World War II victims have also successfully claimed their rights to cultural objects from public institutions and museums. Some of these cases were settled in court, others in arbitration procedures.[29] It is a fact that there is now a growing body of cases on the practice of recognizing claims to cultural property, either in the courts or in out of court procedures which forms an exception to the general rules of time limitations with regard to property rights to tangible cultural goods.[30]

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[26] Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, repeated and replaced by Council Regulation (EC) No. 116/2009 of 18 December 2008 (OJ L 39 of 10 February 2009) and Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (OJ L 74 of 27 March 1993). See also EU Report 2011, p. 39.

[27] In the literature these objects are referred to as having been 'looted' following the terminology of Bretton Woods 1943 and the subsequent use of this term in the American Occupational Army Directives.

[28] For example in New York Law as in Menzel v. List 1966, Kunstsammlungen zu Weimar v. Edward I. Elicofon, 1981; Solomon R. Guggenheim Foundation v. Mrs. Jules Lubell,1992, and De Weerth v. Baldinger 1992, affirming the demand and refusal rule, and granting restitution to the claimant, whose painting was stolen in 1945 in the aftermath of the Second World War, although it was purchased in good faith. See also Reyan 2001, pp.977-984; In 2002 California enacted a law temporarily suspending the statute of limitations in Jolocaust cases. However, in the case of von Saher v. Norton Simon Museum of Art at Pasadena (2009), the U.S. Court of Appeals in the Ninth Circuit held that this law was unconstitutional, because foreign policy and in particular laws on war are the exclusive power of the federal government. Case note Adler 2010, p.109-125.

[29] Lubina 2009, p.160; See by example the Decision on the Return of a large part of the Goudstikker Collection made public by a Letter to Parliament by State Secretary van der Laan, 6-02-2006: http://www.minocw.nl/documenten/5640.pdf.

[30] The subject of the return of 'looted art' has become a distinct subject in the context of the governance of cultural expressions and contains, besides a complex of legal issues pertaining to the particular circumstances of the Second World War, many political aspects which require a specific study. See also Katja Lubina 2009, pp.32,33, p.160.

[31] United States v. McClain 1979; United States v. Schultz 2002, Islamic Republic of Iran v. Barakat 2008; Gill and Chippendale 2007, p.205; Lufkin 2007, p. 305; Lufkin 2007, p. 305.

In recent decades, the discussion on rights to cultural property in the context of former colonial relations has also become relevant. National states have become increasingly active in the search for cultural objects originating from their territory, and governments are increasingly considering claims for the return of their cultural heritage from the current possessors. [31] These claims seem to affect mostly the rights of public institutions. In July 2003, the Egyptian Government issued a public demand for the return of the famous Rosetta Stone from the British Museum, the statue of Nefertiti from the Berlin Museum, the statues of Hatshepsut in the Metropolitan Museum of New York and the Obelisk in the Place de la Concorde, Paris.[32] Also private organisations like the Association for the return of the Magdala Treasures (Afromet) have made it their objective to trace artefacts that were taken in the 19th century from Ethiopia.[33] However, demands for restitution after such a long time have no basis in international law and are subject to diplomatic negotiations. Nevertheless, more and more institutions and museums are collaborating on a voluntary basis with claims from former colonies, as in the restitution of several objects from the collection at the Leids Museum van Volkenkunde.[34] In 2005 the Italian Government returned the Ethiopian Stele to its country of origin, after it had already agreed to do so in the Italian – United Nations Peace Treaty in 1947. [35] It took a new agreement in 1997 and the subsequent investigation into the technical issues concerning transport to realise its return in April 2005.[36]

Indigenous peoples, like the Maori in the Ortiz Case, could well be entitled to a claim to cultural goods that were taken from them without their consent and presented as art objects without reference to their original context. It might even be the case that this object represents a function that is sacred to them and that displaying it as a mere art object is sacrilegious in their eyes. In fact, in the years since the Ortiz case, the international community has become increasingly aware that the ordinary legislation on property rights is not entirely suitable to address the issues of claims by former owners who were dispossessed under circumstances that may have been appropriate under the legal order of that time, but that are now considered to be immoral.

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[32] http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/1436606/Egypt-demands-return-of-the-Rosetta-Stone.html, last accessed 1 July 2012.

[33] http://www.afromet.org/index.html, reports of The Association for the Return of The Maqdala (or Magdala) Ethiopian Treasures - is an international organisation dedicated to retrieving the cultural property looted during the British invasion of Ethiopia in 1867-8. (last accessed 1 July 2012).

[34] Lubina 2009, pp. 379-411.

[35] On the return of all artefacts taken after October 1935, Article 37 in the Italian Peace Treaty 1947.

[36] F. Shyllon, 2006, 137-144. See also the overview of major international restitution cases in Korka, 2009.

3.A.1.3. Issues concerning the protection of private interests in cultural property

The following subsections will discuss the issues in private property law that an owner faces when cultural heritage objects are moved to another state without his consent after theft or conversion. Private property law is national law. Different legal systems and national laws have developed their own solutions to the distinct legal issues concerning title to and the transfer of moveable goods in general and therefore also concerning title to and the transfer of cultural goods. The following issues will be considered:

a) the protection of the purchaser in good faith a non domino;

b) the right of the sovereign state to declare goods to be 'res extra commercium';

c) the issue of time limitations; and

d) issues relating to conflicts of law.

a) Protection of the purchaser in good faith a non domino
In national laws there are three main approaches towards legislation concerning the transfer of goods to an innocent purchaser in legal systems that protect the buyer, systems that protect the first owner and systems that provide for indirect solutions and protect both. Siehr refers to systems that protect the bona fide purchaser, systems that do not accept bona fide purchases a non-domino and systems that make compromise between the owner and purchaser.[37] Kowalski refers to the fact that these divisions are often blurred, even more so when dealing with cultural objects[38].

The protection of the innocent purchaser is considered to be important by the trading countries with a civil law background which see it to be within their interest to secure a legal environment where trust in the security of the transfer of property rights is honoured.[39] These countries provide protection to the third party in good faith. Other trading countries, with a common law system, have always considered it to be of prime interest to protect the property rights of the original owner, who should therefore be able to claim his property from an innocent purchaser who should beware of the rule of caveat emptor.[40] However, in practice, this right can be severely restricted by statutes of limitation and legislation on the sale of goods that modify the rights of the first owner. As Den-

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[37] K.Siehr, 1995, p. 57.
[38] Kowalski, 2001, p. 103.
[39] S.Levmore, 1987, p. 48.; Chatelain, 1976, p.114.
[40] Let the buyer beware!

ning L.J. commented in the case of Bishopsgate Motor Finance Corporation v. Transport Brakes Ltd: "In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle had held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times." [41]

The divergences in the protection of the innocent purchaser in the different legal systems were of course crucial in the discussion on the new international treaties. There was consensus on the principle that stolen cultural objects should be returned, but there were opposing views on the principle of compensation for the innocent purchaser after he has to relinquish his possessions. Influential authors like Chatelain[42] and Rodota[43] have doubted the effects of compensating the bona fide purchaser, as this would stimulate the commercial art market, and "… would constitute indirect protection not only of the final purchaser but also of all those through whose hands the object has passed."[44]

The Draft Convention Providing a Uniform Law on the Acquisition in Good Faith of Corporeal Moveables (LUAB) started to be prepared in the 1960s and was presented in 1975 to support the interests of trade by setting an international standard for the protection of the interests of trade, "the certainty of which requires the protection of the transferee".[45] The element of good faith or bona fides was considered to be an essential quality for the innocent buyer. Good faith was seen as the "reasonable belief that the transferor has the right to dispose of the moveable in conformity with the contract" (Article 7, paragraphs 1-2).

Elements to be taken into account were:

> "the nature of the movables concerned, the qualities of the transferor or his trade, any special circumstances in respect of the transferor's acquisition of the movables known to the transferee, the price, or provisions of the contract and other circumstances in which it was concluded" (Article 7 paragraph 3).[46]

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[41] Bishopsgate Motor Finance Corporation v. Transport Brakes Ltd, 1949 ,1 KB 322, paragraphs 336–337.
[42] J. Chatelain, EEC Doc XII/920/79-E, 1976.
[43] Rodota 1984, p. 99.
[44] Chatelain, 1976, p. 144.
[45] Unidroit 1974, p. 2
[46] Unidroit 1974, p.21.

An interesting element of the Draft was the element of the registration of stolen objects with the effect that a purchaser could not claim to be in good faith as it stipulated that:

> "rights registered in a public register shall continue to be available against a transferee when the movables have been handed over in the country where the register is kept and when, according to the law of that country, their registration makes them available against the transferee"(Article 6).

The idea of a register has outlived this Draft Uniform Law, and today there are several registers available to check the provenance of goods that might be stolen, like Interpol's international register, or the register of the Italian Carabinieri, or the privately funded Art Loss Register, that specialises in 'vetting' the catalogues of the major auction houses, and the preliminary investigation into the stock available at the major Art Fairs like the TEFAF in Maastricht. These registers have become essential in establishing good faith and due diligence.

b) Res extra commercium

In some jurisdictions res extra commercium are not subject to the rules on the transfer and movement of moveable property.[47] This is the result of national legislation on the use and destination of these objects.[48] They are declared inalienable and imprescriptable, which means that they cannot be transferred to another party, nor can they become the property of anyone by statutes of limitation.[49]

c) Recovery of objects restricted by time limitations

Stolen cultural objects are often deliberately exported to make a possible recovery more difficult, not only because the search has to be conducted under another national law, but also because of the different rules on time limitations that are regulated in domestic law.

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[47] Dufau, 1993, p. 274.

[48] In Europe this is the case in Greece, France and Italy for all moveable objects that are in public use. In Switzerland only state archives are declared extra commercium.

[49] Weidner 2001, pp 28-32.

Time limitations concern the period of time during which a claim for revindication can be made, or in which the possessor becomes the legitimate owner because of acquisitive prescription. There are two main legal approaches to the issue of time limitations. The English system, where the original owner is protected by the nemo dat quod non habet rule, meaning that a thief cannot transfer an object to another party acting in good faith because he cannot transfer any rights which he himself does not have.[50] The effects of this rule, however, are countered by the Limitations Act of 1980 that declares the buyer in good faith to be the owner of the object after the lapsing of six years.[51] At the other end of the spectrum is the system for the protection of the economic interests of trade that is more attuned towards the protection of the buyer. This system prevails in national law in states like Italy[52], Switzerland[53], France[54] and the Netherlands[55]. Furthermore, the time limitations on commencing a legal procedure can differ from state to state. The difference between the United States and most European countries became apparent in some recent claims for the recovery of cultural objects that were taken from their original owners during World War II. In most European countries the time for action starts to run at the time of the theft. However, in the United States a different approach is taken. Some states apply the ´discovery rule´, meaning that the time for action only starts to run at the time the plaintiff becomes aware of the location of the object in question.[56] Another approach is the ´demand and refusal rule´ as applied in New York state, where the time for action only starts to run when the original owner makes a demand for the return of the stolen work, but this refused by the possessor. [57]

d) Conflict of Laws

Time limitations are also central to the problems confronting the owner whose objects have been stolen and exported to another country. [58] The Conflict of Law rules of the national states have to be applied here. These rules decide what national law will apply in the case of legal conflicts with an international character.

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[50] Nemo dat plus iuris quod non habet. s. 21(1) Sale of Goods Act 1979; see the English 'Market Overt' for exceptions to this rule when a sale occurred in an open market during daylight (only applicable in England, not in Scotland or Wales); that was the rule for more then 300 years until the Sale of Goods Act revision of 1994, when the rule was abolished. Market Overt 1596; Reid v. Commisioner, 1973; Manning v. Estate, British Columbia 2008, see : Macdougall 2009,pp. 89-91.

[51] Section 3(1)Limitations Act 1980.

[52] Article 1153 Codice Civile Italiano; however, Article 823 CC precludes the transfer of objects that are part of collections owned by public cultural heritage institutions and are therefore considered to be publico domanio.

[53] Article 714 Schweizerischen Zivilgesetzbuch.

[54] Article 2279 Code Civil Francais, L451-5 Code du Patrimoine, objects from public collections are within the public domain and are therefore inalienable.

[55] Article 3:86 Dutch Civil Code.

[56] O'Keefe v. Snyder 1980, Erisoty v. Ritzik 1995; See also Footnote 29.

[57] R. Gugenheim v. Lubell 1991, Deweerth v. Baldinger 1992.

[58] Winkworth v. Christies 1980; City of Gotha 1998; Barakat Galleries 2007; Islamic republic of Iran v. Denyse Berends 2007.

These rules apply, on the one hand, to the procedural side and, on the other, to the conflict in question, whether this relates to a contract, tort or property rights. The main rules which are relevant to cases on the international movement of cultural objects are i) the Lex fora, ii) the Lex loci rei sitae and iii. Lex loci originis.

i. Lex fora

The main procedural rule is the Lex fora that is incorporated in most legal systems. A case concerning the recovery of an object can be brought before the court in the place where an object is situated.[59]

ii. Lex loci rei sitae

Who has the right to act as the legitimate owner is decided according to the Lex loci rei sitae. This rule is based on the same premise as the international consensus on the sovereignty of states and the right to govern the rights of their citizens and the goods on their territory.[60] The rule connects the moveable object to the place (the situs) where it is located.[61] It provides the legal right of ownership to the owner if 1) a legal transfer has been made, or 2) after acquisitive prescription according to the law of the state where the object is situated at the moment of its transfer or prescription.[62] When an object is subsequently moved to another state this ownership right still stands, although, according to the rules of the new situs, such a transfer of ownership rights would not have accrued. The court will therefore respect the ownership rights of the new owner. The Lex loci rei sitae, however, is not without its various forms of interpretation.[63] The outcome of the Winkworth v. Christie's Case could also have been based on the application of the Lex loci actus as the law of the place of transfer.[64] In this case art objects were stolen in England ,and then taken to Italy, where they were sold. The buyer brought them to England to be auctioned at Christie's. The judge applied the Lex res situs rule and decided that the buyer in Italy should be considered as the legitimate owner of the objects as under Italian law he had legal title to the objects. In contrast, in French law, the Lex loci rei sitae has been interpreted as being the law of the state where the object is situated at the time of litigation.[65] It was, however, the application of the Lex loci rei sitae in the Winkworth Case that alerted the international community on the effects of the Lex loci rei sitae on international trade as an easy way to launder stolen cultural objects.[66] In the more recent City of Gotha Case the standing of the Lex loci rei sitae has again

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[59] Kingdom of Spain 1986.
[60] P. Lalive, 1955, p. 106.
[61] Kowalski, 2001, pp. 218-225.
[62] City of Gotha 1998; Greek Orthodox Curch v. W.O. Lans, 1999.
[63] Siehr, p. 610; Kowalski 2002, pp.218-220.
[64] P. Lalive, 1955, p. 74-83; Kowalski 2002, pp145-147.
[65] Stroganoff Scherbatoff v. Bensimon, 1967, p. 120.
[66] Pr E. Jayme, 1992, p. 7; G. Reichelt, 1986, pp. 23-24; K. Siehr, 1993, p. 75, Kowalski 2002, p. 218; Carducci 2006, p. 76..

been confirmed. [67]

iii. Lex loci orginis

There is increasing attention for the rule of the lex loci originis with regard to claims for the return of cultural property.[68] The Resolution on the " International Sale of Works of Art from the Angle of the Protection of Cultural Heritage" was adopted by the Institute of International Law in 1991 refers to " measures that are in force in the country of origin of the work of art to be recognised in other countries".[69] The country of origin is explained as the country "with which the property concerned is most closely linked from the cultural point of view".[70] Kowalski's comments that this may raise controversy. The reference to the closest link 'from a cultural point of view' is unclear, and gives rise to legal uncertainty.[71] However, in the the 1970 UNESCO Convention as well as the 1995 UNIDROIT Convention, as discussed below, are both legal instruments on the return of cultural property that favour the law of the country of origin.

3.A.1.4. Mitigation of applicable law by public order

When the application of a general rule has a negative effect on the public interest, many states rely on the principle of public order. The Dutch Hoge Raad quashed the decission on the return of a Madonna statue that had been stolen from a French church, because the ordre public resisted the application of criminal law procedures to facilitate French public law.[72] In cases concerning the recovery of property lost during the Second World War the public order argument has also been applied. In the case of City of Gotha v. Sotheby's, the English judge considered that English Courts will not recognise a governmental act affecting private property rights when the property is situated outside the territory of that government.[73] Furthermore, the Judge referred to the principle that English courts will not entertain an action to enforce the penal, revenue or

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[67] M. City of Gotha v Sotheby's 1998.

[68] Carducci 2006; EU Report 2011, p. 68,69.

[69] Article 2 , Yearbook of the Institute of International Law, Basel Session, 1992, Vol. 64 II, p.402; Kowalski 2002, p.222,223; Carducci 2006, p.77; EU Report 2011 p. 69.

[70] Yearbook of the Institute of International Law, Basel Session 1992, Vol 64 II, p. 405.

[71] Kowalski 2002,p.223.

[72] This decision was overruled by the Dutch Supreme Court as it concerned a criminal case and it was not for this court to decide on matters of private law. HR 18 January 1983, NJ 1983, 445, annotated by ThWvV, De Raad v. OvJ., See also Haak 1992, pp. 107-111.

[73] Kowalski 2002, p. 226.

other public laws of a foreign state.[74] The judge also considered the application of German Law to be contrary to public policy, as this would otherwise have led to the application of German statutes of limitation (10 years) that would be favourable to the possessor who was not in good faith.[75]

3.A.1.5. Interim conclusion

The increase in the international traffic and trade in cultural objects made it clear that the problems caused by diverging and incompatible regulations in national public and private law concerned two situations:

a) the cultural object is exported without the consent of the owner after theft or conversion;

b) the cultural object has been exported by the owner or his agent without an export licence.

National property laws have not been well adapted, because conflicts in respect of property rights to cultural objects concern the legal rules on a transfer, acquisition, the protection of the bona fide purchaser and statutes of limitation and there is no system in Western law with identical rules. In the case of property rights to cultural goods, the standard rule of lex res sitae concerning moveable goods may lead to situations that are not in accordance with the importance attached to these cultural objects by the original owner and by the state of origin. The conflict caused by the diverging systems, which represents underlying conceptual differences, make it necessary that an international law instrument determines standard rules which are applicable to cross-border property conflicts. Public law, meanwhile, has not been adapted to solve these problems because of the principle of state sovereignty, which, in the case of international legal conflicts on the restitution of illegally exported cultural objects, concerns the enforcement of national public law which is a matter for that particular state. Without any specific arrangements in international law, a national state has no legal basis to uphold the national public law of another state.

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[75] Ibid. paragraph 2.4.

[74] M. City of Gotha v Sotheby's ,1999, 2 All ER p. 1024,footnote 50, paragraph 1.4.

3.A.2. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property [76]

3.A.2.1. Developments towards the UNESCO 1970 Convention

Already in 1933 the Office International des Museés (O.I.M.) submitted a draft for a Convention on the Repatriation of Objects of Artistic, Historical or Scientific Interest which have been Lost, Stolen or Unlawfully Alienated or Exported to the member states of the League of Nations. The US, the UK and the Netherlands took a critical position, however, because they argued that a distinction should be made between privately owned and publicly owned property. The O.I.M. then prepared a new draft, the Convention for the Protection of National Historic Artistic Treasures, that was only to apply to publicly-owned cultural property. This draft contained Article 17, which enabled Contracting States to declare that they chose for the option that their obligations also amounted to the recovery of privately owned property. In subsequent years this draft was again revised in 1936 and 1939, but was then suspended after the events of World War II made it impossible to continue. The final revision of the Draft contained the provision that it would only deal with the import of public property or property of public interest stolen from public and private owners. [77]

After WW II, the UNESCO adopted the Recommendation on international principles applicable to archaeological excavations in 1956. This new instrument promoted international collaboration to discourage the smuggling of archaeological material or which "affect adversely the protection of sites and the collecting of material for public exhibit" (art. 27). Importantly, this Recommendation also contained a provision on the obligation to lend assistance to other countries to ensure the recovery of objects that were excavated illegally, stolen or exported without a licence (art. 31), that would later become part of the UNESCO 1970 Convention.

In 1964 followed a new UNESCO Recommendation on the means of prohibiting and preventing the illicit export, import and transfer of ownership of cultural property. The General Conference at that time thought it necessary to "… take steps forthwith to improve the international moral climate in this respect, to encourage States to adopt, within the limits of their national competence, various provisions calculated to prevent illicit dealings in cultural property…".[78] To monitor these illicit dealings it was deemed necessary that each state should

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[76] As of 17 June 2010 120 states had accepted or ratified the Convention including the United States (1972), the Netherlands (date of acceptance 17/07/2009), and most of the other EU Member States.
[77] Goy, 1970, p. 614 .
[78] Final Report for Special Committee of Governmental Experts, 21 March 1964, UNESCO Doc.CUA/123/, p.6.

create an inventory of cultural heritage that "should receive the protection envisaged in this Recommendation by reason of its great importance" (paragraph 1.2).

Thus UNESCO started working on the Draft for a Convention, aiming for the highest achievable international instrument with binding authority for its member states. The project of devising draft preliminary recommendations was in the hands of a Committee with members from 30 States, including major art trading states like the United Kingdom and the United States. After the initial preparatory draft, however, these states were no longer active in the preparatory committees and the special Committee of Governmental Experts did not contain representatives from these countries. Only in the final stage of the process did the United States become active, and it even promoted an alternative draft, besides the draft by the Governmental Experts. Most specifically, the US wanted no provisions on obligations regarding import controls, because that would make it an instrument of foreign legislation, nor did it want a system to control transfers within its national borders.[79] In the end the UNESCO delegates agreed to accommodate these wishes and to amend the Convention accordingly.

3.A.2.2. Objectives of the 1970 UNESCO Convention

The 1970 UNESCO Convention regards the protection against illicit trade in cultural property. The definition of cultural property in Article 1 of the Convention has a 'mixed character' because it combines subjective and objective elements. Each State has to designate the property which it considers to be "specifically...as being of importance for archaeology, prehistory, history, literature, art or science". This criterion is followed by a list of categories such as products of archaeological excavations (including regular and clandestine excavations) or of archaeological discoveries (sub. c); or antiquities more than one hundred years old, such as inscriptions, coins and engraved seals (sub. e); and furniture more than one hundred years old and old musical instruments (sub. k). Subparagraph g refers to a general category of objects of artistic interest, like paintings, drawings and sculptures. The Convention's text does not give any indication regarding an age or value which would limit this category.

[79] O'Keefe, 2000, p. 13,14.

This Convention is to protect cultural property against the unauthorised import, export and transfer of this designated cultural property (Article 2). For this aim the Convention is dedicated to
a.) setting up inventories of important cultural objects in order to define and qualify cultural property, thereby establishing a framework of national policy on the recognition of the importance of cultural heritage[80] ;

b.) setting up a system to control and monitor the trade in and the maintenance of these objects[81] ;

c.) prohibiting the import of stolen cultural objects coming from a public institution or religious monument in an other country[82] ; and

d.) setting up a system of restitution regarding
designated objects that have been stolen[83] ;
designated objects that have been illegally exported [84] .

The Convention adopts the principle of non-retroactivity, although it has been debated to make it retroactive by accepting a provision that would deem the Convention to be applicable to all cultural objects that are present on the territory of the State at the moment of its adherence to the Convention. This provision was not accepted, as it was considered to be in conflict with the law on vested rights and Treaty law. [85]

3.A.2.3. Obligations

The UNESCO Convention contains obligations to: a) return imported cultural objects that have been illicitly exported or stolen in another contracting state; b) protect the purchaser in good faith a non domino; c) take emergency measures in a situation of crisis; d) establish a national policy regarding illicit trade; e) respect the legislation of other states parties regarding cultural objects that are considered to be in the public domain.

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[80] Article 3.
[81] Articles 5 and 6.
[82] Article 7b(1).
[83] Article 7b and Article 13c.
[84] Article 13d.
[85] Goy, 1970, p. 619.

a) Regarding the return of imported cultural objects that have been illicitly exported or stolen in another contracting state.

Articles 7 and 13 combined set out a framework of measures that should be implemented within national legislation, thereby first indicating the level of measures that should be taken, while also implying that adjustments must be made when necessary. These obligations pertain to cultural policy, the public law on imports and exports, penal law and administrative law, and a system to monitor and communicate information on sales and movement of cultural property.
Art. 7a lays down an obligation on the state:

"a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States."

This provision is a weaker version of the original draft because the US insisted on inserting a provision which was 'consistent with national legislation'. As O'Keefe points out, the reason for this amendment is the fact that in the US this would only affect a few institutions like the Library of Congress and the National Archives. However, Nafziger argued that most American museums are under some form of governmental influence as they are subject to specific tax regimes or are the recipients of subsidies, and these instruments could also be used to assert influence on the conduct of museums.
Moreover, a contracting state should ensure:

the prohibition of imports of cultural property stolen from a museum or a religious or secular public monument or similar institution, but only when these objects are documented in an inventory of that institution, and only after the date of entry into force of the Convention. (Article 7(b)(i))

Again, this is a weaker version of the original draft, as it was feared by states like the US and the Netherlands that the Convention would impose on the Contracting Parties an obligation to establish a system to control the importation of cultural goods. This was presented as a near impossible task that would lead to a system of certificates for every object that crossed the border and the search for hidden objects on every passenger entering the customs zone.[86] However, as it is now formulated, it only provides a formal basis for the recovery of illicitly

[86] O'Keefe, 2000, p. 59.

imported objects and the practice that receiving states only act upon the formal request of another member state. A further limitation on the scope of the objects covered in Article 7 is the fact that it is only considers objects that have been stolen from a museum or a religious or secular monument or similar institution, with an emphasis on the fact that only those objects that are documented in an inventory can be considered.
In recent years this provision has become an issue of debate, as it is increasingly recognised that archaeological materials from sites where there was no inventory or provenance documentation are not covered by Article 7. During the Session of the 40th anniversary of the Convention in 2010 it was decided that a committee was to prepare a modelprovision defining State ownership of undiscovered archaeological materials. [87]

b) Protection of the purchaser in good faith a non domino

Art. 7(b)(ii) relates to the actual recovery of objects that are no longer within the legal sphere of the state of origin and where an action for the recovery of such objects is subject to the assistance of the hosting state and is therefore central to the Convention. It has to be reiterated, however, that this provision only applies to classified objects requested by contracting states.
In the original draft Convention of 1939 the regulation dealt with an adjustment to the rules of the state where the object is situated and followed the general conflict of law rule of the lex res sitae.

> "A bona fide purchaser shall be ordered to surrender an object only against compensation to be paid in advance by the claimant State when the domestic law of the country to which the claim is addressed allows the said possessor either to retain the object or to demand compensation" (O.I.M. 1939. art. 8(1)(a)).

The Secretarial Draft of the UNESCO Convention stipulated the obligation for contracting states as follows:

> "…to make provisions in their respective national laws for the possibility of dispossessing, for reasons of public utility, and with an advance payment of fair compensation corresponding to the purchasing price, bona fide possessors of cultural property illicitly imported since the entry into force of this Convention and claimed by the State of origin, the cost of compensation to the possessor to be borne by that State".[88]

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[87] CLT-2011/CONF.208/COM.17/2REV, Secretariat Report Paris May 2012, paragraph 6, Recommendation No 3.
[88] Preliminary Draft Convention Concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property 1969, of UNESCO Doc SHC/MD/3Annex 4, Article 10(d).

The final version of art. 7(b)(ii) of the 1970 Convention reads:

> "at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. (..)"

This provision first relates to just compensation for the third party. In this provision this third party is the possessor in good faith who has purchased an object a non domino, or the owner after a gift or inheritance. This provision is mostly interpreted as being of a supplementary nature, as it adds to the already available procedures for the recovery of stolen property.[89] However, as O'Keefe points out, this provision specifically obliges contracting states to act and not the individual property owners, and furthermore, should be understood as a separate instrument and not subsidiary to already existing procedures.[90]
The issue of who is to pay for the compensation is left to the requesting state. Furthermore, the costs of the recovery are to be borne by the requesting state. It has been noted that this provision places less developed countries at a disadvantage, as they will be less able to meet the compensatory costs.[91] The result of this provision is that many countries had to make adjustments to their national law. However, not all countries were willing to do so, and this resulted in 'Understandings' from some contracting states like the United States that they would not implement this provision.

c) The 'crisis' provision: Article 9

Article 9, described by Bator as lying at the heart of the Convention, provides for an immediate response to pending danger or a threat to cultural patrimony from the pillaging of archaeological or ethnological materials.[92] Each contracting state should then decide to agree to take specific measures to protect these objects.

Article 9 reads:

> " Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific

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[89] Williams, 1978, p. 184.
[90] O'Keefe, 2000, p.64.
[91] O'Keefe, 2000, p. 62.
[92] Bator, 1982, p. 63-68.

materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State."

Noteworthy is that these objects are not yet part of an inventory in an official institution as referred to in art. 7. Noteworthy is the use of terminology here, as it refers to cultural patrimony and not cultural heritage. O'Keefe, in his extensive comment on all provisions, concluded that this was due to the provision in the US draft that refers to cultural patrimony thus reflecting the US inclination to think of cultural objects as property. The combination of the two separate drafts had resulted in a reference to cultural patrimony instead of the more commonly used cultural heritage.[93] An example of the effectiveness of this provision is the 2004 formal request by China to the Government of the United States for assistance under art. 9 to address the problem of the pillaging of its archaeological sites and the smuggling of cultural artefacts from its territory.[94]

d) National obligations concerning national policies

The second pillar of obligations for the contracting parties concerns the establishment and the enforcement of national policy regarding illicit trade and exports. These obligations are formulated in art. 13 (a, b, c and d); however, the way these obligations should be implemented is left to the national states. Art. 13(a) stipulates that States Parties to this Convention also undertake, consistent with the laws of each State:

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

As O'Keefe mentions, this 'considerable freedom' will lead to a 'considerable variation' in implementation, from a total ban on sales to foreign parties, like in Zaire or China, to regulations on the trade in antiquities in Egypt or archaeological objects in New Zealand.[95]

Furthermore, Contracting States have to

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

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[93] O'Keefe, 2000, p. 62.

[94] The Request by the Peoples' Republic of China to the Government of the United States of America under Article 9 of the 1970 UNESCO Convention led to the Memorandum of Understanding between the United States and the Republic of China, signed on 14 January 2009. http://www.artsjournal.com/culturegrrl/2009/01/new_china-us_antiquities_agree.html, last accessed 1 July 2012.

[95] O'Keefe, 2000, p.86.

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

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

These provisions give rise to the question of who is to be considered the rightful owner and what his competences accordingly are.
The 1970 Convention is presented as a public law instrument concerning the public policy on specifically designated cultural objects belonging to specific categories as formulated in art. 1. The rightful owner in Article 13 b, c and d should therefore be read in connection with art. 7 b regarding the import and recovery of objects that have been stolen from a museum or a religious or secular monument or similar institution. Regarding 13b, O'Keefe suggests that the rightful owner in this provision should be understood within the context of Article 13(d) 'to facilitate recovery of such property by a State Party in cases where it has been exported', thus providing a claim for States that declare state ownership of objects that have been illegally exported, as in Italy[96] or in Guatemala[97]. In Article 13 (c), on the other hand, there seems to be room for also privately owned property, as it considers actions brought by or on behalf of the rightful owners. It must be decided by national law whether the State will present a claim on behalf of a private owner.

e) Regarding res extra commercium
The specific property regime of certain countries regarding a category of cultural objects declared to fall within the public domain or domanio publico proved to be controversial during the negotiations.[98] This category, defined in Article 13d as being endowed with an 'indefeasible right', contains those goods that are declared to be 'public property with a public function'. This property therefore becomes inalienable and imprescriptible, meaning that no one can sell these objects and that no legal title can be obtained either by transfer or by derivative acquisition, nor can they be provided as security. Furthermore, this specific type of property is not considered to be subject to the ordinary conflict law provision of lex res sitae that would recognise a legal transfer in another state if the law of the state where the object is situated would deem such an acquisition to be legal.[99] The lack of any limitation in time, however, was not acceptable to countries

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[95] O'Keefe, 2000, p.86.
[96] King of Italy and Italian Government v. Marquis de Medici and Chisties, 1918.
[97] US v. Hollinshead, 1974.
[98] L. Prott, 1996, p. 37.
[99] C. de Visscher, 1935, p. 39.

like the Netherlands, the UK and Switzerland that have no system of 'public domain' regulations. This resulted in the development of an absolute limit of 75 years for claims regarding public collections. In the final text this limit was included in Article 3 paragraph 4, but it was vital to the agreement on Article 13 during the negotiations.[100]

3.A.2.4. Interim concluding remarks

As an instrument of public law, the focus of the 1970 UNESCO Convention is on the role of national states in the protection of cultural property. This has led to increasing criticism by influential actors in the cultural property debate, who accuse the UNESCO Convention of supporting 'retentive nationalism' or 'protectionism' and thereby ignoring the international interest in an active, perfectly legal trade.[101] Market nations are to provide the best environment for the development of an active market, in which the private interests of owners will ensure the best possible care for art objects.[102]

By 1995, 81 States had become parties to the Convention, including an important number of non-Western States.[103] The UNESCO 1995 Report on the measures of Member States to implement the Convention demonstrates an increasingly effective regime to retain cultural heritage within the borders of the state of origin. Increasingly, developing countries came to understand the importance of the debate on whether or not illegally excavated or exported objects could be returned, even if this would have occurred in the period before the entry into force of the 1970 Convention. On the other hand, by the year 2000 it was noted that the majority of African states that could benefit from the Convention were not among the states parties. [104]

Since then, the Convention's IGC has invested substantial efforts in the organisation of training and awareness raising workshops and capacity building projects to combat trafficking in cultural property for representatives from local communities, governments, representatives of the art market and the public. [105] At the same time, there is increasing attention for the potential benefits of the Convention, which is also supported by the call for media attention for cases in which

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[100] L. Prott, 1996, p.38.
[101] Merryman, 1995, p. 13-60.
[102] Merryman, 1995, p. 22.
[103] UNESCO 1995. See the Annex for the List of States Parties by 30 April 1994.
[104] F. Shyllon, 2000, p. 219-241.
[105] CLT-2011/CONF.208/COM.17/2REV, Secretariat Report June 2011, paragraph 14 and 15; Prott 2012, p. 3. See also http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/capacity-building/, last visited 1 July 2012.

return of cultural property is realised.[106] Prott signals that the date of 1970 has become a key marker for enquiries into provenance. At first, a major impediment on the effectiveness of the Convention was the non-retroactivity of the Convention. There is now a timespan of more then 40 years to establish a practice in which the Convention can establish its value. [107] Since 2001, 30 states more have ratified the Convention, among them Belgium and the Netherlands in 2009, Haiti and Equitorial Guinea in 2010, and Austria in 2012. The total number of States Parties in June 2012 is 122.[108]

3.A.3. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995)

3.A.3.1. Introduction

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 was to provide a remedy for the weaknesses of the 1970 UNESCO Convention.[109] Although the 1970 UNESCO Convention may be considered as a breakthrough in international co-operation on the return and restitution of illicitly exported cultural objects, there was still no effective remedy for the private owner whose property had been stolen. Furthermore, the issue of compensation for a buyer in good faith a non-domino had not been resolved.[110] Other issues were the time limitations on suits and the return of unlawfully excavated cultural objects. Because of experiences with the process of ratification and the difficulty of aligning countries with divergent legal systems on statutes of limitation and the treatment of buyers in good faith, as well as UNESCO's lack of competence in addressing issues of private law, it was deemed appropriate to delegate the task of drafting an effective instrument on these issues to the UNIDROIT.[111] This international institution, dedicated to the study of the unification of private law, had previously drafted the Uniform Law on the Acquisition in Good Faith

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[106] Instrumental is the UNESCO website, and press releases highlighting major events. See for instance the webpages with the press releases on emergency actions http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/emergency-actions/, last visited 1 July 2012.

[107] Prott 2012, p.3.

[108] UNESCO Information Kit, 2011, for a list of all States Parties, including the ratifications of these States to other related international treaties.

[109] Kowalski 2002, pp. 145-153; Prott remarks that "the Unidroit Convention is in effect the protocol to the 1970 Convention which is being sought". Prott, 2012, p.9.

[110] Grethe Reichelt was commissioned by the UNESCO to prepare two preliminary studies on these issues: the Protection of Cultural Property, UNIDROIT 1986 ,Study LXX-Doc.1 and UNIDROIT 1988, Study LXX-Doc 4.

[111] Siehr 1995, p. 97; M. Schneider, 2001, p. 476-564.

of Corporeal Movables (LUAB) in 1975.[112] The LUAB, although never adopted, proclaimed the principle of the validity of acquisition a non domino. This was of course the reverse of what was considered to be a solution for the restitution of stolen cultural objects to the original owner. However, the experiences in addressing the issue of harmonizing the common law systems that follow the nemo dat quod non habet rule and the civil law systems that tend to protect the purchaser in good faith were considered to be an important contribution towards drafting an international Convention tailored to the specific nature of heritage objects.
In June 2012, The 1995 UNIDROIT Convention has 31 States Parties, with Denmark added in February 2011. Turkey and Sweden have also taken steps to become parties to the Convention.

3.A.3.2. Objectives

The UNIDROIT Convention of 1995 provides an international standard of minimum legal rules for the restitution and return of cultural objects between Contracting States and for the return of those cultural objects to the original owner (preamble). Article 1 is therefore formulated to address claims of an international character regarding: the restitution of stolen cultural objects (a); and, (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law as illegally exported cultural objects. The Convention deals with stolen cultural objects in chapter II, Articles 3 and 4, and illegally exported objects in chapter III, Articles 5 and 6.
An important distinction between this Convention and the UNESCO 1970 Convention is that the latter requires cultural objects to have been 'designated' by the State requesting return. This left a private owner without recourse if the State had not 'designated' the object concerned. The Unidroit Convention does not require the 'designation' of an object. It is of note that art. 1a refers to stolen cultural objects in general, while not specifying that these should have been stolen in the territory of a Contracting State. This is to solve the problem that when an object is stolen in non-contracting state A, it cannot be recovered because it is found in contracting state B.

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[112] See also the Hague Convention of 1964 relating to a Uniform Law on the International Sale of Goods and the UNIDROIT Convention relating to a uniform law on the formation of contracts.

3.A.3.3. Obligations

The following will describe the obligations of states parties to the UNIDROIT Convention of 1995 under a) the regulations on the restitution of stolen cultural objects; b) the position of indigenous communities in claims concerning cultural objects; c) Compensation of the purchaser in good faith a non domino; d) Claims concerning res extra commercium; and e) Return and restitution of Illegally Exported Cultural objects.

a) The Restitution of Stolen Cultural Objects
Central to the Convention is Article 3 in Chapter II on the restitution of stolen cultural objects, stating in paragraph 1 that the possessor of a cultural object which has been stolen shall return it. Paragraph 2 explains that objects which have been unlawfully excavated or lawfully excavated but unlawfully retained are considered to be stolen.

A claim for restitution can be brought within 50 years from the time of the theft, or within three years from the time the claimant is aware of the location of the moveable object and the identity of its possessor (Article 3 paragraph 3). With an exception for those objects that are part of a public collection or which form an integral part of an identified monument, those objects can only be reclaimed within the three-year period after the claimant knows the location of the object and identity of its possessor (Article 3 paragraph 5). Furthermore, States may choose to implement a time limitation of 75 years (Article 3 paragraph 5).

b) The protection of the interests of indigenous communities as right holders to a claim for restitution
The provision on the claim for works stolen from a public collection refers to objects belonging to a group of inventoried or otherwise identified cultural objects owned by a contracting State, a regional or local authority, a religious institution or a private institution serving a public interest (art. 3 paragraph 7). The beginning of the 1990s marked the onset of interest in the rights of indigenous peoples and the Australian and Canadian delegations remarked that this would exclude many objects of supreme importance to traditional communities. This was supported by UNESCO, whose delegates referred to the recently commenced 'Decade of Indigenous Peoples'.[113] An extra provision was thereby accepted referring to

> "… a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a contracting State as part of that community's traditional or ritual use, shall be subject

[113] Prott, 1997, p. 40.

to the time limitation applicable to public collections"(Article 3 paragraph 8).

This provision refers to the working definition of indigenous communities established by the Official Rapporteur to the UN, Jose Martinez Cobo, in 1986.[114] This means that if a cultural object is stolen from such a community and brought to another State, the normal limitation period of three years from the time the claimant knew the location of the object and the identity of its possessor (Article 3 paragraph 4) or the maximum period of 50 years would not apply. A contracting State has the right to extend the maximum limitation period for objects in public collections and belonging to indigenous communities up to 75 years. This period should also be recognised by other contracting states (Article 3 paragraph 5).

c) Compensation for the purchaser in good faith a non domino

Compensation for the innocent purchaser of goods that are sold by a seller who is not the legitimate owner was an important aspect of the Convention from the outset of the negotiations.[115] Article 4 provides a framework for compensation, which first sets out to state that

> "The possessor of a stolen cultural object who is required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object (Article 4, paragraph 1).

No mention is made of good faith as such, as this was thought to have different meanings in different legal systems; also terms such as 'bona fide', 'equitable', or 'necessary diligence' were omitted in order to avoid confusion.[116] In art. 4 paragraph 4 the element of due diligence is stated to mean that all the circumstances of the acquisition, including the character of the parties, the price paid, and whether the possessor consulted any reasonably accessible register of stolen cultural objects, were to be taken into account. Any other relevant information and documentation which it could reasonably have obtained and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances are also relevant.

Who is to pay for the compensation is left to the discretion of the nation state,

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[114] " Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed in their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or part of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." E/CN.4/Sub.2/1986/7/Add.4.

[115] Prott, 1997, p. 41.

[116] Prott, 1997, p. 46.

although it is recommended that 'reasonable efforts' should be made to make the seller pay for the compensation (Article 4 paragraph 2).

d) Claims concerning res extra commercium

Claims for res extra commercium are considered as claims concerning works from public collections. The provision of Article 3 paragraph 5 allows for an extra period in the regular limitation period from 3 years to 75 years and was intended to accommodate those countries with a system of cultural objects as public domain objects to lengthen the period available for claims. This elongated period was established because some States (the Netherlands, Switzerland and the United Kingdom) opposed the recognition of an unlimited period for res extra commercium.[117]

e) The return and/or restitution of Illegally Exported Cultural objects

Although the return and restitution of cultural objects both refer to the restoration of the original situs of the object, the terms should not be considered as being synonymous. It was only after long discussions that it was decided that both terms should be applied in Article 1 to exemplify the dual nature of the Convention. It was agreed that the return of objects would describe the process of return after being illegally exported and would only apply to the transfer of the object to an original situs, while the restitution of an object denotes the restitution of stolen objects and refers to the actual restoration of the property rights of the original owner. Originally, it was intended to insert these terms in the title of the Convention, but this idea was rejected as both terms were not part of the regulatory UNESCO vocabulary.[118]

3.A.4. Concluding remarks

This section has considered public international law on the return of cultural objects to their country of origin after they have been stolen or illegally exported. This law developed in answer to the problems resulting from an increase in the international art trade including illicit trade and the growing awareness of the necessity to protect national cultural objects that are considered to be part of the cultural heritage of a nation state. The 1970 UNESCO Convention established a system by which to classify objects which are considered to be part of the cultural heritage of a state. Second, the Convention established common rules that are particularly aimed at, first, the return of classified cultural objects that have

[117] Prott, 1997, p. 38.

[118] M. Schneider, 2001, p. 488.

been illicitly removed to the country of origin, which may result, depending on the law in the national state, in their return to the original owner.
The UNIDROIT Convention deals with the private property rights of the original owner and provides for standard compensation for the innocent buyer. It is not necessary that the State Party has designated the object beforehand. However, the effects of the implementation of the provisions on the restitution of cultural objects to the original owner, even when the new possessor has purchased in good faith a non domino, is different in every state and depends on the substantive private law provisions on acquisitive and derivative possession and the indemnity of the third party. It is accepted that States where a good title cannot be acquired to stolen goods will retain that rule and compensation will not be required to compensate the purchaser of a stolen object (Article 10).

It is in the public interest that the UNIDROIT Convention provides that compensation will only be paid upon the return of stolen cultural objects where the possessor can prove that it was diligent when making the purchase so as to avoid acquiring stolen property. It is considered that the effect of this rule should be to make dealers and collectors more careful in verifying the provenance of cultural objects, since they will run the risk of losing them, and being uncompensated, if they are proved to have been stolen.[119]

In order to protect the interests of indigenous communities and their claims to the restitution of their cultural objects, the UNIDROIT Convention also explicitly allows for an extended limitation period equal to the limitation period set for public collections.

Although by 2012 the 1995 UNIDROIT Convention only has 32 States Parties, the normative effect of this Convention must not be underestimated. In the UNESCO Athens meeting in 2009 on the 1970 UNESCO Convention, a proposal was made that a new instrument should be developed which would merge the two instruments into one.[120] On the other hand, Prott points out, that negotiating a new instrument may weaken the standing that the two Conventions have. It would be more appropriate to support the ratification of the Unidroit Convention before starting to work on a revision of the 1970 Convention.[121]

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[119] UNESCO Report 1995, p. 3.
[120] Korka, 2009, p. 4.
[121] Prott 2012, p. 9.

III.B.
THE EUROPEAN AND DUTCH PERSPECTIVE ON THE PROTECTION AGAINST INTERNATIONAL ILLICIT TRADE AND EXPORT OF CULTURAL PROPERTY

3.B.1. Introduction

Section B of this chapter regards the European and Dutch perspective on the protection of cultural property against illicit trade and presents an overview of the relevant legal framework of the Council of Europe and the European Union and the implementation thereof in the Netherlands in the "Wet tot behoud Cultuurbezit" (Cultural Heritage Preservation Act) and the Dutch Civil Code (DCC). This will be followed by a short discussion of the law on the implementation of the 1970 UNESCO Convention that came into force in July 2009.

The introductory chapter 1 referred to the issues of nationalism, the protection of private interests and the position of the community. This section will discuss these issues in the context of Dutch national cultural heritage law pertaining to the protection of cultural heritage against illicit trade and export of cultural property. First will be discussed how Dutch cultural heritage law protects national and international interests. The protection of private interests versus public interests is considered in the light of the protection of cultural heritage granted by the Dutch CHP Act dealing with private collections only, meaning that cultural objects in public collections need not be subjected to a regime of export licences. Furthermore, the amendments to the DCC implementing the UNESCO 1970 Convention affect the position of the private owner. Finally, the position of local communities with regard to the protection of cultural heritage is discussed by looking at the objectives of protecting national cultural heritage and the decision-making processes with regard to the classification of

cultural objects. To further address these issues it is necessary to start by presenting an outline of the European normative framework as provided by the Council of Europe and the European Union, and the implementation thereof in Dutch national law. This will be followed by a short discussion of the recent implementation of the 1970 UNESCO Convention.

3.B.2. The European normative framework as provided by the Council of Europe and the European Union

3.B.2.1.1. The Council of Europe

The Council of Europe (COE) was founded in 1949 as an international organisation dedicated to the "greater unity" between its members states based on the rule of law, human rights, democratic development and cultural cooperation. To date there are 47 member states. The COE operates through standard setting international conventions, of which the 1950 European Convention on Human Rights is the most important. The Council of Europe initiated seven culture conventions. Most relevant to this chapter on the protection of cultural heritage against illicit trade and export are the European Culture Convention of 1954, and the 1992 European Convention on Protection of Archaeological Heritage, which are discussed below.[122]

[122] The 1954 European Culture Convention ETS 018; The 1992 European Convention on the Protection of the Archaeological Heritage (Revised) ETS 143; The other Council of Europe Culture Conventions are the 1985 European Convention on Offences relating to Cultural Property, ETS 119 , which never came into force; the 1985 Convention on the Protection of Architectural Heritage of Europe ETS 121; the 1992 European Convention on Cinematographic Co-Production , ETS 147 . The 2005 Framework Convention on the Value of Cultural Heritage for Society, ETS 199 is positioned as the 'Umbrella' Convention, see also Chapters 1 and 8.

3.B.2.1.2. The European Culture Convention

The European Cultural Convention of 1954 was the founding instrument on the cultural aspirations of the European Council of Europe (COE).[123] The Convention declares the aim of the COE to be the aspiration to " achieve a greater unity between its members for the purpose, among others, of safeguarding and realising the ideals and principles which are their common heritage".[124] The Convention is phrased in general terms to commit the Contracting Parties to take appropriate measures to encourage the development of its national contribution to the European common heritage.[125] The States Parties of the Council of Europe are thereby invited to regard their national cultural heritage as part of the common European heritage, and arrange for collaborative projects in order to promote cultural exchanges.

3.B.2.1.3. The Council of Europe: The European Convention on the Protection of the Archaeological Heritage (Valetta 1992)

The European Convention on the Protection of the Archaeological Heritage of 1992 is the revised version of the earlier London Convention of 1969.[126] The revised version changed the focus from the protection against illicit excavations to a focus on the effects of the increasing building activities which could disturb hitherto undiscovered archaeological sites. The aim of the Convention was therefore to come to an integral approach of the protection of archaeological sites, existing ones and also potential ones.[127]

The Convention has become an integral part of the planning policies of local and regional governments of the States Parties.

Article 10 of the Convention sees to the prevention of illicit circulation of archaeological finds. Illicit circulation means the dealing in objects coming from illicit excavations or unlawfully from official excavations. States Parties are to arrange for the means to identify illicit excavations, to pool information and if there is information on any illicit excavation to if inform, if that other State is also a party to the Convention, the competent authorities in the State of origin of any offer suspected of coming either from illicit excavations or unlawfully

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[123] CETS No 018. The Convention entered into force in 1955. Total number of ratifications on 1 July 2012 is 50.
[124] Preamble COE Cultural Convention.
[125] COE Cultural Convention Article 1.
[126] CETS No 143. The Convention entered into force in 1995. Total number of ratifications on 1 July 2012 is 42, and 3 States Parties have signed but not ratified the Convention.
[127] Explanatory Report, Introduction sub b and Article 5.

from official excavations.[128] This provision was negotiated against the backdrop of the 1986 ICOM Code of Professional Ethics, stating that a museum should not purchase objects where there is "reasonable cause to believe that their recovery involved the recent unscientific or intentional destruction or damage of ancient monuments or archaeological sites, or involved a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities" (paragraph 3.2). At the time of the negotiations, it was remarked that museums sometimes also serve as a repository for archaeological finds to prevent them from destruction, and that this provision should not be aimed to prevent museums of fulfilling that role.[129] It was emphasised therefore that the provisions in Article 10 do not apply retroactively. The Explanatory Notes explain that the provisions on illicit circulation were considered to be too complex to be sufficiently covered by this Convention, and therefore Article 11 states that nothing in this Convention is to be explained as to interfere with future bilateral or multilateral treaties dealing with these problems.[130]

3.B.2.2.1. The Europenean Union: Introduction to the normative framework

Introduction

The Lisbon Treaty, containing the Treaty on European Union (TEU) and the Treaty on the Functioning of European Union (TFEU) , entered into force on 1 December 2009, stating in the Preamble of the TEU that it was 'drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law. Article 3 TEU affirmed that 'It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'. The respect for cultural, religious and linguistic diversity is supported by Article 22 of the EU Charter of Fundamental Rights. In Article 6 of the TEU the Charter of Fundamental Rights, as accepted in Nice in December 2000, is recognised as having the same value as the TEU and the TFEU.

The 1957 European Economic Treaty or the Treaty of Rome, contained only two references to Community competence with regard to culture. Article 36 EEC, allowed Member States to restrict imports and exports to protect 'national

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[128] Article 10ii.
[129] Explanatory Note on Article 10.
[130] Explanatory Note on Article 11.

treasures possessing artistic, historic or archaeological value'. Article 131 EEC, regarded the commitment to support the association of Member States with a number of non-European countries and territories because of historic bonds from former colonial relations, ' to serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire'. [131]

The 1992 Maastricht Treaty on the European Union creating a single market came into force in november 1993. Between the years 1977 and 1992 four Communications paved the way for establishing Community consensus on the need define Community policies on culture and the need to legitimise complementary Community action on culture. [132] The subsidiary character of the Community competence on culture was ensured by Article 5(2) TEC, and Article 6, paragraph 3 TEC stating that the Union was to respect the national identities of its Member States. These provisions confirmed that the European Union was still founded on the congregation of its Member States, and national identities were to be respected.[133] The preamble of the Maastricht Treaty states the desire of Member States to 'deepen the solidarity between their peoples while respecting their history, their culture and their traditions'. Article 3q of the Maastricht Treaty referred to the aim of the Community to contribute to the flowering of cultures of the Member States. This was further articulated in Article 128 of the Maastricht Treaty, renumbered into 151 TEC, now 167 TFEU, which in its first paragraph states that ' The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore'. [134] This provision was supported by the amendment of Article 87(d) TEC, now Article 107 TFEU, stating that 'aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest' is to be considered compatible with the internal market. Article 167 paragraph 4 TFEU states that "The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures, and is to make that the European Union has regard for the cultural implications in its other policies.[135]

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[131] Craufurd Smith 2004, p.19.

[132] 1977 " Community Action in the cultural sector, 22.11.97 Bulletin of the EC. Supplement 6/77; 1982 " Stronger Community action in the cultural sector, 12.10.82, Bulletin of the EC, suppl. 6/82; 1987 " A Fresh boost for culture in the European Community", COM (87) final, December 1987, Bulletin of the EC, Suppl 4/87 and in 1992 " New prospects for Community cultural action, COM(92) final, 29.4.1992. See also Crauford 2004, pp. 20-28.

[133] Besselink 2010, p. 41.

[134] More on the impact of Article 151 on the EU policy on the protection of cultural heritage and the protection of cultural Diversity in chapter 4.B. paragraph 2, and chapter 6.B. paragraph 2.

[135] Psychogiopoulou 2008, p. 56.

3.B.2.2.2. The EU normative framework on trade in cultural property

The European Union regards trade in cultural property as trade in goods, that is subject to the general rules on the movement of goods in the single market as regulated in Articles 26, 28 and 34-36 of the TFEU. The free movement of goods was a fundamental principle to the European Community, and remains one of cornerstones of te single market in the European Union. Therefore, no Member State should impose custom duties or import restrictions, nor measures having equivalent effect for goods coming from other Member States.[136] Any quantitative restrictions on imports or exports are also prohibited.[137] In 1968, The Court of Justice affirmed that cultural objects are goods, as they are " Articles possessing artistic and historical value" and can be valued in money, and therefore the rules of the common market apply[138]

Important exception to this general rule is Article 36 TFEU, which allows Member States to restrict imports and exports to protect "...national treasures possessing artistic, historic or archaeological value".[139] It is noteworthy that the English version of the text refers to 'national treasures' while the Italian, Spanish and Portugese texts refer to 'patrimonio national', which could lead to the conclusion that the text version of these latter Member States covers a broader concept of cultural goods then those States that refer to 'national treasures'. However, a strict interpretation would be in line with the decisions on the interpretation of the Treaty texts by the European Court of Justice.[140]

When the Maastricht Treaty came into force in November 1993, Member States were in need of legal measures to be able to request the return of cultural goods from the territories of other Member States.[141] In paragraph 6 of the preamble to the Single European Act it was therefore agreed that "under the terms and within the limits of art. 36 of the Treaty, Member States will, after 1992, retain the right to define their national treasures and to take the necessary measures to protect them in this area without frontiers." In order to protect the external borders of the European Union, the rules on exports outside of the Union had to be harmonised also.

The first step was Regulation 3911/92 (December 1992) on the export of cultural goods which related to controlling the export of specific categories of cul-

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[136] Articles 28 and 30 TFEU, ex Articles 23 and 25 TEC
[137] Articles 34 and 35 TFEU, ex Articles 28 and 29 TEC.
[138] Commission v. Italy, Case 7-68, ECR, p. 423.
[139] ex Article 30 TEC, ex Article 36 EEC.
[140] EU Report 2011 pp.41-43.
[141] Sjouke 1999, pp.40-44.

tural goods and governed exports out of the territory of the European Union.[142] Council Directive 93/7 on the return of cultural objects unlawfully removed from the territory of a Member State into the territory of another Member State was adopted in March 1993 and governed the movement of cultural objects within the European Union.[143] Noteworthy is the distinction between the terms objects in the Directive and goods in the Regulation. The goods that are allowed to be exported are considered in their economic capacity, the objects of cultural interest that are requested to be returned between Member States are referred to in a non- trade terminology.[144]

3.B.2.2.3. Regulation 3911/92

Regulation 3911/92 regards the movement of cultural goods from Member States to third states only.[145] The Regulation provides for the introduction of an export licence for 'items' that are listed in the Annex, which is identical to the Annex of the Directive. The categorisation in the Annex is based on Article 1 of the 1970 UNESCO Convention. However, this list is not intended to be restrictive, as it 'is not intended to prejudice the definition by Member States of national treasures within the meaning of art. 36 TFEU. [146]

The Annex contains one important limitation. From the general category of objects of artistic value, objects younger than 50 years of age and in the possession of the originator are excluded. These limitations are only mentioned in a footnote.[147]

The export licence may be refused if the object is covered by national law protecting treasures of artistic, historical or archaeological value in the Member State concerned.[148] There is no obligation to designate the specific object beforehand.

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[142] Regulation (EEC) No. 3911/92 on the export of cultural goods and Directive 93/7/EEC, O.J.E.C. 31 December 1992, no. L 396/1. The Regulation was active before the Directive, because it was based on the procedure of art. 113 EEC Treaty, without the consultation of the European Parliament. Amended by Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods OJ L 039, 10/02/2009 P. 0001– 0007.

[143] Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from theterritory of a Member State, OJ L 74 of 27.03.1993, p. 74. The procedure for the Directive was based on art. 100A of the EEC Treaty. Amended by Directive 96/100/EC of the European Parliament and of the Council of 17 February 1997, OJ L 60 of 1 March 1997, p. 59, and by Directive2001/38/EC of the European Parliament and of the Council of 5 June 2001, OJ L 187 of 10 July 2001, p. 43.

[144] De Witte, 1994, p.6.

[145] Updated by Regulation 116/2009. The Regulation also applies to the contracting partners of the European Economic Area, i.e., Norway, Iceland and Liechtenstein.

[146] Preamble.

[147] Annex of the Regulation and the Directive, Footnote 1

[148] Article 1 paragraph 2.3.

3.B.2.2.4. Directive 3911/93

After the introduction of Council Regulation 3911/92, Council Directive 93/7/EEC was to provide for a system regulating the trans border traffic in cultural objects that are classified as 'national treasures' between member states as an exception to the free movement of goods in the European Community (EC).[149]). If an object is unlawfully removed, i.e. removed from the territory of one Member State to the territory of another Member State in breach of national law, or not returned after a lawful temporary removal, the Member State may submit a request for its return.[150] The Member State is to classify the object before or after its unlawful removal from its territory as a national treasure within the meaning of Article 36 TFEU. The Directive only applies to objects that are listed in the Annex, or are listed as an integral part of public collections in the inventories of museums, archives or libraries.[151] Public collections are collections which are the property of a Member State, or a local or regional authority, or a public institution, if such an institution is the property of, or significantly financed by, the Member State. Also the collections of ecclesiastical institutions are eligible for protection.[152]

The Directive enables the requesting Member State to initiate proceedings against the possessor or the holder of the designated object, within a time limit of 30 tears, or 75 years when the removal concerns objects from public collections or ecclesiastical collections.[153]

Art. 9 provides for the compensation of the possessor in good faith. The competent court in the requested State is to grant compensation 'as it deems fair according to the circumstances of the case", subject to the condition that the possessor has exercised due care and attention. Article 11 regulates that the costs may be recovered by the requesting state from the person responsible for the unlawful exportation.

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[149] Article 34 TFEU.
[150] Regulation 116/ 2009 Article 1 paragraph 2.
[151] It was only after pressure from the Ministers from France, Germany and Belgium that public collections were included in the scope of the Directive and the Regulation. Sjouke 1999, p. 43.
[152] Article 1 paragraph 1.
[153] Articles 5 and 7.

3.B.2.3. Implementation of the Directive in the Netherlands

The following paragraphs will only discuss the amendments to the CHP Act and the DCC.

The legal protection of cultural property against international illicit trade and export in the Netherlands is regulated in the Wet tot behoud Cultuurbezit (Cultural Heritage Preservation Act/CHP Act), in the Dutch Civil Code (DCC) , the Code of Civil Procedure and the Code on Economic Offences. [154] The following will only discuss the amendments to the CHP Act and the DCC.

The Cultural Heritage Preservation Act

The Cultural Heritage Preservation Act (CHP Act) of 1984 regards the preservation of Dutch national cultural heritage by designating specific objects and collections as Dutch cultural property of national interest and providing a system of control to prevent the export of these designated objects.[155] The CHP Act also covers objects that are stolen, as it is obvious that stolen objects are exported without the consent of the owner.

The CHP Act contains a strict system of control for designated cultural objects that are privately owned. Designated objects are of particular cultural, historic or scientific interest and are irreplaceable and indispensable to Dutch cultural heritage. The latter criterion explains that the object has to represent either a symbolic function, or a 'linking' function, meaning that the object is of interest to scientific or historical developments, or a 'reference' function, meaning that the object is an important contribution to the research into other important cultural objects.[156] The effect of classification as a designated cultural object is that the private owner is required to inform the State Inspectorate in writing of the intention to transfer the object out of his possession into the hands of a non-resident.[157] After the State Inspector has been informed of this intention, it is forbidden to export the object in the following period of four weeks. This period can be extended by another eight weeks. The Minister has the right to object against the export, and for a period of three months this is to be considered as an offer to buy the object.[158]

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[154] See also Lubina, 2009, pp. 39-45; Van der Vlies and Salomons, 2012, p. 110- 129.

[155] Wet tot behoud Cultuurbezit, Act of 1 February 1984, Stb. 1984, No 49. . See also Kamerstukken II, 1980-1981, (MvT) 16749, no.3, pp. 8 -9.

[156] CHP Act, Article 2

[157] CHP Act, Article 7.

[158] CHP Act, Article 10. If need be, the price of the object may be determined by the District Court of The Hague, Article 10, paragraph 3 sub. a.

Objects owned by public institutions are not included in this strict regime.[159] It was considered that public institutions are responsible for the cultural objects that are placed in their care, and if necessary, as an ultimate remedy, the Crown may repeal a decision of a lower public authority to bring an object or collection outside of the Netherlands.[160]
However, Article 14a implemented the Directive by regulating that moveable objects from public collections as described in Article 1, paragraph 1 of the Directive may not be taken outside of the territory of the Netherlands without written permission from the public institution owning the collection. This provision covers three kinds of collections:
- a public collection owned by the state or another public body;
- a religious institution;
- a collection owned by a private legal entity but supported for a major part by public funding.

Thus the legal representative of a municipal or provincial museum collection is in the position to grant permission to bring a moveable object outside of the territory of the Netherlands to another Member State.With regard to the collections owned by private legal entities but supported by public funding, the Minister will have to identify the private legal entity as being an entity in the meaning of article 14A. The Explanatory Note states that it is to be expected that all the museums that are supported by public funding will be subjected to this regime.
Article 14B brings the CHP Act in line with the Regulation 116/2009 on the export of designated cultural property outside of the European Union. If their value corresponds to, or exceeds a certain value, the export of those cultural objects as covered by the Annex without a licence is prohibited. The export licence only applies to archaeological objects, or elements forming an integral part of artistic, historical or religious monuments of an age exceeding 100 years. Pictures, paintings and other creative works made entirely by hand and younger than 50 years or still in the possession of the originator are exempt from an export licence.

The Dutch Civil Code
The Directive 93/7/ EEC sees to the right of the Member State to request the return of designated cultural property that is taken outside of its territory without its consent. as regulated in the new article 1008 Civil Procedure. To bring such a request in line with Dutch civil law on the transfer of movables the Dutch legislator decided to amend the Dutch Code (DCC). At that time, the revision of the Dutch Civil Code had just come into force in 1992 and in general favoured the approach to protect the position of the purchaser in good faith against a claim of the original owner as regulated in Article 3:86 DCC. Article 3:99 DCC

[159] Kamerstukken II, 1980-1981, 16 749, no.3, p. 10; no. 6, p. 13; Lubina 2009, p. 237- 240..
[160] Article 268 Gemeentewet (Municipalities Act); Article 261 Provinciewet (Provinces Act).

thereby saw to a period of three years for acquisitive prescription in favour of the purchaser in good faith. Article 3:105 DCC on prescriptive prescription made that the possessor of an object would become the owner after the period of twenty years in which a civil procedure could be instated had lapsed. These provisions had already caused critics to complain that this regime would favour thieves.[161] The implementation of the Directive led to Article 3:86a with the rule that the protection of good faith purchasers cannot be evoked against a Member State requesting the return of a cultural object under the regime of the Directive. This in turn caused critique, as this amendment was considered to be 'spoiling' the system of the Dutch Civil Code.[162] The explanatory note to the amendment states that the general objective of protecting the purchaser in the interest of trade in the DCC is not relevant in the case of trade in protected cultural goods.[163] However, the purchaser who demonstrates due care and attention in the particular circumstances of the case is to be awarded compensation. Important is that under Article 3:86a DCC the burden of proof with regard to due care and attention rests on the possessor of the object.[164] To adapt the Dutch Civil Code to the new regime for designated cultural property, the Dutch legislator decided to include article 3:86a paragraph 2, seeing to cases in which privately owned and designated cultural property was stolen or lost and sold in the Netherlands, and making that a purchaser in good faith would not be protected under article 3:86.[165] This provision also allows the private owner of an object designated under the CHP Act to instate an action for the return of his property. Article 3:99 on acquisitive prescription was amended by paragraph 2 stating that the period of three years would not apply for movable goods that are designated objects under the CHP Act on Dutch territory and by paragraph 3 which made that the period of three years would also not apply for objects that are requested to be returned by EU Member States under the regime of article 3:86a BW.
Article 310a DCC on the time limitations for an action for the return of the object by a Member State states that an action should be initiated within a year after the Member State has learned of the objects' location or the identity of the possessor. The same Article 3:310a DCC sets the absolute time limitation of 30 years for the return of classified objects and 75 years for works from public or ecclesiastical collections.
Under Article 310b DCC the private owner of an object designated under the CHP Act is also allowed an action for the return of an object within a period of five years from the date the location or the possessor of the object has become known, with an absolute time limitation of 30 years.

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[161] Salomons 2007, p.173, and footnote 76 with an overview of all the critical comments in Dutch legal comments.
[162] Bollen and De Groot 1995, pp.4-8; Critical comments were also made by Snijders and Rank Berenschot 2001, p. 205; and Salomons 2007, p. 167 and p.177. See also Brunner, 1992, p. 45; and Klomp, 1996, 519-520.
[163] MvT., Kamerstukken II 1993/94, 23 657, p. 11-12.
[164] Salomons 2007, pp.167-168; Krans 2010, pp.72-73.
[165] Bollen and De Groot, 1996, p.2, and p.4.

3.B.3. The implementation of the 1970 UNESCO Convention

The Dutch Minister of Culture stated her intention to ratify the 1970 UNESCO Convention, but not the UNIDROIT Convention of 1995, in a letter to Parliament in 2004.[166] The law on the implementation of the Convention came into force on 1 July 2009, just before the 40th anniversary of the Convention.[167] The Netherlands is listed as the 118th State to enter into the Treaty as a State Party followed by Haiti and Guinea Bissau.

The reason for this long delay was that the Dutch Government first intended also to ratify the UNIDROIT Convention, but subsequent Governments considered that the fact that obligations of this Convention are mandatory in toto was not in the interest of Dutch art trade.[168] Furthermore, the 1995 Unidroit provisions on the protection of good faith combined with the requirements on due diligence were considered to be incompatible with the Dutch law. It was argued that the categories were too general in their scope because they were not restricted to objects of an outstanding or specific interest to national cultural heritage, and the obligations with regard to the return of objects that were held by good faith possessors were too stringent.[169] An important argument in favour of ratifying the 1970 Convention was that this Convention may be explained strictly as only including cultural objects with a specific interest to national cultural heritage of the country of origin, as was concluded by interpreting Article 5 against the background of Article 2 of the Convention.[170]
Also, the 1970 UNESCO Treaty is more flexible, and States Parties are free to implement the Convention in their national laws, provided that they comply with the minimum standard of protection.[171] However, the Dutch Government chose to a include some of the measures from the UNIDROIT Convention regarding the position of the right holder and the good faith purchaser.

The Dutch law on the implementation of the Convention follows the framework of the Dutch implementation of EU Directive 93/7/EEC and extends the regime for the protection of cultural objects of national interest to all the territories of the States Parties to the Convention.[172] The general obligations in the

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[166] Ministerie of 'Onderwijs Cultuur &Wetenschappen', letter DCE/04/32233, Kamerstukken II, 2003-2004, 29314, no. 8.
[167] Goedkeuringswet Stb. 254, 2009; Uitvoeringswet UNESCO-verdrag 1970, Staatsblad 255.
[168] Kamerstukken II, 2003-2004, 29314, no. 8.
[169] Kamerstukken II, 2007-2008, 31 255, no. 7 p. 4; Van der Horst 2009, Ars Aecqui p. 666-669; Schneider, Lubina, Ars Aecqui 2010, p. 80.
[170] Kamerstukken II, 2007-2009, 31 255, no. 7 p. 7-9.
[171] Van der Horst 2009, p. 667.
[172] Wet van 12 juni 2009 tot uitvoering van de op 14 november 1970 te Parijs tot stand gekomen Overeenkomst inzake de middelen om de onrechtmatige invoer, uitvoer of eigendomsoverdracht van culturele goederen te verbieden en te verhinderen (Uitvoeringswet UNESCO-verdrag 1970 inzake onrechtmatige invoer, uitvoer of eigendomsoverdracht van cultuurgoederen).

Convention regarding the designation of cultural objects that are to be protected as national cultural heritage were already provided for in the CPA Act. The law on the Implementation of the Convention of 1992 contains the prohibition on the import of any cultural object of specific cultural interest that was exported contrary to any national law of a State Party to the Convention in Article 3.
The new Article 1011a-1011d in the Code of Civil Procedure regulates that a State Party, as well as a private owner, may initiate proceedings for the return of the cultural object.[173] It is of note, that the Directive 93/7/EEC only provides for a procedure initiated by the Member State and not a private owner. That a private owner may also claim the return of designated cultural property under the Convention is considered compatible to the Directive as it is stated in Article 15 that the Directive shall be without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen. [174]
Article 99 paragraph 2 DCC regulates that the term of acquisitive prescription of three years does not apply for objects protected under the Convention.
Article 310c DCC extends the regime on time limitations for actions on the return of cultural objects as protected in the Convention to a period of five years from the date that the location or the possessor has become known, or an absolute term of 30 years. Paragraph 2 sees to an extended term of 75 years for objects from public collections or religious institutions that are included in their inventories. The explanatory note however conveys that considerations on fairness may be prohibitive to a strict application of this 'extremely long' period.[175]

At the same time, the Dutch Civil Code was amended by Article 3:86b, stating that the general provisions on the protection of the purchaser in good faith may not be invoked against a State Party of the Convention in a procedure based on Article 4 of the Convention. Paragraph 2 of this Article provides for reasonable compensation, provided that the possessor has taken the necessary care at the time of purchasing the object. Again, the burden of proof rests on the purchaser, and not on the claimant.

The influence of the UNIDROIT Convention is apparent in the addition of Article 3:87a DCC, which states that in answer to the question whether the possessor has acted with the necessary care, all circumstances of the transfer will be taken into account with particular consideration being given to the position of the parties, the price paid, and evidence as to whether a register of stolen or missing cultural objects has been consulted or other relevant institutions have

[173] Implementation law, Articles 3 and 4.
[174] Kamerstukken II, 2007-2009, 31 255, no 3 p.9.
[175] Kamerstukken 2007-2008, 31 255, no 3, p. 19.

been approached, as well as to all other steps taken that may be expected of a person acting reasonably.[176] An extra burden is placed on the professional art dealer, who is under an obligation to verify the identity of the seller, and to have a statement in writing by the seller that he has the necessary legal capacity to sell the object. The art dealer is to maintain a register with data on the provenance, the name and address of the seller, the price paid and a description of the object. The dealer also has to consult relevant registries on stolen or protected cultural objects.[177] And, finally, the auctioneer who has not fulfilled the obligations of both the seller and the art dealer is considered to have committed a tortious act against the original owner and is liable for damages.[178]

3.B.4. The Issues revisited

3.B.4.1. The issue of nationalism

The issue of nationalism in Dutch cultural heritage came to the fore in the question if only the export of Dutch cultural heritage of Dutch origin is to be prevented. In answer to this question by Parliament in the discussion on the implementation of the 1970 UNESCO Convention, the Dutch Minister answered that the Dutch interpretation of this Convention was that the obligations only regarded cultural heritage originating in the territory of a State Party. Is this supported by Dutch practice regarding the export of cultural objects? In 1993 nationality was considered in a Court decision, which held that the fact that the owner of a Dutch street organ was not a resident of the Netherlands was of no consequence to the decision whether an object could be classified as protected cultural property. Only the fact that the object was situated in the Netherlands was taken into account.[179] A few years later, the intention to export a painting by Cézanne in 1995 was barred by the Minister on the ground that the painting had been classified under the CHP Act in 1985 because of the painting's interest to Dutch cultural heritage. After the State's offer to purchase the painting for Dfl. 6.5 million had been refused, the district court of The Hague decided, after hearing advice from three independent experts, that the value of the painting should be estimated at Dfl. 15 million. When it became clear that the Dutch State could not raise that sum, it was bought by a private party and loaned to the Boymans

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[176] 3:87a paragraph 1. See also Gaalen, van en Verheij 1997,p. 200.
[177] 3:87a paragraph 2.
[178] 3:87a paragraph 3.
[179] AR 28 December 1992, unpublished, Sjouke 2010, p. 42—43.

Van Beuningen Museum in Rotterdam.[180] This demonstrates that when a cultural object originates in another state this does not stand in the way of its classification as an important contribution to Dutch cultural heritage.

Contrary to a nationalist approach is the implementation of the EU Directive and the 1970 UNESCO Convention changing the standard DCC regime in which the right holder to an object is determined by the law of the state in which the last legal transfer is concluded, the lex res situs. After the implementation, the DCC grants the requesting state the right to determine whether an object was removed illicitly from its territory under its national law, the lex orginis. With this implementation Dutch national property law has come to favour the law of another Member State in the EU or a State Party to the Convention over Dutch national law.[181]

Thus it is only with regard to a small group of heritage objects that the national interest of keeping national treasures on Dutch territory is protected. International interests are served by implementing international cultural heritage law, even if this means that the protection of the good faith buyer of protected cultural objects is limited.

3.B.4.2. Private interests and public interests

The second issue is that of protecting private interests versus public interests. With regard to the protection of private interests, the most significant change in the DCC is the provision protecting the good faith buyer of goods, which marked a shift in whose private interests are protected, the good faith buyer's or the first owner's. As was explained above, after the implementation of the EU Directive and the 1970 Convention, Article 3:86 DCC was amended by Article 3:86a and later 3:86b, and Article 3:87a determining that the protection available for the buyer of ordinary goods was not to be invoked against a claim based on the Directive or the Convention. On the contrary, a cultural object as classified under national cultural heritage law is to be returned to the first owner, and reasonable compensation is only available under strict conditions. Moreover, the burden of proof shifts onto the possessor. It may be argued that these changes reflect the deference to public interest arguments in international treaties.

With regard to the protection of public interests, a recent event clarifies that the protection of public collections may not be as adequately dealt with in Dutch

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[180] Rb Den Haag, 14 januari 1998; Lubina 2009, p. 32; Sjouke 2010, p. 51.
[181] Bollen, De Groot, 1996, p.3.

cultural heritage law as might have been expected. The upheaval caused by the sale of a painting by the prominent Dutch artist Marlene Dumas in 2011 demonstrates that the director of a municipal museum may, with a letter of consent by the municipal authority, decide to sell a contemporary painting that is part of the museum's collection at auction at Christie's in London. The painting entitled 'The Schoolboys' was sold for € 1.2 million to an anonymous buyer, presumably outside of Europe, without being prevented by Dutch heritage law.[182] The State Secretary for Culture stated in his answer to questions in Parliament that he expected that heritage institutions would come up with creative solutions to budgetary problems, but that he did not think that public cultural heritage should be offered up for sale just like that.[183] But still, while public institutions may be considered to be responsible for safeguarding access to heritage collections, there is the option to sell and export elements of the collection without having the obligation to apply for an export licence, which could initiate a procedure for negotiating the purchase of the painting with the intention to safeguard its presence in a Dutch heritage collection. The EU Regulation does not contain a requirement to do so. Even though the export regime in the Regulation does not exempt objects from public collections from having an export licence, this licence may only be refused if the object is covered by legislation protecting artistic, historical or archaeological value in the Member State concerned. If a Member State decides that its legislative framework is adequate, and fulfils the minimum standard of the Regulation, there is nothing to be done. Moreover, the relevant provisions in the Annex of the regulation only concern objects in collections older than 100 years[184], or objects made entirely by hand and which are more than 50 years old and not owned by the originator.[185] The effect is that paintings in public collections by contemporary artists can be exported without an export licence.

3.B.4.3. The position of local communities

The third issue that is discussed in the course of this research project is that of the position of local communities with regard to the protection of cultural heritage. The stated objective of the CHP Act is to safeguard Dutch historic and cultural values by keeping the most important cultural objects on Dutch territory and, by doing so, safeguarding continuous access to this heritage.[186] In this mission statement we can read, between the lines, the understanding that this also

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[182] Letter by J. van Leeuwen 15-11-2011, studio manager Marlene Dumas, on file with the author.
[183] Answer to questions by Ms Klijnsma (Labour Party) as a Member of Parliament to the State Secretary for Culture, 9 September 2011, file no. 2011Z17334.
[184] Annex paragraph 2.
[185] Annex paragraph 3 footnote 1.
[186] Kamerstukken II 1980-1981, 16749, pp. 1- 4.

concerns local communities. However, as such, they are not singled out as stakeholders in the prevention of exports, or as potential claimants in a procedure to request the return of certain objects. This is due to the policy on classification which is aimed to single out cultural objects which are of national interest. Likewise, in the classification procedure, local communities are not considered to be stakeholders.

3.B.5. Concluding remarks

The CHP Act is to protect Dutch cultural heritage of national interest against its removal from Dutch territory. However, even after the implementation of the EU Regulation and Directive and the 1970 UNESCO Convention, this protection only concerns a small part of Dutch cultural heritage, while leaving the major part free to be exported by private owners. This is a policy choice which may be explained by reasons of efficiency and a subsidiarity approach, in which only a minimum amount of interference is mandatory. Furthermore, objects from collections of public institutions, religious institutions or from public funded private legal entities are only subject to a light regime, needing only the written statement of consent by a representative of the owning public institution. Another issue is the value threshold and the age threshold for objects in both private and public collections in the Annex of the EU Regulation and Directive.[187] That an object needs to represent a certain monetary value may be acceptable, also in view of the administrative burden. However, this age threshold needs to be reconsidered. It is based on a historic perspective of cultural heritage which includes remnants from the past, and not the role in today's cultural life nor its potential contribution to the future. As became clear with the sale of the Dumas painting, if only from the price that was paid for it at auction, contemporary art is today of great value to national cultural heritage, and therefore it is necessary to adjust the regime of export licences for cultural objects accordingly. The other recommendation to be made after the Dumas sale is that it is necessary to reconsider the arguments for excluding cultural objects from public collections from the controlling mechanisms available for privately owned cultural objects of national interest to prevent their export. It may be clear that now that the self-regulating mechanisms in the Museum community have not been able to prevent such a sale, the state should intervene and provide a regulatory framework to evaluate decisions made by representatives of public institutions that result in the loss of cultural objects for the Netherlands.

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[187] There is no such threshold in the 1970 UNESCO Convention.

IV.
THE LEGAL PROTECTION OF CULTURAL HERITAGE

4. Introduction

The 1972 UNESCO Convention on the Protection of Natural and Cultural Heritage (or the World Heritage Convention (WHC)) and the 2003 UNESCO Convention on the Protection of Intangible Heritage (IHC) are representative of developments in the thinking on the international protection of cultural expressions that are regarded as cultural heritage. Both Conventions have a large and increasing number of member states.[1] Together, they are the manifestation of the concept of a common heritage and common responsibility.

Section A of this chapter concentrates on the World Heritage Convention, presenting a general overview of the background and the objectives of the relevant provisions with regard to the protection of cultural expressions. This will be followed by a discussion of the criteria used to define those cultural expressions that are eligible for inclusion in the two lists containing cultural heritage of 'outstanding universal value'. The chapter will further discuss the position of nation states in the realisation of the objectives of the Convention, and how private and public interests are affected by it, as well as the role of communities in the Convention.
Section B of this chapter will discuss the legal protection of cultural heritage in the Netherlands, as it has implemented international law as well as the legal framework of the Council of Europe and EU law.

[1] The World Heritage Convention had 189 States Parties as of 8 March 2012; the Intangible Heritage Convention had 144 States Parties as of 16 July 2012.

IV.A
THE INTERNATIONAL DIMENSION OF THE LEGAL PROTECTION OF CULTURAL HERITAGE IN THE WORLD HERITAGE CONVENTION

4.A.1. Towards the World Heritage Convention

The World Heritage Convention (WHC) is based on the work that started at the 1931 Athens Conference of the League of Nations on the Protection of World Cultural Heritage. In 1964, during the Second International Congress of Architects and Technicians of Historic Monuments, the Venice Charter was accepted, laying down the international recognition of the importance of protecting monuments from deterioration and other threats in the interest of a common heritage. The Charter presented a modern concept of monuments in the definition in art. 1:

The concept of an historic monument embraces not only the single architectural work but also the urban or rural setting in which is found the evidence of a particular civilization, a significant development or an historic event. This applies not only to great works of art but also to more modest works of the past which have acquired cultural significance with the passing of time.

Confronted with the plans to build the Aswan Dam in Egypt which would result in the flooding of the Abu Simbel temples in Egypt, UNESCO, as a specialized agency of the UN, took the lead in the organisation of international collaboration to work on a new instrument to protect cultural heritage. UNESCO launched an international campaign, in which more than 50 states participated in a 50 million US Dollar project to conduct archaeological research, to dismantle the temples and then to move them to higher ground. Similar projects were instigated with the flooding of Venice in 1966 and the restoration of the Borobodur. The success of these projects helped to strengthen the international consensus on the necessity for an international normative instrument. In 1965, a White House Conference in Washington, D.C., called for a 'World Heritage Trust' that would stimulate international cooperation to protect 'the world's superb natural and scenic areas and historic sites for the present and the future of the entire

world citizenry'.[2] The International Union for Conservation of Nature (IUCN), active since 1948, developed a similar proposal for its members in 1968. Both proposals were presented to the 1972 United Nations conference on Human Environment in Stockholm. This conference would lead to the final text of the WHC that was accepted during the 16th Session of the General Conference in November 1972. The Convention entered into force in December 1975. As of March 2012 , 189 Member States adhere to the Convention, which makes this instrument one of the most widely accepted treaties in the world.

[2] The World Heritage Convention is also known as the Convention Concerning the Protection of the World Cultural and Natural Heritage. For a comprehensive overview of the World Heritage Convention see Francioni 2008, and the UNESCO world heritage website: http://whc.unesco.org/en/convention/, last accessed 1 July 2012.

4.A.2. Defining world heritage of outstanding universal value

Cultural heritage is defined in art .1 as

> "monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
> groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
> sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view."

while art. 2 defines natural heritage as

> "natural features consisting of physical and biological formations or groups of such formations, which are of outstanding value from the aesthetic or scientific point of view;geological and physiological formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of science and conservation;natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty. [3]

It is important that the definition in this international instrument recognizes that cultural properties have a value which is independant from territorial claims, because their importance is universal and equal to all mankind. The recognition of the universal status of cultural heritage presents a statement to the effect "that the cultural heritage of each is the cultural heritage of all".[4]
The definition of world heritage contains a number of categories of tangible cultural heritage, with the common characteristic being that they must be of 'outstanding universal value' from the point of view of history, art or science for monuments and groups of buildings, and from the historical, aesthetic, ethnological or anthropological point of view for sites.[5] It has been noted that there is friction between the idea of outstanding, with the implication that an object must have exceptional qualities which makes it stand out against all other objects, and universal value, which it also needs to demonstrate.[6]

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[3] The following will concentrate on a discussion of the Convention from the perspective of cultural heritage.
[4] NARA Document on Authenticity 1994, paragraph 8. available at http://whc.unesco.org/archive/nara94.htm, last accessed 1 July 2012.
[5] See also the preamble paragraphs 6, 7 and 8.
[6] Musitelli, 2002, p. 327-329; Francioni, 2008, pp. 18,19.

The draft version of the Operational Guidelines for the Convention explained that they interpreted '(outstanding) universal value' as: "Some properties may not be recognized by all people, everywhere, to be of great importance and significance. Opinions may vary from one culture or period to another. As far as cultural property is concerned, the term 'universal' must be interpreted as referring to a property which is highly representative of the culture of which it forms part."

4.A.3. The objectives of the World Heritage Convention

Chapters II and III of the Convention deal with the objectives of the national and international protection and preservation of cultural and national heritage. The States Parties are the actors which are responsible for realising these objectives. The nation states are to identify the cultural heritage in their territory (article 3) and are responsible for the protection and conservation of this cultural heritage as defined in articles 1 and 2:

> "the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Article 1 and 2 and situated on its territory …". (article 4)

States Parties are committed to ensuring effective and active measures to protect the cultural and natural heritage on their territory by adopting general policies, and to set up services, studies, and national or regional centres to

> '(...) give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes'. (article 5)

4.A.4. The obligations in the World Heritage Convention

States Parties are also to provide for documentation and inventories of the cultural heritage in their territories, as defined in articles 1 and 2, which are to be submitted to the World Heritage Committee (article 11 paragraph 1).
States Parties are to recognize that the cultural and natural heritage as defined in articles 1 and 2 constitute a world heritage, and to support the identification, protection, conservation and presentation in other States if so requested (article 6).

Chapter II is followed by the third chapter concerning the establishment of the two Heritage Lists, one for World Heritage and a second one for World Heritage in Danger .[7] Although the World Heritage List has become a leading feature of the Convention, the obligations in chapter II stand alone. This means that the objective of the obligation to protect cultural heritage exists independently of whether or not a State Party has any entries on the List.

4.A.5.1 The Lists in the World Heritage Convention

The objectives of the WHC, the protection and preservation of World Hertiage of outstanding universal value, are therefore also and not only realised by "the capacity of the (World Heritage) List to be representative of all cultures of the world in their intellectual, aesthetic, religious and sociological expressions". The systematic approach of compiling lists has a long-standing tradition in Western culture. As Umberto Eco has demonstrated, written history demonstrates countless examples of lists which may serve as an inventory of all elements present to enumerate, or to organise these elements in categories, or to make them part of a hierarchical order.[8] The Heritage Lists contain all of these types of lists. They enumerate and organise world heritage properties, while at the same time officially elevating them to the standard of outstanding universal value. The lists have also been key to the success of the WHC and the regular work on the lists, with the evaluation of new nominations and the monitoring of existing entries, has contributed to the worldwide visibility of and constant publicity for the Convention.

The Convention provides for the "List of World Heritage in Danger", containing properties that are threatened by serious and specific dangers (article 11 paragraph 4). These dangers may be: a threat of extinction caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; and changes in water level, floods and tidal waves (article 11 paragraph 4). Importantly, in cases of urgent need the Committee may at any time make a new entry in the Danger

[7] Article 11 paragraphs 2 and 4 in Chapter III of the Convention.
[8] Eco, 2009.

List at its own discretion (art.11.4).[9] Most of the properties on the Danger List are there at the request of the territorial state in question. In some cases, however, the Committee has acted on its own authority, which is based, of course, on consensus between the member states in the Committee. An example of such a case was the inclusion of the old city of Dubrovnik on the Danger List in 1991. A year later the Committee decided to add four new cases to the Danger List, although the States Parties concerned had not made a formal request to that effect: Angkor in Cambodia, the Nimba Wild Reserve in Cote d'Ivoire/Guinea, the Sangay National Park in Ecuador and the Manas Wildlife Sanctuary in India.[10]

The States Parties are represented in the World Heritage Committee, which is responsible for the institution, the development of criteria, and the upkeep of the Lists (article 8).[11] States are to submit a Tentative List as an inventory of those properties situated on their territory which each State Party considers suitable for inclusion on the World Heritage List.[12] States Parties are to include, in their Tentative Lists, the names of those properties which they consider to be cultural and/or natural heritage of outstanding universal value and which they intend to nominate in the following years.[13]
The World Heritage Committee is to define the criteria on the basis of which properties may be included in the list (article 11 paragraph 5) and it may also refuse to include a suggested property (article 11 paragraph 6). No property shall be included in the list without the consent of the State concerned (article 11 paragraph 3).[14] The World Heritage Committee is also instrumental in requests for international assistance formulated by States Parties concerning properties on their territories that are either included or are suitable for inclusion (article13).

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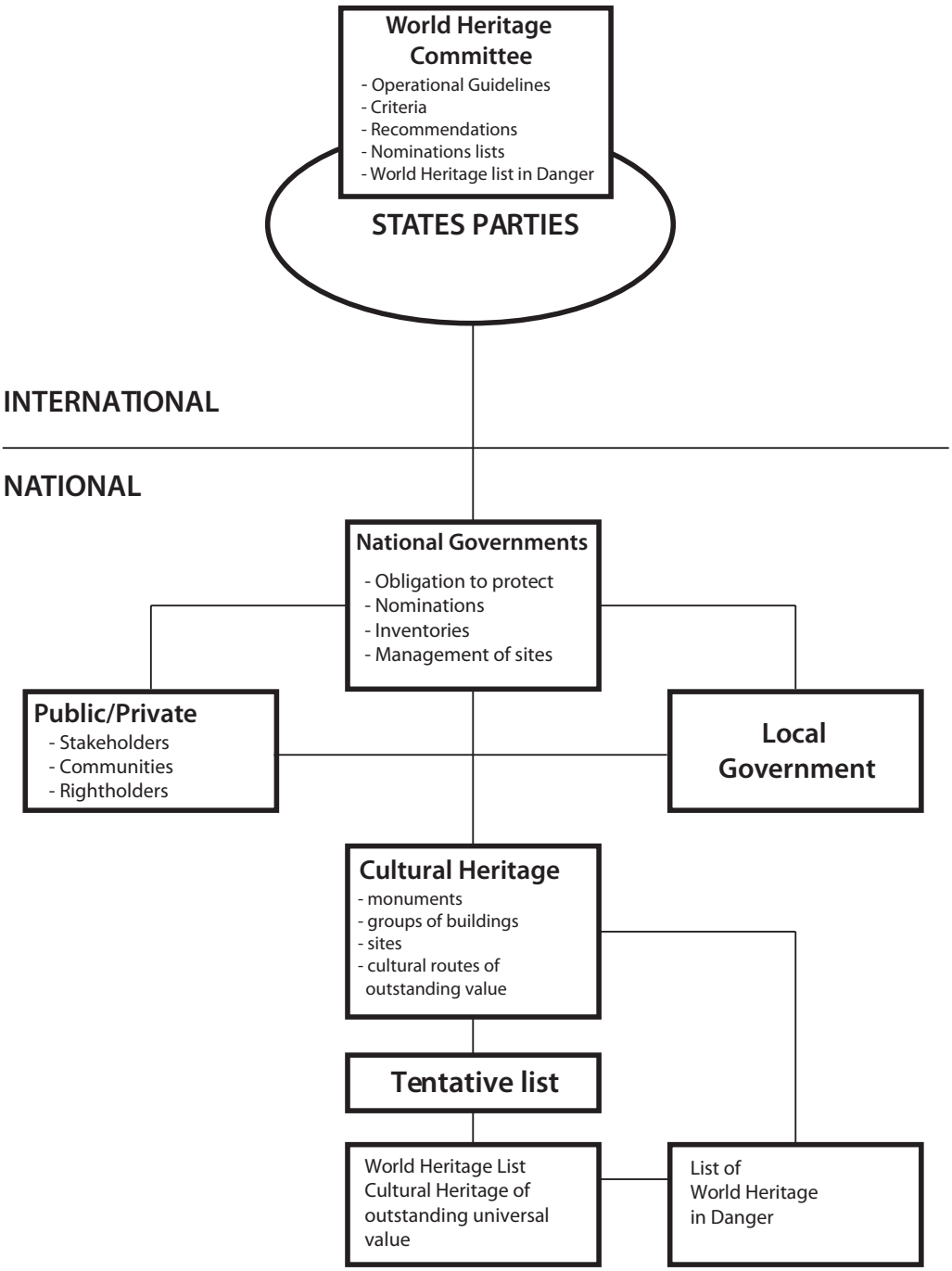
[9] As of 1 October 2010, 34 properties are listed on the World Heritage Danger List.
[10] WHC-92/CONF.002/12, p.46.
[11] The World Heritage Committee has consisted of representatives of 21 States Parties since the number of Member States reached 40 in 1978 (art. 8.1). At the beginning of this century, the equal representation of States Parties to the Convention became a matter of concern. Particularly European countries were well represented, while there was a distinct lack of representation from the African countries. In 2001, a resolution was accepted with voluntary rules of behaviour (such as a voluntary reduction of the number of years in the Committee from six to four) that could help to rectify this imbalance. See also Strasser, 2002, p. 244.
[12] Article 11 paragraph 2. The Tentative Lists were made mandatory in Decision 24COM VI (the Cairns Decisions, 2000) paragraph 3.2(1), in order to promote the representativeness of nominations for the World Heritage Lists.
[13] Operational Guidelines 2008, paragraph 62.
[14] UNESCO's World Heritage List now numbers a total of 936 properties (725 cultural, 183 natural and 28 mixed properties) located in 153 States Parties. See the 2012 , 36th Session Report of the World Heritage Centre on its activities and the implementation of the World Heritage Committee's Decisions, WHC-12/36.COM/5A.1, p.2


World Heritage Committee
- Operational Guidelines
- Criteria
- Recommendations
- Nominations lists
- World Heritage list in Danger
STATES PARTIES
INTERNATIONAL
NATIONAL
National Governments
- Obligation to protect
- Nominations
- Inventories
- Management of sites
Public/Private
- Stakeholders
- Communities
- Rightholders
Local Government
Cultural Heritage
- monuments
- groups of buildings
- sites
- cultural routes of outstanding value
Tentative list
World Heritage List Cultural Heritage of outstanding universal value
List of World Heritage in Danger

4.A.5.2. The Criteria for being placed on the World Heritage List

During the 6th Extraordinary Session of the World Heritage Committee in 2003 the formerly separate criteria for natural and cultural heritage were integrated into one list of criteria to address the developments in "evolving approaches in heritage".[15] This was the decisive transition from the idea of protecting only 'the best of the best', to the aim of protecting 'representatives of the best'.[16] From then onwards the Committee has considered a cultural heritage property as having outstanding value if it has at least one of the following criteria:

representing a masterpiece of human creative genius;

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

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

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

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

(vi) being directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria);

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

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

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[15] UNESCO Doc. Press release 18-03-2003.
[16] UNESCO Doc. WHC06/30COM/09e.

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

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

In addition:

78. To be deemed of outstanding universal value, a property must also meet the conditions of integrity and/or authenticity and must have an adequate protection and management system to ensure its safeguarding:

79. Properties nominated under criteria (i) to (vi) must meet the conditions of authenticity. (…)[17]

The final two criteria of authenticity and integrity are of particular importance in view of the protection of the heritage site. The emphasis is not only on qualifications that are intrinsic to the monument or site, but also on the role of the protection and management system that is to be established to ensure its safeguarding.
The combination of criteria for cultural and natural heritage was the result of the developments in the thinking on tangible heritage in which also mixed heritage properties were recognized, and the idea of protecting cultural landscapes was developed.[18] At the same time, the discussion on the protection of intangible heritage had resulted in the Convention on the Safeguarding of Intangible Heritage, which would concentrate on the protection of the intangible aspects of 'living' cultural heritage.[19]

[17] Operational Guidelines 2005/2008 paragraphs 77-79, UNESCO DOC WHC.05/2; Decission 6 EXT.COM 5.1.
[18] ICOMOS Background Paper; Kazan, April 2005, par.11.
[19] To be discussed in chapter 5.

4.A.5.3. Towards the criteria

The basic concepts underpinning the ten criteria for the World Heritage List were derived from the Venice Charter of 1964.[20] Architects and others responsible for restoration works were to protect the authenticity and integrity of monuments as they were to "preserve and reveal the aesthetic and historic value of the monument (…) based on respect for original material and authentic documents" (Venice Charter, article 9).

The actual work on the World Heritage criteria began in 1977. The World Heritage List was to become the main instrument of the Convention to provide for the protection of World Heritage and was to include only a select list of the most valuable objects of cultural and natural heritage from an international viewpoint.[21] The starting point was the ICOMOS Report which explained that "To be eligible for inclusion in the World Heritage List, properties making up the cultural heritage must satisfy certain specific criteria of outstanding universal value, and must also satisfy the criteria of unity and integrity of quality (to be derived from qualities like setting, function, design, materials, workmanship and condition)." Then followed a list of criteria that were each in themselves, or in combination with other criteria, capable of constituting outstanding universal value.

> "1) Properties which represent a unique artistic achievement, including the masterpieces of internationally renowned architects and builders.
> 2) Properties of outstanding importance for the influence they have exercised over the development of world architecture or of human settlements (either over a period of time or within a geographical area).
> 3) Properties which are the best or most significant examples of important types or categories representing a high intellectual, social or artistic achievement.
> 4) Properties which are unique or extremely rare (including those characteristic of traditional styles of architecture, methods of construction or forms of human settlements which are threatened with abandonment or destruction as a result of irreversible socio-cultural or economic change).

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[20] The IInd International Congress of Architects and Technicians of Historic Monuments, Venice 1964, adopted the International Charter for the Conservation and Restoration of Monuments and Sites, as the successor to the 1931 Athens Charter.

[21] UNESCO CC77/Conf.001/8.

5) Properties of great antiquity.
6) Properties associated with and essential to the understanding of globally significant persons, events, religions or philosophies."[22]

These criteria were the basis for the work in the first Session of the Committee in 1977. A building or site was considered to be of outstanding universal value when it could meet one or more of the six specified cultural criteria, as well as meeting the test of authenticity. In addition, the integrity or relative state of preservation of the property should be assessed in comparison with other sites with similar characteristics. The other three criteria were formulated to guide the nominations for natural heritage properties (vii-x). [23]
In the 1980 Session of the Committee the Operational Guidelines were adopted.[24]

4.A.5.4. Examples of the use of the criteria

So how are cultural heritage properties considered according to these criteria? The following examples demonstrate that most heritage properties are nominated with reference to more than one criterion. [25]
The first criterion (i) states that the heritage property must represent a masterpiece of human creative genius. This criterion relates mostly to already well known and internationally recognized masterpieces. Examples are the Mont Saint Victoire in France, Ancient Thebes and the Necropolis in Egypt, and Persepolis in Iran. All of these properties were also examined under criteria (iii) and (vi).
Criterion (ii) is fulfilled if a heritage property exhibits an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town planning or landscape design. As such it is applied when a certain area has influenced cultural

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[22] ICOMOS Report 1976. The Convention recognises three separate expert organisations to assist in the implementation of the Convention: the International Centre for the Study of the Preservation and Restoration of Cultural Property (the Rome Centre), the International Council of Monuments and Sites (ICOMOS) and the International Union for Conservation of Nature and Natural Resources (IUCN). In Article 14 paragraph 2 the UNESCO commits itself to making use of their services in the 'fullest extent possible' in the respective areas of competence and capability. See also Article 8 paragraph 3.
[23] Ibid. paragraphs 7, 8, 9. The criteria are listed in paragraph 4 paragraph 3.
[24] Since 1980 the Operational Guidelines have been revised in 1983, 1984, 1988, 1992, 1994, 1996, 1997, 2005 and 2008. See also ICOMOS Report 2008.
[25] A full overview of all inclusions and criteria is available in the ICOMOS Report Monuments and Sites 2008, Compendium of World Heritage Sites and Criteria, appendix 2B.
[26] See the "User's guide to world cultural heritage criteria" of 2007.

life, and also vice versa when a site is the result of a specific cultural period.[26] It is often applied together with criterion (iv) and it is sometimes difficult to discern between the two. Examples of heritage properties are the Boyana Church in Bulgaria (also referring to criterion (iii)), or the site of Palmyra in Syria (also referring to criteria (i) and (iv)).

Crtierion (iii) relates to cultural heritage properties bearing a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared.

This criterion is often applied together with the first criterion.

Criterion (iv) relates to outstanding examples of a type of building, architectural or technical ensemble or landscape which illustrates significant stages in human history. Often used together with criterion (ii), there are some examples in which this criterion has been used solely to identify a cultural heritage property like the Hanseatic City of Lubeck and the Mudejar Architecture of Aragon.

Criterion (v) relates to properties that are an outstanding example of a traditional human Settlement, land-use or sea-use which is representative of a culture (or cultures) or human interaction with the environment, especially when it has become vulnerable under the impact of irreversible change. It is often used in the nominations of vernacular architecture or traditional architecture that is constructed with fungible materials. This criterion is often used together with criterion (iii), but adds to that criterion the quality of vulnerability, and a threatened state of preservation. Examples are the Old City of Sana'a in Yemen (together with criteria iv and vi), and the Medieval City of Rhodes (together with criteria (ii) and (iv)).

Criterion (vi) was originally intended to be used in conjunction with other criteria only and relates to cultural properties that are directly or tangibly associated with events or living traditions, with ideas, or with beliefs, and with artistic and literary works of outstanding universal significance. It is a criterion which is used to emphasize other criteria as in the Palace and Park of Versailles (together with criteria (i) and (ii)). It is used in isolation only in exceptional cases like the Auschwitz Concentration Camp or the Goree Slave Island in Senegal.

4.A.5.5. Credibility and representativeness of the criteria

On the 20th anniversary of the World Heritage Convention in 1992, the number of nominations for the World Heritage List was rapidly increasing, which placed a heavy burden on the work of the Committee and the Secretariat. But more disadvantageous was the fact was that the bulk of the properties on the World Heritage List were situated in Europe. This raised concerns with regard to the credibility and representativeness of the List. The Inventory of inclusions on the

World Heritage List in the year 2000 clearly demonstrates this issue: of the 501 inclusions 265 are situated in Europe, 103 in Asia, 50 in Africa, 33 in the USA, 45 in Central and South America and five in Australia and Ocenania.[27] It was concluded by the Committee that not only Europe was overrepresented in the List, but that there was also an imbalance in view of the many historic towns, religious buildings, Christianity, certain historical periods, and 'elitist' architecture in relation to 'vernacular' architecture.[28] This lack of balance was due to a number of reasons. As Musitelli noted, the concept of outstanding universal value, as the keystone of the normative structure of the Convention, was not cut out to take into account the developments towards an anthropological conception of culture.[29] The criteria simply did not fit the manifold manifestations of cultural heritage and were framing cultural heritage as relating only to traditional historical monuments in Western States Parties.

Aside from the substantive problems in the practice of the World Heritage Convention, the Committee also recognised that the organisational structure of the Convention, the application procedures and the support systems were not sufficient to accommodate the needs of non-Western States Parties.[30] It was therefore decided that an in-depth evaluation, followed by a strategic orientation, were in order.[31] In 1994, the World Heritage Committee started 'The Global Strategy for a Representative, Balanced and Credible World Heritage' to identify and fill the major gaps in the World Heritage List. The Committee wanted to broaden the concept of cultural heritage in the Convention to make it more representative of the wide spectrum of the World's cultural and natural heritage. This strategy incorporated a development towards a more anthropological approach and focused on cultural heritage as a demonstration of human coexistence in complex social structures and relations. Preparatory studies emphasized that cultural heritage was not to be regarded as singular expressions, but as complex manifestations of ways of life and systems of knowledge and should not be seen in isolation but within its whole context and also in relation to its physical and non-physical environment.[32] The Committee's objective was first to encourage more countries to become States Parties to the Convention. The second strategic objective was to make the Tentative Lists mandatory, which should lead to a more systematic preparation of nominations. Thirdly, the strategy should focus on the increase in nominations of properties for inscription from underrepresented States Parties by encouraging and supporting these States Parties and by setting limits to inscriptions from other States Parties.

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[27] Analysis of the World Heritage List by Category of Monument and Period.(List as of 1 January 2000), ICOMOS 2000Annex III.

[28] WHC-94/CONF.003/INF.6, paragraph II.

[29] Musitelli, 2002, p. 329.

[30] WHC-02/CONF.202/13A Annex I.

[31] WHC-02/CONF.202/13A Annex I.

[32] WHC-94/CONF.003/INF.6, paragraph II.

4.A.5.6. Convergence in categories of heritage properties

An important step was the recognition of the role of the physical environment in which culture takes place, and the interaction between human, social activity and the natural environment. The 1992 Revision introduced the category of 'cultural landscapes' in which cultural heritage and natural heritage were merged. These landscapes were defined as follows:

> "Cultural landscapes are cultural properties and represent the "combined works of nature and of man" designated in Article 1 of the Convention. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal."

Cultural landscapes were considered as the result of continuous changes because of their evolutionary nature, but also because of the changes made by human beings as a result of the creation of a liveable world. Thus, the characteristics of a landscape could be analyzed as a social construction and interpreted as 'a window on culture'.[33]

The World Heritage List has come to encapsulate three types cultural landscapes.[34] First, the landscapes designed and created intentionally by man, and are often related to religious or monumental buildings. The first inscription as a cultural landscape was the Tongariro National Park, the mountain sacred to the Maori People in New Zealand combining cultural criterion vi with criteria vii and viii of the Natural Heritage criteria. The second category is the organically developed landscape that has monumental remains and is signifcant because it contains superimposed patterns of different periods, providing testimony to changing or continuous patterns of landscape use and activity. An example is the Takht-e-Soleyman archaeological site in Iran which was included in 2003 under criteria (i),(ii),(iii),(iv), and (vi).

In the last category, the associative cultural landscape, the emphasis is on the powerful religious, artistic or cultural associations a certain landscape may have, such as the Aboriginal landscapes in Australia[35] or the 'Head-Smashed-In-Buffalo Jump' in Canada[36].

In 1993 the Pilgrim Route to Santiago di Compostella was included in the World Heritage List. This led towards the discussion of the potential of 'cultural routes' as a specific type of cultural landscape on the List. Routes were thought to be

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[33] Dailoo, Pannekoek, 2008, p. 28.

[34] Operational Guidelines 2005/2008 Annex 3 Clause 3(i), (ii) and (iii).

[35] In 1981, the Wilandra Lakes Region was included under cultural criterion iii and natural heritage criterion viii.

[36] 1983 Canada, criterion vi.

"offering a privileged framework in which mutual understanding, a plural approach to history and a culture of peace can all operate. It is based on population movement, encounters and dialogue, cultural exchanges and cross-fertilisation, taking place both in space and time."[37] Of interest is the emphasis on the non-tangible qualities a cultural route may express, including the combination and exchange of material, cultural and spiritual, combining tangible and intangible elements, culture and nature. The Operational Guidelines, however, emphasize the tangible character of cultural routes as "composed of tangible elements of which the cultural significance will be considered in its intangible and symbolic dimensions.[38]

Further thinking on the criteria for the selection of objects of cultural and natural heritage of outstanding cultural value resulted in the 1994 Nara Conference on Authenticity in Relation to the World Heritage Convention and the Nara Document, that was to formulate a 'test of authenticity in ways which accord full respect to the social and cultural values of all societies" (paragraph 2 preamble).[39] Authenticity was described as the 'essential qualifying factor' in the process of determining the heritage value. It was considered that the level of authenticity should be judged from the perspective of the original cultural environment, and as such, it was not deemed possible to develop fixed criteria that could address all cultures equally. It was therefore considered to be a matter of the highest importance and urgency that 'within each culture, recognition be accorded to the specific nature of its heritage values and the credibility and truthfulness of related information sources (paragraph 11). The original authenticity test concerned materials, design, workmanship and setting only. In the future, the Guidelines needed also to observe aspects of use and function, traditions and techniques, spirit and feeling and other internal and external factors relevant to the object. Also the specific artistic, historic, social, and scientific dimensions of the cultural heritage were thereby to be examined. [40]
In the following years, the strategic programme on the representativeness of the Word Heritage List led to the Cairns decisions of 2000 with new rules of procedure for nominations. In future, no nominations would be considered unless they appeared on a (national) Tentative List.[41] It was decided that in future the Committee would establish a maximum of nominations in each ordinary Session, including a schedule giving priority to States Parties with no inclusions or which are under-represented or with categories that are not represented or less represented.[42] Furthermore, capacity-building, training facilities and international

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[37] Report on the Expert Meeting on Routes as a Part of our Cultural Heritage (Madrid, November 1994), paragraph 2a.
[39] UNESCO Doc. WHC-94/CONF.003/INF.008.
[40] Nara document paragraph 13, see also the Operational Guidelines 2008, paragraph 82.
[41] Decision 24 COM VI, (Cairns Decisions) paragraph 2.i.
[42] Ibid. paragraph 3, New rules of procedure of the World Heritage Convention 4.3, 20.4 and 21.3

assistance were to support under-represented States Parties to ensure the equitable representation of the different regions and cultures of the world.[43]

The 2005 revision of the Operational Guidelines contains a chapter on the concepts of integrity and authenticity, followed by a chapter on protection and management, which reflect the developments in the functioning of world heritage properties. The paragraphs on authenticity reflected the discussion on the quality of heritage preservation. It was deemed necessary to state specifically that 'the reconstruction of archaeological remains or historic buildings or districts is justifiable only in exceptional circumstances and only on the basis of complete and detailed documentation and to no extent on conjecture'.[44]

The 2005 Revision affirms that the quality of outstanding universal value is to include the element of integrity. The Operational Guidelines of 2005 and 2008 define integrity as 'a measure of the wholeness and intactness of the cultural/natural heritage and its attributes'.[45] It is stated that it is necessary to establish that the object includes all the elements which are necessary to express its outstanding value (a); to give a complete presentation of all the features and processes which convey a property's significance (b); and (c) to establish that a property does not suffer from adverse effects of development and/or neglect.

These provisions support the provisions on protection and management, which ensure that all the properties listed are to have adequate and long-term legislative, regulatory, institutional and/or traditional protection and management to ensure their safeguarding.[46]

To further improve the representativeness of the World Heritage List, the Operational Guidelines of 2005 stated that the nomination of properties for inclusion on the World Heritage List should include a justification for the inclusion of the property in question.[47] A nomination should contain a Statement of Outstanding Value as in paragraphs 49-53 and 155 of the Operational Guidelines, with separate Statements on the integrity and authenticity of the nominated property.

Monitoring the quality of management may lead to the decision to remove properties from the World Heritage List. In 2007, Oman's Arabian Oryx Sanctuary, listed in 1994, was the first site to be 'delisted' because of Oman's decision to reduce the size of the protected area by 90%.

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[43] Ibid. paragraph 5.

[44] WHC Operational Guidelines (O.G.) 2005/2008, paragraph 86. Compare the discussion in the 19th century on heritage preservation in Great Britain and Germany, see chapter 2.3.2.

[45] WHC, Operational Guidelines 2005/2008, paragraph 88.

[46] WHC, Operational Guidelines 2005/2008, paragraphs 96- 119.

[47] UNESCO Decision 7 EXT.COM 4A. Operational Guidelines 2005/2008 paragraph 132.

This was considered by the Committee to destroy the outstanding universal value of the site.[48] The second site removed was the Dresden Elbe Valley, because of advanced plans for the building of a four-lane bridge in the heart of the cultural landscape, despite the possibility of building a tunnel under the river. Thereafter, it was considered that the property had failed to retain its "outstanding universal value as inscribed".[49]

4.A.6. The Documentation of World Heritage

In view of the objectives of the World Heritage Convention, the documentation of protected cultural heritage is important. Each State Party is required to ensure, besides identification, protection, conservation, also the presentation and the transmission to future generations, including the support of scientific studies and research.[50] States Parties are also to set up inventories, including documentation about the location of the property in question and its significance.[51] This documentation has several purposes. First, of course, is the classic role of documentation which is to provide information for the Bureau and Committee in order to be able to make a considered judgment. The second role is gaining in importance as it is intended to make the information on the cultural heritage properties available to mankind at large. With the emergence of the Internet, the importance of documenting this information has taken a quantum leap. Most visitors to the World heritage properties today are 'virtual' and experience world heritage by visiting the relevant websites. UNESCO has adopted a policy of transparency and open access, putting all the information concerning the WHC labelled as publicly available and copyright free, including all documents on the Sessions of the Committee, the Expert reports and the documentation on the individual heritage properties, on their website.[52] The Operational Guidelines stipulate that all the information received by the Secretariat is stored in hard copy as well as in electronic format in a form which is appropriate to long-term storage.[53] States Parties are encouraged to submit extensive documentation, together with the grant, free of charge, of "a non-exclusive cession of rights to diffuse, to communicate to the public, to publish, to reproduce, to exploit, in any form,

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[48] Inscribed in 1994, removed by UNESCO at the 31st Session of the World Heritage Committee, in 2007. See also Buzzini and Condorelli, 2008, pp.175-200.

[49] Inscribed in 2004, Press Release 25 June 2009 UNESCO 33rd Session of the World Heritage Committee, Seville.

[50] See WHC Articles 4 and 5.

[51] WHC Article 11 paragraph 1.

[52] WHC, Operational Guidelines 2005/2008 paragraph 280. The database is made available at: http://whc.unesco.org and http://whc.unesco.org/en/statutorydoc, last accessed 1 July 2012.

[53] Operational Guidelines 2005/2008, paragraph 282.

and on any support, including digital, all or parts of the images provided, and license these rights to third parties. [54] This cession of rights refers to a cession of copyrights and neighbouring rights on this documentation. However, there may be some points of concern here. Applicant States Parties may not be aware that these copyrights may not in fact be theirs to convey to others. These are exclusive private property rights that are protected worldwide under the Berne and Rome Conventions. Copyright exists as of the moment of the creation of the work and lasts until a minimum of 50 years after the death of the author. Copyright may be 'layered', because there may be several copyrights on the heritage property as well as on the documentation (the photo/film, recording) thereof. A State Party may have entered into a contract with a photographer or producer that includes the transfer or licensing of his copyrights, but there are also the rights on the property itself to consider. Furthermore, a right holder may not be made sufficiently aware of the scope of the uses of his work that may follow when the documentation is submitted, which could lead to problems later on.

Commercial aspects are also important here. The last part of the sentence in the nomination form refers to the right to license these rights to third parties. In copyright terms, this would mean that the State Party grants UNESCO a non-exclusive license to make use of the documentation in whatever way it thinks necessary, including commercial uses.[55] In view of the progressive developments in internet uses, this may become an issue of conflict.

Another issue is the scope of publicity that is involved. Of course, to nominate a cultural heritage property is to recognize its importance for mankind at large and to commit to the objectives of presentation and transfer to future generations. But there is a gap between conservation in situ, receiving visitors and controlling these spectators, and the presentation on the internet for all the world to access. In the classic 'monumental' approach to cultural heritage this may not be such a problem. There may be other views, however, on the display of images of landscapes or cultural sites which have a sacred meaning to the communities living there. And it certainly is a problem with intangible heritage, as we will see in the next chapter.

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[54] Operational Guidelines 2005/2008 Nomination Format 7.a.

[55] Of course, in most jurisdictions moral rights remain with the author. (Berne Convention Article 6 bis).

4.A.7. National and international interests in the protection and preservation of world heritage

The States Parties are the actors in the World Heritage Convention. The guiding principle is the territory of the tangible heritage. In the framework of international law, States are sovereign nations, governing their territories and only being subject to international conventions to which they have agreed, international custom and general principles of law.[56]

The Convention addresses, first and foremost, the States Parties' responsibility to protect their cultural and natural heritage of outstanding universal value. As such, the national State Party has to act as the protector of heritage, "and will do all to this end, to the utmost of its own resources" (article 4). The State Party can also claim assistance in protecting the heritage within national borders. The State Party has to accept its duty to assist other nation states to guard their heritage.

Besides nation states, the international community is presented both as an actor and a beneficiary of the protection of world heritage. The international community is to cooperate in the realisation of the objectives of the Convention as the objects of world heritage may be situated on the territory of a national state, but is considered to contribute to world heritage (art. 6.1). As the preamble states, by protecting world heritage, mankind as a whole is to benefit.

4.A.8. The protection of private interests in the World Heritage Convention

This subsection looks at how private right holders are affected by the Convention. A distinction must be made between positive and negative effects as a result of the protection of cultural heritage in a certain territory.

The WHC, instead of referring to neutral 'objects', specifically refers to properties. The French version translates into 'patrimoine culturel' while the German version uses 'guter'. The Convention also uses terminology such as patrimony, heritage, Welt Erbe, all terms with a distinct link to proprietary rights. So how does the Convention affect the rights of private property right holders?

Objects of cultural heritage often involve several owners. While the scope of the Convention also includes sites and landscapes, it is highly probable that there are multiple owners, most likely a combination of both private and public (legal) persons. Stonehenge, for example, involves local farmers and householders, while English Heritage actually owns Stonehenge, and the National Trust owns most

[56] Art. 38 Statute of the International Court of Justice.

of the landscape surrounding the stone circle. [57]

The text of the Convention is completely neutral as to the property rights concerning heritage objects. There is no provision, within the Convention itself, or within the Operational Guidelines, that may serve as an extension to the Convention, that alters, or arranges for alterations in allocating or transferring property rights. However, the status as world heritage may well affect the content of the property rights involved. The obligations of the States Parties involve public law measures for

- active policies in protecting cultural heritage in comprehensive planning programmes
(art. 5.(a))
- setting up services for the protection, conservation and presentation of cultural heritage (art.5(b))
- taking appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage (art.5(c))

In view of the issue of the integrity of a heritage object, it is deemed important that heritage objects are conserved intact and as part of their natural and historical environment.[58] This means that neighbouring properties may also become part of a planning programme concerning the environment of the object at hand. The public planning programme is to contain measures to enhance the protection and visual integrity of the property, thereby altering the scope and extent of the rights of the right owner.[59] The rights of use may be severely limited, as conservational measures shall affect the right to alter the appearance of these objects. This will affect the development of neighbouring properties and the value thereof.

A major effect of inclusion on the World Heritage List is tourism. This effect is both an opportunity and a threat.[60] Research has demonstrated that world heritage sites receive 15 to 20 percent of the tourist market.[61] On the positive side, tourism is considered as an important instrument in the sustainable development of local economies. In 2001, the Committee established the World Heritage

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[57] The implementation of the Management Plan on Stonehenge as a World Heritage Site is to be executed by the Highways Agency, Salisbury District Council, Wiltshire County Council, the parish councils, the Department of Culture, Media and Sport, DEFRA and English Nature. As the local road A 303 is now overburdened by the flood of tourists that are attracted to the site, serious plans are being made to enhance the road and these plans are subject to the highest scrutiny by all interested parties to protect their distinct interests.
[58] Barrett, Morgan and Gates, 2006, p. 224-225.
[59] Paulson, 2006, p. 249-254; Vadi, 2008, pp. 1-24.
[60] Van der AA, 2005, pp. 107-126.
[61] Musitelli, 2003, p. 331.

Sustainable Tourism Programme which ensures capacity-building in the management of World Heritage Sites to deal with tourism. Local community members are to be trained in environment and culture preservation and tourism-related activities to receive the benefits of tourism. Important is the aim of aiding communities around the sites to market their products and to use the World Heritage sites as a lever for local economic social and cultural development. Other aims are raising public awareness with a focus on intercultural dialogue with local communities and visitors through conservation education, not only at the specific site, but also in communications with other sites, tourism authorities and officials. Another beneficial effect is the aim to use the funds generated by tourism to supplement site conservation and protection costs.[62]
However, there may also be a risk involved in the World heritage label. It is a point of concern that tourism is also considered to be a risk factor in the protection of cultural heritage properties. In the State of Conservation Reports, a chapter is to be dedicated to 'factors affecting the property', which may be earthquakes, floods and landslides, but also tourism. [63] There are heritage sites that seem to be incapable of adapting to the increase in visitors.[64] A well known example is the Galapagos Islands, first inscribed in 1978. This small group of islands, with a population that has become almost completely dependant on tourism, suffered a severe disruption to its native eco system because of the increase in air and marine traffic. After a formal request was made by the Government of Ecuador, the Site was to be placed on the Danger List in 2007, in order to organise action to control invasive species and to protect biodiversity on the Islands.[65]

4.A.9. Communities and world heritage

In view of the immovable character of world heritage, heritage properties share territory with the local community. The function of these local communities in the protection and preservation of world heritage is both active and passive.

The Convention mentions local communities and residents of the heritage sites in their passive capacity as beneficiaries. Art. 5(a) explicitly refers to the development of policies that are to give the relevant cultural and natural heritage 'a function in the community'. The cooperation and involvement of local communities in the protection of heritage properties is essential to the objectives of protection and preservation. In the realisation of heritage programmes, local

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[62] Sustainable Tourism Programme, Decission 34 COM 5F.2,
[63] WHC Operational Guidelines II.5.
[64] Van der AA, 2005, p. 108; UNESCO,1987, p. 20-22.
[65] Decision - 31COM 7B.35 - Galapagos Islands (Ecuador) .

communities are therefore to be considered as partners and not only as beneficiaries.[66] In the Operational Guidelines of 2008 States Parties are encouraged explicitly to prepare their Tentative Lists with the participation of a wide variety of stakeholders, including site managers, local communities, NGOs and other interested parties and partners.[67]

The active participation of local communities, on the other hand, has become increasingly important in the development of the criteria and the Strategy programme. As we can see in the Operational Guidelines, most of the criteria are linked to the significance of a property for the local community. Criterion (i) may relate to specific works of human genius only, the other criteria ((ii) to ix)) are more directed towards recognizing the connection between local cultural life and the monumental properties that are either the result, still bear witness, have had, or continue to have a key function in this cultural life. As such, the local communities are not only on the recipient side, but also have an active role in the creation of these monuments as well as the continuation of the cultural role of these monuments. UNESCO's tourism programme in particular is directed towards actively engaging local communities in the safekeeping of the sites, and also the development of local and sustainable economic benefits.

4.A.10. Concluding remarks

The year 2012 marks the 40th birthday of the World Heritage Convention. This calls for a celebration, as there is no doubt that the Convention has become a success. In 2002, the year when the Convention started, there were no adequate means to preserve important objects of cultural heritage. Therefore, one of the most important objectives was to raise awareness in view of the protection and preservation of tangible heritage properties. At the beginning of the 21st century, Musitelli noted that this atmosphere of poverty has changed into a sphere of abundance in the means to protect a wide variety of cultural heritage in a global society. [68]
The recognition of mixed sites, the merging of cultural and natural heritage criteria, and the recognition of cultural landscapes and cultural routes are all signs of the development towards a view in which the importance of the social and natural context of cultural heritage is integrated in the work of the Convention.

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[66] Barrett e.a., 2006, p. 220.
[67] Operational Guidelines paragraph 64.
[68] Musitelli, 2002, pp.330-334.

In the work of the Committee on the development of the operational guidelines of the criteria on tangible aspects have become increasingly important. The emphasis has gradually turned from the conservation of the most valuable objects, the monumental treasures, towards a 'more democratic' approach, which considers the value of cultural heritage for local communities in a social context, recognizing the importance of the role of local communities in the creation as well as in the protection of cultural heritage. Another aspect of this democratic approach is the attention to the role of identity building that has become an important aspect of the WHC. This is demonstrated by the inclusion of heritage sites that represent important historic periods like slave trails or the Auschwitz Concentration Camp.

On a more practical side, the protection of cultural heritage has become linked with the thinking on sustainable development, including local communities in the analysis of the economic exploitation of the heritage site. Cultural heritage today is rapidly developing into a vehicle for tourism, an asset in the leisure industry. At the same time, world heritage status is a valuable quality mark for a certain region, which is attractive for economic investments in related cultural industries.

The global awareness of the importance of cultural heritage also has a problematic side. It has been noted that the international standard of protection could ultimately result in an increasingly homogenous conservational 'state of the art' of sites.[69] In view of the development of the thinking on the importance of cultural diversity this might be considered a negative effect. It may be suggested, therefore, that although the standard of protection and preservation is expected to be 'universal', the Convention understands 'universality' not as being of equal significance for all the world but as highly representative of the culture of which it forms part. Modes of protection and preservation are therefore relative to the particular culture of which the heritage property is part.

However, the protection of 'universal cultural heritage' is also part of a process of increasing cultural exchanges, cultural adaptation and assimilation. At the same time, the pressure from tourism may prove problematic in maintaining an adequate level of authenticity and preservation. As will be further discussed in the chapter on the protection of cultural diversity, the process of globalisation is supported by the new communication media. These media are important vehicles in the realisation of the objective of awareness raising by the publicity of world heritage. The internet has become a virtual library hosting elaborate documentation on heritage properties. This will, on the one hand, stimulate potential travellers to visit these properties to experience the authentic object and territory. On the other hand, technology and the development of more sophisticated virtual realities may present alternative modes of experiencing the universal cultural heritage.

In time, this may lead to new ways of thinking on the necessity of the preserva-

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[69] Musitelli, 2002, p.331.

tion of or access to the original heritage property.
Summing up these concluding remarks, the protection of cultural heritage in the WHC has developed from a focus on heritage treasures towards a more democratic approach of cultural heritage in which the social and natural context and its link with local communities have become more important. Cultural Heritage has also become important in economic terms, attracting tourism and supporting related services. Digital communication media, like the internet, have an important role in providing publicity to the Convention, which is important in view of the documentation of cultural heritage properties. The developments in documentation may, in time, lead to alternative ways of experiencing cultural heritage.

IV.B.
THE PROTECTION OF CULTURAL HERITAGE IN DUTCH LAW

4.B. Introduction

Section B of this chapter starts with the European framework providing the European legal context for the protection of cultural heritage in Dutch law. First the Council of Europe's 1992 Convention on the Protection of Archaeological Heritage (The Valetta Convention) and the 2005 Framework Convention on the Value of Cultural Heritage (The Faro Convention) will be discussed. The Valetta Convention has proved to have had a major impact on the Dutch protection of archaeological heritage, while the Faro Convention marks significant changes in the conceptual framework of cultural heritage protection. For the Dutch policies on heritage protection it is also important to look at the EU culture paragraph in Article 167 TFEU, that was first included in the Maastricht Treaty as article 128 and later renumbered as Article 151 in the Amsterdam Treaty. This provision demarcates the scope of the EU competency on culture, which leads to the conclusion that the Netherlands, as a national state has its own obligations in cultural heritage protection. This will be followed by a discussion on the Dutch implementation of the UNESCO's World Heritage Convention and the Valetta Convention on the protection of Archaeological Heritage.

4.B.1. The European perspective on the protection of cultural heritage

4.B.1.1. The European Convention on the Protection of the Archaeological Heritage

The European Convention on the Protection of the Archaeological Heritage of 1992, (the Valetta Convention), replaces the original London Convention of 1969.[70] The new Convention is based on the results of the meeting organised by the Council of Europe Select Committee of Experts on Archaeology and Planning in 1988, that had convened to discuss new developments in the scientific and economic context of archaeological research.[71] By that time, illegal excavations were no longer the only threat to archaeological heritage. Large-scale infrastructure projects, development of news building sites all caused major disruption to the soil in which archaeological sites were hidden. The Select Committee concluded that archaeology had moved from a practice based on the 'mining of objects' , towards a far more sophisticated integrated approach, in which the use of new techniques like satellite pictures and geo-prospecting had become increasingly important. Excavations were to be limited to 'preventive' measures, to safeguard archaeological sites and to foresee and avoid disruption.[72] At the same time, the Select Committee saw that archaeological heritage has become a major element in European cultural identity and that access to the past had become an important element in the realisation of cultural rights. It was therefore in the public interest to see to it that archaeological research was conducted by professional archaeologists in a framework of public law regarding cultural heritage, town planning, and public works.[73]

The revised version for the Convention made it obligatory for each State Party to provide procedures for the authorisation and supervision of excavation and other archaeological activities, and to ensure that excavations are only conducted by qualified and specially authorised persons.[74] It was also regulated that the use of metal detectors, an activity which is popular among amateur-archaeologists, was to be subjected to prior authorisation.[75] The Convention is to secure that development plans include the participation of professional archaeologists in the various stages of the development, and to see to the modification of the plans if they would have an adverse effect on the archaeological heritage.[76] Together with obligations regarding the funding of research[77], the collection and dissemination

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[70] ETS No. 143. See also Chapter 3B paragraph 2.3.2.
[71] Recommendation Np. R.(89) 5.
[72] Bozoki-Ernyey 2004, p.12.
[73] Explanatory Report, p. 1. available at http://conventions.coe.int/Treaty/EN/Reports/Html/143.htm, last accessed September 2012.
[74] Article 3. sub i and ii.
[75] Article 3 sub iii.
[76] Article 5 sub i,ii,iv.
[77] Article 6.

of information[78], the promotion of public awareness[79], and regulations of the trade in archaeological objects, this Convention provides an integral approach in the safeguarding of archaeological heritage, with a major impact on the national legislation of the States Parties.

4.B.1.2. The Council of Europe Framework Convention on the Value of Cultural Heritage for Society

The Framework Convention on the Value of Cultural Heritage for Society of 2005 is intended to provide an overarching framework for the culture conventions of the Council of Europe[80] that see to aspects of the protection of the cultural heritage of Europe. Although the Convention does not contain any concrete obligations that need implementation in the national law of States Parties it was deemed necessary to have an international treaty establishing the developments in the concept of cultural heritage by emphasizing the importance of cultural heritage to sustainable development, as a resource for cultural diversity in times of globalisation and a resource for cultural identity to contribute to dialogue and democratic debate.[81] As such it presents the protection of cultural heritage not as an objective in itself, but as a means to an end. The Convention pays particular attention to the interactive nature of cultural heritage, thereby connecting cultural heritage as such with its function in the networks within and between social communities. Cultural heritage is considered to be defined and redefined by human actions and should not be perceived as either static or immutable. It is emphasized that cultural heritage is "a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions....".[82] The Convention presents the concept of a cultural heritage community as self-defining: by valuing and wishing to pass on specific aspects of the cultural heritage, in interaction with others, an individual becomes part of a community. A heritage community is thus defined without reference to geography, ethnicity or other rigid communities. Although the Convention contains no concrete obligations,

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[78] Article 7 and 8.
[79] Article 9.
[80] European Culture Convention, 1954, ETS No. 018; European Convention on the Protection of the Archaeological Heritage 1969 ETS No. 66; Convention for the Protection of the Architectural Heritage of Europe 1985 ETS No. 121; European Convention on the Protection of the Archaeological Heritage, 1992, revised, ETS No. 143, and the European Landscape Convention, 2000, No, 176.
[81] Therond 2009, p. 9-11.83 Article 2.
[82] Article 2.

the message conveyed in the Convention is that the value of cultural heritage lies beyond national interests, but instead is to be found at the level of self defined, social communities. Such a community may have a geographical foundation linked to a language or religion, or indeed shared humanist values or past historical links. But equally, it may arise out of a common interest of another type. An interest in, for example, art, can create an "art community" whose members are linked by participation in the major exhibitions, biennials and art fairs, which form the focus of their activities.[83] It is of note that this provision includes a definition of a cultural community, which does not refer to national or international interests. Instead, the right to cultural heritage is presented as a dimension of the right to participate in the cultural life of the community and the right to education.[84] This new concept of a cultural community reminds of the concept of "networked individualism" developed by Castells.[85] The concept of self-defined communities also reflects a new idea of self-empowerment, which coincides with a general tendency of thinking about alternative methods of governance, other than centralised by the national state. This is reflected in the call for a bottom-up approach in national policies regarding cultural heritage ,as is emerging also in the UNESCO cultural heritage conventions.[86]

4.B.1.3. The EU perspective on the protection of cultural heritage

As was outlined in chapter 3B paragraph 2.2, the EU paragraph on culture was only inserted in the 1992 as article 128 in the Maastricht Treaty which entered into force in November 1993. This article was renumbered in the Treaty of Amsterdam as article 151 and is now numbered as Article 167 TFEU. Paragraph 1 of Article 167 TFEU starts with the general statement that

> " The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore."

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[84] Article 1.b.

[85] Preamble, paragraph 4, citing Article 27 of the Universal Declaration of Human Rights and Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights.

[86] See chapter 1. Introduction, p.

The "shall contribute" reflects the principle of subsidiarity as it was formulated in article 5 paragraph 2 of the TEC, which stated that the

> "Community only, and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of effects of the proposed action, be better achieved by the Community".

Paragraph 2 of Article 167 TFEU aims specifically at formulating the scope of Community competence with regard to the protection and the preservation of cultural heritage. Thereto actions by the European Union shall be aimed at encouraging cooperation between Member States i.a. by supporting and supplementing their action in the area of "improvement of the knowledge and dissemination of the culture and history of the European peoples" as well as the "conservation and safeguarding of cultural heritage of the European Peoples". This leads to the conclusion that the Netherlands as a Member State of the European Union may rely on EU support that contributes to the European perspective, or if the cultural heritage may be considered of European importance. The EU effort however is only complementary in nature. The Netherlands as a national state is responsible to fulfil its obligations on the protection of Dutch cultural heritage, the coöperation with third countries in the protection of their cultural heritage as well as classified World Cultural Heritage as follow from international treaties. [87]

4.B.2.1.The legal protection of cultural heritage in the Netherlands

The Dutch policy on the legal protection of national cultural heritage developed in a tradition of modest ambitions. While many 19th century European states were engaged in developing a protective regime for national cultural heritage, the Dutch kept to the adage " The Government is no judge of science and arts".[88] The Dutch lawyer and civilist Molengraaff regretted in 1905 that Dutch private law had "left the protection of treasures of art to the mercy of the owner". [89]

It took until 1961 to enact the first national law dedicated to the protection of national cultural heritage: the Monuments Act. The Monuments Act (revised in

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[87] See also chapter 3B2.2.

[88] 1977 " Community Action in the cultural sector, 22.11.97 Bulletin of the EC. Supplement 6/77; 1982 " Stronger Community action in the cultural sector, 12.10.82, Bulletin of the EC, suppl. 6/82; 1987 " A Fresh boost for culture in the European Community", COM (87) final, December 1987, Bulletin of the EC, Suppl 4/87 and in 1992 " New prospects for Community cultural action, COM(92) final, 29.4.1992. See also Crauford 2004, pp. 20-28.

[89] Famous words by Dutch stateman Thorbecke, stated in Dutch Parliament in 1862. Handelingen Tweede Kamer 1863, Verslag p.36.

1988) deals with the protection of immovable objects of national interest only.[90] It took until 1992 before the Netherlands ratified the World Heritage Convention.[91] Since then, the Netherlands has become an active partner in the community of States Parties, and was a member of the World Heritage Committee from 2003 until 2007. In 2007 the Monuments Act was amended by the Archaeological Heritage Act, implementing the Council of Europe Treaty of Valetta.[92]
The next sections will present the Dutch activities related to the World Heritage Convention followed by the most important elements in the legal framework and will only discuss the protection of national monumental heritage. This will be followed by some concluding remarks.

4.B.2.2. Implementation of the World Heritage Convention in the Netherlands

The ratification of the World Heritage Convention (WHC) took place in 1992, four years after the Monuments Act of 1988. Therefore many of the obligations in the WHC were already covered. The Monuments Act, and its operative agents like the State Inspectorate on Cultural Heritage, already dealt with the provisions in articles 4 and 5 regarding the national protection of cultural heritage: the duty to ensure identification, protection, conservation, presentation and transmission to future generations of cultural (and natural) heritage situated on its territory. The Monuments Act will be further discussed in the next section. This section will look at the measures taken to fulfil the obligations contained in the WHC regarding the protection of world heritage.

As was discussed in section A of this chapter, the success of the WHC is for a major part due to the system of the Lists of World Heritage.[93] Also in the Netherlands, nominations for the List are the main instrument for publicity for the WHC. The Dutch World Cultural Heritage List contains 8 inscriptions, the first being the Defence Line of Amsterdam (1996), and the last being the 17th century canal ring area of Amsterdam in 2010. The World Natural Heritage List contains only the nature preservation area of the Wadden Sea. The Tentative List of 2011 contains 10 inscriptions, including a former Sanatorium (Zonnestraal), the island of Saba, and plantations in Curacao.[94] These last two nominations fol-

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[90] Salomons, De genade en ongenade van de eigenaar: omvat het eigendomsrecht de bevoegdheid om eigen kunstschatten te vernietigen?, inaugurele rede Universiteit Amsterdam 2002.
[91] The Monuments Law 1961;Staatsblad1961, 200. Monumenten wet 1988, Staatsblad 638.
[92] The World Heritage Convention was ratified by the Netherlands in 1992. Trb 1992, nr. 152.
[93] Wet op de archeologische monumentenzorg (Stb. 2007, 42) en het Besluit archeologische monumentenzorg (Stb. 2007, 292) met ingang van 1 september 2007. Per 1 januari 2009 is een wijziging van de Monumentenwet 1988 in werking getreden (Tweede Kamer, vergaderjaar 2007 -2008, nr. 31345, Stbl. 2008 nr. 563).
[94] Chapter 4A section 4.

low the trend, highlighted in paragraph 4., of increasing attention for heritage sites having added value because of their cultural-historical context.
As required in article 29 of the WHC, the Netherlands has also incorporated a system of periodic reporting, which sees to reports on the implementation and further activities related to the objectives of the WHC. An important aspect of this obligation is the continuous preservation of the heritage object or site, and the report on any changing conditions with regard to particular inscriptions.
The discussions regarding the heritage canals in Amsterdam and the Wadden Sea demonstrate that inclusion on the List as a World Heritage property also has its effects on the economic functioning of the region. While, on the one hand, the function as a tourist attraction is considered to be beneficial, it is feared that economic activities will be obstructed because of the obligation to monitor the preservation of the heritage. Dutch shopkeepers and house owners were reassured that the status as world heritage would not change their position as this area was already subject to protection as municipal heritage.[95] The world heritage status of the Wadden Sea might be threatened by the building of a fossil-fuel power station near Eemshaven. Although its status as a nature reserve under the Habitat Directive was an argument in the proceedings, the world heritage status as such was not argued in the court case on the prevention of the building of a coal plant. The court of last resort decided that the building permits were not valid because of omissions in the environmental impact reports, but it was left to the energy company to assess whether or not it could take the risk to continue building, while a new application could be decided upon.[96] The provincial authorities have in the meantime granted a temporary permit to continue building.[97] It is expected that the revision of the environmental impact reports will be sufficient, and that the final building permit will be granted.

4.B.2.3. The protection of national cultural heritage by the Dutch Monuments Act

This section will discuss the general provisions regarding the protection of national monuments in the Dutch Monuments Act (DMA). The specific regime for the protection of archaeological monuments will be discussed in the next section.

The Dutch Monuments Act of 1988 is to protect national cultural heritage which is at least 50 years old. However, municipalities may choose to protect lo-

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[95] http://whc.unesco.org/en/statesparties/nl, last visited 15 January 2012.
[96] http://www.amsterdam.nl/werelderfgoed/wonen_en_ondernemen/, last visited 15 January 2012.
[97] Raad van State, 200900425/1/R2 en 200902744/1/R2, LJN: BR5684.

cal monuments regardless of their age.[98] These properties include buildings and monuments, as well as groups of buildings containing monuments combined in a 'cityscape' or 'villagescape' and, lastly, archaeological sites. The overarching criterion is that these properties, because of their beauty, scientific value or cultural historic value are of public interest.[99] Archaeological objects found on these sites are also protected under the Monuments Act. Monuments that have a religious function are protected as 'church' monuments and are subject to a separate regime, involving the consent of the owner regarding the nomination. The Minister of Culture, considering the advice of the municipal government, may declare specific properties to be national monuments. These monuments will be listed in a register based on the territories of the municipalities.[100] In 2009, a total of 52,158 national monuments were registered. [101] The status of protected monument leads to the prohibition of damaging or destroying that property. Furthermore, it is not allowed to make any alterations whatsoever to the property without a license. This license is granted by the municipality and is subject to public national, provincial and municipal legislation. The municipality is to establish a committee on monumental care which is to provide advice on licensing applications.[102] A regime of subsidies is to ensure the preservation and upkeep of monuments as well as funding for the restoration of monuments.[103]

4.B.2.4. The implementation of the Council of Europe Valetta Convention on the protection of archaeological monuments in the Dutch Monuments Act

In 2007 the Dutch Monuments Act was amended by the Archaeological Heritage Act, implementing the 1992 Treaty of Valetta.[104] Fundamental to the Valetta Treaty is the objective to protect archeological heritage as a source of the collective European memory and as an instrument for further scientific research. A guiding factor is the principle that archaeological excavations should be preserved in situ and that any disturbance to archaeological materials should be done with the least possible disruptive means.[105] To this end, States Parties to the Council of Europe are to set up a legal system which is to safeguard an inventory of archaeological heritage as well as a register of protected areas, a system of

[98] Press Release by the Province of Groningen 23 September 2011.
[99] Gemeentewet Article 149.
[100] DMA Article 1.
[101] DMA Article 6.
[102] Jaarverslag 2009 , see http://www.cultureelerfgoed.nl/node/605, last visited 15 December 2011.
[103] DMA Article 15.
[104] DMA Article 34.
[105] TK, 2003-2004, 29 259 no. 3, Memorie van Toelichting op de Monumentenwet (Explanatory Memorandum concerning the DMA).

reporting to the Council of Europe, and to ensure the creation of archaeological reserves, in which archaeological materials are to be preserved to be studied by later generations.[106]

The Dutch implementation of the Treaty is achieved by the insertion of a new chapter on archaeological heritage in the Monuments Act[107], as well as amendments to several other public laws, like the Housing Act, the Environmental Care Act and the Removal of Soil Act.[108]

The amended Monuments Act provides for a comprehensive approach to the protection of archaeological heritage by the establishment of three licensing regimes: a regime for projects which are subject to a public law regime of reporting on environmental effects, which applies to large-scale projects involving large-scale disturbance; the regime for building in the context of provincial and municipal zoning schemes; and projects on the removal of soil.[109] All regimes are based on the objective of preventing unnecessary disturbance to archaeological monuments by a mandatory rule that the application procedure regarding a project includes the requirement of an assessment report with an inventory of the effects and risks. The costs of these assessments are to be borne by the party that incurs that cost, i.e. the party that is to undertake such a project.[110]

The new Monuments Act provides for a fine-tuned system of allocating powers of control and the governance of archaeological heritage. The guiding principle is to allocate powers to the level of government that ensures the most effective control. The municipality is to make a first assessment of the potential archaeological sites in its territory and to include these assessments in its zoning scheme.[111] Likewise, the provincial government is to safeguard the sites that are overlapping or otherwise are not covered by one municipality.[112] The central government is to ensure final control and also has the power to assign the status of protected archaeological monument. Moreover, the central government is to organize the 'archaeological infrastructure' and to provide for a central database containing documentation on all archaeological monuments.[113] To add to the control of the national government, the 2007 amendment contains the provision that the license for archaeological excavations can only be granted by the minister.[114]

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[106] Council of Europe Convention on the protection of Archaeological Heritage (also known as the Treaty of Valetta or as "Malta"), ETS no. 143, Articles 2 and 4.ii.

[107] Treaty of Valetta, Article 2.

[108] DMA 2007, Chapter V Articles 38-60.

[109] The DMA has effect in 26 public law instruments. See the technical information on the Monumentenwet 1988, www.wetten.nl, last visited 16 January 2012.

[110] Article 41.

[111] TK 2003-2004, 29 259, nr, 3, p. 48. DMA Article 42.

[112] DMA Article 38a and Article 41.

[113] DMA Act Article 44.

[114] DMA Act Article 55.

4.B.3.1. The Issues revisited

How do the three central issues which serve as a continuous thread in this study on the protection of cultural heritage relate to the Dutch protection of monumental heritage? This will be discussed in the following subsections in which the Dutch Monuments Act is considered from in the perspective of the protection of national and international interests; the protection of private and public interests, and the role of local communities.

4.B.3.2. The protection of national interests

As was outlined in the introduction, the Netherlands does not have a strong tradition in protecting national cultural heritage. It is mostly in the alliance with the international community that the Dutch experience their national pride. Therefore, most legislative measures on the protection of cultural heritage are inspired by the developments in international law. In this context it is of interest that the Monuments Act refrains from referring to world heritage or common heritage. The only qualification indicating a subjective nationalist approach is to be found in the definition of a monument referring to man-made properties that are of public interest because of their beauty, their value to science or their cultural-historic value.[115]
The explanatory note to the implementation of the Treaty of Valetta only refers to the importance of archaeology as a source for the study of the history of countries.[116] During the discussions on the 2007 revision of the Monuments Act in Parliament there were some references to the importance of the preservation of archaeological heritage in the public interest and as common heritage, but more attention was given to the practical implications.[117] Thus it may be concluded that the Dutch protection of monumental heritage is primarily based on the responsibility towards that heritage because it is situated on Dutch territory.

4.B.3.3. The protection of private and public interests

As was described in the previous chapters, the protection of cultural heritage in-

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[114] DMA Act Article 55.
[115] DMA Article 45.
[116] DMA Article 1.b.
[117] TK, 29 259 no.3, p. 3, the reference is to countries and not States or the State.

volves choices between the prevalence of public or private interests. The amendments to the Dutch Monuments Act in 2007 demonstrate, on the one hand, the serious implications for the private interests of the owners of the sites where archaeological finds are situated, while, on the other hand, displaying a liberal approach in opening the mandatory research market to private archaeological research companies.

The Dutch approach to the ownership of archaeological monuments is similar to that of most other countries: these are owned by either the state, the province or the municipality. With the 2007 amendment, the Dutch legislator took leave from the old rule that the owner of the site was to receive compensation based on half of the market value of the monumental object. [118] This was done because it was considered that this rule was no longer in line with the objectives of the new Act, in which the excavation of a monumental object is only done in case of an emergency, and monumental objects are to be kept outside of commerce. Also it was considered that to allow a claim regarding compensation is not consistent with the fact that archaeological heritage 'belongs to all of us".[119] The new article 50 provides for the rule that the ownership is linked to the level of government hosting the depot to which the finds are to be transferred after their excavation. This can be the state, the province, or the municipality, if they have such a depot. Another intrusive obligation for the owner is that he is to allow technical research on his territory in article 57, which was already regulated in article 49 of the old Monuments Act.

The liberalisation of the market of archaeological research is another aspect of the protection of private interests. In the old Monuments Act, scientific research on archaeological excavations was only permitted when it was done by an authorized public research institution. With the implementation of the Valetta Treaty, it was to be expected that the need for archaeological research would increase, as all plans leading to zoning schemes and building activities were to include a report on the expected effects with regard to archaeological monuments.[120] At the same time, this type of research could be offered by privately owned companies specializing in archaeological research, and a state monopoly was no longer in line with a free market in services. A system of licensing and self-regulation, including a Professional Code for Archaeologists is to safeguard the quality of any research.

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[118] TK Handelingen Vergaderjaar 2005-2006 29 259 D Memorie van Antwoord; TK Handelingen 2006-2007, 29 259 F Memorie van Antwoord.

[119] DMA Article 43 old.

[120] TK, 2003-2004, 29 259, no. 3, p. 52.

4.B.3.4. The role of local communities

The involvement of local communities in the protection of monumental heritage takes place mostly in the context of the municipality. In the Netherlands, the municipality is the lowest level of the governance structure.[121] Because of the Dutch public law approach to zoning schemes, there is ample opportunity for stakeholders to participate in the decision-making process.[122]
Another aspect of participation by local communities is the consideration of the value of local amateur archaeologists participating in local archaeological research. Their activities are considered as elementary to the acquisition of knowledge on local archaeological sites and finds.[123]

4.B.4. Concluding remarks

Dutch law on the protection of national monumental heritage has become an elaborate web of legislation regarding not only the protection of known monuments, but also the preservation of archaeological monuments that are unknown. These normative measures tie into the public law on public and private immoveable property. With the addition of the implementation of the Treaty of Malta in 2007 the protection of national cultural heritage monuments seems to be secured. The building of the fossil-fuel power station near the world natural heritage site the Wadden Sea, however, is an example of how economic interests may prevail over the protection of world heritage.
The private owners of monuments have a duty of care and an obligation to allow scientific research on the monumental objects. How does this level of protection compare to the protection against the loss of moveable cultural heritage to Dutch cultural heritage as was described in the previous chapter? The last chapter signalled that although there is an effective system regulating the movement of specific categories of cultural objects between member states of the European Union and exports to third countries, there is a gap with regard to objects that are younger than 50 years old.[124] The monumental properties protected in the Monuments Act are also subject to this age threshold; however, since the 2007

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[121] DMA Articles 44-48.
[122] Although some cities, like Amsterdam, have delegated powers to sub-municipalities, which also have powers regarding urban planning.
[123] Monuments Act Article 3 paragraph 4. The 2009 Crisis and Recovery Act (Crisis en Herstel Wet) has interfered with some procedures in the authorisation of building activities. The explanatory note explained that the protection of archaeological values is still to be considered in the procedure. (Kamerstukken II, 2009-2010, no. 3, MvT, p. 21). Because of the temporary character of this Act, this will not be discussed any further.
[124] TK 2003-2004, 29259, no.3, p. 25.

revision of the Monuments Act municipalities may decide to assign the protected status to monuments regardless of their age.
As for the level of governance of monumental properties, the Dutch CHP Act makes it mandatory that municipalities have their own monument regulations. This seems to be in tune with developments in the protection of cultural heritage that are of significance to the cultural life of local communities as in the successive Operational Guidelines of the World Heritage Convention.[125]

[125] Chapter 3B, paragraph 2.3.
[126] Chapter 4A, paragraph 9.

V.
THE SAFEGUARDING OF INTANGIBLE CULTURAL HERITAGE

5. Introduction

In the discussion on the international law on the protection of tangible cultural heritage chapter 4 identified a trend towards increasing attention for the intangible aspects in cultural heritage objects as well as for the protection of the interests of local communities that are related to this cultural heritage. However, the focus of that chapter was on the protection of tangible cultural heritage, and more in particular how cultural heritage of outstanding universal value is protected by the World Heritage Convention. Part A of this chapter will describe the protection of intangible heritage in international law. The focus of this protection developed from a focus on expressions of folklore towards the focus on safeguarding traditional cultural expressions. The following paragraphs will start with a general outline of these developments, starting with the initiatives regarding protecting expressions of folklore by copyright law. Section A of this chapter will then discuss the safeguarding measures in the UNESCO Convention on the Safeguarding of Intangible Heritage of 2003, followed by an account of the activities in WIPO regarding the protection of the rights of individuals, groups and communities to their traditional cultural expressions. Section B of this chapter will concentrate on the Dutch implementation of the UNESCO Convention on the Safeguarding of Intangible Heritage.

V.A.
THE SAFEGUARDING OF INTANGIBLE CULTURAL HERITAGE IN INTERNATIONAL LAW

5.A.1.1. Towards the safeguarding of intangible cultural heritage

This chapter on the safeguarding of intangible heritage concerns the safeguarding of manifestations of traditional cultural expressions as well as the safeguarding of the position of the cultural communities as right holders that are related to these traditional cultural expressions. This distinction is linked to two aspects of protecting cultural heritage. On the one hand, the public policy aspect, as in the safekeeping of the mainspring of cultural heritage and the contribution to sustainable development. On the other hand, there is the protection of cultural and economic interests. The allocation of intellectual property rights or sui-generis rights are thereby considered as a tool for individual right holders to make it possible to generate economic benefits as well as to provide a defensive mechanism against abusive practices.[1] This defensive mechanism would also be useful in the protection of secret or sacred traditional cultural expressions. All of these aspects are entwined, and mutually reinforcing, and it is difficult to discuss them in isolation. However, as will be demonstrated in this chapter, they have come to be discussed in different fora. While the UNESCO today only refers to the safeguarding of intangible heritage and traditional cultural expressions, WIPO refers to the protection of the rights to traditional cultural expressions (TCEs)/ Expressions of Folklore as part of the protection of Traditional Knowledge. In the discussion on intangible heritage, the geographical aspect, or, the aspect of developed and developing countries has always played an important role. Although developed countries regard expressions of folklore as a minor traditional element in the cultural heritage in their territories, developing countries as well as local communities tend to regard these expressions as elementary manifestations of their continuing and constant cultural heritage. It may be clear that the historical and economic position of these countries makes the discussion of traditional cultural expressions a sensitive subject-matter.[2]

Terminology is an issue here. The following will refer to traditional cultural expressions, as a generic term in referring to expressions and manifestations of intangible cultural heritage. These expressions are also addressed by WIPO as Expressions of Folklore, which are regarded as particular manifestations of folk-

[1] Report E/CN.4/Sub.2/1993/28, (Daes Report), paragraph 21; Hilty, 2009, p. 885.
[2] EU Report 2000, p. 6.

lore. The reference to Expressions of Folklore instead of Folklore marks the distinction between the information contained in folkloric expressions and the expressions thereof. This distinction is important in view of the protection available by intellectual property rights for expressions, and not for styles, traditions and knowledge. In the WIPO perspective, expressions of folklore are both a subset of and complementary to Traditional Knowledge.

5.A.1.2. Protecting expressions of folklore by copyright after the 1967 Stockholm revision of the Berne Convention

The position of local communities as the holders of rights to traditional cultural expressions became a subject for discussion in the Stockholm Revision Conference of the Berne Convention on Copyright in 1967.[3] Increasingly, former colonies were becoming independent states and began to represent themselves in international fora. The economic potential of the exploitation of folkloristic works made it relevant to explore the possibility of including expressions of folklore in the copyright system.[4]

However, Western copyright law as codified in the Berne Convention provides the general international framework for a temporary monopoly on cultural expressions. This monopoly is based on exploitation rights and moral rights for individual authors of literary and artistic works, which are to be implemented by signatory states and adapted to national cultural conditions.[5] The basic provisions were developed in Western industrialised countries in the 19th century in the context of an economic rationale based on incentive and reward to create and contribute to the public domain and freedom of expression.[6] The result is the protection of exclusive rights for individual authors of original works in the literary, scientific and artistic domain.[7] This means that, within the Western perspective of the doctrine of the personal creativity and genius of the author, originality is an implied requirement.[8] Under the Berne Convention, the minimum copyright terms are limited in time to 50 years after the death of the author.[9] It is for the national legislator to decide if the standard rules for the protection of copyright works only apply to fixated works, leaving unrecorded compositions outside the scope of copyright protection.[10]

Most manifestations of Folklore do not meet the standards set for copyright protection and are considered to be in the public domain.[11] In many cases, this has

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[3] Stockholm Records 1967, Vol. II, p. 1152; See Hemmungs Wirten 2010.

[4] Monika Domman, 2008, p. 9. See also Chapter 2.4.3 and 2.4.4.

[5] The Berne Convention for the Protection of Literary and Artistic Works; Stockholm Revision refers to the 1967 revision of the Berne Convention. The leading treaty today is the "Berne Convention (1971)" which refers to the Paris Act of this Convention of 24 July 1971, and has 164 signatory states. Under article 9, is the TRIPS Agreement, Annex 1 C of the Marrakesh Agreement Establishing the World Trade Organization, 1994. The 153 Member States (December 2010) are to comply with articles 1-21 of the Berne Convention, with the exception of article 6bis on moral rights.

[6] Ploman and Hamilton, 1980, pp.203-213.

[7] Berne Convention, Article 1, 2 and 3.

[8] Berne Convention, Article 2, paragraph 1. See also paragraph 3 on translations to be protected as 'original works'.

[9] Berne Convention, Article 7 paragraph 1.

[10] Berne convention, Article 2 paragraph 2. 11 See WIPO/GRKTF.IC/17/8/inf., paragraph 5.

[11] See WIPO/GRKTF.IC/17/8/inf., paragraph 5.

led to a situation in which folkloric expressions are freely available for anyone to reproduce, adapt or publish, without the consent of or attribution to the author or originating community.

As formerly colonised states began to demand an equal share in the international debate on international trade relations, the protection of private property rights and intellectual property rights, it seemed the way forward was to claim a copyright on folkloric expressions. If the Western approach was to single out the individual author and grant exclusive rights against all others, the non-Western delegates considered that it could well be conceivable that indigenous collective creative works may also be protected by a copyright against all others. At the background of this claim is the consideration that manifestations of folklore in non-Western communities are rooted in communal values, beliefs, and social constructs that are inconsistent with individual ownership that is protected by 'Eurocentric' intellectual property rights.[12] This is problematic, as non-Western communities have a wide spectre of customary laws that extend legal personality to families, clans, and communities. It is noted that the link between individual and collective creativity in indigenous communities all over the world should not be interpreted that this means that indigenous artists are not creative and that their creativity should not be protected.[13] This claim is also an expression of the aspiration to be taken serious as a partner in the Western discourse on copyright protection, with its associations to the supremacy of Western creativity and entrepreneurial skills.

Thus, during the Stockholm revision discussions, the non-Western delegations wanted to see the inclusion of 'works of Folklore' in the listing of copyright-protected works in article 2 of the Berne Convention. However, the delegates could not reach consensus on the definition of 'Folklore'.[14] The end result was the insertion of the article on the protection of "unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of that country" in article 15 paragraph 4. States Parties willing to comply with this provision are to designate a competent authority to set up a regime for copyright protection for these works.[15] Today, in a world of projects to digitise libraries, this paragraph is understood to refer to orphan works: works by unknown authors.[16] At the time of its conception, however, this provision

[12] See also Chapter 2.2.4.
[13] Mgbeoji 2009, p. 220.
[14] Records of the Intellectual Property Conference Stockholm 1967, Vol. II, p. 1152.
[15] Berne Convention, article15, paragraph 4. After the Stockholm revision of the Berne Convention,however, no states deposited a notification of the establishment of an authoritative body that would look after the rights of unknown authors.
[16] Orphan works have become an important issue of debate, particularly in heritage digitisation programmes. See The SURF Foundation International Study on the Impact of Copyright Law on Digital Preservation, 2008, and the work of the "Comité des Sages" in 2010, final report The New Renaissance, published in January 2011. Documents available at http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm, last accessed 15 January 2011.

was considered to address expressions of folklore.[17]

5.A.1.3. Tunis Model Law on copyright for developing countries

UNESCO's initial work on intangible heritage also focused on protection by copyright law. UNESCO and WIPO together developed the Tunis Model Law on copyright for developing countries in 1976. After the 1971 The Berne Convention revision, it was deemed appropriate to provide for a legal text that could be used as a pattern for framing or revising domestic law in developing countries. The Tunis Model Law was presented as a Model to provide advice on the specific position of developing countries in the regulation of access to foreign works that are protected by copyright as well as to ensure the protection of their own works.[18] The Model Law contains the following definition:
" 'folklore' means all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting the basic elements of traditional cultural heritage" (section 18 Definitions, (iv.)).
Section 6 of this Model Law contains the provision protecting works of national folklore, in which it is stated that the exploitation rights as well as the moral rights to these works shall be exercised by the 'competent authority'. This protection is without any time limit (section 6 paragraph 2). The 'competent authority' is defined by section 18 (iii) as

> "... one or more bodies, each consisting of one or more persons appointed by the Government for the purpose of exercising jurisdiction under the provisions of this Law (...)."

The competent authority is thereby linked to the governmental structure of the national government, and not to the local communities itself. The scope of authority also extends to copies of works of national folklore made abroad, and copies or translation, adaptations ... or other transformations of works of national folklore made abroad, that may only be imported or distributed, with the authorisation of the competent authority (section 6 paragraph 3).

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[17] Von Lewinski, 2007, p. 208. After the Stockholm revision of the Berne Convention,however, no states deposited a notification of the establishment of an authoritative body that would look after the rights of unknown authors.
[18] The Tunis Model Law on Copyright was adopted by the Committee of Governmental Experts in Tunis in March 1976.

5.A.1.4. The WIPO/UNESCO Model provisions of 1982

In 1982 WIPO and UNESCO together presented the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions. This is the first document by an international agency that is aimed at protecting against the exploitation of cultural heritage that is being commercialised without the consent of the communities involved.[19]

The Model Provisions were the result of a process that started in 1973 when the Government of Bolivia sent a memorandum to UNESCO requesting an examination of the possibility of preparing an international instrument for the protection of folklore.[20] In his research on the background of this letter, Hafstein demonstrates that this request should be understood in the context of the Bolivian military regime that at that time was actively engaged in oppressive policies regarding indigenous communities, as well as celebrating folkloric spectacles as 'national- popular' culture.[21] The regime's interest was therefore not in the protection of folklore only, but also in the control over folkloric expressions of indigenous communities. As was noted, since the Stockholm revision of the Berne Convention, no states had deposited a notification of the establishment of an authoritative body that would look after the rights of unknown authors. The 'Committee of Experts on the Legal Protection of Folklore' was established under Article XI of the Universal Copyright Convention in 1977. They concluded that copyright is not the proper instrument to provide sufficient protection for rights to expressions of folklore. Moreover, many countries at the time did not adhere to the Rome Convention on performers' rights that was considered to be a useful instrument because it would protect performers and the recordings of their performances.[22] The Committee recommended the development of model provisions that would provide for a model of adequate legal protection at the national level, paving the way for adequate local, regional as well as international protection. Furthermore, the model provisions were to include forms of copyright and related rights protection when applicable.[23]

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[19] The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, paragraph 2, paragraph 14, UNESCO?WIPO/FOLK/CGE/I/4, part II. Official publication by UNESCO,OMPI/WIPO with a commentary prepared by the Secretariats of UNESCO and WIPO in 1985.

[20] FOLK/J/3 p. 1. See also the letter by the Ministry of Foreign Affairs and Religion of the Republic of Bolivia, April 1964, FOLK/J/3, Appendix A. See also Hafstein, 2007, on the complex background of this memorandum, which has since become known as the starting point of UNESCO' s activities regarding intangible heritage.

[21] This memorandum is commemorated as the starting point of UNESCO' s activities regarding intangible heritage, As Hafstein remarks, folkloric spectacle is a favourite form of entertainment under dictators: Other examples are Salazar in Portugal and Pinochet in Chili. Hafstein 2007 p.6.

[22] The Sages Report, paragraph 13 see footnote 14.

[23] Ibid. paragraph 20.

The study, published in 1977, presented folklore as

> "the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation."[24]

The impersonal collective character of folklore is considered as a distinctive and elementary element. Added to that is the traditional character of folklore, in which the transmission between generations is elementary. Also, folklore is considered to be transmitted orally, and not fixated.[25] Originality is not important, as it is required to comply to the expectations of the social group and authorship is considered to be collective rather than individual.[26] Moreover, the work is not a finished 'product', "but is constantly made and remade".[27] The key criterion is authenticity, as it is stated that the "most authentic form is the actual work of folklore".[28] This resulted in the definition of folklore as

> "a musical, literary or other artistic composition which has been handed down from generation to generation by oral means with variations which do not change its basic character".[29]

It is of note that the Expert Committee at that time still explicitly excluded tangible objects or artefacts, like ceremonial objects, as not being part of the concept of folklore.[30] This was in line with the objective of the study, which was to investigate how expressions of folklore might be included in the copyright system. The conclusion was that the protective measures should have the character of a sui generis instrument that could exist independently from copyright law.

In the years thereafter, however, it became clear that the distinction between oral expressions and tangible expressions was increasingly difficult to maintain, as both were considered elementary in manifestations of folklore. Section 2 therefore referred to both intangible cultural expressions as the material expressions thereof and included protection for those expressions that are reduced to a material form like productions of folk art, metalware, carpets, or jewellery and musical instruments.[31] To be protected they must qualify as being 'characteristic', meaning that the element must be recognised as representing a distinct tradi-

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[24] UNESCO/WIPO/ FOLK/CGE/I/4, paragraph 10.
[25] Ibid. p. 2, 3.
[26] Ibid. p. 3.
[27] Ibid. paragraph 29. Brown 1998, p.196.
[28] The use of this criterion in the context of folklore since then has been fiercely debated in anthropological circles, see Hafstein, 2007.
[29] See Footnote 14, paragraph 29.
[30] Ibid., paragraph 35, drawing the distinction between physical products of folk art and non-material compositions
[31] Model provisions section 2.

tional heritage of the community.[32] This was considered to imply the 'consensus' of the community with regard to the value of the expression for this community, and thereby the 'authenticity' of the expression.[33]

An important element in the Model Provisions is section 3 on the requirement of authorisation by the originating community for any publication, reproduction, and any distribution of expressions of folklore, as well as for any public recitation or performance, or any transmission by wire or wireless means. What types of utilisation should be subject to authorisation? Criteria to be considered are: whether the use is for commercial purposes; whether it is made by non-members of the originating community; and whether the utilisation occurs outside of the traditional or customary context.[34] This would mean that utilisation within the traditional context is not subject to authorisation. On the other hand, utilisation by members of the community, outside of the traditional context, does require authorisation.[35] There is no indication as to how this authorisation is to be organised, which leaves the important question of who is to be recognised as the representative of the community to be decided by the national state.

Section 4 follows the standard organisation of copyright law by including exceptions to the rule. No authorisation is necessary for educational purposes; if utilisation was done by way of illustration; and if it is compatible with fair practice. It is also allowed to utilise expressions of folklore for creating new original works of an author or authors. Incidental uses were exempted from the rule of authorisation, such as in reporting, or photographing or filming the work in a public place.[36]

5.A.1.5. Developments in the case law on Aboriginal cultural expressions

The growing self-awareness among the indigenous communities in Australia resulted in case law that has since been regarded as an important step towards the recognition of the interests of these communities in their cultural heritage.[37] This was of major influence as it received worldwide attention concerning the potential ramifications for legal standards. After all, what happens in the courts in the Commonwealth of Australia is relevant to Western legal traditions. In the Yum-

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[32] Paragraph 36 of the Commentary to the Model Provisions.
[33] Ibid.
[34] Ibid, paragraph 41.
[35] Ibid.
[36] Explanatory note, paragraphs 50-55.
[37] Janke, 2003, Case Study 3; Janke 2009, p.175;Anderson 2009 provides an extensive study of the mechanisms of law protecting indigenous cultural expressions in Australia.

bulul Case the Court first recognised that "Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin".[38] The matter of ownership of a traditional cultural expression was further discussed in the Bulun Bulun Case, in which the bark painting of the *Magpie Geese and Water Lilies at the Waterhole* was considered in the context of the complex social structure of the Ganalbingu people.[39] There was no doubt that local indigenous artists should be considered as the owners of individual intellectual property rights. However, the judge did not want to go so far as to recognise a communal title in the work:

> "Whilst it is superficially attractive to postulate that the common law should recognise communal title, it would be contrary to established legal principle for the common law to do so. There seems no reason to doubt that customary Aboriginal laws relating to the ownership of artistic works survived the introduction of the common law of England in 1788. The Aboriginal peoples did not cease to observe their sui generis system of rights and obligations upon the acquisition of sovereignty of Australia by the Crown. The question however is whether those Aboriginal laws can create binding obligations on persons outside the relevant Aboriginal community, either through recognition of those laws by the common law, or by their capacity to found equitable rights in rem."[40]

However, the Judge recognised a fiduciary duty of the artist towards the community. The artist was therefore under a personal obligation to protect the communal interests in the work. In this way the English common law was made compatible to customary Aboriginal laws.

The Milpurrurru case on the unauthorised copying of aboriginal designs on carpets was a few years later.[41] The labels attached to the carpets stated that the carpets had been designed by Aboriginal Artists and that royalties were paid to the artists on every carpet sold. The applicant artists claimed damages as they were responsible for the protection of the stories and images of their community. They claimed that they had been harmed because their community was now entitled to order them to stop producing any type of creative work related to the community and treated them like outcasts. The judge awarded damages in compensation for the commercial value of the copyright. More importantly, the judge also awarded additional damages for the personal and cultural harm

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[38] (1991) 21 IPR 481, p. 49

[39] Bulun Bulun v R & T Textiles Pty Ltd.,1998; 41 IPR p.513, See also Anderson 2009 pp. 141-156.

[40] Bulun Bulun v R & T Textiles Pty Ltd. ,1998, 41 IPR, p.525.

[41] Milpurrurru and Others v Indofurn Pty Ltd and Others,1994, 130 ALR 659, Anderson 2009, pp. 131-141.

suffered by the applicant artists.

These cases illustrate a growing recognition of aboriginal customary law and the effects of these laws on the individual members of these communities. They also demonstrate that the increasing use of indigenous cultural expressions in Western culture may be regarded as in conflict with indigenous culture and that it is therefore considered necessary to provide for legal remedies to protect the interests of local communities and their individual members.[42]

Recalling the discussion on the social relations theory by Underkuffler in chapter 2, we see that. similar to the Indian cases in the US, in these cases on aboriginal intangible heritage the individual or communal interests in cultural heritage are increasingly taken into consideration in conflicting claims with Western private property rights.

5.A.1.6. The 1996 WIPO Treaties

WIPO's work on the protection of folklore filtered through in to their work on copyright and related rights in the Berne and Rome Conventions. Since the Berne Convention was last revised in 1971, information and communication technologies had taken a quantum leap. Although these were still the early days of the internet, digital technology made it necessary to reconsider not only copyright to literary and artistic works, but also the related rights of performances and the audio-registrations of these works. The WIPO Performances and Phonograms Treaty (WPPT) of 1996 was one of two special agreements within the meaning of art. 20 of the Berne Convention, and was to complement the existing international law on copyright.

The WPPT incorporated protective provisions on phonograms of performances of folklore more explicitly.[43] Article 2(a) defines not only the performers of literary or artistic works but also the performers of expressions of folklore as right holders. Article 15 deals with the right of remuneration for the broadcasting and

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[42] Janke 2003 pp.61-65; Sherman and Wiseman 2006,p. 263; Graber 2007 pp.46-47, Anderson 2009 pp.11-12. , See also Chapter 2.4.2.

[43] A phonogram is defined in Article 2(b) as "the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work".

communication of phonograms to the public, in which the Contracting Parties have the right to establish certain rules with regard to remuneration for commercial purposes. This means that also phonograms of traditional cultural expressions, if broadcast to the public, may require a form of payment to benefit right holders. Paragraph 3 determines the right of Contracting Parties to broaden these uses into any use, and thereby to regulate remuneration for communication to the public, even if not for commercial purposes. This would imply that also educational uses could become subject to remunerative schemes.

The 1996 WIPO Copyright Treaty (WCT) does not contain any explicit provision on traditional cultural expressions. This is consistent with the concept of copyright as related to the original literary or artistic work by an individual author as defined in Articles 1, 2 and Article 3 of the Berne Convention. The WCT is however relevant to the documentation of expressions of intangible heritage and regards the right of distribution (Article 6) and the right to make creative works available in such a way that members of the public may access these works from a place and at a time individually chosen by them (Article 8). Computer programs and databases were also to be considered as literary works (Articles 4 and 5).

5.A.1.7. The 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore

Meanwhile, UNESCO focussed on a more general approach to the protection of cultural expressions which is in line with the objectives of this organisation. In 1989 UNESCO issued the Recommendation on the Safeguarding of Traditional Culture and Folklore. This Recommendation defines folklore as

> "...(traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognised as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts."[44]

At that time, the definition of folklore had come to include both the aspect of

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[44] 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, available on http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_(last accessed 1 July 2012).

oral transmission as well as the (tangible) forms in which folklore may be expressed.

The Recommendation presents a universalist approach by referring explicitly to folklore as being part of the 'universal heritage of humanity'.[45] Commentators objected that this reference is particularly inappropriate with regard to folklore, as folklore is rooted in local communities and is central to the identity of a particular community.[46] On the other hand, the reference to universal value could be considered useful if a state fails to protect its own heritage.
Under the general title of 'Safeguarding traditional cultures and folklore', the Recommendation aims to support the identification, conservation, preservation, protection and dissemination of folklore, and also to improve the international co-operation in realising these objectives. The protective measures include the responsibility of the relevant authorities to provide for intellectual property protection, with the remark that this only refers to one aspect of folklore.[47]
The use of terminology is significant, as the recommendation presents Safeguarding as the leading activity, which includes protecting 'manifestations of intellectual creativity, whether it be individual or collectively', in particular by intellectual property rights.[48]

5.A.1.8. Towards the UNESCO 2003 Convention on the Safeguarding of Intangible Cultural Heritage

In 1993, the UNESCO commenced the 'Programme on Safeguarding Living Human Treasures'. The honorary title of 'Living Human Treasure'' is given to individuals who are capable of a high-level performance or creation of specific elements of intangible cultural heritage. The Member States are to nominate candidates who have to meet the criteria of being a testimony to their living cultural traditions and to the creative genius of individuals, groups, and communities present in their territory.[49] It is of note that this programme presents individual creative persons as the 'bearers' of collective cultural traditions. Also important is the focus on elements of intangible heritage that are still being actively practised by skilled representatives of the groups, communities and individuals involved.

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[45] Preamble, first paragraph.
[46] Blake comment available at http://www.folklife.si.edu/resources/unesco/blake.htm, (last accessed 1 December 2010).
[47] 1989 Recommendation paragraph F (a).
[48] 1989 Recommendation paragraph F heading.
[49] http://www.unesco.org/culture/ich/index.php?pg=00061, last accessed 1 July 2012.

At the 1997 International Consultation on the Preservation of Cultural Spaces in Morocco, UNESCO launched the programme on oral heritage. In 1999, the General Conference agreed to initiate a programme on the 'Proclamation of masterpieces of the oral and intangible heritage of humanity'. Two types of Masterpieces were then recognised: forms of popular and traditional cultural expressions, and cultural spaces.[50]

In 1999, UNESCO, together with the Smithsonian Institute, organised an international conference on the 'Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Co-oporation' to evaluate the Recommendation of 1989.[51] The use of terminology was again problematic. It was noted on the one hand that 'intangible heritage' as a term might weaken the value of folklore. 'Community-based folklore' would be a better way to convey the shared values in these cultural expressions. To call this the heritage part of the shared heritage of humanity could be construed as positioning folklore in the "public domain" and hence outside of the scope of property rights.[52] However, representatives from indigenous communities, on the other hand, pointed out that to refer to folklore was no longer acceptable as it did not give sufficient credit to the value of this intangible heritage to the local communities and cultural rights. These comments were made by representatives of the Pacific Islands and they reflected the opinion of many representatives of non-Western communities that references to folklore are based on a Western perspective of culture.[53] This non-Western perspective would become increasingly important in UNESCO's normative actions.

5.A.1.9. Expressions of folklore and traditional cultural expressions as intangible cultural heritage

Although the above developments reflect many different approaches, expressions of folklore are considered to contain at least four common features that may be characterised as traditional, social/cultural, territorial and communal. Folklore is tradition-based, because all of these expressions are regarded as being based on a historical background and transmitted by generations. It is linked to

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[50] Nas, 2002, p. 139.

[51] Seitel, 2001, p. UNESCO/ Smithsonian Institute, Washington D.C. 30 June-2 July1999.

[52] McCann 2001, p. 59-60, Sherman and Wiseman 2006, p. 263.

[53] Tora, 2001, "Our culture is not "folklore" but the sacred norms intertwined with our traditional way of life — the norms that set the legal, moral, and cultural values of our traditional societies. They are our cultural identity." p.221.

a particular social and cultural environment, because it is embedded in the social life of a cultural community. The territorial environment is important because of its traditional bond with a certain cultural community that is associated with a certain territory. However, there may be more cultural communities in a specific territory, and cultural communities may also extend over different countries. And the final distinctive feature is its communal nature, which is the result of the tradition-based heritage which ties the cultural traditions of successive generations to the creative efforts of the practitioners. Any protective legal regime, whether in public or in private law, should recognise these four features in order to provide adequate measures to safeguard intangible cultural heritage.

But although the terminology thus became contested, common to all interpretations of Folklore is the recognition that these cultural expressions are tradition-based, because all of these expressions are regarded as rooted in a shared historical background and transmitted by generations. It is linked to a particular social and cultural environment, because it is embedded in the social life of a cultural community. That the territorial environment is important because of its traditional bond with a certain cultural community that is associated with a certain territory, although there may be more cultural communities in a specific territory, and cultural communities may also extend over different countries. And finally its communal nature, which is the result of the tradition-based heritage which ties the cultural traditions of successive generations to the creative efforts of the practitioners.
The next paragraph will demonstrate, that UNESCO would decide to stick to the general term 'intangible cultural heritage' which is regarded to include (expressions of) folklore .

5.A. 2. The UNESCO Convention on the Safeguarding of intangible cultural heritage

5.A.2.1. Introduction

The Convention on the Safeguarding of Intangible Heritage was adopted at the General 32nd Session of the UNESCO Conference on 17 October 2003. The swiftness of the process of ratification by the Member States that followed was unprecedented, and by 20 April 2006 the Convention entered into force, three months after the ratification by the 30th State Party.[54] By 2 October 2008, 104

State Parties had deposited an instrument of ratification, approval or acceptance. In May 2012 the Convention had 143 States Parties.[55] The ratification of the Netherlands, in March 2012, came into force three months later, in August 2012.[56]

5.A.2.2. Objectives: Safeguarding Intangible Cultural Heritage

The objectives of the Convention are to safeguard intangible cultural heritage (ICH) (article 1(a)); to ensure respect for the intangible heritage of communities, groups, and individuals (article 1(b)); to raise awareness at the local, national and international level (article 1(c)); and to provide for international cooperation (article1(d)).
Intangible heritage is defined in article 2 as

> ""intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity." (Paragraph 1)

Although the historic element of intangible heritage is ensured by terms such as 'practices', knowledge and skills, the definition in the 2003 Convention puts emphasis on the continuous practice of this cultural heritage, 'that is transmitted from generation to generation', until the present day.
This is also apparent in the way the UNESCO refers to intangible heritage as 'living heritage', although this reference is not found in the Convention text, nor in the Operational Directives that were accepted in 2008.

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[54] As required by article 34 of the Convention. The first 30 were Algeria, Mauritius, Japan, Gabon, Panama, China, Central African Republic, Latvia, Lithuania, Belarus, Syria, Republic of Korea, Seychelles, United Arab Emirates, Mali, Mongolia, Croatia, Egypt, Oman, Dominica, India, Vietnam, Peru, Pakistan, Bhutan, Nigeria, Iceland, Mexico, Senegal and Romania.

[55] Group I, the European States, included Austria, Belgium, Cyprus, Denmark, France, Greece, Iceland, Italy,Luxembourg, Monaco, Norway,Portugal, Spain, Sweden, Switzerland and Turkey.
the United States, Canada and Australia are not States Parties to the Convention.

[56] TK 31 482, 1 December 2009; SG 33 206 (R 1979), Letter of the Minister van Buitenlandse Zaken, 2 March 2012.

The domains of intangible heritage are indicated by the non-exclusive list that followed:

> "(a) oral traditions and expressions, including language as a vehicle of the intangiblcultural heritage;
> (b) performing arts;
> (c) social practices, rituals and festive events;
> (d) knowledge and practices concerning nature and the universe;
> (e) traditional craftsmanship."[57]

An important restriction of a moral nature is provided in the last sentence of article 2 regarding the issue of cultural practices that may be in breach of human rights:

> "For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development."

Safeguarding is defined in article 2 paragraph 3 as

> " (...) measures aimed at ensuring the viability of the intangible
> cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and nonformal education, as well as the revitalization of the various aspects of such heritage."

The use of safeguarding as a term is to distinguish it from the objective of protection in the World Heritage Convention, which is regarded as a consolidation of a static situation regarding immovable property. In contrast, safeguarding is not only related to protective measures of existing expressions of intangible heritage, but is also to secure this intangible heritage for generations to come.[58] The Glossary, that was drafted during the preparatory work on the Convention explained safeguarding as "the identification, documentation, protection, promotion, revitalization and transmission of aspects of this heritage".[59] Article 2 of the ICH Convention adds to these measures the preservation, research and enhancement of intangible heritage. The combination of these efforts is to emphasise the specific human dimension of intangible heritage and the need to

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[57] Compare criterion R.1: to be nominated as an element in the Representative List, the manifestation should fall within one or more of these domains.
[58] Blake, 2006, p. 39-41.
[59] Van Zanten, 2004, p.2.

sustain a living practice of intangible heritage. [60]

5.A.2.3. Obligations on the national level

The obligations of the Member States on the national level mirror the obligations in the 1972 World Heritage Convention. As in the World Heritage Convention, these obligations are to be interpreted as independent from the obligations on the international level.[61]

On the national level, the States Parties are committed to ensure the safeguarding of intangible heritage (article 11(a)) by identifying and defining the various intangible cultural expressions within their territory (11(b)). This provision explicitly takes the territorial nature of traditional cultural expressions into account. At the same time, the reason for the restriction of 'within their territory' is that this ensures that this provision only determines the obligation of States Parties to take action with regard to elements of intangible heritage that are actually within their territory.
The safeguarding activities are to make use of inventories that are regularly updated (article 12). Further measures 'may include' the adoption of general policies with regard to education, research, conservation, documentation and awareness raising (articles 13 and 14).

In legal terms, the wording of these obligations is rather weak. Although the heading of article 13 refers to "shall ensure the safeguarding", the second part of the sentence continues with "shall endeavour to". This is the result of negotiation between "making efforts to" and "undertakes to". In this way, the States Parties could avoid an overly prescriptive text.[62]

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[60] Blake, 2006, p. 40.
[61] See also chapter 4A paragraph 4.
[62] Blake, 2006, p. 66.

5.A.2.4. Obligations on the international level

The Convention establishes a General Assembly, a sovereign body consisting of all States Parties meeting every two years (article 4). Executing powers are allocated to the Intergovernmental Committee, consisting of representatives of 24 States Parties (article 5.2). With the developments within the Intergovernmental Committee of the World Heritage Convention of 1972 in mind, it was decided that from the start the election of Member States of the Committee should "obey the principles of equitable geographical representation and rotation" and only be elected for a period of four years (article 6).

On the international level, States Parties shall engage in programmes on mutual co-operation and assistance with regard to intangible heritage (articles 19-24).

5.A.2.5. The Lists in the Intangible Heritage Convention

Important instruments of this Convention are the two Lists, one of which is the Representative List of the Intangible Cultural Heritage of Humanity (article 16), which is to incorporate the items that were designated as Masterpieces of the Oral and Intangible Heritage (article 31). The Intergovernmental Committee is to decide whether or not the criteria are met, and if the ICH element is eligible for the Representative List.

The Representative List refers explicitly to the Intangible Heritage of Humanity, as opposed to the World Heritage List in the Wold Heritage Convention that makes a reference to cultural heritage of 'outstanding universal value' of mankind and aims to represent 'the best of the best'.[63] This List aims to ensure better visibility for as well as raising awareness of the existence of intangible heritage. States Parties, if they wish, can propose elements for the List to the Committee. The Convention explicitly mentions the necessity of regularly updating the List because intangible heritage is 'living' heritage, and may therefore have only a limited existence as an element on the List.[64]

Of interest here is that States Parties may jointly submit nominations for the Representative List.[65] The first new element included on the Representative List

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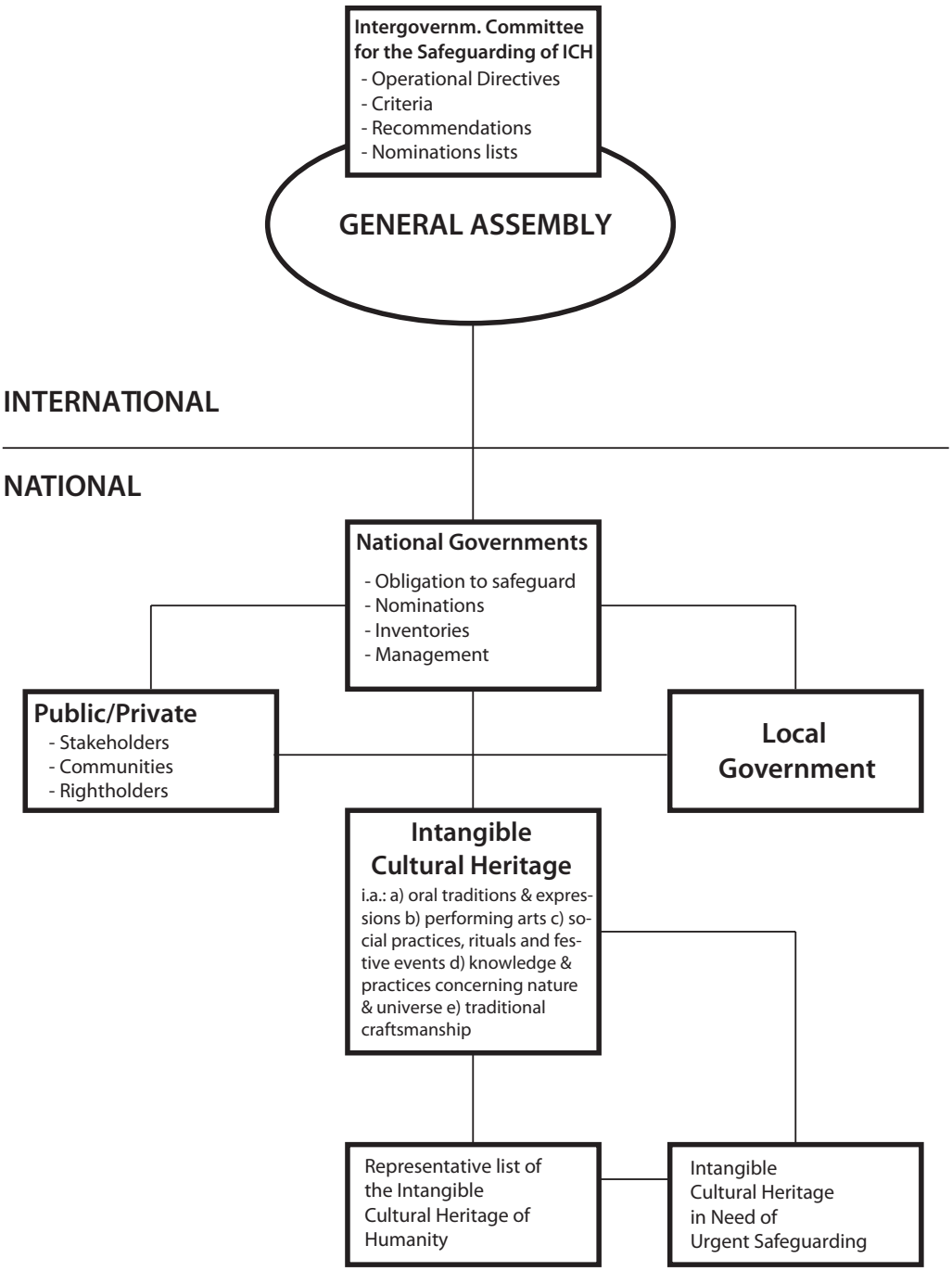
[63] See also chapter 4 paragraph 3.
[64] See the Intangible Heritage Messenger 1, 2006. This magazine carries the subtitle ' Living Heritage' in its heading.
[65] Operational Directives paragraphs 13-16.


Intergovernm. Committee for the Safeguarding of ICH
- Operational Directives
- Criteria
- Recommendations
- Nominations lists
GENERAL ASSEMBLY
INTERNATIONAL
NATIONAL
National Governments
- Obligation to safeguard
- Nominations
- Inventories
- Management
Public/Private
- Stakeholders
- Communities
- Rightholders
Local Government
Intangible Cultural Heritage
i.a.: a) oral traditions & expressions b) performing arts c) social practices, rituals and festive events d) knowledge & practices concerning nature & universe e) traditional craftsmanship
Representative list of the Intangible Cultural Heritage of Humanity
Intangible Cultural Heritage in Need of Urgent Safeguarding

after the Intangible Heritage Convention came into force was the Tango, nominated by Argentina and Uruguay.
In 2009, Falconry was nominated with a widespread campaign carried out by all the eleven(!) States Parties involved. The United Arab Emirates, Belgium, the Czech Republic, France, the Republic of Korea, Mongolia, Morocco, Qatar, Saudi Arabia, Spain, and the Syrian Arab Republic saw their efforts rewarded with the inclusion of Falconry on the Representative List in 2010.[66]

States Parties, if they wish to do so, may nominate their territory to be added to the enscribed element, which may be an option for the Dutch Falconry Society, if the Dutch government decides to finally ratify the convention.

The second List is complementary and is called the List of Intangible Cultural Heritage in Need of Urgent Safeguarding (article 17).The Urgent Safeguarding List in principle follows the same regime for enscription by the States Parties and approval by the Committee as the Representative List, except for one important addition. In cases of extreme emergency, the Committee may only include the item after consultation with the State Party concerned (article 17.3).[67]

Besides the two lists the Convention is to support specific projects, programmes and activities for safeguarding intangible cultural heritage (article 18).

5.A.2.6. The Representative List and the importance of 'Representativeness'

During the discussions on the title of 'the Representative List of Intangible Heritage of Humanity' the distinctions between this Convention and the World Heritage Convention were further articulated. The first draft referred to 'Intangible Cultural Heritage List', which would avoid any reference to the universal aspects of world heritage. A following draft referred to "a List of Treasures (typical examples) [Masterpieces] of the World Intangible Heritage".[68] The brackets indicate the different options that were discussed. The final version of the 'Representative List' is the result of the discussions on the need to avoid a direct reference to the universal aspects in World heritage, in a way that would make it seem

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[66] Falconry is described in the nomination file as "Falconry is the traditional activity of keeping and training falcons and other raptors to take quarry in its natural state. Originally a way of obtaining food, falconry is today identified with camaraderie and sharing rather than subsistence.(...). Nomination File 00442 For the Inscription on the Representative List of the Intangible Cultural Heritage, 2010.

[67] Compare the World Heritage Convention article 11, paragraph 4: The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicise such entry immediately, and paragraph 6: Before refusing a request, the Committee shall consult the State Party in whose territory the cultural or natural property in question is situated.

[68] Blake, p. 80

that intangible cultural heritage was being appropriated by the world community. In particular the objections raised by representatives of minority communities were decisive in the choice for the title of the List, that was also to convey the particular link between the originating community and the intangible heritage.

The List is expected to include representative elements of ICH. This term is also increasingly prominent in the World Heritage Convention, but there it is used as a measure to restrict the nomination of too many similar properties.[69] The negotiating states parties in the ICH Convention wished, on the one hand, to avoid a hierarchy in the elements beforehand, while, on the other, noting that in order to represent ICH it should be defined whether it represented the ICH of humanity or be representative of the ICH of a given community. It was decided that to be representative within the scope of the Convention, this representativeness should be connected to the diversity of the complete List, thus connecting the element with its significance to humanity at large. Representativeness would thus be required from two perspectives: bottomup, from the perspective of the practitioners, as well as top-down, from the perspective of the international community. The criteria for inclusion on the List are to further elaborate the requirements for the official inscriptions.

5.A.2.7. The criteria

In the 2006 November meeting, a team of experts discussed and approved the draft set of criteria for the Representative List to be presented to the Committee in 2007.[70] The Operational Directives were accepted by the General Assembly in June 2008.[71]

The experts affirmed that 'representativeness' is to be considered as the leading principle of the Convention, in contrast to the notion of 'outstanding universal value' in the World Heritage Convention. Importantly, it was again confirmed that any idea of hierarchy, or subjective qualifications, should be avoided.[72]

The criteria are a checklist of conditions that are to be met in toto, in accordance

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[69] Compare the World Heritage List, restricting the heritage objects on the List to the representative of the best. Chapter 4A, paragraph 5.1.

[70] The first list of criteria drawn up by the Committee in article 16.2. Adopted at the First Extraordinary Session of the Committee in Chengdu, May 2007. UNESCO Doc. ITH/07/1.EXT.COM/CONF.207/Decisions and contained 9 criteria, that were later revised in the Operational Directives.

[71] Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage, Adopted by the General Assembly of the States Parties to the Convention at its second ordinary session (Paris, France, 16 to 19 June 2008), amended at its third session (Paris, France, 22 to 24 June 2010).

[72] Ibid., p. 7

with article 2.1 of the Convention. States Parties submitting intangible heritage for inscription on the lists should provide evidence that the elements are representative and should satisfy all the criteria in R.1-5.

> R.1 The element constitutes intangible cultural heritage as defined in Article 2 of the Convention;
>
> R.2 Inscription of the element will contribute to ensuring visibility and awareness of the significance of the intangible cultural heritage and to encouraging dialogue, thus reflecting cultural diversity worldwide and testifying to human creativity.
>
> R.3 Safeguarding measures are elaborated that may protect and promote the element.

Criterion R.4 refers to the bottom-up commitment of both the community, group or individuals, whilst criterion R.5 secures the involvement of the State Party:

> R.4 The element has been nominated following the widest possible participation of the community, group or, if applicable, individuals concerned and with their free, prior and informed consent.
>
> R.5 The element is included in an inventory of the intangible cultural heritage present in the territory(ies) of the submitting State(s) Party(ies), as defined in Articles 11 and 12 of the Convention.

5.A.2.8. A recent example of applying the criteria: Falconry

When a State Party decides to nominate a certain element of intangible heritage for the 'Representative List', it has to submit a nomination file.[73] This file should contain all the official forms containing documentation as well as the consent forms as prescribed in the Operational Directives.

The following example, which speaks for itself, demonstrates how Falconry was presented to satisfy the criteria as listed in the Operational Rules:

> "* R1: Falconry, recognised by its community members as part of their cultural heritage, is a social tradition respecting nature and the environment,

[73] Nomination File 00442 For the Inscription on the Representative List of the Intangible Cultural Heritage, 2010.

passed on from generation to generation, and providing them a sense of belonging, continuity and identity;

* R2: Its inscription on the Representative List could contribute to fostering cultural diversity and intercultural dialogue worldwide, thus enhancing visibility and awareness of intangible cultural heritage and its importance;

* R3: Efforts already underway in many countries to safeguard falconry and ensure its transmission, focusing especially on apprenticeship, handicrafts and conservation of falcon species, are supplemented by planned measures to strengthen its viability and raise awareness both at national and international levels;

* R4: Communities, associations and individuals concerned have participated in the elaboration of this nomination at all stages and have provided plentiful evidence of their free, prior and informed consent;

* R5: Falconry is included on inventories of intangible cultural heritage in each of the submitting States." [74]

5.A.3. Remarks on similarities and differences between the World Heritage Convention and the Intangible Heritage Convention

The Intangible Heritage Convention was initiated to answer the need of in particular non-Western countries for a normative instrument regarding the safeguarding of intangible heritage that is as important to the local communities and states parties as the World Heritage properties are to most Western countries. [75]

Discussing the developments and the criteria of the two Conventions, the focus was on the distinct elements of the Conventions in question. There is, however, a reason to wonder why these Conventions have become separate institutions. It has to be noted that, first, conventions are not static products, but should be interpreted as path-dependent organisations, developing and adapting to new conditions and events. Second, different stakeholders constituting the organisation of a Convention have different perspectives, intentions and needs. At the initial stages of drafting a new Convention, there is, of course, emphasis on the

[74] Decision 5.COM 6.45, http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011&RL=00442, last accessed 1 December 2011.
[75] Kono 2009, pp.9-14

need to develop such a Convention. And third, in the analysis of the two heritage Conventions it is important to highlight the distinctions between the two Conventions. On the other hand, the Intangible Heritage Convention might be regarded as having a temporary existence as a separate instrument, and, in time, will merge with the World Heritage Convention.

Of course, the major, and most apparent distinction is that World Heritage is concerned with tangible objects and the Intangible Heritage Convention deals with intangible elements and manifestations of intangible heritage and the objects associated therewith. This distinction implies what may be described as a distinction between static and fluid, between product and process.[76]
The recent removal of two world heritage sites from the World Heritage List highlights this distinction.[77] The removal was due to the fact that the responsible States Parties had made it clear that they intended to alter the site (building a bridge in the Elbe Valley) and, in the other case, that they wanted to change the contours of the site (Oman). This led to the conclusion that these sites were no longer to be considered as being of 'outstanding value' to World Heritage. What this reveals is that the Heritage Committee considers that the existing World Heritage should be kept in exactly the same state as when it was added to the List. The Intangible Heritage List, on the other hand, regards the Heritage Elements as 'Living Heritage', which therefore means that they are expected to continuously change and be 'recreated in response to their environment'.[78]
Although these distinctions may be clear, the similarities are also considerable. The main point is that the development of the criteria in the World Heritage Convention, in particular in the 1990s, demonstrates, first, an increasing focus on the links between local communities and the world heritage. They are to be involved in the maintenance programmes and are to be supported in the economic development of the area in which the property is situated. [79]

Second, as was demonstrated by the policy changes in the World Heritage Convention after the NARA Convention, the criteria have become increasingly attuned to the intangible aspects of the World Heritage properties. The criteria for nominating properties for the World Heritage List are to be linked to the original cultural environment, and thereby to take intangible aspects into account.[80]
The old distinction between the two Conventions with, on the one hand, the 'bottom-up' approach of the Intangible Heritage Convention in the recognition and the safekeeping of intangible heritage, and the 'top-down' approach of the World Heritage Convention, is fading. As the safeguarding of intangible herit-

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[76] See paragraph 5A paragraph 1.4 .
[77] See chapter 4A paragraph 5 .
[78] Definition in article 2 IHC.
[79] See chapter 4A paragraph 9.
[80] See chapter 4A parapgraph 5.6.

age is becoming the responsibility of a widening community of national states, the benefits of protecting World Heritage are increasingly considered as being important to local communities.

Third, the process of the convergence of categories in the World Heritage Convention has led to the creation of new categories, like the cultural landscapes, and the reinterpretation of existing categories.[81] This means that although the Convention only concerns tangible properties, the content of the Convention is still flexible. The Intangible Heritage Convention, on the other hand, aims to safeguard expressions and manifestations of intangible heritage, including the material manifestations thereof. The question is therefore whether it would be such a big step to add the safeguarding of intangible heritage to the existing World Heritage Convention.

Fourth, the fact that the World Heritage Convention has 187 States Parties which should all agree to the incorporation of the Intangible Heritage Convention (133 states parties) is of course important. However, the steady increase in States Parties to the Intangible Heritage Convention makes this increasingly less problematic.

5.A.4.1. The participation of communities, groups and individuals in the safeguarding of intangible cultural heritage

This subsection examines the growing trend towards the recognition of the position of communities with regard to cultural expressions.
During the discussions on the Stockholm revision of the Berne Convention it was generally accepted that local communities have an important role in the creation and dissemination of works of folklore and are therefore key stakeholders in the allocation of rights. However, to specify who could be identified as right holders to particular works of folklore gave rise to an immediate problem, as in most non-Western cultures the role of the author and the appreciation of original works are not considered in the same way as in Western cultures.

In view of the discussion of copyright protection in the Stockholm Conference of 1967, however, the issue of defining right holders led to the solution of referring to 'a national of a country of the union' (in article 15 parapgraph 4), delegating the problem of addressing an individual or a community to the na-

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[81] Ibid.
[82] Records of the Intellectual Property Conference of Stockholm, 1967, Vol. II, Summary minutes, Main committee I, 946- 981 and 1505-1515.

tion state.[82] This, however, sidestepped the problem that most traditional cultural expressions are considered not only as individual products but also as communal products.

However, it is first important to determine what types of community might be considered relevant. At the start of the discussions on the Intangible Heritage Convention, a Glossary with definitions presented a nuanced view on the subject-matter of communities, distinguishing, besides an indigenous community, a community in general, a cultural community, and a local community.[83] The Glossary describes a community in the most general terms as

> "people who share a self-ascribed sense of connectedness. This may be manifested, for example, in a feeling of identity or common behaviour, as well as in activities and territory. Individuals can belong to one or more communities". [84]

In a 'cultural community', the main distinctive element is a distinctive culture, or a variant of a generic culture. A 'Local community' is considered to refer to the specific locality of the community. An indigenous community' is described as

> "a community, whose members consider themselves to have originated in certain territory. This does not exclude the existence of more than one indigenous community in the same territory"[85]

Also, communities may not be homogenous entities. It is important to differentiate within communities, in particular in view of the levels of access to and authority over cultural expressions. Cultural differences and distinct approaches may lead to problematic situations.[86] This aspect is particularly relevant, as mere copyright protection concerns the protection of published works, without modes of differentiation. But traditional cultural expressions may have several levels of access in a given community. Some expressions and manifestations may be accessible by the general public. Other rituals or other activities may only be practised and witnessed by a special group initiated in certain skills or knowledge. Many communities also have a third layer of privileged individuals, who may have access to secret or sacred activities or knowledge.[87]
These types of access are linked to the definition of communities, groups and individuals as was discussed at the 2005 Expert meeting in Tokyo on the imple-

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[83] Netherlands UNESCO Commission, 2002, p. 4,5.
[84] Ibid., p. 4.
[85] Ibid., p.5.
[86] See the case law on aboriginal cultural expressions in parapgraph 5A.1.5.
[87] Hazucha and Kono, 2009 p. 152; Mgbeoji, p.212.
[88] UNESCO Document CLT/CH/IHT/DOCEM0306 REV.1.

mentation of the Intangible Heritage Convention.[88] Although the Convention contains no definition of these important actors, the experts agreed on the following definitions:

- Communities are networks of people whose sense of identity or connectedness emerges from a shared historical relationship that is rooted in the practice and transmission of, or engagement with, their CH;
- Groups comprise people within or across communities who share characteristics such as skills, experience and special knowledge, and thus perform specific roles in the present and future practice, re-creation, and/or transmission of their intangible cultural heritage as, for example, cultural custodians, practitioners or apprentices.
- Individuals are those within or across communities who have distinct skills, knowledge, experience or other characteristics, and thus perform specific roles in the present and future practice, re-creation and/or transmission of their intangible cultural heritage as, for example practitioners, cultural custodians, and, where appropriate, apprentices.[89]

5.A.4.2. Communities and article 15 of the Intangible Cultural Heritage Convention

Communities are to play an active role in the implementation of the Convention. Article 15 reads:

> "Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management."

The Operational Directives explain that States Parties are encouraged to establish functional and complementary cooperation between communities, groups and individuals who create, maintain and transmit intangible cultural heritage, and experts, centres of expertise and research institutions.[90] This means that they are to be recognised as playing an important role in the creation, as well as the safeguarding, of the intangible cultural heritage.

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[89] Ibid., p.9

[90] See the Preamble ICH, article 11 ICH, and Chapter III, paragraph 79 of the Operational Directives.

They are also to participate in the identification and definition of the various elements of intangible heritage presented in their area. Moreover, communities are to participate in the safeguarding activities and be actively involved in the management of intangible heritage.[91]

Most important, however, is the provision in the Operational Directives that makes it mandatory for the communities to issue a statement of 'free, prior and informed consent' in the nomination file for inclusion on the Representative List as in criterion R.4.

Taking note of the prominent place of the reference to the Bill of Human Rights in the preamble to the Convention and again in criterion (ii), this is a clear reference to the discussion in the human rights sphere on the rights of indigenous communities. In fact, the 2007 UN Declaration on the Rights of Indigenous Peoples also refers to the concept of free, prior and informed consent.[92] This Declaration, to be further discussed in chapter 7, strengthens the discussions on the creation of sui generis rights for indigenous cultural expressions as well as the discussion on the scope of the content of existing intellectual property rights.

5.A.5. Protecting intellectual property rights in the ICH Convention

The ICH Convention on the protection of Intangible Heritage contains no explicit reference on the protection to copyrights. In fact, any wording that might associate intangible cultural heritage with the legal concept of (intellectual) property is avoided. Even the reference to creativity is indirect. Article 2.1 only refers to 'practices, knowledge, skills… that are recognised as part of their cultural heritage, that is transmitted from generation to generation …constantly recreated by communities and groups…". The only direct reference is in article 3 paragraph b. stating that nothing in this Convention is to affect the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights. In fact, the whole Convention is framed so as not to establish any indication that might lead to a claim for a copyright or any other intellectual property right. During the negotiation period, the Western delegations carefully avoided any phrasing that might lead to an interpretation that would alter the scope of existing intellectual property rights. The reason may be the delinea-

[91] ICH, article11(b); article 12; Operational Directives paragraph 80.
[92] UN Doc. A/61/L.67, Declaration on the Rights of Indigenous Peoples, in particular articles 28 and 31. See also chapter 8 on cultural expressions and human rights.

tion of competencies between UNESCO and WIPO. This is not only guarded within the organisations itself, but is also closely monitored by States Parties like the United States and the European Union and in this case also by the lobby of stakeholders / representatives from Western copyright holders organisations. Although there are no direct references to intellectual property rights in the Convention, copyrightof course plays an important role in the operationalisation of the Convention. The obligations of inventorying and documentation leads to copyright issues with regard to the copyright to original expressions and manifestations as well as to the documentary materials that are to be submitted to the Intergovernmental Committee in the nomination files. The fact that the documented files are also made available on the internet also raises problems in view of prior informed consent with regard to making these materials available.

It has to be reminded that the copyright to cultural expressions only relates to those expressions that are to be considered as original works, and that are, depending on the specific jurisdiction, fixated, or at least discernable to others.[93] Styles in general, or traditions in themselves, like 'Tango dancing", are in the public domain. The Intangible Heritage Convention is regarded as relating to processes, not products.[94] Be that as it may, the particular expressions and manifestations thereof are created by 'authors' and are protected by copyright.

The safeguarding of intangible cultural heritage includes 'the recording thereof in tangible form'.[95] This relates to the requirement of handing in documentary materials in the nomination forms for the Lists. Photographs, sound recordings and documentaries are often protected by copyrights, although the level of protection depends on the jurisdiction. In the USA, it was decided in 1999 in the Bridgeman Case that two-dimensional reproductions of two-dimensional original works were only the result of 'slavish copying' and were therefore not protected by copyright.[96] However, this judgment was met by criticism and it is not clear if the same conditions would not lead to another outcome in other jurisdictions.[97] The documentation of three-dimensional works and performances would certainly be more eligible for copyright protection. The individual choices in the way these expressions can be registered is based on the creative input by the director, photographer, or producer.

This implies that the communities, groups and individuals involved may not have copyrights to these expressions, while others, documenting these expres-

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[93] Berne Convention Article 2 paragraph 2.
[94] Van Zanten, 2010
[95] Van Zanten Glossary, Netherlands UNESCO Commission, 2002, p.4.
[96] Bridgeman Art Library Llt. v. Corel Corp, 1998.
[97] WIPO 2010, p. 26.

sions, may have intellectual property rights and effective control over the making available of these expressions.

A related issue is at hand in the case of performers rights. Performers rights rest in performances, sound recordings and broadcasts. Performers are described in article 3(a) of the Rome Convention to be "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works", including expressions of folklore.[98] The Rome Convention provides a minimum standard of protection on the right to prevent the broadcasting, communication to the public, the reproduction, or the fixation of a performance without the consent of the performer, or if the reproduction is made for purposes different from those for which the performers gave their consent.[99]

The Operational Directives of the Intangible Heritage Convention gives specific directions for the cession of copyrights and neighbouring rights to UNESCO for the documentary materials that are to be submitted. The set of nomination forms contains form ICH-07.[100] This form states that a signed cession of rights is required for all documentation that is submitted in the nomination file. Added to that, the nominating State Party is to further grant to UNESCO the non-exclusive right to sub-license third parties to use the materials in whole or in part, solely for non-profit educational or public information purposes. This particular provision was added because, otherwise, this paragraph might lead to a right for UNESCO to sub-license the materials to third parties with commercial objectives in mind.[101] Likewise, the alternative option of a Creative Commons Licence was removed, as these types of licences are difficult to control after they have been issued. The current version of the ICH-07 file stipulates that the nominating State has to certify that there is in no way whatsoever a violation or an infringement of any customary practices governing access to the heritage depicted or incorporated, and that it contains nothing obscene, libellous or defamatory.[102]

The question remains whether the more traditional communities are aware of the implications of these types of licences. Consenting to the nomination of a certain element of intangible cultural heritage may not imply consent in making the documentation available in whole or in part for all the world to see. In particular in view of the presentation of these materials on the internet, it might be wise to point out that an active policy on awareness raising regarding the im-

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[98] WPPT, Article 2a.

[99] Rome Convention Article 7.

[100] http://www.unesco.org/culture/ich/index.php?lg=en&pg=00184, (the " Forms Page" last visited 15 December 2010).

[101] A first version of the file included a reference to a creative commons licence as an alternative to the cession of rights. See Belder, 2010.

[102] ICH-07 paragraph 4.

plications of making documentation available might be in order. It may also be advised, that there is an option that the consent may be restricted to certain levels of access by the general public.

5.A.6. WIPO and the protection of intangible cultural heritage

5.A.6.1. WIPO

The task of the World Intellectual Property Organization (WIPO) is to administer the major intellectual property Conventions.[103] This specialised agency of the United Nations has come to play an important role in the discussions on the protection of traditional knowledge and expressions of Folklore. This has resulted in the recent negotiations that are to conclude in a sui generis instrument, or, as is formulated in the mandate of the Assembly, "the text of an international legal instrument" (or instruments). This text is to contain provisions to ensure the effective protection of traditional knowledge (TK), traditional cultural expressions (TCEs/Folkore) and Genetic Resources. Initially it was thought that this should lead to a result by 2011, but the term was extended to 2013.[104]

5.A.6.2. Protecting Expressions of Folklore by intellectual property rights

Intellectual property rights are considered to be elementary tools in the protection of innovation and creativity. A worldwide framework of intellectual property law has harmonised international and national legislation on the protection of intellectual property. International treaties implemented in national law protect exclusive property rights like copyright, which, under the Berne Convention and WTO's Trade-Related Intellectual Property Rights (TRIPS) Agreement, automatically come into being from the moment of the creation of a work of art, science or literature. The system also provides for the protection of industrial property against unfair competition and the protection of patents, trademarks, and geographical indications. The TRIPS Agreement also regulates the protection of strade secrets and the disclosure of confidential information. The international protection of intellectual property represents large-scale economic interests and has been, since the introduction of the TRIPS, completely integrated in the world trade system.

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[103] Including the Berne Convention on Copyright signed in 1886, last revision Paris 1971; the Paris Convention on Industrial Property signed in 1883; the Rome Convention on the rights of producers, phonograms and broadcasting organizations, signed in 1961; the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), both adopted in 1996.

[104] Decision of the Assembly of Member States of WIPO ,20th Ordinary Session (October 2011), Agenda Item 31.

The system contains certain certain flexibilities as to the pace and scope of implementation, in particular in view of the position of developing countries. This cannot hide the fact, however, that these flexibilities are only for a limited period of time, and are intended to become extinct in the years to come. The final outcome is the result of the process of international trade negotiations.[105]

The incentive provided by the temporary monopoly granted by intellectual property rights makes it attractive for investors to make use of traditional cultural expressions in the development of new inventions and creations. At the same time, the protection of intellectual property is only granted for a limited period, and is based on a trade-off between the creator/inventor having legal protection against unauthorised use and the surrender, after a limited period of time, of the property to the public domain, and in the case of copyright meanwhile contributing to cultural diversity and freedom of expression. The bond between the allocation of exclusive rights and the public interest is also apparent in the system of copyright law, which includes, besides the limitations in time, exceptions and limitations to the excercise of his rights by the exclusive right holder that are based on public interest considerations. [106]

Copyright not only regulates the allocation of exclusive exploitation rights but also grants protection to right holders against the misuse or misappropriation of creative expressions. This essential aspect of intellectual property protection is of interest in view of the cultural rights claims of some indigenous communities that seek permanent control over their expressions.[107] At the same time, as mentioned earlier in paragraph 5A1.2, non-Western States increasingly stake their claim in the international trade debate, and want their interests, and/or the interests of their indigenous communities represented in the forum of debate on the protection of intellectual property rights.
The inconsistencies between the needs of indigenous communities in developing countries and the global system protecting intellectual property rights have led to initiatives regarding the development of a sui generis instrument in the context of intellectual property rights.[108] As will be outlined in the next paragraph, this instrument is to provide defensive protection and seeks to provide a limitation to the excercise of copyrights by intellectual property right holders to new works that are based on traditional cultural expressions without the free, prior and informed consent of the communities involved.

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[105] This process is discussed by Claessens, 2009. She has concluded that currently the delicate balance between the interests of developing countries, the protection of investments and the reinforcement of market power results in asymmetrical bargaining power in the negotiations on trade treaties. p. 548-554.
[106] Berne Convention Article 2bis, Article 6bis, Article7, Article 10 and 10 bis, and Article 13. 107 See also chapter 7. and the discussion of cultural rights in paragraphs 7.3 ff.108 See also Chapter 2.4.3.
[107] Anderson 2009, 172-187; Janke 2009, p. 185.
[108] See also Chapter 2.4.3.

5.A.6.3.1. Protecting Expressions of Folklore by a sui generis right

Since 2001, the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (IGC) has been active in developing new policy options and legal mechanisms by considering a list of issues regarding the protection of Traditional Knowledge (TK) and Expressions of Folklore (EoF) and Genetic Resources (GRs) which would lead to a draft set of 'Revised Objectives and Principles'. The WIPO considers Expressions of Folklore as partly overlapping, and partly to be distinguished from Traditional Knowledge. This distinction may be explained by the distinctions in the protection of technical or scientific knowledge by industrial rights and artistic works in copyrights and related rights. The importance of Traditional Knowledge to Western biotechnology and the pharmaceutical industry makes it difficult to reach a consensus on protective measures that may restrict access to and uses of the knowledge held by traditional communities. The Western distinction between creation (man-made) and discovery (nature) is of course relevant here.[109]
At the start of this ongoing process, the emphasis was first on an inventory of all relevant positions and opinions. The WIPO had issued extensive reports on questionnaires and background studies leading to the ultimate Draft Text in 2004.[110]
At the same time, the WIPO started work on the compilation of an inventory of all relevant cultural expressions, which besides contributing to understanding the scope of the subject-matter to be protected, also was to establish a registry or documentary repository of protected expressions.

It was decided that the object of protection under the new instrument should be

- a product of creative intellectual activity, individual or communal;
- characteristic of a community's cultural and social identity and cultural heritage;
- be maintained, used or developed by such a community, or by individuals authorised by the community in accordance with customary law and practices.

The instrument is to provide defensive protection against:
- a wide range of uses and forms of reproduction and dissemination without free, prior and informed consent;
- the failure to acknowledge the source of the TCEs/EoF;
- distortion, mutilation or other derogatory action;
- acquisition or exercise of IP rights over TCEs/EoF or adaptations thereof;
- use which creates a misleading or disparaging link to a community.

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[109] WIPO GRTKF/IC/17/5. See Koopman, 2009.
[110] Starting with the Reports of the Two Fact-Finding Missions in 1999. See Blakeney, 2000. All the documents are made available on the website http://www.wipo.int/tk/en/igc/, last visited 15 December 2011.

Although it was stressed that it was important to take a holistic approach to the protection of TCEs, the development of one single sui generis instrument for both TCEs and Traditional Knowledge was a step too far.
As the early developments in the protection of intangible heritage concentrated on the discussion of folklore, it stands to reason that indigenous communities are the first to come to mind when discussing the protection of traditional cultural expressions, especially in view of their historic relation to their local territory. However, as the American Folk Society has noted, relevant communities may also have their roots in other regions, like the Amish in Pennsylvania, the Cajuns in Louisiana, and the African, Asian, and Latin American communities in the USA.[111] This implies that immigrant communities are also considered relevant in the discussion of the protection of their intangible heritage.
The issue of group or communal rights for TCEs is addressed in draft article 2 regarding the beneficiaries of the instrument.[112] The beneficiaries of protection should be the peoples or communities or the whole population of the country concerned. The rights themselves could be vested in either the communities, an agency or an office. The commentary to the draft states that this sui generic instrument is intended primarily to benefit communities, also when the particular expression has been developed by an individual. The product should therefore be understood as "not 'owned' by the individual but 'controlled' by the community according to indigenous and customary legal systems and practices". The benefits of the sui generic instrument are thus projected to fall on communities and only indirectly on individuals.

Regarding the terms of protection, article 6 stipulates that this protection should last for as long as traditional cultural expressions continue to meet the criteria of article 1.

Article 10 of the draft regulates the complementarity of this instrument in relation to existing intellectual property rights. It is clear that the draft text does not contain any provision that might lead to the creation of exclusive exploitation rights as such. Moreover, the complete text lacks any reference to 'cultural property', which may indicate the sensitivity between the negotiating participants regarding the property rights/cultural expressions nexus. Therefore any misgivings concerning the allocation of previously non-existing group rights in property law are avoided. However, this Draft makes clear that the provisions should be concurrent with the protection available under existing IP law.

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[111] WIPO/GRTKF/IC/7/3, paragraph 25 Footnote 27.
[112] The Draft Provisions were formulated in WIPO document WIPO/GRTKF/IC/9/4. The first version of the Draft Provisions on Traditional Cultural Expressions was published in WIPO/GRTKF/IC/7/, as a result of the seventh session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folkore in November 2004.

5.A.6.3.2. Further steps towards the international legal document

In 2009 the WIPO General Assembly established three Intersessional Working Groups to discuss the development of the new instrument to be presented before the General Assembly in 2011. The working group on Folklore then set to work on the realisation of the new instrument. The whole process is to be transparent and open to observers from local communities and other stakeholders. The agenda, working documents and minutes from the meetings are published on the WIPO website.[113] If there is any document that is not made available officially, there is always one of the many groups of observers ready to inform the general public.[114] As the minutes demonstrate, the Draft provisions focus on establishing a defensive right against abuses of traditional cultural expressions, giving a dominant role to the cultural community.

The discussions on the new instrument are organised in groups and subgroups, containing affiliations of countries, expert groups and groups with similar interests. It is of note that representatives of minority groups are also active in the discussions. A first Draft was published in December 2010, reflecting the suggestions and positions of the negotiating states during the December meeting in Geneva.[115] The Draft discussions concerned the core obligations in the text; article 1: the subject matter of protection; article 2: beneficiaries; article 3: the scope of protection; article 4: collective management of rights; article 5: exceptions and limitations; and article 6: term of protection.
In the 2011 meetings of the working groups and the intergovernmental Committee the discussions continued. During the 18th Session of the Traditional Cultural Expressions Group the discussion focussed on the draft articles on the definitions in article 1, the beneficiaries in article 2; the scope of protection in article 3; and the exceptions and limitations in article 5. The continuously amended articles were edited into two versions, one more flexible and another more narrowly defined. In the following sessions these versions are to be discussed further.

In the overall discussion, some national states are more active than others, although these kinds of meetings often entail active interaction in the back office. On the floor, however, States from the global South like Mexico and India are very active in contributing amendments that broaden the scope of protection for traditional cultural expressions. On the other hand, the Western countries like Canada, the United States and the EU Member States, contribute amendments

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[113] The records of the July Meeting of the Intersessional Working Group I were released on 27 September 2010 as WIPO/GRTKF/IC/17/INF/7.
[114] See for example the contributions on the website of IP Watch: the http://www.ip-watch.org/.
[115] WIPO/GRTKF/IC/17/9. Draft Articles, In Session Version, Geneva December 6 to 10, 2010. Published on the website ip-watch.org.

that make sure that this text stays in line with existing IP and cultural heritage instruments.

Many of the amendments repeat earlier versions, as during the last few decades probably all potential variations have been discussed at some point in time. One of the reasons for this may be that although the contracting partners are the same, the representatives are new at the table, and may take a fresh approach in the discussions. At the same time, earlier discarded amendments may find a new audience who are more willing to accept them. Other amendments are made to edit the text and to avoid duplicate requirements.

The submissions from the European Community and its Member States in response to the Questionnaire were issued as an Annex to the Tenth Session of the IGC. The European Community emphasised the principle that in recognising the aspirations and expectations of indigenous communities regarding their TCEs, the first step is to enable non-Western indigenous communities to use the existing IP system, both nationally and internationally (paragraph 1(a)). The EC recognised that the specific characteristics of TCEs (i.e. their evolving character, the difficulty in identifying their creator, the concept of the unique character of a protected work and the duration of the protection) make their protection by copyright unsatisfactory. Moreover, the protection granted to performers and the recordings of expressions of folklore in article 2(a) of the WIPO Performances and Phonograms Treaty is considered to emphasise that TCEs as such are not to be regarded as protected by copyright. Furthermore, the protection of rights of performers of TCEs is to be considered as regulated by the existing framework of neighbouring rights (sub. 3). The EC further stated that other IP rights may also be useful, especially in the perspective of trade. In particular Trademark Law, the law on industrial designs, the laws on geographical indications as well as the concepts of unfair competition or unfair trade practices provide protection against wrongful commercial use.

In addition, the European Union emphasised that most TCEs in Western jurisdictions are in the public domain and are open to free use by anyone. It was reminded that in the context of IP, the Western concept of the public domain presents one side in a delicate balance between the granting of a temporary monopoly in exclusive private property rights and the protection of the public interest in the public domain, cultural diversity and freedom of expression. A protective regime is not to lead to any obstacles for those that are inspired by these TCEs (paragraph 1.h,i). This official EU comment demonstrates the general attitude of the Western states, that the existing IP rights are regulated in the framework of TRIPS, and are to accomodate the global community in toto. The existing framework of copyright is thereby guiding in the exploitation of private property rights pertaining to cultural expressions, it allows for sufficient arrangements in national laws protecting indigenous cultural expressions and that there-

fore any further claims should be articulated in the sphere of cultural rights.
The general approach of the United States may be described as not committing itself to any direct results in the near future. The official response to the questionnaire emphasised that the broad overall objective of the protection of IP is the promotion of creativity and innovation. The discussion of the protection of TCEs is, in the perspective of the US, to be considered more as policy objectives, as "encouraging, rewarding and protecting authentic tradition-based creativity and innovation". The discussion in the IGC was thereby thought to be an extremely useful tool in the advancement of the interests of the economic and cultural development of local communities. But, given the fact that there is no consensus between all the different stakeholders in the debate, any discussion of specific details with regard to definitions, or the stipulation of specific legal norms or sanctions, was considered premature. Based on these contributions, it may be assumed that the approach of the United States and the European Community will not lead to a final text in the near future.

The US qualified the negotiations as an aid in articulating 'policy objectives'. In any case, the states that are willing to subscribe to this instrument are to decide how the provisions in this sui generis instrument are to be implemented in their national copyright laws. Meanwhile, the influence of the WIPO debate is apparent in the development of national protective regimes the copyright laws in developing countries like Ghana and Indonesia. It is of note, that both the Ghanean as well as the Indonesian copyright law framed the protection of indigenous cultural expressions as a defensive right against unauthorised uses and not as an exploitation right in itself.

Ghana is an example of an African state with an advanced system of national protection of folkloric expressions. Section 4 in the Copyright Act of 2005 (Act 690) provides for the protection of folkloric expressions and in Section 17 these rights to folklore are held in trust for the people in perpetuity. The National Folklore Board is to grant permission before a work of Folklore is sold or offered for distribution. Non-compliance with this provision is considered to be an offence and subject to a fine (Section 44). During the WIPO negotiations Ghana was in favour of an international protective regime against the 'misappropriation' of traditional cultural expressions.

Indonesia is another example of a state that aims to provide legal protection for indigenous cultural expressions. The Indonesian Copyright law thereby regulates that the State holds the copyright for folklore and works of popular culture that are commonly owned, such as stories, legends, folk tales, epics, songs, handicrafts, choreography, dances, calligraphies and other artistic works (article 10 paragraph 2). Any person who is not a citizen of Indonesia has to seek permission to publish or reproduce the works 'from the institution related to the matter' (article 10 paragraph 3). The copyright to these works is valid without a time limit (article 31). It remains however unclear which or what type of institution exactly is to act as the state representative and has the legal capacity to grant or withhold permission.

But although many states have adopted some form of protective measures for their intangible cultural heritage, or, at least, have provided for standard protection as regulated in the Rome Treaty, and although the mandate for the Intergovernmental Committee refers to a text-based instrument in the year 2013, it is doubtful that the work will be completed with consensus between all the stakeholders. On the other hand, the view of the United States that the negotiations in themselves are contributing to the development of national protective regimes, that may or may not lead, in time, to international agreements is not without merit. It is also in line with developments in the approach of international governance to complex heritage issues as became clear in the UNESCO Conventions, that tend to increasingly grant the power to control to a lower level of governance.

It is also to be expected, in line with Underkuffler's social theory of property rights, that the debate on the sui generis instrument, as also the UN Debate on cultural heritage rights that will be discussed in chapter 7, will feed into the communis opinio on what is proper conduct in view of relations with indigenous communities.[116] And likewise, that with the recognition of indigenous communities as actors in the process of protecting or safeguarding cultural heritage, this will also become part of the network of relations between local communities, governments and the international community. This may be expected to lead, in time to adaptations in the interpretation of the scope of intellectual property rights by national courts, and will also have its effects on the excercise of intellectual property rights by right holders that are compelled to adhere to basic principles of corporate social responsibility.

5.A.7. Concluding remarks

The protection of intangible heritage first developed in the context of copyright protection.

The Stockholm revision of the Berne Convention of 1967 and the WPPT of 1996 both specifically addressed the protection of works of folklore. Meanwhile, several Model Provisions on the protection of intangible heritage were developed containing provisions on defensive mechanisms against the misuse of traditional cultural expressions.

At first, the scope of protected subject-matter was derived from the object of protecting copyright and related rights. With an increasing focus on the social and cultural conditions of intangible heritage, also material expressions of intangible heritage were seen as expressions of folklore.

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[116] See also Chapter 2.4.3.

In the development towards a sui generis instrument, the WIPO has come to refer to the protection of Folklore/Traditional Cultural Expressions, with the emphasis on providing a defence against abuse by exploitation without the permission of the right holder. UNESCO would focus on the traditional elements of these cultural expressions, and discuss them in the framework of safeguarding cultural heritage.

The Intangible Heritage Convention provides for a new step in the relation between national government and local communities. States Parties to the Intangible Heritage Convention will first have to recognise the bond between communities and their representatives as they have to obtain their 'free, prior and informed consent' if they want to file an application for the Lists. Also, State Parties will have to apply their judiciary and executive powers to comply with the obligation to engage in policies and programmes that are aimed towards the awareness of the existence of - and the necessity for - the safeguarding of valuable expressions of intangible heritage. In this, all stakeholders in immaterial heritage, the first right holders, the communities involved as well as the public at large are being recognised.

With regard to the development of the criteria for insertion on the Lists, the focus of the World Heritage Convention was first on the protection of objects of outstanding value to the cultural heritage of mankind. After the Nara Conference in 1994 the focus shifted to the context of the original cultural environment and to the values of authenticity and integrity. The List was to contain representative or outstanding examples of cultural heritage objects. In the criteria for the Lists of the Immaterial Heritage Convention the value judgment inherent in the classification of 'outstanding value' was avoided. Instead, it is left to the communities and groups that are related to the intangible heritage to declare the value of the intangible heritage. Only if the communities involved declare their commitment, will the discussion turn to the question of whether the insertion of the particular element of intangible heritage enhances the diversity of the List.

With regard to the obligations for inventories of national intangible heritage as well as the nomination procedures for the Heritage Lists, the protection of copyrights and related rights to the documentary materials alone and in relation to the rights of the authors and performers of the expressions and manifestations of (intangible) cultural heritage needs close surveillance. As it stands, it could be that the local cultural communities involved may not be expected to fully understand the scope of their informed consent with regard to making the documentation available by digital information channels.

The latest developments in the WIPO confirm the tendency towards the increasing recognition of the rights of local communities to their cultural expressions. The instrument that is being developed and which was due to be discussed at

the WIPO General Assembly in 2011 has the characteristics of a sui generis instrument, which means that it will exist independently from any other legal instrument. However, as the Draft text of 2004 and the ensuing discussion documents have shown, the instrument should also be considered as complementary to existing international intellectual property law. It is expected that the instrument will provide a next step in the protection of secret TCEs, the granting of defensive rights against misuse, and the confirmation of the position of the local cultural community with regard to its intangible heritage. However, it is unclear whether there is a sufficient sense of commitment amongst the Western states. On the other hand, as was stated by the United States' submission to the Questionnaire issued by the WIPO, the text-based negotiations also provide a forum for indigenous communities and developing states, and these negotiations will also contribute to a growing awareness of the issues at stake, and will contribute to a national, regional and local framework of protection.

As to the interaction between the UNESCO heritage conventions and the WIPO treaties, it is to be expected that the system of registration and monitoring in order to comply with the obligations to safeguard the intangible heritage on the territory of States Parties under the Intangible Heritage Convention will feed into the organisation of defensive mechanisms in the WIPO instrument. On the other hand, it would be a positive development if the new WIPO instrument would be considered as a guideline for making documentary materials available regarding (intangible) cultural heritage as is required in the UNESCO Heritage Conventions.

V.B.
THE SAFEGUARDING OF INTANGIBLE HERITAGE IN THE NETHERLANDS

5.B.1. Introduction

The focus of section B of this chapter is on the Dutch implementation of the UNESCO Convention on the Safeguarding of Intangible Heritage. The Netherlands have ratified the Convention in March 2012, with the effect that the Convention entered into force in August 2012.

There is no Dutch law dedicated to the protection of intangible cultural heritage as such. The discussion of the protection of rights to Traditional Cultural Expressions in the WIPO, as discussed in paragraph 5.A.7. , would have to be considered within context of Dutch Copyright protection and the protection of phonograms and performers' rights. As such, there are no specific provisions relevant to the protection of TCEs. On the other hand, the general provisions regulate the protection of right holders' traditional cultural expressions under the general conditions of copyright and neighbouring rights' protection. Paragraph 2 will provide a brief overview of the relevant provisions.

The lack of any legal provision with a direct reference to traditional cultural expressions does not mean that intangible cultural heritage is not an object of discussion in Dutch society. The effects of globalisation and the developments in the European Union and the discussions on the position of refugees and immigrants come together in questions on what could be regarded as national, regional or local identity markers. This also makes intangible cultural heritage a subject-matter that is related to the degree of integration of immigrant communities, or, on the other hand, to the emancipation of these communities. An essential feature of intangible cultural heritage is that it is a time-honoured practice, carried out by generations and that it is still a living practice today. What would be considered as representative Dutch intangible cultural heritage could range from the celebration of the birthday of Saint Nicholas on 5 December, to tradition-

al dress in local communities, to local traditions in wedding ceremonies.[117] On the other hand, the UNESCO Convention means more than just the institution of Representative Lists. The main objective is the safeguarding of living intangible heritage; the Lists are just one of the means to this end. However, an overall discussion of the protective measures that are related to the wide field of Dutch intangible cultural heritage is outside the scope of this study. Paragraph 3 of this part B describes the ratification of the Convention in the Netherlands, followed by some concluding remarks and recommendations.

[117] See for a general introduction to intangible heritage in Dutch society Dibbits, 2011.

5.B.2. The context of EU Copyright law

The Information Society Directive (ISD) harmonised the rights of reproduction and communication to the public, including a closed list of the limitations and exceptions to these rights.[118] Besides a mandatory exclusion for certain acts of temporary reproduction like caching in computers, the ISD gives a list of uses without permission by the right holder which provide the member states with a catalogue of available options to choose from in article 5 paragraphs 2 and 3.[119] These exceptions include private uses; uses in cultural heritage institutions; uses in non-commercial institutions like hospitals or prisons; uses in education; uses in helping the disabled; use in the press; uses in parody, pastiche or caricature; public security; politicial speeches; religious uses; architectural works in public places; incidental uses of a work; use for advertising the sale or public exhibition of artistic works; use for the reconstruction or repair of buildings; and a de minimis exception. The exceptions that member states choose to implement are to comply with Article 5 paragraph 5 providing a three-step test, so that these exceptions shall only refer to 1. 'certain special cases; 2. not in conflict with normal exploitation and 3. "not unreasonably prejudice legitimate interests".[120] The ISD was implemented in the Dutch Copyright Act revision of 2004.[121]

5.B.2.2. Protection of the rights to Traditional Cultural Expressions in the Dutch Copyright Act and the Dutch Neighbouring Rights Act

The only explicit reference to Traditional Cultural Expressions (TCEs) is in article 1.a. of the Dutch Act on Neighbouring Rights, declaring the provisions of this act applicable to performers of works of literature, science or art and also of expressions of folklore.

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[118]The Information Society Directive (2001/29/EC 22 May 2001) - also known as the "EU Copyright Directive" (EUCD). A full discussion of this directive, its implications for Dutch copyright law and its effects on the scope of the rights of right holders to cultural expressions is outside the scope of this study. However, since this Directive came into force, it has been a subject of debate. In 2008 the publication of the Green Paper on Copyright in the Knowledge Economy (Brussels COM (2008) 466/3) announced the revision of the Directive to adapt the European framework to new societal and technological developments. See van M. Eechoud, 2009, p. 263-296; and Hugenholtz and Senfleben, 2011.

[119] In the recent Infopaq II decision the CJEU held that under the exemption in Article 5(1), an act of reproduction must "not have independent economic significance", or "enable the generation of additional profit" or lead to a modification of a work. CJEU Case C-302/10, 17 January 2012.

[120] The same test appears in the Berne Convention article 9 paragraph 2; the WIPO Copyright Treaty article 10 and TRIPS article 13. See also chapter 6A.3.2.

[121] Staatsblad 2004, 409 and 336.

In other words, the protection of rights to TCEs is subject to the general provisions in Dutch Copyright Act[122] and the Act on Neighbouring Rights[123]. The following section will present a brief outline of the Dutch legal provisions on the rights of the author, the rights of performers and rights to the documentation of TCEs.

Dutch copyright law grants an exclusive right to the creator of a work of literature, science or art to publish or to copy under the limitations as described in the law. [124] This right arises at the moment of the creation of the original work, and lasts until 70 years after the first day of the year following the year of the death of the author. The Dutch Supreme Court has defined a copyright work as bearing a unique, original character as well as the personal imprint of the author. This interpretation is consistent with the ECJ's Infopaq I decision which defines a copyright work as the author's own intellectual creation.[125] The copyright consists of exploitation rights that may be transferred or licensed, and moral rights which are non-transferable. Exploitation rights may only be transferred with the permission of the right holder. The right of publication includes the right to decide whether or not a creative work is to be made public. The publication of a work is an important threshold on the limitations imposed by the law, to allow for certain uses without the explicit permission of the right holder. Limitations to copyright, besides the time limitation, are enumerated in articles 15-25 DCA and concern limitations with regard to to the correction of market failure, like the use of a work for educational purposes (art. 16 DCA), lending rights (article 15c DCA), or, to a certain extent, private copies (article 16b DCA) and limitations in the public interest. Most relevant are the right to copy works that are situated in public spaces and the preservation copy which gives cultural heritage institutions the right to make a copy of a work that is in danger of being irreparably damaged (article 16n DCA).

5.B.2.3. The protection of performers of TCEs

Performers of expressions of Folklore are protected under article 1a of the Dutch Neighbouring Rights Act (DNRA). This gives performers the exclusive right to grant permission for the recording of a performance or the reproduction

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[122] Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht (Dutch Copyright Act - DCA).

[123] Wet van 18 maart 1993, houdende regelen inzake de bescherming van uitvoerende kunstenaars, producenten van fonogrammen of van eerste vastleggingen van films en omroeporganisaties en wijziging van de Auteurswet 1912. (DNRA)

[124] Art. 1 DCA.

[125] Supreme Court 30 May 2008, LJN BC2153, (Endstra/Nieuw Amsterdam); CJEU16 July 2009, Infopaq I International/Danske Dagblades Forening, case C-5/08.

thereof. This also covers the sale, rental, lending, delivery or any other way of bringing the work into circulation, as well as the broadcasting of this recording that is subject to permission from the right holder (article 2 paragraph 1 DNRA). However, this right is also subject to the limitations enumerated in article 2, amongst which are rental rights (article 2 paragraph 3 DNRA) or use without permission for educational purposes (article 2 paragraph 8 DNRA). The moral rights of the performer are protected by article 5, meaning that the performer has the right to object against publication without a reference being made to his name, or under another name, and the right to object to any changes to his work, or to any adaptation that may be explained as damaging the work or the reputation of the performer. The exploitation right may also belong to the patron of the work in the context of a contractual arrangement. Also, if the performance is made in the context of a film, the rights are considered to belong to the producer of that film (article 4 DNRA; article 45a-g DCA). The period of protection granted to neighbouring rights is 50 to 70 years after the first recording.[126]

5.B.2.4. The protection of rights to the documentation of TCEs

In view of the obligations in UNESCO's Intangible Cultural Heritage Convention to provide for inventories and documentation, the right to the documentation of TCEs also merit attention.

The producer of phonograms (sound recordings) has the exclusive exploitation rights to his recordings (article 7). The producer of the first recording on film also has an exclusive right to the reproduction, the exploitation and the first broadcasting of the film (article 7a).

Limitations to these exploitation rights are similar to the limitations on copyrights, and include limitations in the public interest like the broadcasting of news items, or for educational purposes (article 10 a-k).

The documentation of TCEs by the recording of performances or photographs or films of traditional customs, or customary dress makes it also relevant to refer to the portrait rights of those who are depicted. If the picture can be qualified as a portrait, i.e. if one can recognise the features of an individual person, the portrait right gives the depicted person the right to grant or withhold permission for the publication of the portrait. When a portrait is made under the patronage of the portrayed, this gives the portrayed person the right to withhold permission for publication (article 20 DCA). If a portrait is made without the consent of the

[126] As regulated in the recent implementation of Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

portrayed, he may object against publication if he or his heirs have a reasonable interest in doing so (article 21 DCA).

5.B.2.5. Regarding the digitisation of the documentation of traditional cultural expressions.

Cultural Heritage Institutions in the Netherlands are active in the digitisation of their collections. In the course of this work, they have been increasingly confronted with problems regarding orphan works, those works, that because of their age may be expected to be protected by copyrights, but of which the right holder is unknown or cannot be traced.[127] Because the holder of a right to a particular work has to grant permission for the publication or the copying of this work, the fact that these right holders need to be traced is a major impediment in the realisation of the creation of digital inventories and databases of cultural heritage collections.[128] Moreover, it is often not even clear whether the original author is the right holder, or whether he is the only right holder, or if these rights have been transferred to others. That it is difficult to trace the right holder is because under the binding law of the Berne Copyright Convention there is no obligation to register a copyright.[129] A first step towards finding a solution may be the proposal for a Directive on Orphan Works regarding inter alia printed works, cinematographic or audiovisual works contained in the collections of cultural heritage institutions.[130] The Directive contains the requirement of a diligent search, as well as a reference to a list of the sources that should be consulted in the search for the right holder (article 3). Important is the principle of mutual recognition so that the status of orphan works in one state is recognised in one of the other 27 member states (article 4). Be that as it may, the effort to search for the holders of rights to all the works in heritage collections is still a serious impediment to digitisation projects.

In April 2011 the Dutch Government issued a policy letter on its 'targets' with regard to copyright protection.[131] The Letter refers to the Government's respect for the value of the protection of cultural heritage, and the importance of the work

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[127] S. van Gompel, 2007, p. 669-702; M. Elferink & A. Ringnalda, de Lex, 2009; Ringnalda, 2010.

[128] See for the costs: A. Vuopala, 'Assessment of the Orphan Works Issue and Costs for Rights Clearance', European Commission, DG Information Society and Media, February 2010, available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf.

[129] " ...The enjoyment and the exercise of these rights shall not be subject to any formalities...", Berne Convention article 5 paragraph 2.

[130] Proposal for a Directive on certain permitted uses of orphan works, Brussels 24.5.2011 COM (2011) 289 final, article 1.

[131] Kamerstukken II 2010-11, 29 838, no. 29.

of cultural heritage institutions in digitisation projects like Europeana. Policy Target Four therefore explicitly refers to support for this Proposal for an Orphan Works Directive, provided that this would support the large-scale digitisation of cultural heritage collections. The same Target Four discusses the revision of the system of exceptions and limitations in Dutch Copyright Law, with the intention of investigating whether the potential of a more flexible approach in a fair use exception would be in the interest of innovation and creativity.[132] This implies that a revision of the Dutch Law on Copyright protection would protect the interests of cultural heritage institutions in the digitisation of their collections.[133]

5.B.3. The ratification of the Convention on the Safeguarding of Intangible Cultural Heritage

In December 2009, the Dutch Minister informed Parliament of his intention to ratify the Convention.[134] The procedure was to be completed before the end of 2010; however, the ratification procedure in the Netherlands also includes the consultation of Aruba, Curacao and St. Maarten, and this has led to a delay.[135] In March 2012 the Minister issued the formal letter to Parliament, starting the 'silent' procedure for ratification.[136] The Convention came into force in August 2012.

The Dutch Government has recognised the Convention as an important instrument both for the protection of Dutch intangible cultural heritage as well as for the safeguarding of international cultural heritage. The implementation of the Convention is to be considered within the context of the implementation of the World Heritage Convention and the Convention on the Diversity of Cultural Expressions.
The letter emphasised that in countries in Africa, South America and Asia cultural heritage is mainly intangible, and that it is important to convey solidarity with the efforts of these countries to safeguard their intangible cultural heritage. Therefore, the Netherlands is to contribute to the worldwide implementation of

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[132] Ibid., p.12.
[133] See also the pending study on Cultural Heritage Institutions, Copyright and Cultural Diversity, Centre for Intellectual Property Rights Utrecht: cultivate-cier.nl (last accessed 1 July 2012).
[134] TK 2009-2010, 31 482, no. 53.
[135] TK 2010-2011 32 500 VIII, no. 177.
[136] SG 2011-2012, 33 206, Letter of the Minister van Buitenlandse Zaken Rosenthal of 2 March 2012, announcing the procedure based on Article 2, paragraph 1 and 2 and Article 5,paragraph 1 and 2 of the Rijkswet goedkeuring en bekendmaking Verdragen.

this Convention to support states that are under-represented on the World Heritage List. That is also the reason why, with regard to the nominations for the Lists in the Convention, the Minister states that he sees no need for immediate action, also because there are many stated parties from those areas that have applied for the Representative List and they should have first access to the List.

The Minister's letter of 2011 describes the effects of the ratification of the Convention in the Netherlands mainly in terms of policy. The central obligation of the Convention is that of the identification of intangible heritage in co-operation with the relevant communities, groups and non-governmental organisations. This bottom-up approach is to be supported by Dutch organisations which are active in the safeguarding of intangible heritage. These organisations are to work with a focused agenda of awareness raising with regard to the importance of safeguarding intangible heritage to Dutch cultural life. On a practical level, that would mean that existing inventories should be regularly updated and combined so as to provide for the data for the regular reports that are expected from a state party to the Convention.

In 2011, in consultation with the Dutch Ministry of Culture, the Dutch Centre of Folk Culture, the Dutch Open Air Museum and the Meertens Institute decided to participate in the Centre for Dutch Folk Culture and Intangible Heritage[137] (the VIE Centre) with the specific purpose of meeting the obligations in the Convention on safeguarding intangible cultural heritage. One of the first acts of this institution was to proclaim the Year of Intangible Cultural Heritage in 2012, the year of the expected ratification.

The Minister's letter of 2012 explains that the main obligation of the Convention is to set up inventories of exisiting intangible cultural heritage in the national state. In conformity with the bottom-up approach, the Minister therefore states, that as this regards living cultural heritage of existing communities, it is important that they are involved in the preparation of the inventories. Chosen representatives of these communities are societies and groups or organisations that consist of members of those communities, or societies and groups and organisations that are actively engaged in the practices and the safeguarding of this intangible cultural heritage. This should lead to an interactive, open access on-line database. As the Minister states, as this inventory- database belongs to society, it should be made by society and as such will benefit society.[138]

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[137] Het Nederlands Centrum voor Volkscultuur en Immaterieel Erfgoed (VIE). http://www.volkscultuur.nl/over-ons_4.html, last accessed 1 July 2012.
[138] Letter 2012 p.2.

5.B.4. Concluding remarks

In the explanation of the intention of the ratification of the Convention the Netherlands demonstrated that the protection of international interests is an important factor. This is also the reason why the Netherlands has not yet declared its intention to prepare a nomination regarding a specific element of intangible cultural heritage.

As was made clear in the letter of the Minister of 2011, the Dutch government understands that in the national sphere, the main obligation is the inventory and the reports in articles 11 to 15. Also important is to support activities regarding awareness raising concerning the meaning of intangible cultural heritage in a cultural and social context. With the VIE Centre, the Netherlands has the necessary organisation to meet the obligations under the Convention in place. However, it is important to realise, that the commitment to adopt policies with regard to education, research and awareness raising in articles 13 and 14 may not be sufficiently dealt with by one organisation only. The pervading message of the Convention is that a botoom-up approach is called for, and this means that the safeguarding of intangible heritage should be made a fixed component in all policies that regard social life.

The 2011 letter emphasised that on a national level intangible cultural heritage is to be safeguarded by the communities, groups and organisations that are actively involved in this heritage, and that the role of the government would be restricted to policy making with regard to facilitating and providing the means for the realisation of targeted programmes. At the same time the safeguarding of Dutch intangible cultural heritage is to provide a contribution to the idea of a Dutch identity. In this respect, the safeguarding of intangible cultural heritage may well prove to be an important contribution to Dutch relations with other member states in the European Union, as well as Dutch self-awareness in the context of increasing delegated powers to a central European government.
At the same time. the Dutch identity also matters to descendants from former colonised territories or second generation immigrants who have the Dutch nationality. Likewise, the intangible cultural heritage of their cultural community is also part of the Dutch identity.

The implementation of this Convention is to take place with both the World Heritage Convention and the Convention on the Diversity of Cultural Expressions in mind. Especially in (trade) contacts with countries outside of the European Union, this Convention, and in particular the Lists of Representative Elements, may contribute to the enhancement of cultural exchanges and the understanding of other cultures.

It is therefore to be recommended that this Convention will be taken into ac-

count in diplomatic and trade exchanges with third countries. This would also mean that the Dutch business community, as well as the international corporate community, could be involved in the awareness raising programmes.

The last recommendation regarding the implementation of this Convention is that the organisations active in the field of the safeguarding of intangible heritage are encouraged to take specific consideration of the intangible cultural heritage of those communities that are relatively new in Dutch society.

VI.
THE PROTECTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS

6. Introduction

The focus of part A of this chapter is on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (UCDCE) of 2005. Chapters 3 and 4 discussed the protection of cultural heritage in the context of illicit trade and as objects of outstanding value. Chapter 5 focused on the expansion of the cultural heritage concept in the UNESCO Convention on the safeguarding of intangible cultural heritage. All these normative instruments are based on the principle that in order to protect the cultural heritage of the past and the living cultural heritage as embodied in intangible cultural heritage, then cultural diversity should be protected and enhanced.[1]

This chapter will discuss the UNESCO activities leading up to the adoption of the Convention in 2005. This will demonstrate that the central issue in this study - the relation between national and international interests; private and public interests; and the position of communities vis-à-vis the interests of international trade - are also relevant in the protection of the diversity of cultural expressions. Section B of this chapter will focus on the position of the European Union in the operationalisation of the Convention, followed by an overview of the effects of the Convention for the Netherlands as a state party.

[1] See the NARA Document on authenticity, paragraphs 5-8, ICH, preamble.

VI.A.
THE PROTECTION THE DIVERSITY OF CULTURAL EXPRESSIONS IN INTERNATIONAL LAW

6.A.1. Introduction to the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions was adopted in Paris at the 33rd Session of the General Conference of the UNESCO on 20 October 2005. Only two States voted against: the United States and Israel, while four abstained: Australia, Honduras, Liberia and Nicaragua. Twelve member states of the European Union (Austria, Denmark, Spain, Estonia, Finland, France, Lithuania, Luxembourg, Malta, Slovakia, Slovenia, and Sweden), a future member (Bulgaria), and the European Community itself together deposited their ratification instruments on December 18 at the UNESCO headquarters in Paris, bringing the total number of parties to this Convention to 35 at the end of 2006. The Convention entered into effect on March 18, 2007, or three months after the 30th ratification instrument was deposited, barely 14 months after the Convention was adopted.

The Convention provides a framework for protective measures by securing cultural policies dedicated to the diversity of cultural expressions against the negative influence of globalisation and free trade. The sources of danger to the diversity of cultural expressions can be identified as cultural, physical and economic. The World Heritage Convention and the Convention on the Safeguarding of Intangible Cultural Heritage aim to protect cultural expressions of particular value against physical and cultural threats. In the protection of the diversity of cultural expressions, economic aspects are important. Cultural expressions are goods and services which are and turned into assets by cultural industries. Concerns relating to economic and cultural threats to cultural expressions require measures that regulate the economic and cultural functioning of these expressions. The threats to the diversity of cultural expressions can be external, like competition from global markets, competitive pressures, or abuses of cultural symbols. From an internal perspective, insufficient demand, or indifference to local cultural expressions can lead to the loss of diversity.[2]

When we consider the protection of the diversity of cultural expressions as the protection of assets, as objects of value, a distinction should be made between

[2] UNESCO doc CE/08/1.EXT.IGC/INF.3,p.5.

the protection of tangible or intangible items, like monuments or rituals, on the one hand, and the protection of the production and consumption of cultural goods, services and activities, on the other. The UNESCO Convention on the protection of the diversity of cultural expressions aims to provide a framework for national policies on the protection of the diversity of cultural expressions both as existing objects and manifestations as well as the protection of processes enabling the future production of cultural expressions.

Central to the UCDCE, as is stated in the preamble, is that "cultural activities, goods and services have both an economic and a cultural nature, conveying identities, values and meanings, and must therefore not be treated as solely having commercial value"[3]. The dual aim of the Convention is the protection and promotion of cultural diversity, a multiple goal that involves a belief in the value of the co-existence of multiple cultural communities. The Convention not only aims to protect already existing cultural expressions, but should also contribute to the future diversity of cultural expressions.[4] Therefore the Convention aims to protect the rights of states to have a national cultural policy in relation to the international community as well as in relation to their local communities.

Another internal duet in the Convention is the relevance of the provisions for both Western trading countries and their cultural policies, on the one hand, and the relation between the developed and developing countries, on the other. The Convention aims to protect rights and obligations for developing countries in order to overcome the fact that their relations with Western states are increasingly dominated by international trade treaties. Thus, the Convention provides for rights and obligations concerning both cultural rights and cultural policies of states that wish to adhere to the Convention.

[3] Preamble paragraph 18.
[4] Frau Meigs, 2001, p. 8.

6.A.2.1. From cultural exceptions in trade agreements to the protection of the diversity of cultural expressions

This paragraph will discuss the process leading up to the Convention starting with the trade negotiations in the Doha rounds since 1995. A report on how the UNESCO came to be the chosen venue for this normative instrument on the diversity of cultural expressions will be followed by a discussion of the principles and definitions, and the main rights and obligations as formulated in the Convention. These will be discussed as they determine both national and international obligations, and in particular how these obligations concern relations with developing countries. The final subsections deal with the position of the two main actors in the drafting process: civil society and industry.

From the start of the Doha Rounds in 1995, it was clear that the regulations on the trade in cultural goods and services would be an important issue in the trade negotiations during the following years.[5] There was a growing consensus that the creation of a 'new instrument' would be in order, although at the time it was not certain what kind of instrument it should be or under whose responsibility this instrument would be realised. The International Network on Cultural Policy (INCP) was to provide a forum for the cultural ministers of the member states of the WTO. The Network developed from 20 represented states in 1998 to 53+ in 2006.[6] The Network was to convene annually to discuss the developments towards an international legal instrument that would provide protection for the diversity of cultural expressions against the influence of the liberalisation of the world market. The core of the activities was coordinated by the contact group: Canada, Croatia, France, Greece, Mexico, Senegal, South Africa, Sweden and Switzerland. Canada led the discussions on the 'new instrument' from the very beginning. The Department of Foreign Affairs and International Trade and the Department of Canadian Heritage together took a significant initiative when they commissioned the Canadian Conference of the Arts to organise an international NGO. This NGO, that would become the International Network on Cultural Diversity (INCD), was to bring together representatives from the cultural domain in order to prepare the annual meetings of the INCP. In the end the INCD consisted of artists, collecting societies, representatives from the cultural industries, academia, cultural activists and human rights groups, and the kept a close eye on the developments towards the new instrument, preparing the meetings of the INCP, and at a later stage commenting on every proposal and

[5] Donders 2008, pp.11-13.

[6] Gateway to information on activities and projects: www. incd.net, last accessed 1 January 2012.

draft text.[7] On a national scale, this initiative was followed by the setting up of national 'coalitions' that would bring together national and local representatives of interest groups. When it became clear that the forum for the new instrument was to be the UNESCO, in many states, like in Switzerland and France, the national UNESCO committees took the lead in organizing these coalitions, or otherwise organised discussions on the developments towards the 'instrument'. This led to different approaches in different states. In France, the collecting society for copyrights figured prominently in the debate, while in the Netherlands the collecting societies remained silent on the subject. [8]

6.A.2.3. UNESCO and the protection of the diversity of cultural expressions

The UNESCO was the chosen venue for the development of the 'new instrument'. The UNESCO Constitution of 1946 contains the provision that all the activities should be pursued "with a view to preserving…the fruitful diversity of cultures" and recommends "such international agreements as may be necessary to promote the free flow of ideas by word and image".

While the United Nations proclaimed the 'World Decade for Cultural Development' from 1989-1997, the UNESCO focused on issues involving the situation of developing nations regarding education, language and their cultural conditions. The UNESCO established the World Commission on Culture and Development in 1991[9] that presented the Report `Our Creative Diversity´ in 1995.[10] The report was followed by the Stockholm Conference in 1998 that was given the mission to investigate the relationship between cultural heritage and creativity. In a background document, it was stated that '… approaches to the heritage were not diverse enough, leading to its under-utilisation as a resource for creativity and development' The Commission wished to present the transformed and transformative role of creativity in a rapidly changing world, while stating that 'Any cultural policy should envision the two domains in a dialectical relationship'.[11]

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[7] Acheson and Maule, 2003, p.8.

[8] As witnessed by the Presentation of the French Coalition UNESCO Conference in Bratislava 28-29th August 2006. The Dutch collective rights organisation BUMA/STEMRA did not issue any statements on the subject; see also the Dutch UNESCO Report by Belder and Smithuysen, 2007.

[9] Resolution 26 C/3.4 adopted by the 26th Session of the General Conference of the UNESCO.

[10] World Commission on Culture and Development, Our Creative Diversity (2nd edn, Paris: UNESCO, 1996).See also Donders 2008, p.10.

[11] BackgroundDocument,http://portal.unesco.org/culture/en/ev.php-URL_ID=18726&URL_DO=DOTOPIC&URL_SECTION=201.html, last accessed 1 January 2012.

Following the recommendations in 'Our Creative Diversity', the UNESCO convened the 1998 Stockholm Conference on Cultural Policies for Development. This Conference adopted a Plan of Action recommending the recognition that cultural goods and services should be 'treated as being not like any other form of merchandise'.[12] In November 2001, the year after the Council of Europe had adopted a Declaration on Cultural Diversity, the UNESCO adopted the Universal Declaration on Cultural Diversity, which was a non-binding instrument. This Declaration, presented by the UNESCO both as an 'ethical commitment' by the UN member states and the assignment to pursue standard-setting, awareness-raising and capacity-building activities in the areas related to the Declaration, clearly connects cultural diversity to 'the common heritage of humanity'.[13] At that time it had not yet been decided what the following step would be, as the choice was between

- a new comprehensive instrument on cultural rights
- an instrument on the status of the artist
- a new Protocol to the Florence Agreement[14]
- a new instrument on the protection of the diversity of cultural contents and artistic expressions.[15]

The 32nd General Conference then decided that a UNESCO Convention should be prepared according to the procedures in the heritage Conventions.[16]
The whole process would take place in full view of all stakeholders. This was made possible by the technological facilities provided by the Internet as used by UNESCO to publish documents, together with background documents and progress reports.[17] The civil society groups also became very active in immediately publishing their findings on the internet.

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[13] UNESCO doc. 33 C par. 2.

[14] The UNESCO Florence Agreement of 1950, amended by the Nairobi Agreement of 1976 was to ensure that the signatories would not undertake to apply import taxes or other levies to printed materials like books and other educational, scientific or cultural matters.

[15] Ibid. par.3

[16] Resolution 32C 34 UNESCO General Conference 2003. Donders 2008, p. 16.

[17] All the Reports were made available on the UNESCO site. See also Neil 2006, pp. 41-70; Donders 2008 pp.9-22.

6.A.2.4. Principles and definitions in the Convention

The principles and definitions in the Convention provide the moral framework of this Convention.[18] The first guiding principle is the principle of respect for human rights and fundamental freedoms, thus closely linking the protection of cultural expressions in this Convention to the body of international human rights (article 2.1). The second principle is the affirmation of the sovereignty of national States, directing the scope of the Convention firmly to 'the sovereign right to adopt measures and policies' to protect the diversity of cultural expressions (article 1.2). Further guidelines included the principle of the complementarity of economic and cultural aspects of development (article 1.5), the principle of sustainable development (article 1.6), equitable access (article 1.7), and the principle of openness and balance (article 1.8).

The definitions in article 4 are intended to be functional and to improve the focus on the scope of the Convention, without trying to present a concluding, all embracing interpretation.[19]

The definition of 'cultural diversity' is central to the Convention and was, of course, carefully debated throughout the drafting process. It was deemed essential to refrain from directly associating culture with a region or a community, thus avoiding political discussions that might ensue from references to regional or territorial connections. Furthermore, it was intended to embrace the notion of the plurality of modes of expression.[20] The following is the final definition:

> "Cultural diversity is the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.
> Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented, and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used" (article 4.1).[21]

The Convention also contains definitions of cultural content (article 4.2); cultural expressions (article 4.3); cultural activities, goods and services (4.4); cultural

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[18] UNESCO Doc Report Second Expert Meeting, p. 3.
[19] Ibid., p. 3.
[20] Ibid., p. 6.
[21] The initial version drafted by the 15 experts also included between the first and second paragraph: "From the diverse forms taken by culture over time and space stem the uniqueness and plurality of the identities and cultural expressions of the peoples and societies that make up human kind". This was omitted at the third intergovernmental Session.

industries (4.5); cultural policies and measures (4.6); protection (4.7); and interculturality (4.8). The first versions included a definition of culture based on the 1982 Mondiacult definition:[22] however, this definition was omitted during phase II as the focus was to remain on cultural products and not to become too all inclusive. This has resulted in comments on the 'circular nature' of the definitions in article 4, where, for instance, cultural expressions are defined as "those expressions…that have cultural content" (article 4.3).[23] Another definition that was lost was 'cultural capital', as well as references to intellectual property that were present in the first drafts of articles 4 (definitions) and 7 (the obligation to protect national cultural expressions).

The first Draft included article 4.4 containing a definition of cultural goods and services Cultural goods and services (a non-exhaustive list of which is annexed to the Convention, (see Annex I) refer to those goods and services that embody or yield cultural expressions and have the following characteristics:

> a. they are the outcome of human labour (industrial, artistic or artisanal) and require the exercise of human creativity for their production;
> b. they express or convey some form of symbolic meaning, which endows them with a cultural value or significance distinct from whatever commercial value they may possess;
> c. they generate, or may generate, intellectual property, whether or not they are protected under existing intellectual property legislation.

The final version became article 4.4:

> Cultural activities, goods and services:
> "Cultural activities, goods and services refers to those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services."

The insertion of intellectual property rights in the Convention became one of the main issues in the debates on the Draft. In the original version intellectual property rights were referred to in article 7 under the heading of national obligations: the obligation to promote and protect the diversity of cultural expressions and contents. The original text made this an obligation to:

> "have access to the cultural expressions, representing cultural diversity in other countries in the world".

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[22] Bernier, 2004, p. 4.
[23] F. Macmillan, 2006, p. 167.

In the version discussed in the first Government Expert Sessions, the following other proposals for this article were:

> "..States Parties shall ensure intellectual property rights are fully respected and enforced according to international instruments to which States are parties, particularly through the development [or strengthening][24] of measures against piracy."

Yet another version stated:

> "State Parties undertake to ensure in their territory [protection against unwarranted appropriation] of traditional and popular [cultural contents and expressions], with particular regard to preventing the granting of invalid intellectual property rights".

These different versions signal the conflicting forces in the discussion on what should be the scope of the Convention, and how ambitious this Convention could be in order to reach the goal of protecting the right of nation states to maintain national cultural policies. From the start it was clear that the same opponents that had met during the Uruguay Round would again have to battle over the issues of protecting vested rights under international trade agreements, including the TRIPS Agreement that provided international protection for intellectual property rights. The 'free trade' side realised that this Convention might not only ensure Member States the right to national policies on culture, as in screen quota or subsidies, but the drafting process was also leaning towards definitions and obligations that might affect the intellectual property rights of right owners in the cultural industries. On the other side, the cultural exceptionists were keenly aware of the developments in other fora. First, the discussion on access to knowledge and fair use in the Western world played an important role in the contributions to the Convention.[25] But also the cultural rights discussion relating to the inalienable rights of cultural communities were regarded with either suspicion or hope.[26] To some, intellectual property rights could be judged

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[24] The brackets refer to alternative versions, or to terms still to be debated. UNESCO Doc. CLT/CPD/2005/CONF.203/6, p. 26.

[25] See Smiers, 2003 and 2006, and the website http://www.incd.net/incden.html, last accessed 1 November 2010.

[26] See ICESCR's General Comment no. 17 on article 15.1.c. that was accepted in November 2005 and the developments concerning the United Nations Declaration on the Rights of Indigenous Peoples that was being prepared since 1995 and was finally accepted in June 2006.

as restricting human rights in that they gave exclusive rights to right holders who could then exclude others.[27] On the other hand, intellectual property rights could be seen as potential assets, a way to exploit cultural capital and a way to ensure economic development.[28] More fundamental was the issue of the character of intellectual property rights, whether they should be seen as economic rights as in the tradition of copyrights, employed to ensure competition in a free market by rewarding creative efforts, or as inalienable rights stemming from the natural right of the creator to his works as in the tradition of authors' rights.

The USA was in favour of including intellectual property rights in so far as this would be the means to ensure the protection of vested rights and to secure the existing intellectual property provisions against new limitations and exceptions.[29] The European Union, on the other hand, declared that references to intellectual property rights should be removed, as "there are many intellectual property rights that apply to activities, services and goods that are not 'cultural' and conversely, there are many activities, services and goods that are not subject of intellectual property rights".[30] However, the EU stressed the importance of provisions on the protection of intellectual property rights to ensure the flourishing of culture as supported in the preamble. This resulted in the neutral provision in the Preamble declaring: "Recognizing the importance of intellectual property rights in sustaining those involved in cultural creativity". The cultural exceptionists remained against the insertion of obligations regarding intellectual property rights in the sections on the rights and obligations ensuing from the Convention. This camp was in favour of making a clear distinction between the mandate of the UNESCO and that of the WIPO. Interestingly, some of these exceptionist groups included national IP-collecting societies like the French Coalition on Cultural Diversity.[31]

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[27] Chapman, 2002, 861-882.

[28] Anderson andWager, 2006, 707-747.

[29] US Communication to the Council of Services, December 2000; see also the EBU Comments on the US Negotiating Proposals of December 2000, 12.4.2001, DAJ/MW/mp, at http://www.ebu.ch/CMSimages/en/leg_gats_us_tcm6-4397.pdf, last accessed September 2006.

[30] Communication of the European Community and its Member States to the UNESCO on the preliminary Draft on the Protection of the diversity of cultural contents and artistic expressions, 15 November 2004 No Doc no. accessed at http://trade.ec.europa.eu/doclib/docs/2004/december/tradoc_120449.pdf, September 2006.

[31] Message A2K, comment on the press release by the French Coalition on Cultural Diversity, 17 September 2006, communicated per email a2k-admin@lists.essential.org, on file with the author.
Donders 2008, p.19-21.

6.A.2.5. Balancing national rights and obligations in the Convention

Article 5 lays down the right of States Parties to formulate and implement national policies and measures in aid of the protection and promotion of the diversity of cultural expressions. Thus, States Parties may adopt measures, but the nature and extent of these measures are only indicated but not limited by article 6 and include:

This is not supposed to be a comprehensive list, but it is rather elaborate in referring to all sorts of ways that might come to mind when thinking of supporting cultural activities and reflects the list of measures that might conflict with WTO rules on State policy.[32]

In order to promote cultural expressions the measure should aim to:

1. "create an environment which encourages individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expressions"; and

2. "to have access to diverse cultural expressions from within their territory as well as from other countries of the world" (article 7.1.a);

3. "encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions, cooperate with other Parties in doing so, and encourage creativity by setting up educational, training and exchange programmes in the field of cultural industries…" (article 10);

4. "Acknowledge the fundamental role of civil society to this aim" (article 11)

5. "To provide every four years information on these activities in reports to the UNESCO, establish a point of contact and in general share and exchange relevant information with the other State Parties" (article 9).

The emergency clause in article 8 provides the right for a Member State to

"determine the existence of special situations, where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in serious need of urgent safeguarding…" (article 8 paragraph 1).

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[32] See also section 4.3 on the GATTS.

When such an occasion arises, the "Parties may take all appropriate measures to protect and preserve these cultural expressions *in a manner consistent with the provisions in this Convention*" (article 8 paragraph 2), which broadly means that Parties can take all the actions they need, either short-term direct measures, as well as engaging in longer-term policy measures, as long as they can demonstrate the urgency of the situation. However, Parties may take such actions, but they are not under obligation to do so.[33] The right to take measures dealing with emergency situations is further elaborated in articles 12 and 17 which consider the international obligations presented below.

6.A.2.6. Balancing international obligations in the Convention

Articles 12 to 19 contain the international obligations of State Parties.
Article 12 provides for the general obligation of international cooperation. In the heading, this cooperation is specifically linked to the cooperation in emergency situations as in article 8 with an international obligation to respect the right of a State to declare such a situation and to support any measures taken by that State to resolve that situation.

6.A.2.7. International obligations with regard to developing countries and indigenous communities

Articles 13 to 19 focus on support for the diversity of cultural expressions in developing countries. It is of note that a number of these provisions are formulated with the more committed "shall". Article 17 concerns emergency situations in developing countries, when Member States "shall cooperate" in order to provide assistance. International commitments are envisaged in article 13 on the integration of culture in sustainable development, and in article 14 on the cooperation for development. This should be accomplished by measures aimed at strengthening the cultural industries; capacity-building programmes; technology

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[33] Compare the emergency clause in article 9 of the 1970 UNESCO Convention that enables States Parties to call upon the States whose cultural patrimony is in jeopardy from the pillage of archaeological or ethnological materials and may call upon other States Parties which are affected. When asked to do so, "each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State".

transfer; and financial support.[34] Other measures are strengthening the industries of developing countries and the setting up of collaborative arrangements (article 15).[35] In view of the diversity of cultural expressions in developing countries, these measures should foster an environment which is conducive to access to and the creation, production, distribution/dissemination of cultural activities, goods and services.[36] In this respect, article 16 providing preferential treatment for developing countries is of particular importance. During the 2nd Extraordinary Session of the Intergovernmental Committee on the Operational Guidelines of the Convention it was emphasised that the reference to preferential treatment should not be interpreted in the meaning of the WTO or other trade treaties, but that it is intended to function as a wider and more elaborate concept. As was stated in the expert report by the European Commission: "preferential treatment aims to achieve the twofold objective of improving cultural exchanges with developing countries, by facilitating the access of their cultural activities, goods, services and professionals to the territory of developed countries, while protecting and promoting the cultural diversity of all the partners in the agreement… [and] cannot therefore be achieved by trade liberalisation or through one size fits all solutions only. Effective preferential treatment relies on innovative cooperation schemes with developing countries adapted to their specific situation". [37] The Operational Guidelines describe, in article 14, the measures that are considered to strengthen the cultural industries in developing countries. Besides general paragraphs on the setting up of and enhancing support mechanisms, the developing countries advocated the insertion of practical measures like facilitating the mobility of artists and other cultural professionals and practitioners from developing countries and their entry into the territory of developed and developing countries through, inter alia, consideration of flexible short-term visa regimes in both developed and developing countries to facilitate such exchanges.[38] This particular provision was the result of a compromise after the developing countries had suggested the introduction of a cultural visa for artists and producers from the cultural industries of developing countries that would allow them to be able to travel freely to Western countries. The Operational Guidelines also referred to "the conclusion of co-production and co-distribution agreements between developed and developing countries and amongst the latter, as well as market access for co-productions".[39]

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[34] Article 14, Operational Guidelines Approved by the Conference of Parties at its second session (June 2009) paragraph 1.

[35] See also 9.5 on the role of private parties.

[36] Art. 14, Operational Guidelines paragraph 6.

[37] UNESCO doc. CE/08/2.IGC/8 (2008), p. 3.

[38] Paragraph 6.1.5.

[39] Paragraph 6.1.6.

6.A.2.8. The role of civil society in the operationalisation of the Convention

The definition of civil society in the Operational Guidelines as "... non-governmental organisations, non-profit organisations, professionals in the culture sector and associated sectors, groups that support the work of artists and cultural communities" underscores their role as advocates of the public interest.[40]

It must be remembered that from the start of the preparations, civil society has been most active in the process of drafting and the rallying of support on a national and international level. This led to the inclusion of article 11, in which "Parties acknowledge the fundamental role of civil society in…[and] shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention". The role of civil society is also acknowledged on the international level, as in article 12(c) the Parties are committed to strengthening international cooperation by reinforcing partnerships with and among civil society, non-governmental organisations and the private sector.[41] The Operational Guidelines explicitly refer to the need to encourage civil society to participate in the implementation of the Convention and to make use of the potential of civil society to act as an innovator and change-agent.[42] Illustrative is the list of areas in which the support of civil society can be considered:

- support in the elaboration and implementation of cultural policies;

- capacity-building in policy domains, as well as documenting and data collecting;

- promotion of cultural expressions of minority groups;

- advocating the ratification of the Convention and promoting the principles in other international forums;

- input in the periodical reports;

- cooperation for development at local, national and international levels.[43]

The Operational Guidelines conclude with a listing of the ways civil society may contribute to the work of the organs of the Convention, and a set of criteria for the admission of civil society representatives. In addition, international non-

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[40] Article 11 of the Convention, Operational Guidelines on the Role and Participation of Civil Society Approved by the Conference of Parties at its second session (June 2009), paragraph 3.
[41] Other provisions in which reference is made to civil society are articles 6, 7, 15 and 19.
[42] Operational Guidelines art. 11, paragraphs 5 and 6.
[43] Ibid., paragraph 6.

governmental organisations coming from developing countries that are party to the Convention are entitled to benefit from the Fund.[44]

6.A.2.9. The role of private partners in the operationalisation of the Convention

The drafting stage of the Convention was buzzing with lobbying by civil society as well as the major companies in the cultural industry in order to influence the negotiations.[45] This certainly contributed to the fact that the role of 'private parties' is considered to be elementary in the success of the Convention. This is made explicit in the provision on collaborative arrangements, in which States Parties are encouraged to develop partnerships between and with public and private sectors and non-profit organisations. The Operational Guidelines explicitly define these partnerships as collaborative arrangements between and within the public and private sectors and non-profit organisations. The private sectors were added at the instigation of the Member-States of the European Union that had ratified the Convention.[46]

6.A.3.1. Culture and Trade

As was indicated in the first paragraphs of this chapter, this Convention marks an important step in governing the relation between culture and trade. In the preparatory process towards the UCDCE it was stated that:
"The Convention is positioned as an instrument to counterbalance the influence of the international trade agreements on national policy in trade of goods and services and may help to enable national states to take protective (financial) measures to ensure the production and protection of local, regional and national cultural expressions". [47]

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[44] Article 18 of the Convention, Guidelines on the use of the resources of the International Fund for cultural diversity, Approved by the Conference of Parties at its second session (June 2009) paragraph 9.1.3.
[45] Smiers, 2006. 207-216.
[46] Austria, Croatia, Finland, France, Germany, Greece, Lithuania, Luxembourg and Slovenia. Doc. CE/08/1.EXT. IGC/4, paragraph 3.
[47] Preliminary Report of the Director General containing two preliminary drafts of a Convention on the Protection and Promotion of the Diversity of Cultural Contents and Artistic Expressions, CLT/CPD/2005/CONF.203/6, Paris, 3 March 2005.

The following paragraph will concentrate on the economic functioning of cultural expressions and their position in the context of international trade agreements.

From an economic perspective, cultural expressions are goods and services that are objects in commercial transactions. In general, international trade agreements aim to provide for market access and contain no exceptions for cultural products. The authority of a sovereign State to maintain cultural policies that are favourable to cultural expressions or the producers thereof in home countries is limited as this might imply market distortion.

The last decades of the 20th century saw the transition of an industrial economy into an information society.[48] That period also saw the recognition of a discrete branch in economic activity: the creative industry.[49] In the context of international trade, the cultural industry is part of the concept of a creative industry, a concept that came from Australia to the United Kingdom in the 1990s. The cultural industry now signifies 'any activity producing symbolic products with a heavy reliance on intellectual property and for as wide a market as possible".[50] This process was accelerated by the advent of digital technology, as today it is possible to communicate cultural information globally at an unprecedented scale and speed.[51] While distance no longer seems to be an issue, foreign markets are entering the home markets.

As the information society is an important element (if not the most important element) in the global economy, the cultural industry is growing significantly. The 2005 UNESCO Report on the international flow of cultural goods presents figures that, based on customs data, prove that the trade in core cultural goods[52] increased between 1994 and 2002 from US $ 38 billion to US$ 60 billion.[53] PriceWaterhouseCoopers estimated the global Media and Entertainment Industry in 2004 to be 1.3 trillion $. Their outlook report predicted a yearly growth of

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[48] See Castells, 2009.

[49] See Towse, 2003, p. 170-177. See also Coombe, 2005, referring to the critical interpretation in which cultural industry means the mass production of cultural expressions, p. 599.

[50] UNCTAD Report TD(XI)BP/13 , 2004, identifies the recording industry, music and theatre production; the motion picture industry, music publishing, book, journal and newspaper publishing, the computer software industry, photography, commercial art, radio, television and the cable industry, p. 4.

[51] M. Footer, C. Graber, 2000, 115-144; C. Heath, A. Kamperman Sanders (ed.), 2001.

[52] Core cultural goods: heritage goods; visual arts; books; other printed matter; audiovisual media; sound player, recorder and related media; television and radio receivers; architecture plans; related media. UNESCO Report, p. 15.

[53] UNESCO Report 2005 p. 19, 20. These data have to be read together with the information that 1) The content of the category 'core cultural goods' is rather diffuse. 2) As the survey was conducted worldwide there was no uniform system of differentiation between goods and services. 3) At the time of the survey there was no system for the appraisal of the copyrights involved, so it may be assumed that in reality the financial interests in the trade in core cultural goods are higher.

7.8 percent to 1.8 trillion $ in 2009.[54] The comprehensive UNCTAD Report on Creative Industries published in 2008 states that the World annual growth rate between 2000 and 2005 for exports in creative services is 11.2%, and imports 10.5%.[55]

These figures demonstrate that the international trade in cultural goods and services is of increasing importance in global trade, and there is growing awareness that preserving delicate cultural expressions is a fundamental necessity, as they embody the basic values of the community or communities. Unrestricted access by strong market players to local markets would provide a serious threat to local cultural expressions. This situation has led to profound controversies over the role of the market when dealing with cultural expressions.[56]

6.A.3.2. Cultural expressions and the WTO trade treaties

The decade of negotiations on a worldwide regime for the international trade in goods and services resulted in the establishment of the World Trade Organisation (WTO)[57] in 1994. The objective of the WTO is that all Members may engage in the global market on equal terms on a 'level playing field'. Instrumental to this aim is the basic rule of free market access with non-discrimination between trading partners, granting national treatment to foreign trading partners and the Most Favoured Nation Doctrine, in which all States are treated equally in trade relations.[58] Although the WTO agreements provide for transition periods and a process of negotiating and a concept of a progressively higher level of liberalisation in the trade in services, the stated objective is the global market.

The Marrakesh Agreement was supplemented by a range of Protocols containing agreements on covered aspects of trade. The first was a revision of the General Agreement on Tariffs an Trade (GATT).[59] The second Protocol was the General

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[54] The Annual Global and Media Entertainment Outlook Report 2005- 2009 covers 14 major industry segments in the five world regions. See also the overview in Table A 2.1. of the Media industries in Castells 2009, on the connection between multinational media conglomerates and other cultural and political networks like the universities and heritage institutions and political bodies.

[55] UNCTAD Report Creative Industries, p. 228.

[56] Acheson and Maule 2003, p. 4, Obuljen 2006, p. 24; Neil 2006, p.47.

[57] Annex 1 A to the Agreement Establishing the World Trade Organization, Marrakesh 1994, in force since 01-01-1995.

[58] Preamble to the Agreement Establishing the World Trade Organization 1994, and Annex 1A: General Agreement on Tariffs and Trade (GATT), article I and article III; Annex 1B, General Agreement on Trade in Services (GATS), articles II and XVII; Annex 1C, Agreement on Trade-Related Intellectual Property Rights (TRIPS), articles 3 and 4.

[59] Annex 1 A to the Agreement Establishing the World Trade Organization, Marrakesh 1994.

Agreement on Tariffs and Services (GATS)[60]. The Agreement on Services had been one of the crucial issues during the negotiations, as this agreement was also to include the negotiations on market access for the film and broadcasting industries. The third Agreement concerned the Trade-Related Aspects of Intellectual Property Rights (TRIPS).[61] Adherence to TRIPS is obligatory for all member states of the WTO. In other words, when a nation decides to join the WTO and become a member of the global trading community, it has to accept, respect and enforce the exclusive rights to intellectual property.

Thus, with TRIPS, international intellectual property conventions like the Berne Convention on Copyright and the Rome Convention on Performers' and Producers' rights became part of the set of rules on international trade. These Conventions set up a framework of intellectual property rights which give the right holder an exclusive right of control over his intellectual property. Trade in the context of the creative industries is essentially trade in intellectual property rights and right holders to contemporary media and audiovisual productions have a significant interest in a free market for their products and the worldwide enforcement of their rights. At the same time TRIPS, as well as the related IP Conventions, provide for a balance between the allocation of exclusive rights, on the one hand, and the functioning of these rights in a market and the public interest in access to the information contained in the intellectual properties, on the other, by providing a system of limitations on these exclusive rights. As an overall guideline, the three-step test is to provide guidance to the national legislator on the scope of exceptions and limitations.[62] Under TRIPS article 13, Members may codify exceptions or limitations to the rights of right holders as long as these are "confined to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder": the three-step test. This rule is an extension of the three-step test in the Berne Convention in article 9.2, which dealt only with the right of reproduction in article 9.1, as was introduced into Berne in the 1967 Stockholm Revision and adopted in the 1971 Paris Act. At that time, it proved difficult to harmonise the different national positions on limitations to the reproduction right, and the diplomatic result was the three-step test formula that could accommodate the separate national traditions with their particular cultural backgrounds in allowing unauthorised use of copyright works.

The final stages of the Uruguay Rounds involved intense discussions on the right of States to maintain systems of public aid for a national cultural industry, in particular cinema and audiovisual works, without infringing on obligations under

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[60] Annex 1 B to the Agreement.
[61] Annex 1 C to the Agreement.
[62] Art. 13 TRIPS; article 9 paragraph 2 Bern Convention; WIPO Copyright Treaty article 10. And also in the EC Information Society Directive 2001, article 5.5.

international trade treaties. In particular the common policy of many States to subsidise their national film industry could be affected by the new Agreements. The protection of the French language and culture was the central concern of the Organisation International de la Francophonie (OIF). This rapidly growing international organisation includes states like Canada and France that have taken a vehement stance against the complete liberalisation of cultural services. [63] The OIF advocated the position that national states should remain able to maintain national cultural policies. They were supported by the European Union, that had recently issued the 'Television Without Frontiers' Directive in 1989, with provisions on favourable treatment for national and European television productions providing for a (non-obligatory) quota of 50% screening time for these productions.[64]

Opposition against the emphasis on economic arguments without giving sufficient attention to concerns relating to the preservation of regional cultural identity led to the rift between so-called "Protectionists" or 'Exceptionists' against the Free-traders or "neo-Liberals".[65] Free-traders believe that, ultimately, the way to realise true democratic values is to secure the free flow of human activities and to facilitate the market to control itself. As all citizens are also consumers, they will themselves decide what is the optimal choice in the circumstances. Any interference in the market amounts to protectionism that will be distortive, and will therefore harm the natural process towards an optimal situation.[66]

6.A.4. The relationship between the UCDCE and other instruments

The relationship between the UCDCE and other instruments is defined in articles 20 and 21. Article 20 UCDCE, the provision its the relationship to other instruments, is central to the Convention, as it lays down the aim of the Convention to balance the economic and the cultural character of cultural expressions in the context of the international trade treaties and agreements. Obviously, this

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[63] From 25-29 September 2006, during the 11th OIF Summit in Bucharest, Romania, 72 countries were represented, with 43 government leaders, 40 ministers of foreign affairs and the presence of the Director General of the UNESCO, Matsuura, as well as the EU President, Barroso. During the Summit 6 new countries applied to be members (Serbia ,Montenegro, Sudan, Ukraine, Mozambique, Thailand and Malta) while Ghana and Cyprus applied for 'associated member status'. During the Summit the Bucharest Declaration was accepted, in which it was declared that "… we urge states that have not yet deposited their instruments of ratification to do so".

[64] Television without Frontiers Directive, 1989, section 4.5 (updated in 1997), since then replaced by the Audiovisual Media Services Directive 2007/65/EC.

[65] Frau Meigs, 2001, p. 7; Van Grasstek, 2004, pp.6-8.

[66] Cowen, 2002, p.17; Martin Roy, p. 923-952.

provision was extensively discussed, as the choice had to be made how the Convention was to relate to existing international law. The standard rule under international law is that older treaties should be respected by the member States when negotiating new treaties.[67] However, when entering into negotiations for a new international treaty three options can be considered:

1. the Convention supersedes every other instrument;
2. the Convention is subordinate to other instruments;
3. the Convention is complementary to other instruments.[68]

This last option was strongly favoured by the European Union, and the final version of article 20 reads

a "..without subordinating this Convention to any other Treaty…they shall foster mutual supportiveness between this Convention and the other Treaties of which they are Parties" and

b "when interpreting and applying the other treaties to which they are Parties or when entering into other international obligations, Parties shall take into account other provisions of the Convention".

This makes the Convention a normative instrument with equal standing with other international legal instruments. This is further supported by article 21 that commits Parties to undertake to promote the objectives and principles of the Convention in other international forums and provides a new framework for binding international law on cultural policies.[69]
This includes the international commitments under the TRIPS and other WTO agreements as well as the Lisbon Treaty of the European Union. The UCDCE could thus be a valuable instrument in the interpretation of the three-step test regarding the scope of limitations and exceptions to the copyright laws of national states.[70]

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[67] Vienna Convention on the Law of Treaties, article 31.
[68] The UNESCO Office of International Standards and Legal Affairs presented, at the first Session of the Intergovernmental Experts on 23 September 2004, the report "On possible ways of Dealing with the Question of the Relationship between Successive Conventions Relating to the Same Subject Matter and article 19" by Abdulqawi A. Yusuf. Art 20 is the former article 19.
[69] Wouters and De Meester 2008, pp 96-102.
[70] See also section 3.2 of this chapter; the Green Paper on copyright in the knowledge economy published on 16.07. 2008 at p. 5 on the revision of the EC Directive on the Information Society and the discussion on the limitations to copyright and the recent report by Hugenholtz and Senftleben on flexibilities in EU copyright law 2011.

6.A.5. The impact of the Convention

In this subsection on the impact of the Convention two effects may be distinguished: a.) the legal effect and b.) the political effect.[71] The legal effect is an important element in the considerations of the States on the ratification of the Convention. The legal effect works in two ways, either internally and externally. Indeed, all States conduct surveys in order to assess whether and how they should adjust their legislation when they ratify the Convention. The legal effect is also relevant in the way this treaty will function in the system of international law. The political implications are important, but are more difficult to estimate beforehand, as these are more matters of evolving policies, relative to other international developments. In the following, first the legal implications will be presented, and then different perspectives on the political implications will be addressed.

a.) Legal effects

The legal effects of the UCDCE are limited. The Convention does not contain any rights or obligations that involve the immediate adaptation of legislation in national law.[72]
The legal implications of the UCDCE are to be derived from the general rules on treaty law, specific provisions on the legal implications, the formulation of the text and information on the context of the Treaty.
The interpretation of the UCDCE is governed, first, by the Vienna Convention on the Law of Treaties, more specifically by article 31, which proclaims the general rule that a treaty must be executed in good faith and be interpreted in relation to its context, including any other treaty that is concluded between the parties to the treaty. This means that in interpreting the UCDCE the existing body of WTO law must be respected. This is the general rule between two parties to a treaty. As it is to be expected that the US will not become a party, the rule on the effects of the treaty between a party and a third state is relevant. According to article 34, a treaty cannot provide any rule or obligation for a State without its consent. Furthermore, in article 35 on obligations for third states it is agreed that obligations can only arise with the consent of that third state. Following article 36, rights for a third State only arise when the intention to do so is included in a provision in the treaty and the third State thereby agrees. Without any indication to the contrary, this agreement is presumed.

Article 20 on the relation to other instruments is specifically relevant as to the legal implications. The three basic principles in the heading of article 20 are

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[71] Bernier, 2006 p. 67; Graber, 2006, p. 563-568; Hahn, 2006; Germann, 2007.
[72] Graber 2006, p. 563;

mutual supportiveness, complementarity and non-subordination. The text of the provision is construed in order to leave no room for any interpretation in favour of subordinating or superseding other treaties; the UCDCE should be interpreted so as not to modify the rights and obligations of the Parties under any other Treaty. However, the provision is to be executed 'in good faith', which, in combination with the basic principles, leads to the effect that Member States are under an obligation to conduct their future international relations with the objectives of the UCDCE in mind.

Chapter IV on rights and obligations contains two kinds of provisions: the first are the 'weak' provisions, containing auxiliary verbs like 'may' (article 6), "may determine" (article 8) that underscore the principles of good faith and balance which are present in the UCDCE. Regarding the right to conduct a national policy on cultural diversity (article 6), this right 'may' include measures to protect and promote cultural diversity that, according to the list in article 6, might be considered to be in breach of the provisions of the WTO framework. However, as this provision should be read in accordance with article 20, the room to manoeuvre is narrowed down to what is already acceptable under WTO law. [73]

There are stronger provisions, however. The difference may be minimal, but there is a distance between 'may determine' and 'shall endeavour' in article 7 on general policy, and articles 12-15 on the promotion of international cooperation. Even more convincing is the stipulation in article 16, the provision on preferential treatment for developing countries, stating that 'developed countries shall facilitate cultural exchanges by granting….preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.

Although this may seem like a firm obligation, the enforcement of this obligation may be a problem. The UCDCE does not contain a binding dispute settlement mechanism. Article 25 provides for the least interfering solution for disputes: par. 1 suggests that Parties should seek a solution by negotiation; paragraph 2 suggests, as a second step, mediation by a third party, and paragraph 3 refers to the Annex. In the Annex there are 6 articles that provide for the possibility to create a 'Conciliation Commission' 'upon the request of one of the Parties'. This provision is a far cry from the original provisions that were taken from the dispute settlement arrangement in the Convention on Biodiversity.[74] Be that as it may, at this point in time it is more likely that a dispute on State Policy containing protective measures for cultural goods will be brought before the WTO Dispute Settlement Board. Most of the signatories to the UCDCE are Members of the WTO and it is likely that a complainant, in a dispute concerning international

[73] See also Wouters and De Meester 2008, p. 88-92.

trade and market access, will resort to the WTO as the forum where most success is to be expected.[75] In view of the delicate balancing act in the final stages of the negotiations, it is very likely that the weak dispute provision in the UCDCE was accepted because a more committing option was not politically feasible.

b.) Political effects

The fact that there is now a Convention in international law on cultural policy constitutes a major normative effect.[76] The main obligation for Member States ensuing from the UCDCE is contained in article 5 paragraph 2: when a Party implements policies and measures to protect and promote the diversity of cultural expressions, this will be consistent with the provisions in the Convention. The combination with article 12 on the promotion of international cooperation, articles 13 and 14 on support for culture in sustainable development, article 15 on collaborative arrangements, article 16 on preferential treatment for developing countries, and article 17 on international cooperation in situations of serious threats concerns a states party's policies on the national and international level. This means that when a state claims the right to formulate and implement national policies and measures, these should not be in conflict with the preamble, principles and guidelines referring to the rights of all state parties.[77] The result is that no party can claim this right as a bypass towards a policy of protectionism that may be harmful to other states. Moreover, article 21 commits states parties to undertake to promote the objectives and principles of the Convention in other international forums. Therefore the obligations to protect and promote the diversity of cultural expressions is expected to commit governments to the formulation and execution of a national policy on cultural diversity, containing at least the following elements:

- education and promotion
- support for minority cultures and indigenous communities
- governance and international exchange of information
- international cooperation
- engaging in dialogue with civil society

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[74] CBD 1992, Annex II part 1 articles 1-17 on the procedure for Arbitration, and Annex II part 2 articles 1-6 on the procedure for Conciliation.

[75] The Dispute Settlement system of the WTO can include compensation for injured parties and forms of retaliation like the suspension of concessions or other obligations (article 22.1 DSU). These remedies are not restricted to the sector of the breach of WTO obligations; a complainant may also decide that a remedy is more effective when applied in another sector (Van den Bosche 2005, pp. 220, 221). See also the measures taken by the different complainant states like the US, Guatemala and Honduras in the the EC-Bananas III Case WT/DS27/R/ECU,WT/DS27/R/GTM,WT/DS27/R/HND 25 September 1997. See also also Hahn 2006, p. 533,538.

[76] Bernier 2006,p. 62; Hahn 2006, p.534.

[77] Wouters, De Meester 2008, pp. 129-133.

- engaging in partnerships with the private sector.

On the international level, these commitments also concern negotiations on economic partnership agreements. This will be discussed in more detail in part B of this chapter, which will concentrate on the position of the European Union and the Netherlands in the operationalisation of the Convention.

VI.B.
THE PROTECTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS IN THE EUROPEAN UNION AND THE NETHERLANDS

6.B.1. Introduction

Section B of this chapter first considers the position of the European Union to the Convention on the Diversity of Cultural Expressions (UCDCE or 'the 2005 Convention') after the entry into force of the Treaty of Lisbon in December 2009. To better understand the context of European policy in the protection of the diversity of cultural expressions an account is given of the participation of the European Union in the negotiations during the drafting period. At the time of the negotiations on the 2005 Convention the shared competency of the European Union as a negotiating partner in international treaties was regulated in the Nice Treaty that came into force on 1 February 2003.
The Netherlands were an active participant in the preparation of the Convention, ratifying the Convention in 2007. The obligations in the 2005 Convention regard internal policies, as well as commitments regarding external policies, related to exchanges with third states in general as well as with developing countries in particular. This chapter will therefore also discuss the Dutch internal perspective related to cultural policies with regard to the protection of the diversity of cultural expressions as well as the Dutch media law of 2008-2010. This will be followed by a short discussion of the Dutch policies with regard to cultural exchanges with third countries.

6.B.2.1. Cultural Diversity in the EU Treaty

The Lisbon Treaty contains the amended Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). With the Lisbon Treaty, also the Charter of Fundamental Rights (the Charter) entered into force. Article 3 paragraph 3 TEU stated that that 'It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced' is relevant to all other Treaty provisions. The reference to the objective to respect the Union's rich cultural and linguistic diversity and the safeguarding and enhancement of Europe's cultural heritage is further supported by article 167 paragraph 4 TFEU stating that the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.[78]

The Charter of Fundamental Rights is recognised as having the same legal value as the TEU and the TFEU in Article 6 paragraph 1 TEU. Moreover, paragraph 3 of Article 6 TEU further stipulates that the fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. The Charter's article 22 supports Article 167 TFEU by explicitly stating that the Union shall respect cultural, religious and linguistic diversity.[79]
At the same time Article 4 paragraph 2 TEU guarantees the equality of Member States before the Treaties as well as their national identities, and to respect their fundamental structures, political and constitutional, inclusive of regional and local self-government. While respecting national identity, paragraph 3 adds that Member States are expected to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Importantly, Article 6 (F) of the TFEU states that the Union shall have competence to carry out actions in the area of culture to support, coordinate or supplement the actions of the Member States. However, any further harmonisation of the laws and regulations of the Member States continues to be excluded. Noteworthy is that new Article 167(5) TFEU states that the Council should take decisions on culture under the rule of qualified majority rather than by unanimity.[80] The old rule was that only complete consensus could lead to a Community decision on cultural policies. The fact that a national veto can no longer halt Community decisions is a major change, and cannot but have a major impact on future negotiations by the Community in matters of cultural policies. It is report-

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[78] See also chapter 3B.2.2.
[79] De Witte 2008, p. 220.
[80] Ordinary legislative procedure art. 294 TFEU.

ed that especially in the field of negotiations on international cultural services, countries like France have made it very difficult to reach consensus.[81] Furthermore, the general rule is that in the negotiation and conclusion of agreements that fall under the common commercial policy as regulated in article 207 TFEU, the Council will act by qualified majority. However, paragraph 4 retains the old rule of unanimity for the negotiation and conclusion of agreements in the fields of the trade in services and the commercial aspects of intellectual property, but only where such agreements include provisions for which unanimity is required for the adoption of internal rules. Another exception to the rule of qualified majority under paragraph 4(a) is reserved for the field of trade in cultural and audiovisual services, but only where these agreements risk prejudicing the Union's cultural and linguistic diversity. This last provision raises questions as the scope of this exception and the interpretation of the 'risk' requirement. What this exactly means is a question which is still to be answered.[82]

In conclusion, it might be stated that the space underneath the umbrella of transnational European Union Law is protective as far as the specific regional and national characteristics are concerned. This also applies to relations with third countries. An example is the cultural protocol in the recent Economic partnership agreements that will be further discussed after the following paragraph on the European Union as a negotiating partner in the drafting period of the Convention.

6.B.2.2. The European Union as a party in the negotiations on the Convention

At the time of the negotiations on the UCDCE the European Union was committed to the development of a common commercial policy, as in Article 207 TFEU (ex Article 133 TEC). Not only were Member States to contribute to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers, but the negotiations with third states on issues related to the common commercial policy were to be conducted by the European Commission. This also concerned the negotiation and conclusion of agreements in the fields of the trade in services and the commercial aspects of intellectual property. An exception to this general rule was provided for in paragraph 6 of Article 207 TFEU; agreements relating to the trade in cultural and audiovisual services were to fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article

[81] Loisen, DeVille, 2011, p. 261.
[82] Loisen, DeVille, 2011, pp. 257-258.

218 TFEU (ex. Article 300 TEC), the negotiation of such agreements required the common accord of the Member States. Agreements thus negotiated were to be concluded jointly by the Community and the Member States.

Article 218 TFEU regulates the competency of the European Commission to negotiate international treaties on matters that fall within EU competence. The Commission needs to be authorised by the Council and must act in close communication with the Parliament. This competency was already explained by the ECJ in Opinion 1/94 regarding questions on the competency of the Commission in the signing of the Marrakesh Agreement. The ECJ commented that the Commission would only have authority within the context of the competencies of the European Union. For all other matters, only the individual Member States would enter into international agreements.

The European Union is to foster cooperation in the sphere of culture with third countries and with international organisations and in particular the Council of Europe (now article 167 TFEU).[83] The Community is also to take into account cultural aspects under other provisions in the Treaty under the article 167 paragraph 4 TFEU (old article 151 paragraph 4 TEC) stating that the Community is under a general obligation to include cultural considerations also with regard to external arrangements.[84] However, a strict division between competencies remained the basic rule. This was also the case when entering the WTO Millennium Round.[85] However, as a guideline for entering into the WTO negotiations the Council noted that "During the forthcoming negotiations, the Union will ensure, as in the Uruguay Round, that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audiovisual policies for the purpose of preserving their cultural diversity".[86]

The European Commission, became involved in the process of drafting a new international instrument on cultural diversity in August 2003. The Commission adopted a Recommendation to the Council in order to obtain a mandate from the Council to participate on behalf of the Community in the negotiations within UNESCO on the Draft UCDCE.[87] The Presidency and the Commission together issued a Communication from the Community and its Member States

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[83] De Witte 1993,p. 229; Crauford Smith 2004, p. 28; Psychogiopoulou 2008, p. 24.

[84] De Witte 2008, pp.220-224.

[85] European Commission, Communication to the Council and the European Parliament, The EU Approach to the WTO Millennium Round, COM(1999) 331 final, 8 July 1999.

[86] Quoted in McMahon, 2004, p. 345, available at http://www.europa.eu.int/comm/acpolicy/extern/gats_en.htm, last accessed 1 July 2012.

[87] Com. 2003/520 Comm. to the Council and to the Parliament, Recommendation to the Council to authorise the Commission to participate on behalf of the Community in the negotiations within the UNESCO doc. 12063/04 CULT 61.

to UNESCO on 15 November 2004, containing their preliminary comments on the draft text.
At the same time the Council of Ministers of Culture adopted the recommendation from the Commission of September 2004, i.e. "the mandate", on 16 November 2004.[88] The latter authorised the Commission to participate, on behalf of the Community, in the negotiations within UNESCO on the convention and ordered the Commission to ensure that the provisions of the future UNESCO Convention remained consistent with the acquis communautaire. The Commission was further requested to ensure that the Community and its Member States maintained the possibility to preserve and develop their capacity to define and implement their cultural and audiovisual policies for the purpose of preserving their cultural diversity, in accordance with the principle of subsidiarity as formulated in article 5 TEC.[89]

A novelty in EU external relations was the authorisation by the EU Commission to negotiate on matters of shared competency between the Community and the Member States; these negotiations were to be conducted 'alongside' the Member States and only after the prior common accord of the Member States.[90] The result was considered to have been very effective as now only one presentation representing 25 Member States would have to be heard during the negotiating sessions.

The evaluation of the Draft texts was included in a Communication of the European Community and its Member States to the UNESCO on the future Convention.[91] The Community stressed the importance of the recognition of the specific dual nature of cultural goods and services, the sovereign right of States to pursue national cultural policies and international co-operation vis-à-vis developing countries. But the Community also expressed concern for "the need for an adequate articulation with other instruments and bodies allowing for a fully effective implementation of the Convention while preserving legal certainty…"[92] The document thereby referred to the obligation under the old Article 151 TEU, new Article 167 TFEU, to respect and promote cultural diversity, and declared not to be able to accept a principle according to which rights and obligations deriving from other international agreements would prevail over the UNESCO Convention. The Communication then formulated the principle of 'complementarity' to create 'mutual supportiveness' between the Convention and other

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[86] Com, 13840/04 CULT 103, 29 October 2004.
[89] In the Lisbon Treaty this principle is enshrined in Article 6 TFEU.
[90] Ibid.
[91] Communication of the European Community and its Member States1 to UNESCO on the preliminary draft UNESCO Convention on the protection of the diversity of cultural contents and artistic expressions, Paris, 15 November 2004.
[92] Ibid., p. 1.

instruments in order to ensure an effective implementation of the goals of the Convention.[93]
With regard to intellectual property rights, the Communities' Comment proposed a general observation regarding the importance of the protection of intellectual property to culture. However, any further direct reference to intellectual property rights in the definition of cultural activities, goods and services was considered 'inapproprate', supposedly as this would cause confusion.[94]

From January 2005 onwards consultations between Member States increased. To the outside world, the Member States acted as one, not only in the formal meetings but also in the informal contacts between delegations.[95]

The final third Governmental Conference in June 2005 took place under the Luxembourg Presidency. The EU representation was acknowledged by the insertion of a general provision on the accession of regional economic integration organisations in Article 27 paragraph 3(a) UCDCE.

In art. 27 paragraph 3 (b) of the UCDCE, the division of responsibilities and powers is arranged and it stipulates that the organisation and the Member States shall not exercise their rights under the Convention concurrently. Votes are allotted equal to the number of sovereign States that are Member States of the European Union, and that have transferred their competencies to the organisation.

When the UCDCE was accepted at the General Meeting in October 2005 the EU was one of the signatories to the Convention. The ratification procedure could then begin; however, under the rule of divided competencies, the Member States had to start individual ratification procedures. The EU Council issued the Council Decision on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions on May 11, 2006 in which the Council declared that "The UNESCO Convention should be approved as soon as possible" (sub. 4).

In order to pursue their policy of united conduct by the EU and the Member States on the issue of cultural diversity, the EU then started an intensive campaign in order to encourage Member States to ratify as soon as possible. As an important persuasive argument the EU took the stance that it would not ratify, unless together with all of the then 25 Member States.

An important reason for this, and this was common knowledge during the rati-

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[93] Ibid., p. 6, 7.
[94] Ibid. p.2.
[95] Delia Ferri, EDAP 3, 2005, p. 10.

fication procedure, was that the EU aimed for the entry into force of the Convention before or at the next General Meeting planned in the autumn of 2007, because then it would be in a position to become a member in the Committee. In order to meet this goal, the Convention should be ratified by 30 States Parties, three months beforehand.[96] The General Meeting could then set up the Committee of 18 States Parties to oversee the Convention in which the European Union could then take part.[97] In the event that, the number of Parties to the Convention would reach 50, the Intergovernmental Committee would increase to 24 Members.[98]

On 18 December 2006, 12 Member States (Austria, Denmark, Spain, Estonia, Finland, France, Lithuania, Luxembourg, Malta, Slovakia, Slovenia and Sweden), one future member (Bulgaria), and the European Community together deposited their ratification instruments at the UNESCO in Paris. Since then also Germany, Portugal, Iceland and Italy (2007), the Netherlands (2009) and the Czech Republic (2010) have ratified the Convention. As a result, the Convention came into force on 18 March 2007, well in time before the establishment of the Committee.

6.B.3.3. The EU-Cariforum EPA as a model for future Economic Partnership Agreements

The entry into force of the Lisbon Treaty is relevant to the position of the European Union in trade negotiations with third countries.[99] This parapgraph aims to provide a first impression of the effects of these changes by discussing how the UCDCE has become a factor in the negotiations on trade agreements as is demonstrated in the new economic partnership agreement (EPA) between the European Union, the Cariforum Countries and South Korea.[100]

The first EPA concluded between state parties to the 2005 Convention was with

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[96] UCDCE art. 29.
[97] UCDCE art. 23.1.
[98] UCDCE art. 23.4.
[99] The Lisbon Treaty entered into force on 1 December 2009.
[100] See also UNESCO Doc. CE/08/2.IGC/8 providing an analysis of this EPA by E. Bourcieu of the Directorate General Trade of the European Commission prepared for the 2nd Extraordinary Session of the Inter Governmental Committee in view of the discussion on article 16 of the UCDCE and (critically) the ICTSD, 01 Volume 8, February 2009 available online at www.ictsd.net/news/tni www.acp-eu-trade.org/tni, last accessed 1 July 2012.
[101] The 14 Members of the Caricom are Antigua & Barbuda, the Bahamas, Barbados, Belize, Dominca, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Kitts & Nevis, Saint Lucia, St. Vincent & The Grenadines, Surinam, Trinidad and the the Dominican Republic.

the Cariforum countries[101] and a similar protocol was added to the EPA with South Korea. Today, these protocols provide a model for other EPAs in which the European Union is a partner. The update of the partnership agreements between the European Union and the African, Caribbean and Pacific States (ACP) contains Protocol III on Cultural Cooperation, which refers explicitly to the Convention and the obligation to protect and promote cultural diversity.[102] It is of note that that the focus of this protocol is not on positive obligations and commitments to cooperative arrangements.

The Protocol states its intention to

> "Collaborate with the aim of improving the conditions governing their exchanges of cultural activities, goods and services and redressing the structural imbalances and asymmetrical patterns which may exist in such exchanges" (article 1.3).

The aim is thereby to foster the development of cultural industries and to enhance the exchange opportunities of goods and services, including preferential treatment (article 2). Importantly, the EU is committed to facilitating the entry into and the temporary stay[103] in their territories of artists and other cultural professionals and practitioners provided that this is in the context of collaborative arrangements like festivals or fairs (article 3). Important provisions in the Protocol concern the EU's support for cooperation agreements between producers of audiovisual and cinemtaographic works from the EU and producers from one of the Cariforum countries (article 5). Co-produced audiovisual works shall gain preferential market access, and be qualified as a European Work for the purposes of the requirements for the promotion of audiovisual works in the EU Audiovisual Media Services Directive (AVMSD article 5.2(a)).[104] The result is that these productions will be eligible to be broadcast in the timeslot reserved for European works.[105]

It is still too early to assess how the EU and the Member States have implemented this EPA. The reasons for this are that some Member States have just or not yet ratified the EPA as such. Also, some Member States are of the opinion that the protocol is not a binding legal instrument. Another factor that was reported was a lack of awareness in ths European cultural sector.[106] This conclusion is in line

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[102] Preamble and article 1.3 Protocol III on Cultural Cooperation of the EPA between the EU and the Cariforum.
[103] With a maximum of 90 days in any twelve-month period: article 3.2.
[104] Articles 1 and 4 of EU Directive 2007/65/EC as an amendment to the 89/552/EEC Television without Frontiers Directive. See in particular article 1(iii) which provides for qualification as a European work in coproductions with producers from third countries provided that the co-producers from the Community have provided a major share of the total cost of the production.
[105] On European Audiovisual policies, see Madeleine De Cock Buning, 2008, p. 251.
[106] Smits, 2011, p. xvi.

with the situation in the Netherlands as will be discussed in the next subsection. However, the Netherlands is still in the process of the ratifying of the EPA. It is reported that the Netherlands has made commitments for measures on entertainment services under certain conditions. This means that providers of entertainment services do not need a work permit for incidental cases and if their stay does not exceed a maximum of four weeks in any 13-week period. For longer periods a work permit is required. To obtain a work permit, an economic needs test is required, unless the performing artist is involved in dance, classical music, operas, musicals, or theatre and belongs to the high end of the market (evaluated on the basis of income). The requirements do not differ per Cariforum country. Furthermore, providers of entertainment services are allowed to stay in the Netherlands for 90 days every 12 months, instead of the usual 60 days.[107]

6.B.4.1. The protection of the diversity of cultural expressions in the Netherlands - Introduction

After the UNESCO Universal Declaration on cultural diversity of 2002, the Netherlands actively participated in the preparation of the Convention on the protection of the diversity of cultural expressions. The Dutch objective was to make sure that the Convention was to focus on cultural cooperation and not to interfere with accepted international trade policies.[108] The Netherlands ratified the Convention in 2007.[109] The government of the Dutch Antilles did not wish to enter into the Convention as it claimed that it could not oversee the consequences on such short notice.

Of course, the idea of protecting cultural diversity was not new to the Netherlands. The Cultural Policy (Specific-Purpose Funding) Act of 1993 dictated that the Ministry of Culture is to create the necessary conditions to foster and develop the social and geographical dissemination of cultural expressions, guided by the principles of quality and diversity.[110] Also the Dutch Media Act (old)[111], implementing the EC Television without Frontiers Directive and containing provisions on public broadcasting, outlined as one of its tasks " the development and dissemination of pluriformity and cultural diversity".[112]

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[107] Smits, 2011. See footnote 156.
[108] Explanatory note by the Minister for Foreign Affairs Verhagen, Lower House 27 May 2009.
[109] Tractatenblad 2007, p. 89.
[110] Wet op het Specifiek Cultuurbeleid 1993, artikel 2, Staatsblad 1993, 193.
[111] Staatsblad 1987, p. 249.
[112] Media Wet oud, artikel 13c, paragraph 2 (b).

In the second half of 2004, the Netherlands chaired the European Union and in that period it was active in arranging for the European Union to act as a partner in the negotiations on the Convention alongside the member states. Due to the potential effects of the Convention, and its objective to see cultural expressions both as cultural and economic assets, the Convention was carefully monitored by the Ministries of Foreign Affairs, of Economic Affairs as well as of Education, Culture and Sciences.

The letter by the Minister for Foreign Affairs to Parliament in 2009 explained that the protection of the diversity of cultural expressions was in particular relevant to the field of cultural policies, Dutch media law and the rules on competition. This subsection aims to describe the status of this protection in the Netherlands after the ratification of the Convention in 2007.

The obligations in the 2005 Convention regard internal policies, as well as commitments regarding external policies, related to exchanges with third states in general as well as with developing countries in particular. The next parapgraph will look at the Dutch internal perspective related to cultural policies with regard to the protection of the diversity of cultural expressions followed by a parapgraph on the Dutch media law of 2008-2010. This will be followed by a parapgraph regarding the external perspective, on Dutch policies with regard to cultural exchanges with third countries.

6.B.4.2. Dutch cultural policies, the internal perspective

The report by the Dutch UNESCO Commission in 2007 on if and how Dutch civil society was prepared to participate in the realisation of the objectives of the Convention had concluded that awareness regarding the objectives of the protection of the diversity of cultural expressions was less than was expected, and that further action was necessary to improve the acquaintance therewith.[113]

The explanatory letter that was sent to the Dutch Parliament in 2009 by the Minister for Foreign Affairs stated that manifestations of cultural diversity in cultural life were first and foremost related to "ethnic" diversity in the Netherlands.[114] The idea of protecting 'internal' diversity was also brought to the table in Paris, and according to the letter, it was due to Dutch advocacy that the words 'on its

[113] Belder, Smithuijsen, 2007.
[114] Staten Generaal 208-2009 A 31 971 Nr. 1 A nr. 1.

territory' had been inserted in the Convention in articles 5 to 7. This affirmed the Dutch policies on the protection of cultural pluriformity as one of the main objectives in Dutch cultural policies.

The explanatory letter by the Minister of Culture went somewhat further and stated that the diversity in cultural policies not only concerns ethnicity but also gender, age, religion, income and sexual orientation. It is of note, however, that this reference to cultural diversity seems to be more directed towards the receiving end of a diversity of cultural expressions. Cultural diversity is measured by the participation of minorities in cultural activities and the ways in which cultural institutions, including heritage institutions, are willing to target their programming towards these minorities.

In his letter of 2009, the Minister stated his approval of the initiative by a Dutch NGO, the Netwerk CS, to develop a cultural governance code: "Code Culturele Diversiteit", which is to commit sectoral institutions to position cultural diversity as one of their objectives in the development of programmes and other activities. And, furthermore, that all subsidies related to the cultural sector would henceforth contain a criterion regarding the level of cultural diversity that should be taken into account. The objective of protecting the diversity of cultural expressions is therefore promoted implicitly in the cultural policies as foreseen by the Minister. Indeed, in the following year the Code was presented, but in the meantime a change of government had taken place.[115] The invitation to the new State Secretary for Culture to attend the official presentation was declined because he did not want to raise expectations. The new (conservative) government's intention was that there would no longer be any active policy on the promotion of ethnic or gender diversity. Also, the Code was to be regarded as a matter of civil society, and not to be interfered with by the Ministry, nor were there any funds available to contribute to its objectives.[116] Although the Convention itself gives civil society a specific role in its operationalisation[117], this was, of course, a blow to the efforts of the authors. The lack of support by this State Secretary was a demonstration of the new government's more conservative- liberal approach to its cultural policies. In combination with the largest cuts ever in the government's budget for cultural institutions and activities, this leaves the question of how the Dutch government will fulfil its commitments to the protection and promotion of the diversity of cultural expressions to be answered by looking at other policy areas.

After a short but intensive period of right-wing policy, the government fell, and

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[115] Code Culturele Diversiteit 2010, available at http://codeculturelediversiteit.nl/, last accessed 1 January 2012.
[116] Letter by State Secretary Zijlstra of 8 May 2011.
[117] See section 6A.2.8.

after the elections in September 2012 the new government again supports the protection of cultural diversity with an explicit reference in the official Government Policy Brief stating that public funded cultural instititutions shall adhere to the Cultural Diversity Code.[118]

6.B.4.3. Public broadcasting

The 2009 letter by the Minister for Foreign Affairs highlighted the relevance of the UCDCE for the relevance of European competition law in article 86 paragraph 2 TEC with regard to the public broadcasting sector and the rules on state aid in article 87 paragraph 3 sub. d TEC.[119] The framework of European competition law is considered by the Minister as giving a clear structure for state support for the public broadcasting and the audiovisual sector in accordance with the common market as regulated in the EC Treaty.[120] Although European competition law is primarily aimed to secure a level playing field in a common market, it may also be considered to support pluralism and diversity, because it will prevent an unbalanced concentration in power in the media industries, which could lead to a lack of diversity in the supply of information.

Safeguarding the diversity of audiovisual information is ensured in the Audiovisual Media Directive[121] which is implemented in the Dutch Media Act of 2008[122]. The following will focus, first, on the Dutch government's policy on public broadcasting and, second, on the regulatory measures that involve the content of public broadcasts.

As the Dutch Minister of Culture phrased it in his policy letter in 2008, cultural diversity is an abstract concept that should be embodied by activities in the media. The new Media Act delegates responsibility for safeguarding access to a diverse audience to the Public Broadcasting Organisation (NPO), and the task of programming to the Dutch Programming Foundation (NPS). As we can read in the Concession Policy Plan of the NPO, it is considered that by the year 2025 some 23% of the Dutch population will be of non-Dutch origin. This percentage includes a percentage of 13% of non-Western origin.[123] Cultural Diversity is therefore a guiding principle in this policy paper. This includes the objective of a

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[118] Regeringsakkoord " Bruggen Slaan", VVD- PvdA, 29 Oktober 2012, p. 19.
[119] Staten-Generaal, vergaderjaar 2008–2009, 31 971, A en nr. 1 p. 3.
[120] See also articles 2 and 3 TEC and Communication C 123 of 30 April 2004.
[121] The Audiovisual Media Directive preamble paragraph 5 safeguarding cultural diversity.
[122] Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet.
[123] NPO Concessiebeleidsplan 2010-2016, 2010, p. 81

workforce that is more in line with the diversity of the population at every level of the organisation. At the same time, broadcasting is also to be active in innovative programming in a sphere of creative competition. It is thereby deemed important to invest in cross-media programming so as to keep up with commercial broadcasting and to keep abreast with young audiences.[124] The plan was received positively by the new Minister of Culture, in particular with respect to the objective of positive action related to minority groups and women. This means that the Dutch policy on public broadcasting is still committed to the protection of cultural diversity.

The new Media Act, which came into force in 2008, provides a detailed framework securing diversity in the programming of audiovisual broadcasting. Within the Media Act, public broadcasting has its own regime related to the Dutch system of subsidies which pays for the official state broadcasting company (NPS) as well as a range of other public broadcasting companies representing specific groups in society. These rules relate to programming, content and advertising.[125] Article 2.1 paragraph 2 stipulates that the programming of public media services is to meet the democratic, social and cultural needs of Dutch society by providing quality programmes that are not only to demonstrate pluriformity and diversity in format and content, but also to represent the pluriformity of the Dutch population, its convictions, and interests.[126] The system of allocating funds and broadcasting facilities to public broadcasting organisations also includes rules on the allocation of funds to religious groups (article 2.42), as well as regional or local broadcasting companies (2.61).
As for the content of the programming, the Media Act provides for quotas regarding European and independant productions (article 3.20) and quotas for productions in the Dutch and Frisian languages (article 3.24). This latter provision stipulates that at least 40% of programmes are to be produced in the Dutch or Friesian language.

[124] NPO 2010, p.50. See alsoTK 2008-2009, Brief van de Minister van OCW, 24 april 2009 nr. 34; Brief 2008 Media en Diversiteit MLB/M/79789.
[125] De Cock Buning, 2006.
[126] See also article 2.24 and 2.35 Dutch Media Law.

6.B.5. Concluding remarks

Regarding the UCDCE as the expression of an emerging international norm regarding the role of cultural expressions in a globalizing society, this Convention might be a major step towards a changing perspective on international cooperation in protecting the diversity of cultural expressions in national states, on the norms in international trade and the protection of private interests, and with regard to the protection of the cultural expressions of indigenous communities. One might say that the mere existence of the Convention is a sign of the development towards new insights regarding the importance of sustainable cultural industries in a global economy. However, how this will work out in future years depends on many factors, and it is too early to provide conclusions on the effects of the Convention.

On the other hand, the UCDCE provides a new normative international law instrument that is relevant to the wide spectre of trade and cultural relations between the states parties. The adoption of this 2005 Convention thereby fosters international policies in the protection and promotion of a diversity of cultural expressions which will stimulate continuing access to such a diversity of cultural expressions. More in particular, these policies will contribute to the support for and the international exchange of contemporary artists and performers, which is expected to contribute to the cultural diversity in national states and in international cultural collaborative projects.

The preparatory process has certainly demonstrated that there is considerable support within the international community, but also in the European Union and its Member States for the objectives of the 2005 Convention. This - by some destined to be a "Magna Carta of cultural policies" - may provide a new forum for discussions on the rights and obligations to cultural expressions, and may lead to support for balancing proprietary claims with the public interest.

On a more practical level, and with regard to the private interests of intellectual property right holders, the interpretation of the three-step test as in article 13 TRIPS, which provides a general norm on limitations and exceptions to the exclusive use and control of intellectual property rights, may be served by taking the protection and promotion of cultural diversity into account. However, it is too soon to be able to estimate if and in how far this may lead to amending legislation on the scope of intellectual property rights.

At the same time, the call for collaboration between public agents, private agents and civil society is significant, as it is a sign of the international consensus on the need to establish contacts that may contribute to the amelioration of the balance between the protection of the public interest and the interests of private parties.

An important part of the 2005 Convention is dedicated to the protection of the diversity of cultural expressions in developing and least developed states parties. In that context, the cultural expressions of indigenous communities are of particular importance. It is of note that this protection may be an important contribution to the emancipation of these communities. At the same time this should inform the Western approach on the necessary contribution to the sustainable development of these states parties. It is therefore the responsibility of states parties to interpret the obligations of the 2005 Convention in such a way that it will contribute to their relations with other states parties.

The UCDCE also provides for a normative framework for national policies with regard to the diversity of cultural expressions. How these policies are articulated is a matter for national political decision-making processes. The approach of the Dutch government to the Cultural Diversity Code is a case in point. Political shifts in national governments should, however, not stand in the way of the operationalisation of the 2005 Convention. As an active party to the 2005 Convention, the European Union therefore has a specific responsibility in control over national policies regarding the implementation of the 2005 Convention.

VII.
THE PROTECTION OF CULTURAL RIGHTS

7.1. Introduction

This study is based on the premise that the legal protection of cultural heritage has developed from protection against the loss of cultural property, and the protection of a confined category of tangible cultural heritage of outstanding value, into the governance of representative manifestations of tangible and intangible cultural heritage. The UNESCO culture conventions are considered to be the markers of international consensus on how to achieve the objectives of protecting and safeguarding cultural heritage. The 2003 UNESCO intangible heritage Convention as well as the 2005 Convention on the Protection of the Diversity of Cultural Expressions explicitly refer in their preamble to existing international human rights instruments, in particular to the Universal Declaration on Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966 that had come into force in 1976. The UNESCO Conventions thereby express their commitment to not only protecting cultural heritae, but also the rights holder to this cultural heritage. For that reason, this chapter will consider the individual and the protection of his right to take part in the cultural life and in his community: cultural rights. This chapter will first discuss, in short, the historic background of the human rights that are most relevant to the protection of interests in cultural heritage: freedom of expression and cultural rights. This discussion of cultural rights will demonstrate that in the historical development of cultural rights, the position of the individual, his cultural life alone and as his life as part of his community is central. But as the community is the social environment in which cultural life is realised, the protection of communities, also when they are part of cultural minorities, is a closely linked

subject-matter of cultural rights. This chapter will therefore address the issue of the major developments in human rights law regarding the rights of minorities in cultural rights. This will be followed by remarks on how the rights and interests of the individual are protected in cultural rights and how this protection of cultural rights contributes to the protection, safeguarding and the promotion of cultural heritage.

Cultural rights have been codified in numerous instruments and regulations.[1] This discussion of the obligations of States regarding the protection of cultural heritage will concentrate on the main global instruments: the United Nations Bill of Human Rights, containing the UN Universal Declaration of Human Rights (UDHR) of 1948[2] with the International Covenant on Economic, Social and Cultural Rights (CESCR) and the Covenant on Civil and Political Rights (CCPR) both accepted in 1966 and in force since 1976. To further support the research on the legal protection of cultural heritage this chapter will discuss the core cultural rights contained in article 27 of the UDHR and article 27 of the CCPR, which will serve as guidance on how the issue of community rights is considered in the major human rights instruments. Art. 15 CESCR will serve as a starting point for a discussion of the cultural rights of the individual. Although the right to education (arts. 13 and 14 CESCR) is said to be closely linked to article 15 CESCR, this right will not be discussed any further.[3] The new developments in the protection of indigenous cultural heritage in theadoption of the UN Declaration on the Rights of Indigenous Com-

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[1] Human rights are recognised in a vast body of law. Not only in the major instruments, but numerous Protocols, Covenants, Charters and Agreements recognise, directly or indirectly, the importance of the protection of human rights. Besides the European Convention no other regional instruments are discussed here; among those are the American Declaration of the Rights and Duties of Man, adopted in 1948 O.A.S. Res. XXX, the African (Banjul) Charter of Human and Peoples' Rights, adopted in 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), in force since 1986, and the Kwangju Declaration on the Asian Human Rights Charter 2001.

[2] UN General Assembly Resolution 217 A (III) 1948.

[3] Comment 21 on article 15 paragraph 1(a) links the right to take part in cultural life to the right of education because individuals and communities are thought to educate others by passing on their values, religion, customs, language and other cultural references, which is said to help foster an atmosphere of mutual understanding and respect for cultural values. The right to take part in cultural life is also interdependent on other rights enshrined in the CSCR, including the right of all peoples to self-determination (art. 1) and the right to an adequate standard of living (art. 11). See Comment 21 paragraph 2.

munities in September 2007 will then be presented as a new step towards the recognition of a right to cultural identity. But first, this chapter will look at the historical background of human rights as they developed from a right that protects the individual against interference by the nation state into a concept of cultural rights with the obligation for nation states to respect, protect and fulfil conditions to ensure these rights.

7.2. Historical Background; rights, freedoms and interests

The first codifications of human rights took place during the final stages of the Enlightenment. The Unites States' Declaration of Independence (1776); the French Declaration des Droits de L'Homme et du Citoyen (1789) and the Dutch "Staatsregeling van het Bataafse Volk" (1789) expressed the end of the era of absolutism and heralded democratic governments whose prime task it would be to protect the rights of citizens.

One of the first philosophers to articulate legal rights as internal to a comprehensive political system was John Locke. The role of the state was to protect its citizens and to promote common welfare.[4] At the same time this task served as a justification for the government by the state in a contractual arrangement based on consensus on the protection of interests and rights.

In the 19th century, John Stuart Mill explored the role of the government in his influential writings on liberty, utilism and the pursuit of happiness.[5] Mill stated that one should always be careful concerning the scope of power of public authority that would always have a tendency to interfere in the private sphere of civilians. Both man and government should act to the best of their ability and refrain from doing harm. Mill presented the world as consisting of natural dualities such as the social and the individual, the government and the people, the need to secure and the need to expand, and to ensure that the different sides both have the necessary space in which to operate. It is therefore for the benefit of all to secure a private sphere of liberties or freedoms for the individual against the arbitrary exercise of authority.[6] However, the constitutional protection of these rights and freedoms was primarily considered to take place within the confinement of sovereign states.

The further development of human rights is the history of their infringement.[7] Technological, social and political developments in the 19th century saw the beginning of international agreements on protecting against needles human suffering.[8] The pivotal moment in the development in human rights was the ending of World War II. At that time the world was in a state of shock because of the

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[4] John Locke, Two treatises of Government, 1689.

[5] On Liberty first printed in 1859, "Harvard Classics" Vol. 25, published in 1909 by P. F. Collier & Son made available on http://etext.library.adelaide.edu.au ; "Utilism" first published in three essays in "Frasers' Magazine" in 1861, reprinted in 1861, the 1864 edition published by Longman, Green, Longman, Roberts and Green , in the collection of the Bodleian Library of Oxford University made available at www. google.books.com.

[6] This is not to present a complete overview of the wealth of Mill's ideas. See Mill 1909.

[7] Morsink,1999, p. 36; Eide, 2001, p. 12-17; Wagner, 2001, p. 18; Lynn Hunt, The Story of Human Rights, 2007; A.W.B. Simpson, 2001, p.172-173.

[8] Greer, 2006, p. 7.9 See also General Comment 21 to the CESCR paragraph 6.

unprecedented scale and force of the destruction of human lives. At the same time, there was a complete disruption in pre-war political and economic relations, which caused a vacuum that needed to be filled with new initiatives.

In the United States' State of the Union in 1941, Roosevelt declared the existence of four essential freedoms:

- freedom of speech and expression;
- freedom of worship;
- freedom from want;
- freedom from fear for anyone anywhere in the world.

Roosevelt and Churchill signed this Declaration on Human Rights in the following year.

The notion of 'freedom' refers to the obligation of the state to secure the conditions in which these freedoms may be ensured. These freedoms consist of negative and positive obligations. The negative obligation requires abstention and non-interference by the State, and the positive obligation concerns positive action, ensuring conditions in which these freedoms may be realised.[9]

The four freedoms were to become the backbone of the Bill of Human Rights, comprising the Universal Declaration of Human Rights (UDHR) in 1948, the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR) of 1966.[10]

Under the Charter of the United Nations of 1945, the UN was organised as a legal body ruled by the General Council of Member States. The organisational structure was based on the idea of a separation of policy instruments.[11] The protection of liberty, non-discrimination, the rule of law, and social welfare was to be ensured by 'the creation of wealth', monitored by the IMF, the GATT, and the World Bank. The human rights aspects were allocated to the ILO, the UNESCO, UNICEF and the WHO.[12] These specialised agencies were to have a guiding role in the realisation of their specific fields. However, the principle of universality was to ensure that the governance of human rights was to guide all the activities of the specialised agencies. All the same, it is of note that this separation of agencies has resulted in a process in which the different institu-

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[9] See also General Comment 21 to the CESCR paragraph 6.

[10] As confirmed in the preamble to the UDHR: "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."

[11] Charter of the United Nations, article 57.

[12] Petersman 2001, p. 2.

tions have developed their own rationales that sometimes result in conflicting interests.[13]

For the CESCR the initial standard of the implementation of its objectives was one of 'progressive realisation'. States Parties were required

> "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." (CESCR article 2.1).

After the Covenants came into force in 1976 the discussion focused on the effective monitoring of the implementation and the Committee's reporting guidelines which called for reports on lists of numerous data without any perspective concerning the amelioration of the specific situations of specific groups and communities.[14]
In 1986 the Limburg Principles on the Implementation of the ICESPR marked a new approach, as it set out the principle of the necessity that nation states are to protect against violations of human rights, with an emphasis on a standard of 'minimum core content' in every economic, social or cultural right.[15] Ten years later, in 1997, the Maastricht Guidelines, evaluating the Limburg Principles, defined a violation of social, economic and cultural rights as a failure to perform any of the obligations to respect, protect or fulfil any of these rights. [16]
At the same time, the UN continued the debate on the status of human rights, leading to the Vienna Declaration of 1993, which emphasised the universality of human rights obligations:

> Art. 5 Vienna Declaration 1993 (UN Doc.A/Conf.157/23 paragraph 5)
> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to pro-

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[13] UN Doc. E/CN.4/Sub.2/2002/9 p. 7. This resulted in a situation where many see the economically-oriented agencies as more or less opposed to the human rights agenda as can be witnessed in the growing social unrest during the WTO meetings in Seattle 1999, Cancun 2003, Geneva 2004 and 2006, and Paris 2005.
[14] Chapman, 2002, p. 5.
[15] UN Doc. E/CN.4/1987/17, Committee on Economic, Social and Cultural Rights, "General Comment No. 3: The Nature of State Parties' Obligations (Art. 2(1)), 5th Session 1990.
[16] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 15 Netherlands Quarterly of Human Rights 244 (1997).

mote and protect all human rights and fundamental freedoms.

A new step was taken in 1999, when Kofi Anan, in his address to the Davos Economic Forum, called for a radical change in the position of the human rights codex in society: the Global Compact.[17] Human rights should no longer be observed as an objective standard for states to adhere to, but should be made internal in all human enterprises, be it state, governmental, corporate or private. All segments of society should commit themselves to a continuing reflection on human rights. This resulted in the adoption of the UN Millennium Declaration in 2000 and the start, in 2002, of a new programme that is to realise ten Millennium Development Goals before 2015. This programme is a new step in the UN context as it sets out to achieve ambitious targets, although they are presented as being realistic and verifiable. It connects figures and percentages to the eradication of poverty or the institution of an HIV/Aids programme. The effects of these Development Goals are not yet clear and the results will be a test for the credibility of the UN Organisation. Ultimately this programme is a test as to whether or not the catalogue of human rights as protected by the UN provides an effective governmental instrument in the global community.[18]

7.3. Universality of human rights

The Vienna Declaration of 1993 emphasised the universality of human rights obligations:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[19]

However, there is still a debate on the relative value of individual human rights.[20] Many experience a sense of injustice when the right to be free from torture is equal to the right to take part in culture. Also there are objections against the

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[17] http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html, last accessed 1 August 2011.
[18] http://www.unmillenniumproject.org/ last accessed 1 August 2011.
[19] Art. 5 Vienna Declaration 1993 (UN Doc.A/Conf.157/23 paragraph 5).
[20] Donders, 2005, p. 14.
[21] Schermers, 1988; Kooymans, 1990; Cliteur, 1995; Alston, 1984, pp. 607; Raz, 2007, p. 2.

expansion of the catalogue of human rights.[21]

A way to differentiate between human rights is to refer to the 'generations' of human rights. Three different generations have been distinguished: the classical human rights, including the civil and political rights; the economic, social and cultural rights; and, more recently, the third generation solidarity rights, like the right to development, the right to communication, the right to peace and the right to benefit from the heritage of mankind.[22]

Nonetheless, the universality of human rights does not imply uniformity in their application.[23] Human rights impose a norm, and for most of these norms there is the potential of limitations; however, the scope of these limitations is narrowed down to very strictly interpreted criteria (national safety, public order, national health etc.) and only a few are without limitations, like the right not to be tortured. In the 1993 General Comment no. 24 on the CCPR it is stated that:

> "...provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be."[24]

It is generally assumed that these rights, the first generation, are absolute and without limitations.[25] The second generation, the civil, political, economic, social and cultural rights, would demand minimum core obligations, and commit states to develop policies towards enhancing these rights; while the third generation would reflect a moral obligation to consider these rights. The Committee on Economic, Social and Cultural Rights stated in General Comment 21 on article 15 CESCR that

> "...applying limitations to take part in cultural life may be necessary in certain

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[22] Flinterman, 1990, 75-81.
[23] AIV Report 1998; Riedel, 1999.
[24] General Comment No. 24, paragraph 8.
[25] AIV Report 1998.

> circumstances, in particular in the case of negative practices,(...). Such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the Covenant. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed."[26]

At the same time the differentiation in generations is considered in no way to imply a value judgement, although it might be stated that the generation approach includes the notion of a degree of sophistication.[27] However, as these rights are interdependent and interrelated one may not conclude that there is a sliding scale in the obligations. The universality of human rights was again emphasised in 2009 in the UNESCO World report relating human rights to all individuals, "regardless of language, tradition and location".[28]

7.4. Human Rights and the protection of the right to take part in cultural life

7.4.1. Introduction

Human rights are codified in order to ensure the commitment of nation states to protect every human being as an autonomous individual and to ensure his participation in the social, economic, political and cultural life in his society. As such, all human rights have a cultural connotation. Not only are these rights a cultural product by themselves, they also ensure an individual's right to be an active member of his or her society and culture.

Most important in the spectre of rights related to cultural rights is the freedom of opinion and expression that ensures the commitment of nation states to ensure the right of every individual to actively participate in cultural life.
UDHR art. 19

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

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[26] General Comment No. 21, paragraph 19.
[27] Flinterman, 1990, 75-81.
[28] UNESCO World Report 2009, p. 225.

The information contained in cultural heritage can only exist as a result of the communication of information and the ideas that are involved. Therefore, the freedom of expression defends two principles: the freedom to express information to the outside world and the freedom to receive information. These principles are entwined: it is necessary to have information in order to create information that can be expressed. These principles sustain different functions. First, there is the function of the enlightenment of society. Only through the free exchange of information and ideas can we form our opinions on right from wrong, true or false.[29] Second, there is the utility-based rationale, in that the effects of freedom of speech lead to citizen participation in a democracy. This leads to 'self-fulfilment' that is recognised in the freedom of speech, as it allows the individual, through the expression of ideas, to develop a public personality. [30]

7.4.2. Cultural Rights

The Universal Declaration and the Covenants contain the right to participate in cultural life and the right to the protection of the moral and material interests resulting from one's cultural heritage: 'cultural rights'.[31] It has been repeatedly noted that cultural rights were considered as 'a remnant category' for a long time. However, it is now generally accepted that cultural rights, after a period of neglect, are considered to be of growing importance.[32] Stamatopoulou considered a mixture of reasons for this renewed attention that may be summarised in three aspects: first, the culturalisation of politics in the post-September 11th 2001 world. Tensions in global politics became manifest in religious and cultural struggles. Second, the politicisation of cultures. The global network facilitates communication which is challenging the potential of people and societies to absorb confrontation with other cultures. At the same time, "increased assertiveness of identity" results in the demand for respect and protection for the right to maintain particular cultural values.[33] The third aspect is the demand for respon-

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[29] John Stuart Mill, "On Liberty"; Barendt, Freedom of Speech, 1987, p. 8.
[30] Ibid., p. 285.
[31] This chapter concentrates on the core cultural rights which are considered most relevant for this book. In a wider context, the right to education (as in UDHR article 26, arts 13, 14 CESR as well as articles 28 and 29 of the Convention on the Rights of the Child; and the ESCR Committee General Comment No. 13 (1999) on the right to education, as well as the right of freedom of religion, which have been included in the corpus of cultural rights, see Francioni 2008, pp. 1-16. See also Committee on Comment 21 on art. 15(1) CESR, paragraph 19, and the Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, UN Doc A.HRC.14.36, 2010, paragraphs 11-20, also including the right of non-discrimination as an important parameter in cultural rights (paragraph 17)).
[32] See Meyer-Bisch, 1993; Eide, 2001 p. 289; Stamatopoulou, 2007, p. 7-8; Donders , 2005, p. 2, p.65-69.
[33] Stamatopuolou, 2007, p. 8.

sible public policies regarding cultural pluralism and diversity. Cultural rights are considered as an indispensable component in the realisation of a United Nations (and a global society) that respects its multi-ethnic and multicultural society.[34]

The first, explicit reference to the right to participate in cultural life is article 27 of the Universal Declaration, with in the second paragraph a reference to the right to the protection of moral and material interests resulting from the work of an author.

UDHR art. 27

> Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

These rights were to be further developed in CCPR article 27 and in CESCR article 15.

CCPR article 27:

> In 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.

CESCR Article 15:

> 1. The States Parties to the present Covenant recognize the right of everyone:
> (a) To take part in cultural life;
> (b) To enjoy the benefits of scientific progress and its applications;
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
> 2. The steps to be taken by the States parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
> 3. The States parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
> 4. The States parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

Because in treaty law the analysis of the text as well as the drafting history is

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[34] Ibid., p.7

considered to shed light on the meaning and purpose of an international law instrument and are considered as prime sources of interpretation, the drafting history of these articles warrants attention.[35]

7.4.3. The individual and his right to participate in the cultural life of the community in article 27 UN Declaration on Human Rights

The first paragraph of article 27 of the UDHR contains the rights to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits in paragraph 1.[36] It is of note that, initially, the discussion on the protection of the cultural life of the community was held in the context of the discussion on the Convention on the Prevention and Punishment of the Crime of Genocide, in which it would be decided whether or not cultural genocide would be inserted alongside physical or biological genocide. All this within the perspective of the aftermath of World War II and the Holocaust. There was intensive debate on whether or not to insert a reference to minorities, and because this issue became increasingly loaded with ideological and political considerations, it was decided to transfer a reference to minorities to the Covenant that would follow the drafting of the Universal Declaration. A general reference to the protection of cultural life in the Declaration would replace a reference to cultural genocide in the Genocide Convention. Article 27 was confined to the right to participate in the cultural life of the community, which is neutral with regard to considerations concerning minorities or cultural diversity in the sphere of one state.[37]

Paragraph 2, containing the reference to the rights of authors to moral and material interests in their creative expressions, was also subject to extended debates. The problem was that although states with a Western as well as states with a Communist background agreed on the creation of a codex of human rights, the conveyance of private intellectual property rights to every individual creator was not acceptable to the Communist states. At the same time, in the Western countries the common law protection of commercial exploitation in copyrighted works did not recognise moral rights, whereas the continental authors' rights tradition considered the protection of moral rights as essential. In order to find a way out of this dilemma, during the first preparations of the UDHR the French

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[35] Vienna Convention on the Law of Treaties article 31.
[36] Morsink, 1999, p. 219.
[37] Stamatopoulou, 2007, p. 15.

representative submitted a draft text containing a provision for the protection of moral rights to be discussed by the members of the small preparatory committee. The text was prepared for discussion on 16 June 1947 and contained article 42:

> "L'auteur de toute oeuvre artistique, litteraire scientifique et l'inventuer conservent, indépendant des revenues légitimes de leur travail, un droit moral sur leur oeuvre ou leur découverte, droit qui ne disparait pas, même lorsque cette oeuvre est tombée dans le patrimoine commun de tous les homes."

The French delegation insisted on the addition of moral rights, more specifically the authors' rights to alteration and other misuse of their creation, as well as the right to remuneration for their labour.

Importantly, the American Declaration issued earlier that year also included a provision on moral rights in article 13:

> Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.
> He (or she) likewise has the right to the protection of his (or her) moral and material interests as regards his (or her) inventions or any literary, scientific or artistic work of which he (or she) is the author.[38]

With the support of the Mexican and Cuban delegates the French were able to convince the Drafting Committee that article 13 of the American Declaration should be taken as an example. The Mexican delegate stated that the United Nations should have the moral authority to protect all forms of work, both intellectual as well as manual, as the right to work had already been recognised by the Drafting Committee and that intellectual property should be safeguarded as well as material property.

However, the Commission on Human Rights rejected the Draft. The arguments were that intellectual property should not be interpreted as a basic human right, that the protection of property rights under article 17 was sufficient, and that the protection of intellectual property was 'elitist'. [39]

The matter was again discussed at the Third Session (May 28-June 28) that took place at the same time as the revision of the Berne Copyright Convention in Brussels. It was again rejected by 6 votes to 5 with 5 abstentions. But the Third

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[38] The Charter of the Organization of American States (OAS) (comprising the USA and the Central and South American States) was signed in Bogotá, Colombia, in 1948 and came into force in 1951.

[39] Chapman 2002, p. 313, referring to the Third Committee summary of Records of meetings 21 Sept.-8 Dec.1948, pp. 619-634.

Committee contained a larger number of countries, and the Latin American Countries reversed the balance. Eventually, it was Mr Chang, the Chinese Representative, who harmonised the differences by stating that:

> "The purpose of the joint amendment (i.e. to add moral rights as in article 13 of the American Declaration by Cuba and Mexico) was not merely to protect creative artists but to safeguard the interests of everyone… because literary, artistic and scientific works should be made accessible to the people directly in their original form. This could only be done if the moral rights of the creative artists were protected."[40]

This convinced the delegate members that this provision was merely intended to protect the interests of creative artists and that there was no intention to allocate a new set of private property rights by way of this instrument.

7.5. Minority communities and article 27 CCPR

In 1951, the Covenant on Human Rights was first intended to be one document only. However, in the following years it was decided to Draft two Covenants, one to cover economic, social and cultural rights, and the other to cover civil and political rights. The CESCR and the CCPR were signed on the occasion of the Declaration of Teheran in 1966.

Article 27 CCPR specifically addresses minority rights. Minorities are both subject to as well as the object of protection.[41] In the latter sense, the protection of the cultural environment of a minority is central because cultural conditions are elementary to the existence of a specific group of people. As was stated by Eide:

> "…the basic source of identity for human beings is often found in the cultural traditions into which he or she is born and brought up. The preservation of that identity can be of crucial importance to well-being and self-respect". [42]

A recent rough ethnological estimate by Stavenhagen counts between 3,000 and

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[39] Chapman 2002, p. 313, referring to the Third Committee summary of Records of meetings 21 Sept.-8 Dec.1948, pp. 619-634.

[40] Morsink, 1999, p. 222.

[41] Other basic legal instruments regarding the protection of Minority rights, that will not be discussed any further here, are the ILO Indigenous and Tribal Peoples Conventions 107 of 1957 and 169 of 1989, the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the 1995 Council of Europe Framework Convention for the Protection of National Minorities.

5,000 different groups of peoples which are different from the majority of the people living in a State with regard to ethnic, racial, religious, or linguistic criteria.[43] Another estimate in the 2004 UNDP Human Development Report refers to a figure of 900 million people who belong to groups that are subject to some form of cultural exclusion not faced by the majority in that state.[44]

Capotorti's authoritative definition is neutral as to the origin of the community, and does not distinguish between indigenous communities and immigrant communities:

> "numerically inferior to the rest of the population of the State; that are in a non-dominant position; whose members – nationals of the State of residence - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population; and that show – if only implicitly – a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[45]

However, the drafting history of article 27 CCPR reveals opposing perspectives on minorities as the subject of rights.[46] Nowak reports that this was related to the fundamental difference between the 'Old World' in which (indigenous) minorities were to be protected and the 'New World' consisting of immigrant societies in which minorities should be assimilated.[47] As the 'New World' prevailed, minority rights were not included in the UDHR.

Another issue at the time of the drafting of the text of the Covenants was the realisation of the rights of the individual as a member of a community as distinct from community rights as collective rights or group rights. Again, the prevalent position was that of the Western countries, that insisted on an emphasis on individuality and personal rights. The original draft text stated: "Ethnic, religious and linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practise their own religion, or to use their own language". The British representative suggested replacing the word 'minorities' with 'persons belonging to minorities' because minorities have no legal personality. However, the collective character of the provision was considered important and in the final text it was added "in community with other members of the group".[48]

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[42] A. Eide, 1995, p. 291.
[43] Stavenhagen, 1987, p. 16.
[44] UNDP Human Development Report: Cultural Liberty in Today's Diverse World, 2004, p. 6.
[45] Capotorti, Study on the rights of persons belonging to ethnic, religious and linguistic minorities, E/CN.4/Sub.2/348/Rev.1 1979, p. 96; see also the discussion on definitions of minorities in Thornberry, "Indigenous Peoples and Human Rights", 2002, p. 52-60.
[46] Donders, 2005, p. 166-175.
[47] Nowak, 1993, p. 636.

Although UN Human Rights instruments emphasise the universality of human rights and therefore the fact that these rights relate to persons, regardless of their citizenship, human rights as a legal instrument concerns the obligations of States towards their inhabitants. Some States professed the opinion that their commitment was to protect communities that were traditional inhabitants of the State only, and that immigrant communities were not to be considered. However, General Comment 23 of 1994 explained that the concept of minorities has an autonomous meaning within the CCPR and also includes immigrants.[49] Nowak follows the General Comment by defining the term minority as being strictly related to the definition based on the criteria of objective numerical position and the subjective element of 'a feeling of solidarity'.[50] In addition, Thornberry has noted that in some cases the autonomous meaning of 'minority' can also encapsulate groups that are numerically not in a minority, but whose cultural conditions are an issue of concern. [51] Donders has pointed out, however, that article 27 should not be confused with article 1 on the right of self-determination for peoples and that the rights protected under article 27 should be compatible with the sovereignty and territorial integrity of States.[52]

Stamatopoulou recently analysed that the Human Rights Committee has adopted the General Comment interpretation in a series of cases under the Optional Protocol of the CCPR.[53] She based this conclusion on the case law on the individual right to complain in a 'communication' that is secured by the First Optional Protocol to the Covenant.[54]

In the Lubicon Lake Band Case against Canada, the Committee considered the expropriation of over 10,000 square kilometres in the interest of granting oil and gas leases to private corporations as violating the Communities' right to self-determination as protected in article 1 CCPR. More importantly, the Committee considered the destruction and undermining of the Lubicon Lake Band's economic base under article 27, and concluded that the deprivation of their means of existence and economic and social activities can be a part of the protected culture of a community. [55] Cultural life is thus interpreted as covering:

"not only customs, morals, traditions, rituals, types of housing, eating habits

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[48] Nowak, 1993, p. 639; see also Thornberry, p. 152.
[49] General Comment No. 23, paragraph 5.
[50] Nowak, 1993, p. 645.
[51] Thornberry, 1991, p. 153 and footnote 15 noting the cases on Bolivia A/52/40 and Guatamala A/51/40, considering peoples that may constitute a numerical majority but are non-dominant groups in the state.
[52] Donders, 2005, p.170.
[53] Stamatopoulou, 2007, p. 180-183.
[54] In June 2008 the Human Rights Council also adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OPCESR). This Protocol will now also provide for an individual communication procedure under the CESR.

> that are characteristic of a minority, the term also covers economic activities, such as reindeer husbandry, cattle raising, hunting and fishing, the manufacture of objects of art, the encouragement of music, the establishment of cultural organisations, the publication of literature in the minority's language etc."[56]

An important issue in this perspective is the inclusion of individuals and groups that want to be involved in creating the spiritual, material, intellectual and emotional expressions of the community to which they belong.[57] Article 27 commits States 'not to deny' the rights of minorities to enjoy their culture within their territory, but the question is whether this right is an individual right or if communities are to be granted a 'collective right'. This was also the issue in the Sandra Lovelace case concerning a woman who had lost her legal status as a Native American because she had married a non-Native American. Her claim for the recognition of her right to return to live on the Tobique Reservation was balanced with the right of the tribe to deny her this right. The Committee, however, recognised her personal right as protected under article 27.[58] General Comment 23 to the CCPR later observed that the rights protected under art. 27 are individual rights, although 'they depend in turn on the ability of the minority group to maintain its culture, language or religion".[59]

Thus, the conceptual framework of cultural rights continues to favour individual rights to collective community rights. This was again confirmed in 2010 by Fareeda Rasheed with the statement that:

> "…cultural diversity exists not only between groups and societies, but also within each group and society, and that identities are not singular. Each individual is the bearer of a multiple and complex identity, making her or him a unique being and, at the same time, enabling her or him to be part of communities of shared culture." [60]

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[55] Bernard Ominayak, Chief of the Lubicon Lake Band v Canada HRC No 167/1984 paras 30, 32,33; also in Kitok v Sweden No. 197/1985 in a complaint on reindeer husbandry; Mahuika et al. v. New Zealand, No. 1 547/1993 on the use and control of fisheries; Francis Hopu and Tepoaitu Bessert v France 549/1993 on the interpretation of the term "family" and the access to and use of burial grounds.

[56] Nowak, 1993, p. 659; see also Thornberry, 1991, p. 165-168; Stamatopoulou, 2007, p. 181.

[57] See also UN Report A.HRC.14.36, 2010 paragraph 54.

[58] Lovelace v Canada No. 24/1977.

[59] General Comment No. 23, paragraph 6.2.

[60] Ms. Farida Shaheed was appointed in 2010 as an independent expert in the field of cultural rights, see her first findings in the statement presented in A/HRC/14/36, pargraph 23.

7.6. The protection of the individual and his cultural rights in article 15 CESCR

Art. 15 CESCR is the first legally binding instrument to explicitly mention cultural rights. To define, in general terms, the cultural rights of the individual and the rights and obligations of the sovereign State is a delicate affair.[61] Since its inception, the different elements of art. 15 have therefore been the subject of continuous debate. The first paragraph concerns three distinct rights:

> 1. The States Parties to the present Covenant recognise the right of everyone:
> (a) To take part in cultural life;
> (b) To enjoy the benefits of scientific progress and its applications;
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

At the start of the negotiations on the Covenants to the UN Universal Declaration the focus was on the individual as the right holder of intellectual property rights. In particular the tension between the right to the peaceful enjoyment of one's private property and the limits to the exercise of private property by human rights have been a continuous issue of concern.[62] It was only in later years that the right of the individual to take part in cultural life was to become a problematic issue.
In 1952, when it became clear that instead of one general Covenant to the UN Universal Declaration, there would be two separate Covenants, the French delegates submitted the UNESCO text for discussion on the Draft of the CESCR.[63] This text provided two versions on cultural rights, both including the right to take part in cultural life, to participate in the benefits of science and the protection of intellectual property.

The initial UNESCO draft stated:

> Article (d)
> The Signatory States undertake to encourage the preservation, development and propagation of science and culture by every appropriate means:
> (a) By facilitating for all access to manifestations of national international cultural life, such as books, publications and works of art, and also the enjoyment of the benefits resulting from scientific progress and its application;

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[61] Pineschi, 2010, p. 2.
[62] Grosheide, 2010, p. 5; Belder, 2010 p. 175-179.
[63] Green, UN Doc. E/C.12/2000/15; Chapman, 2002, pp. 312-215.

(b) By preserving and protecting the inheritance of books, works of art and other monuments and objects of historic, scientific and cultural interest;
(c) By assuring liberty and security to scholars and artists in their work and seeing that they enjoy material conditions necessary for research and creation;
(d) By guaranteeing the free cultural development of racial and linguistic minorities.

Article (e)
The Signatory States undertake to protect by all appropriate means the material and moral interest of every man, resulting from any literary, artistic or scientific work of which he is the author.[64]

There also was a short alternative:

The Signatory States undertake to encourage by all appropriate means, the conservation, the development and the diffusion of science and culture.
They recognize that it is one of their principal aims to ensure conditions which will permit every one:
1. To take part in cultural life;
2. To enjoy the benefits resulting from scientific progress and its applications;
3. To obtain protection for his moral and material interests resulting from any literary, artistic or scientific work of which he is the author.

Each signatory State pledges itself to undertake progressively, with due regard to its organization and resources, and in accordance with the principle of non-discrimination enunciated in paragraph 1, article 1 of the present Covenant, the measures necessary to attain these objectives in the territories within its jurisdiction.[65]

This second UNESCO proposal provided the basis for the Commission's discussions at the Seventh Session. Noteworthy is that in contrast to "the cultural life of the community" as in article 27 of the UDHR, the final wording of article 15 CESC refers to "the right of everyone to take part in cultural life". The recommendation by UNESCO to add "...of the communities to which he belongs" was not accepted. [66]

The US delegation, chaired by Eleanor Roosevelt and supported by the UK and Yugoslavia, raised objections to a reference to intellectual property rights in para-

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[64] UN Doc. E/CN.4/AC.14/2, p. 3, cited by Green in UN Doc. E/C.12/2000/15, p.2
[65] UN Doc. E/CN.4/AC.14/2, p. 4. cited in Green in UN Doc. E/C.12/2000/15, p.6.
[66] UN Doc. A/C.3/SR.797, 178; and UN Doc.A.C.3/SR.799, 190-191. See also Vrdoljak, 2005, 11; Stamatopoulou, 2007, p. 17.

graph 3 (the future article 15.1(c)). These discussions took place at the same time as the USA confirmed its position that it did not want to become part of the Union of the Berne Convention on the protection of copyrights as property rights.[67] The UNESCO, meanwhile, was preparing the Universal Copyright Convention to provide for a middle of the road solution that would be acceptable to both the USA and the authors' rights countries. At that time it had already been decided that a general right to property, as accepted in article 17 UDHR, was not to be included in the CESCR. The inclusion of intellectual property rights was also rejected by the Drafting Committee.

The Draft was again discussed at the twelfth session of Third Committee of the General Assembly in the autumn of 1957. The French delegates, with the aid of the UNESCO representative, successfully initiated a campaign to reinsert the copyright provisions. Reflecting the geopolitical tensions of that period, two opposing sides then argued either in favour (Western states, UNESCO, Israel, Uruguay and Costa Rica) or strongly against: the Communist and Socialist countries. The latter group had already opposed the right to property in article 17 UDHR. The voting resulted in 39 in favour, 9 against with 24 abstaining.

The debate on authors' rights was overshadowed by the even more fundamental debate on the issue of government control over science and art, and scientists and artists, and the freedom of state intervention.[68] Earlier, the debate had halted with the USSR proposal to state that authors' rights should be protected according to the laws of each country, which raised the fear of other countries that this would provide a 'dangerous stipulation' since it was not impossible that certain States would not accept the right of the author to the revenues from artistic property.[69] This would explain the Western countries finally embracing the inclusion of authors' rights in article 15 (or 16 as it was then numbered), despite the awareness of the fact that authors' rights had already been dealt with in the UNESCO Copyright Convention of 1952.[70]

This brief history of article 15 makes clear that the codification process was not only guided by noble motivations. By the time of the drafting of the Covenants, the world was politically and ideologically divided into East and West. Capitalism, with its emphasis on private property, was opposed to the ideology of revolutionary communism. The discussions during the draft International Covenant

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[67] Peter Yu, 2007, p. 1054, 1055

[68] One of the reasons was the East-West divide, and in particular the arms race during the cold war and concerns about the codification of rights to scientific work for individual scientists that might interfere with control over scientific research by the State. See also footnote 63.

[69] Green, paragraph 40.

[70] Chapman, 2002, refers to the Official Records, United Nations Assembly, Agenda item 33, 789th meeting, 1 Nov. 1957, paragraph 32, p. 183.

on Economic, Social and Cultural Rights is a clear example of the political controversies during that period.

In the years after 1976, when the Covenant came into force, the issue of the scope of authors' rights as described in article 15 became increasingly topical. The continuing process of the expansion of intellectual property rights, combined with the institution of worldwide enforcement mechanisms in the TRIPS Agreement, made it necessary to investigate the rationale and meaning of art 15 1(c) vis-à-vis exclusive intellectual property rights.

In 2005, the CESCR Committee issued General Comment no. 17 on article 15.1(c), which clarified a number of issues. In this comment the Committee draws a firm line between exclusive property rights and trade law, on the one hand, and human rights, on the other. Of major importance is the consideration "not to equate intellectual property rights with the rights protected under article 15.1 (c)".[71] The rights of the author to benefit

> "in some kind of protection of the moral and material interests resulting from their scientific, literary or artistic productions…need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes, as long as the protection available is suited to secure for authors moral and material interests resulting from their productions…"[72]

Moreover, the Committee explains who is to be regarded as an author as the subject of the rights under the Covenant. First, the text is presented as only referring to natural persons, excluding legal entities as "their entitlements are not protected at the level of human rights".[73] Furthermore, the Committee stipulates that at the time of the drafting of the Covenant, the general idea was that the drafters "seemed to have believed" authors to be natural persons as individuals, "without realizing that they could also be groups of individuals". However, the Committee explains that the rights under 15.1(c) also "can be enjoyed by groups of individuals or by communities". [74] This, again, is a statement of importance with regard to the existing regimes of exclusive intellectual property rights which, at present, do not facilitate group rights to cultural heritage.

This discussion of the rights of individuals and groups demonstrates the growing unease concerning the position of the individual, his cultural identity and his

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[71] General Comment no 17 E./C. 12/GC/17, paragraph 3.
[72] General Comment no 17 E./C. 12/GC/17 , paragraph 10.
[73] GC paragraph 7. This is an interesting divergence from the jurisprudence of the European Court of Human Rights, which does recognise legal entities as having access to human rights.
[74] Ibid.
[75] Donders, 2002, 2008; Vrdoljak, 2005, p. 17; Pineschi, 2010.

relation to his cultural community.[75] In 1992, on the first Day of General Discussion on the content of the provision 15, paragraph 1(a), the right to take part in cultural life reflected the concern regarding the threat to international peace by the increasing number of internal conflicts between ethnic and religious groups.[76] It was only in November 2009 that the CESCR Committee finally adopted General Comment 21 on the right to take part in cultural life.[77] The long period of time in between signals the difficult discussions towards a balanced comment.

Comment 21 characterises the right to take part in cultural life as the freedom to

> "choose his or her cultural identity, to identify or not with several communities or to change that choice, to take part in the political life of society, to engage in one's own cultural practices and to express oneself in the language of one's choice".[78]

This freedom requires the State not to interfere with the exercise of cultural practices and with access to cultural goods and services and the positive action ensuring the conditions for participation, facilitation and promotion of cultural life, and access to and the preservation of cultural goods.[79] This right to take part in cultural life is available to "everyone", which includes every individual, alone, or in association with others, or in association with a group or community. [80]

The Committee adopted a broad, inclusive concept, referring to an anthropological approach to culture in which all manifestations of human existence are part of "cultural life", emphasizing that culture is "a living process, historical, dynamic and evolving, with a past, a present and a future".[81]

Although the right to take part in cultural life is thus available to everyone, it does not come without its limitations. In particular with regard to "negative practices", the Committee stated that the right to take part in cultural life is intrinsically linked to the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association. Referring to article 4 of the Universal Declaration on Cultural Diversity, the Committee emphasised that no one is to invoke the right to cultural diversity to infringe upon the human rights of others, nor to limit their scope. [82]

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[76] UN Doc. E/C.12/1992/WP.4, 25 November 1992; Donders in E/C.12/2000/15,p.4; Pineschi, 2010, p. 4.
[77] E/C.12/GC/21, the right of everyone to take part in cultural life (art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights), adopted by the Committee on Economic, Social and Cultural Rights, Forty-third session, 2–20 November 2009.
[78] General Comment No. 21, paragraph 15.
[79] Ibid., paragraph 6.
[80] Ibid., paragraph 9.
[81] Ibid., paragraph 11.
[82] Ibid., paragraph 19.

7.7. National states and their obligations regarding cultural rights

This section will address the core obligations that are implied in the UN cultural rights instruments. Under international law, obligations regarding human rights are held by nation states and international governmental organisations.[83] Eide observed that the nature of human rights imply that, first, it should be recognised that it is fundamental to understand that the realisation of these rights is primarily the task of individuals themselves. [84] The state is to ensure that the necessary conditions to pursue these rights are available.[85] The UDHR, together with the CCPR and the CESCR, provide for an interrelated framework of obligations that are formulated accordingly.[86] The Covenant on Civil and Political Rights contains an immediate obligation to realise its goals 'within their means'. Specific qualifications are added in the obligations of States Parties to the CESCR as in article 2.1. These obligations are to take steps (French: s'engage a ágir; Spanish: adoptar medidas) by "all appropriate means, including particularly the adoption of legislative measures". These steps should be deliberate, concrete and targeted as clearly as possible towards the obligations recognised in the Covenant. [87]

So it was clear from the very beginning that the CESCR contains the notion that full realisation cannot be achieved in a short period of time. Nevertheless, it aims to provide a flexible obligation and imposes at least the immediate obligation not to engage in activities that counter the objectives of the Covenant (paragraph 9). In the Fifth evaluative Session of the Committee, it was declared that "it is incumbent on every State Party to ensure a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of these obligations" (paragraph 10).[88]

Eide developed the model of a three-tier typology of obligations regarding three levels of duties:

- The obligation to respect forbids a state from acting in way that is in conflict with the right, and a state should not interfere with this right nor restrict the exercise of these rights;
- the obligation to protect compels the state to take measures to ensure that these rights are safeguarded; and
- the obligation to fulfil makes it mandatory that states take action to ensure that these rights are realised.[89]

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[83] Eide, 2001, p. 22, see on his influence on UN Declaration 2000/7 Weissbrodt, 2003; Raz, 2007.
[84] Eide, 2001, p. 22-23, referring to General Comment No 3, UN Doc. E/1991/23 pp. 83-87.
[85] General Comment No. 9 paragraph 4
[86] Eide, 2001, p. 10, p. 18.
[87] Fifth Session Committee on ESC rights, paragraph 2, 1990, E/C/12/2001, General Comment No. 9, para. 7.
[88] The Committee on ESC rights (Chairman Alston) was to issue General Comments on separate articles. See also Coomans, 1995, p. 17; Chapman, 2002, pp. 4-20.
[89] See also Chapman, 2002, p.317. Affirmed once again in General Comment 21 on art .15 1(a), paragraph 48.

Eide then concludes that cultural rights include four rights: the right for everyone

1. to partake in cultural life;
2. to enjoy the benefits of scientific progress;
3. to benefit from the moral and material interests of creations and inventions;
4. to engage in scientific research and creative activity.[90]

According to Hansen these rights lead to the obligation for nation states to

- respect cultural practices and traditions
- ensure access to one's own and other cultures
- create necessary conditions or correct existing regional and legal systems to ensure the representation and direct participation of cultural groups in the political process.[91]

General Comment 21 to the CESCR is more specific on what is expected from nation states. The Five A elements were formulated as the necessary basic conditions for the full realisation of the right of everyone to take part in cultural life: Availability; Accessibility; Acceptability; Adaptability and Appropriateness.[92]

The right to take part in cultural life is described as a freedom, and the positive action required from States parties is to ensure these 'necessary conditions'.[93] Availability (paragraph 16 sub. a.) deals with the protection of cultural and natural heritage, and the whole of cultural goods and services as well as the shared open spaces that are essential for cultural interaction.[94] This is further elaborated in the condition of Accessibility (paragraph 16 sub. b.), which should ensure effective and concrete opportunities for individuals as well as communities, including older people, disabled people, and poor people, to enjoy culture fully. Acceptability (paragraph 16 sub. c.) is to ensure the inclusion of individuals and communities in decision-making processes. The problematic issues of negative practices, the threats to cultural diversity and other human rights is covered by the latter two: Adaptability (paragraph 16 sub. d.) and Appropriateness (paragraph 16 sub. e.). While cultural policies must be flexible and respect the cultural diversity of communities, these policies must also be formulated and implemented in such a way that they are respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples.

In this context, the recent adoption of the Optional Protocol to the CESCR constituting the right to submit a 'communication' to the Committee on Cultural, Economic and Social Rights is another important step in view of the legal power

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[90] Eide, 2001, pp. 292-298.
[91] Hansen in Chapman, 2002, p. 201.
[92] General Comment No. 21 paragraph 16.
[93] Ibid., paragraph 6.
[94] Ibid., paragraph 16 ad (a).
[95] HRC Res. 8/2, adopted at the 8th Session in June 2008, signed in March 2009.

of the CESCR .[95] This right concerns, according to article 2 of the Protocol:

> "communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party".

This Optional Protocol, which is similar to the Optional Protocol on the CCPR, will provide a new means to further develop the understanding of the interpretation of cultural rights.

7.8. UN Declaration 2007: from rights for minority communities to the rights of Indigenous Peoples

The conclusion of the negotiations on the Covenants marked the start of a new phase in the recognition of minority rights in the sphere of the United Nations. In 1971, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Martinez Cobo to report on the specific situation of indigenous populations. The report presented a definition of indigenous communities, peoples and nations that would flag the developments in policies regarding minorities in the years to come.

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or part of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems". [96]

In 1982 the Working Group on Indigenous Populations (WGIP) was established, with proceedings being open to States, intergovernmental and non-governmental organisations of indigenous peoples, and individuals. In the following years 'special rapporteurs' were commissioned to report on specific subjects. In 1993, the publication of the Daes Report on the cultural and intellectual property of

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[96] José Martinez Cobo, Study of the Problem of Discrimination against Indigenous Populations E/CN.4/Sub.2/1986/7 (1986), paragraph 379.

indigenous peoples marked an important step in the rights debate regarding minorities.[97] Importantly, at that same time, during the last stages of the Uruguay Rounds, a worldwide system of Free Trade, including a regime on the protection of intellectual property rights, was being negotiated. The Daes Report seemingly ignoring this discussion and took a human rights perspective in the discussion of property rights on cultural heritage. Notwithstanding the contemporary developments regarding the standardisation of intellectual property rights, the Daes Report concluded that "the distinction between cultural and intellectual property is, from indigenous peoples' viewpoint, an artificial one and not very useful".[98] The report (58 pages in length) presented a concise inventory of the problematic issues in the confrontation between indigenous cultural heritage and Western industrialised societies. The report stated the opinion that instead of discussing cultural or intellectual property preference should be given to discussing the 'collective heritage' of indigenous communities. This heritage was to include

> "everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected."[99]

The report then addressed the issue of legal rights. First, it explained that indigenous communities are to have 'communal rights' to this heritage, a term that may be associated with either family, clan, tribe or other kinship group.[100] These rights may be represented by custodians belonging to the community, but only with the full consent of each member of the community.
At the same time this has to be in concordance with the statement that

> "each indigenous community must retain permanent control over all elements of its own heritage. It may share the right to enjoy and use certain elements of its heritage, under its own laws and procedures, but always reserves a perpetual right to determine how shared knowledge is used."[101]

The report then continued to emphasise the legitimacy of these collective rights

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[97] Irena Daes, Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, UN Doc E/CN.4/Sub.2/1993/28.
[98] Paragraph 21.
[99] Paragraph 24.
[100] Paragraph 28.
[101] Paragraph 30.

as they are based on customary law and, as such, are recognised in international law. Concluding, the report stated that

> "Indigenous peoples are the true collective owners of their works, arts and ideas, and no alienation of these elements of their heritage should be recognised by national or international law, unless made in conformity with indigenous peoples' own traditional laws and customs and with the approval of their own local institutions. This principle should be adopted by the General Assembly, by relevant specialized agencies such as WIPO and UNESCO, and by regional intergovernmental organisations."[102]

The 2007 UN Declaration on the Rights of Indigenous Peoples is the final result of a decade of intensive negotiations between representatives from indigenous peoples, governments and international organisations. The reference to peoples instead of populations refers back to the reference to peoples in article 1 of the CCPR. Although indigenous peoples and communities are not to be considered as identical, they are subject to common normative considerations.[103] The Declaration specifically affirms the claims which indigenous peoples have on their cultural heritage in article 11:

> 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

The listing of the different types of property in paragraph 2 indicates the recognition of a proprietary relationship between peoples and their cultural heritage, regardless of legal system or tradition. Added to that, the Convention indicates the 'free, prior and informed consent' to be given by representatives of indigenous peoples for any use of their cultural heritage as being conditional for any legitimate transfer in the past.

> 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

By mentioning the idea of restitution, tangible indigenous cultural heritage are

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[102] Paragraph 171.
[103] Anaya, 1996, p. 100.

recognised as objects of property rights, to which indigenous peoples may hold a claim. Moreover, in article 31 it is stated that indigenous peoples have the right to maintain and control their intellectual property over cultural heritage, without any reference to the standard formal conditions that are set in the global legal normative instruments regarding intellectual property rights.

> "1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts.
> 2. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights."[104]

However, there is no support in the text to assume that this allocates more rights than the already existing copyrights and neighbouring rights. Because the intellectual property rights in the Berne Convention, as well as the Rome Convention, exist as of the moment of the creation of a creative work and there are no formal conditions attached, they apply equally to all citizens in the States Parties to these Conventions, including members of indigenous communities.[105]

7.9. Cultural rights and the protection of cultural heritage

This section will demonstrate the close relation between cultural rights, on the one hand, and the UNESCO Universal Declaration on Cultural Diversity and the protection of cultural heritage as in the UNESCO cultural heritage conventions, and the Convention on the protection and promotion of the diversity of cultural expressions (UCDCE), on the other.
Noteworthy in this respect is that while in the World Heritage Convention no explicit reference is made to human rights, the first consideration in the Intangible Heritage Convention relates to the affirmation of the CESCR and the CCPR as

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[103] Anaya, 1996, p. 100.
[104] http://daccessdds.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement.
[105] Berne Convention article 5.2.

being relevant to the Convention. Implicitly, the protection of cultural and natural world heritage may be considered to be of prime importance to the protection of the participation in cultural life. The UNESCO Declaration on Cultural Diversity even contains the explicit provision in article 5 reiterating that

> "The flourishing of creative diversity requires the full implementation of cultural rights as defined in article 27 of the Universal Declaration of Human Rights and in articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms".

The preamble to the UDCE contains the consideration that it is

> "Celebrating the importance of cultural diversity for the full realisation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments."

Added to that, the UDCE proclaims that

> "cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed" (article 2, s. 1).

On the other hand, the Committee on Economic, Social and Cultural Rights in its general comment No. 21 confirms that States' obligations to respect and to protect freedoms, cultural heritage and diversity are interconnected, and ensuring the right to participate in cultural life includes the obligation to respect and protect cultural heritage in all its forms and of all groups and communities (paragraph 50).

These cross-references may lead to the conclusion that the protection of cultural rights in a way that is consistent with the General Comments in the UNESCO Conventions are to be explained as enhancing the opportunities for both individuals and groups in view of their right: i. to freely express and develop their cultural identity; ii. to safeguard their access to cultural heritage, its expressions and manifestations, both from their own communities as from other communities, and iii. to participate in the cultural life of the chosen community and to take part in the interpretation, elaboration and development of that cultural heritage.[106]

By the same token the protection and safeguarding of cultural heritage and the diversity of cultural expressions is supported by the cultural rights framework.

If the result of this framework of cultural rights and normative instruments for the protection of cultural expressions and manifestations comes close to a right of cultural identity, it must be emphasised that this right comes with limitations.[107] The exercise of such a right should be "... solely for the purpose of promoting the general welfare in a democratic society" and compatible with the nature of cultural rights as emphasised article 4 CESCR. This means that a delicate balance has to be maintained so as not to infringe upon the rights of others or the cultural life of society, such as when cultural activities include discriminatory practices, or infringe upon the rights of children or women. [108]

7.10. Concluding remarks

Group or community rights are increasingly recognised in international legal instruments like the 2007 UN Declaration on the Rights of Indigenous Peoples. But although this has led to the articulation of community rights in the corpus of human rights, leading commentaries emphasise that the individual still has to be free to choose his community and in the way in which he wants to participate in cultural life.

On the other hand, this does not go so far that it leads to an unrestricted individual right to cultural identity, as this will always be restricted by law and the rights of others.

Furthermore, recent developments in human rights, such as in the 2007 UN Declaration on the Rights of Indigenous Peoples and the adoption of the Optional Protocol to the CESCR, demonstrate that there is an increasing articulation of demands and expectations within the sphere of indigenous rights related to cultural heritage. However, although these demands are often formulated in terminology which is reminiscent of property rights, this has not led to the institution of new communal property rights with regard to cultural heritage. On the other hand, there is a clear tendency towards a claim of community control over cultural heritage which come from minority cultures.

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[106] Compare the observations of the independant expert in A/HRC/14/36 paragraphs 27, 30 and 48.
[107] Which is still an issue being debated, see Donders, 2008, p. 317-340.
[108] See also Donders, 2008, p. 322.

As was stated in parapgraph 2 of this chapter, the history of human rights is the history of its infringements.[109] The development of the UN Declaration of 2007 is the result of the process of raising awareness concerning the position of indigenous communities in the post-colonial period. As such, this development takes place under the same social, political and economic conditions as the development of normative instruments regarding the protection of intangible heritage and the diversity of cultural expressions. It has its basis, however, in the original provisions in UDHR article 27, CPPR article 27 and CESCR art. 15. As was described, at the time the draft was prepared, there was a debate on the individual right holder in relation to a particular community, and also whether or not it should be articulated if the UN Declaration and the Covenants should address minority communities in general, or only indigenous communities, or even communities at all. The recent UN Declaration is therefore just one of the steps in the further development of cultural rights.

In recent years, social, political and economic developments have altered global relations a well as the social relations within nation states. Many Western states are experiencing an economic recession, a changing, and therefore an uncertain position in the global economy, as well as the aftermath of the terrorist attack on New York in September 2001. This has resulted in growing unrest with regard to the position of immigrant minority cultures. It may be reminded that, as described in paragraph 7.6, cultural rights were intended to protect the rights of every individual against interference by the state, as well as to ensure that nation states are to respect, protect and fulfil conditions in which these rights may be exercised, as long as they do not infringe upon the rights of others as well as the cultural life of society at large.

[109] See also footnote 8.

VIII.
THE LEGAL PROTECTION OF CULTURAL EXPRESSIONS, PULLING THE THREADS TOGETHER

8.1. Pulling the threads together

The previous chapters demonstrated that the legal protection of cultural heritage and cultural rights in international law developed from protecting cultural objects and artefacts into a network of law regarding both the protection of cultural heritage as well as the interests of individual right holders to this cultural heritage. Stakeholders other than property right holders are increasingly enabled to express claims and stakes in their cultural heritage, and local communities have become active in presenting their interests in their cultural heritage, as distinct from the interests of their national state, or their individual community members. The result is that the protection of cultural heritage today has become an important subject-matter in a network of policy fields, which makes it necessary to understand the most important objectives of these legal instruments, how they interrelate and how they may support each other. This chapter brings the findings of the previous chapters together and proposes a model which reflects how the UNESCO culture conventions are interrelated. This model will clarify that this legal network provides for important contribution to the strengthening of the network of social and cultural relations between individuals and communities in modern society. The model thereby shows how these instruments are to be interpreted in a way that ensures that they are mutually reinforcing.

In the introduction to this book three major questions were identified,

providing a perspective for the research into the origins and the texts of the UNESCO culture conventions as well as the cultural rights instruments.[1]

The first question related to the protection of national interests in relation to the international community. This will be further discussed in paragraph 2. The second question related to the position of the individual and his rights as right holder to expressions and manifestations of cultural heritage. This will be discussed in paragraph 3. The third question related to the position of local communities in the legal protection of cultural heritage. This will be discussed in section 4. The final parapgraph will be dedicated to the presentation of the model which is to include the different relations described in this chapter.

[1] Chapter 1 paragraph 2. 1 Chapter 1 paragraph 2.

8.2.1. The protection of national interests in the protection of cultural expressions

International law is the result of a process of codification by nation states that are willing to come to an agreement as to how to balance national interests with the mutual interest of finding solutions to problems that need international cooperation. This paragraph will focus on how these national interests have been considered in the UNESCO culture conventions and in the relevant human rights instruments. The leading question is how these national interests in the protection of national cultural heritage are balanced against international and global interests in the protection of common cultural heritage.

8.2.2. The UNESCO Culture Conventions

The 19th century was marked by rising nationalism in a changing world order. The emerging concept of cultural heritage was instrumental in both the development of national history and as an identity marker for the expanding civil society. The focus on national cultural heritage was dominant well into the 20th century; however, the discussion of national interests should be seen as taking place in the space created by either of two opposites, the other being internationalism.

In the ongoing discussion on why we should protect cultural heritage two narratives have developed over the years: The one emphasising the need to protect national cultural heritage, while referring to universal values, and the other emphasising the need to protect international cultural heritage by protecting national, local, and regional cultural heritage while referring to the need to safeguard pluralism and cultural diversity.

The first of these narratives is most manifest in the 1970 Convention dealing with the prevention of the illicit trade in and the export of cultural property. The focus of this Convention is primarily aimed at retaining cultural property on national territory by preventing the illicit trade in and the transfer and export of cultural goods. The reason for the protection of this national heritage is stated in the preamble: "the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations". Indeed, national property/heritage must be protected because universal values are at stake.

The second narrative is more present in the protection of cultural heritage and

cultural diversity, and it developed during the years spanning the World Heritage Convention, the Safeguarding of Immaterial Heritage Convention and the Diversity of Cultural Expressions Convention. This narrative moves beyond national interests, either to focus on international interests or, on the other hand, on local community or regional interests and cultural identity.

From the beginning of the UNESCO, the emphasis was on the international interest of protecting cultural heritage situated on national territory. This was first demonstrated in the criterion of outstanding value in the World Heritage Convention. The institution of the Lists, as described in chapter 3, was an important factor in the success of the Convention, bringing together the outstanding cultural heritage of member states into one collection of excellence. Times changed, and increasing critique was aimed at the imbalance in the represented states, with a bias towards the heritage of Western (industrialised) countries. A bias that was experienced as being enhanced by the emphasis on monumental cultural heritage, thereby excluding more transient, intangible cultural heritage. The fact that this criticism was effective is also a sign of the shifts in the power balance between the northern and southern states. UNESCO, of course, has since its establishment always functioned as a platform on which the changing relations between industrialised states and developing states could be expressed. The increase in global trade and the developments in (digital) communication technologies were identified as prime reasons for these changing relations. And while the relations between states changed, also society at large changed. In particular after World War II, the position and rights of the individual as well as his or her actions in civil society gained importance. As will be discussed in the following paragraph 8.2.3. the development of human rights is an example of this changing perspective.

With regard to the UNESCO Heritage Conventions these trends may be recognised in the developments in the operationalisation of the World Heritage Convention and the criteria for the submission of heritage objects. Increasingly, these criteria refer to the importance of not only including local communities in the programmes that are essential in the preservation of heritage, but also in emphasising the mandatory character of the participation of the local community in the benefits of the development of the area in which the heritage is situated. This change in focus is, of course, even more apparent in the Safeguarding of Intangible Heritage that gives the related community a key position in the nomination and governance of its intangible cultural heritage. The same kind of argument can be traced in the protection of the diversity of cultural expressions, as in the 2005 UNESCO Convention. States Parties are committed to stimulating pluralism, cultural diversity and a wide variety of cultural expressions in order to contribute to international cultural heritage by sustaining local creative economies.

Another way to regard this trend is the change in focus from a top-down approach, in which the nation state dictates from above, and the increasing bot-

tom-up approach, in which local communities and stakeholder alliances have an increasingly important role in the governance of their cultural heritage. The same trend is apparent in the obligations of states parties regarding the promotion of the diversity of cultural expressions, which lays emphasis on the benefits for both local communities and the international and global society.

8.2.3. The human rights perspective

After World War II the freedoms and rights of the individual were codified in the Bill of Human Rights and, since then, they have been further articulated in an increasing body of international and regional laws. From the start, the nation state had a key position in creating the conditions in which these freedoms and rights are to be observed. Remembering Eide's three-tier typology of obligations: The national state has the obligation to respect, to protect and to fulfil the cultural rights of individual citizens.[2] This leads to the obligations for nation states to respect cultural practices and traditions, to ensure access to one's own and other cultures and to create the necessary conditions to ensure the representation and direct participation of cultural groups in the political process.[3] The first conclusions by Faridah Shaheed, the independent expert in the field of human rights, confirm the focus of the United Nations on the rights of the individual as related to his community over and beyond the sovereignty of the nation state.[4] As was described in chapter 7, over the years an increasing body of controlling mechanisms have developed. One example is the Optional Protocol of the Covenant on Civil and Political Rights (CCPR), which enables individuals to file a complaint before the Committee. In the Lovelace case this led to the awarding of damages to the complainant.[5] A similar procedure was made available in the recently adopted Optional Protocol of the Covenant on Economic, Social and Cultural Rights (CESCR) providing for a communications procedure for individuals.[6]

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[2] Eide as referred to in Chapter 7 paragraph 7.
[3] Hansen as referred to in Chapter 7 paragraph 7.
[4] Chapter 7 paragraph 4.
[5] Chapter 7 paragraph 5.
[6] Chapter 7 paragraph 5.

8.2.4. Interim concluding remarks

Concluding, in the timeline of the development of normative instruments regarding cultural expressions we can see a development from a focus on the protection of national interests by national states towards the governance of international or even global interests in an increasing network of international, transnational and non-governmental collaboration.

8.3.1. The protection of private interests in cultural heritage

There is an inherent tension between protecting individual interests and protecting cultural heritage. This duality lies in the contrast between public and private, as cultural heritage is usually associated with the public sphere and the individual with the private sphere. Individual interests are often associated with property rights.[7] In the discussion on the protection of cultural heritage this was exemplified by the following question: Who owns cultural heritage? A question that covered the whole debate regarding the protecting interests in trade and cultural property and the protection and preservation of cultural heritage in the public interest. In a way, property is the central concept by which we measure the exclusive right of the individual against the public domain. In that sense, we may understand the discussion of the ownership of cultural heritage as reflecting the rights of the individual as running counter to the rights of the community. In this section two other aspects of the position of the individual will come to the fore: first, how individuals are regarded in the UNESCO Conventions, followed by the human rights perspective on the position of the individual.

8.3.2. The UNESCO Culture Conventions

The position of the individual in the UNESCO Culture Conventions may be described as a continuum between, on the one hand, protecting the individual and his individual rights and, on the other, protecting the individual as part of the community. In the 1970 UNESCO Convention the aim was of course to protect cultural property by protecting proprietary rights to specific categories of cultural heritage. The individual is protected both in his capacity as the actor as well as in his capacity as the beneficiary of cultural heritage. As was discussed in chapter 4 on the safeguarding of intangible cultural heritage, the first legal provisions regarding the protection of folkloric expressions were inserted in the Berne Copyright Convention during the Stockholm revision in 1967. At

[7] Chapter 2 paragraph 5.2.

that time the protection of folklore still concentrated on allocating rights to oral expressions by individuals. Over the years we saw the development towards folkloric expressions as part of an abstract concept of cultural heritage, which turned into a field covering both tangible and intangible expressions and manifestations of the cultural life of a cultural community. Likewise, the protective regimes in the UNESCO Culture Conventions concentrated more on the creation of conditions for the community closely related to this heritage. This may be described as a development starting with creating individual rights related to copyright towards a right of protection for access and control over cultural expressions for individuals as part of their cultural community.

Another aspect regarding the role of the individual is the way he is enabled to participate in the governance of cultural heritage in his cultural community. The tendency towards a bottom-up approach, as mentioned in paragraph 8.2.2., is of course of relevance to the position of the individual, as it ultimately results in his participation in decision-making processes.

8.3.3. The human rights perspective

The same continuum may be recognised in the sequence of General Comments regarding article 15 of the Covenant on Economic, Social and Cultural Rights. It may be reminded that the first obligation in article 15 CESCR refers to the right of "… everyone to take part in cultural life" as distinct from article 27 UDHR, giving a more abstract reference to "the cultural life of the community". The second obligation concerns the enjoyment of the benefits of scientific progress, while the third regulates the protection of the everyone's interests resulting from any literary, artistic or scientific work of which he is the author. As was described in chapter 6, a more direct reference to intellectual property rights was successfully objected to by the Unites States.[8] In 2005 the first general comment dedicated to article 15 paragraph 1 sub. c. CESCR focused on the rights of the author. Important is the statement that this provision only concerns natural persons; however, their interests are protected not only as individuals but also as a group of individuals or as a member of a community. [9]

In 2009, the General Committee took things a step further by issuing General Comment 21 on everyone's right to take part in cultural life. This Comment

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[8] Chapter 6 paragraph 6.
[9] General Comment No. 17 E.C.12/GC/17, paragraph 10.

reflects a broad inclusive interpretation of the individual who is to be enabled to choose his or her cultural identity and cultural community. Cultural life is considered as a living and dynamic process, maintained by individuals alone, or in association with a group or community. [10]

8.3.4. Interim concluding remarks

The conclusion we may draw from the question regarding the development of the position of the individual rightholder in the UNESCO Culture Conventions and the Cultural rights instruments is that there is a shift in emphasis from the protection of the individual as a (private) property right holder towards the protection of the individual as a stakeholder in community interests. A second trend also concerns property rights and relates to the development from protecting property rights and trade rights towards an emphasis on protecting access to and control over cultural heritage. This trend in a way mirrors the trend in the previous section of a growing emphasis on international interests instead of national interests.

8.4.1. The rise of the protection of community interests in cultural heritage

As was discussed in chapters 4 and 5, the community is increasingly considered as an important actor in the protection of cultural heritage. This position will be discussed below first by returning to UNESCO's World Heritage Convention and the Intangible Cultural Heritage Convention as discussed in chapters 4 and 5. This is to be followed by a brief reminder of the findings in chapter 6 on cultural rights and the development of the WIPO sui generis instrument protecting community interests in their cultural expressions.

[10] See also Chapter 6 paragraph 6 and General Comment No. 21 E.C./GC/21, paragraphs 6, 9, 11 and 15.

8.4.2. The UNESCO Heritage Conventions

As was demonstrated in chapter 4, the Operational Guidelines on the interpretation of the 1972 World Heritage Convention are updated regularly. These updates demonstrate a tendency towards an increasingly important position for local communities.

At first the local community was considered as residents sharing the same territory as the particular heritage object or site, and each State Party was to endeavour to adopt a general policy aiming to give cultural heritage a function in the life of the community, thereby revealing a top-down policy. This approach would change considerably. Increasingly, local communities are considered not only as beneficiaries but also as partners and stakeholders. The Operational Guidelines of 2005/2008 include local communities as one of the key stakeholders in the preparation of nominations for the Tentative List. The criteria for inclusion on the List not only concern consent and participation in the preparation of the nomination, but local communities are also a key factor in determining the significance of the heritage object or site for local cultural life.[11] And, finally, the local community is considered to benefit from the sustainable economic development of the heritage site.

As is described in chapter 5, and other then the World Heritage Convention, the 2003 UNESCO Intangible Heritage Convention has demonstrated from the beginning a bottom-up approach in the recognition of elements of intangible heritage. Local communities were to be invited to participate in every stage of the decision-making process as well as in the operationalisation of the Convention. Article 15 explicitly stipulates that each State Party is to ensure the widest possible participation of, first, the local community, followed by groups and, only last mentioned, individuals, not only in the creative process but also in the management of this heritage. And, importantly, the Operational Directives stipulate that the nomination file should contain a statement of 'free, prior and informed consent' by the local community in order to be accepted.

8.4.3. The human rights perspective

In the human rights perspective, protecting the rights of the community may be considered as an extension of the protection of individual interests. Chapter

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[11] Chapter 4 paragraphs 5.1 and 8 referring to criteria ii-iii and vi.

7 described the development of human rights as one of negotiating between conflicting views on individual and community interests, with a dominant position for the Western, more liberal view with a bias for individual rights. UDHR article 27 refers to 'everyone's right to freely participate in the cultural life of the community', while article 27 of the CCPR refers to persons belonging to minorities who are not to be denied the right to participate in community with other member of their group to enjoy their own culture.[12] However, in the context of cultural heritage, the position of the local community is also increasingly important. Chapter 7 also demonstrated that local communities are considered as potential holders of rights to their cultural heritage, both as objects of protection and protected as subjects with rights. The 2007 UN Declaration on the Rights of Indigenous Peoples is a milestone in that respect, in particular in view of the position of local communities. The provisions in article 11 provide for their right to practice and revitalise their cultural traditions and customs, as well as the right to be protected by effective mechanisms ensuring the restitution of cultural property that was taken without their free, prior and informed consent, or in violation of their laws, traditions or customs. Moreover, article 31 stipulates the right of indigenous peoples to develop their cultural heritage as well as the right to maintain, control and protect their intellectual property over such heritage.[13]

Regarding local communities as rights holders, the agenda of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions in the WIPO is focused on a text-based legal instrument that designates local indigenous communities as the holders of rights to a defensive mechanism against abuses of their cultural heritage.

8.4.4. Interim concluding remarks

As we saw in the UNESCO Culture Conventions and in the Cultural Rights instruments, local communities are increasingly protected. Not only as beneficiaries of the protection of cultural heritage, but also, increasingly, as the holders of rights to key positions in the access to and control of cultural heritage. In the Culture Conventions, they have the right of final consent to the nomination of a new heritage object or element, which implies that no nomination can be accepted if the local community is not willing to cooperate. The human rights instruments safeguard the right to participation in and access to the cultural life of the community, as well as the right to maintain and develop their cultural life and cultural property. The still to be agreed upon WIPO text-based instrument

[12] Chapter 7 paragraph 5.
[13] Chapter 7 paragraph 8.

is to further support these rights and to grant a defensive mechanism against abuses of traditional cultural expressions.

8.5.1. Governance of cultural heritage, a model

This subsection therefore aims to capture the developments described above in a model so as to position the major normative instruments on cultural heritage in way that could clarify their normative scope and provide guidance as to their interpretation in a way that is mutually supportive.

The above has demonstrated that the protection of cultural heritage ranges from the protection of cultural goods and services towards the protection of cultural heritage as such. In a scheme, this may be illustrated by a vertical axis, with goods and service on the bottom, and public goods at the top.

The three issues were discussed as if they are situated in a continuum ranging from, in the first issue, the emphasis on national interest moving towards the emphasis on international interests. The second issue, which in a way may be stated to be complementary to the third issue, concerns the protection of individual interests, developing towards an emphasis on protecting the individual as a member of the community. A similar trend towards increasing protection for communal interests was also apparent in the discussion on the protection of the interests of local communities in the third issue. These trends may be illustrated by a vertical axis, on which from left to right the more individual/national would develop towards the international into the global/communal.
When these two axes are crossed, a four-point square figure is formed (Figure 1 next page).

How can the normative instruments, discussed in the previous chapters, be situated in this scheme? The protection against illicit trade is to be placed in the bottom left-hand square, because it aims to protect particular objects, with private property rights attached. This was the subject-matter of the 1970 UNESCO Convention and the Unidroit Convention. At the same time, there should be an overlap towards international interests and heritage interests, as these are also to be protected by these Conventions. The UNESCO instrument on the protection and promotion of the diversity of cultural expressions could then be situated

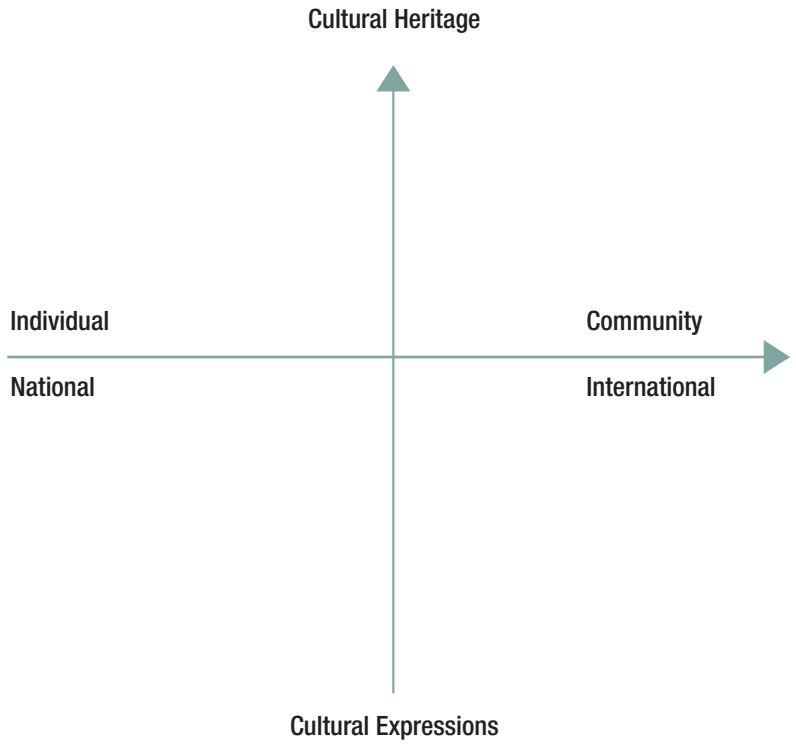

Figure 1

in the bottom right-hand square. The protection of international interests is a major concern in this Convention; however, it refers to the protection of singular cultural expressions, all in aid of the protection of cultural heritage, as well as cultural rights, so there a slight overlap is also in order. The World Cultural Heritage Convention as well as the Intangible Heritage Convention are to be situated in the upper right-hand square, although as it stands, not completely overlapping. The Intangible Cultural Heritage Convention would have to overlap to some degree with the Cultural Diversity Convention, as there are identical interests in the

monitoring and safeguarding of intangible heritage by protecting cultural diversity. The top left-hand square could then be allocated to national protective regimes as they implement international normative instruments. And, underneath, all of this law on the legal protection of cultural expressions is positioned on top of the framework of human rights.

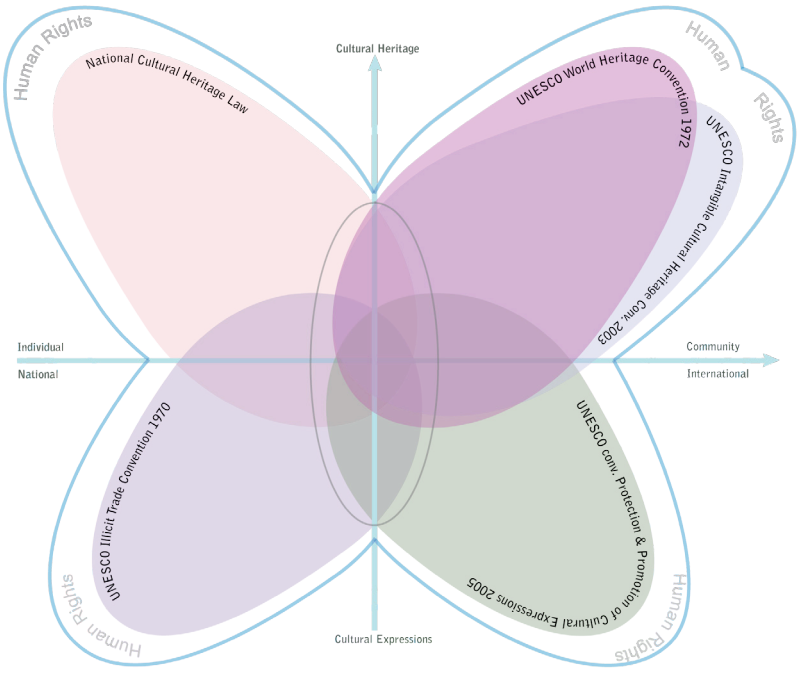

Figure 2

8.5.2. Chasing butterflies

After positioning the major normative instruments as in the figure above, it is time to take stock of what this image could contribute to our further understanding of the body of law regarding the protection of cultural heritage. A first impression is that Figure 2 is reminiscent of a butterfly, a symbol of transience and vulnerability as well as of transformation and regeneration. It is fitting that such a figure illustrates the developments in cultural heritage law. At the same time, to capture any meaning from this figure should not seem like chasing butterflies. However, Figure 2 illustrates four conclusions that emanate from this study. The

first is the trend in the governance of cultural heritage as a public good, the second is the overlap between the two cultural heritage conventions and the third and fourth conclusion regard the necessity to adapt the protection of cultural heritage in Dutch national law to the standard set by the developments in the World Heritage Convention and the Intangible Heritage Convention.
If we would position a trend line based on the previous chapters, we would find that markers in the bottom left-hand square related to private interests regarding cultural expressions move sideways and upwards when the objects gain in significance as cultural heritage. In other words, the more an object or manifestation is considered to be cultural heritage, the more it is subject to international controlling mechanisms. This trend line also illustrates the previous findings that the more something is considered as cultural heritage, the more the emphasis is not so much on the protection of private property rights, but on the protection of access to and control by local and/or cultural communities.

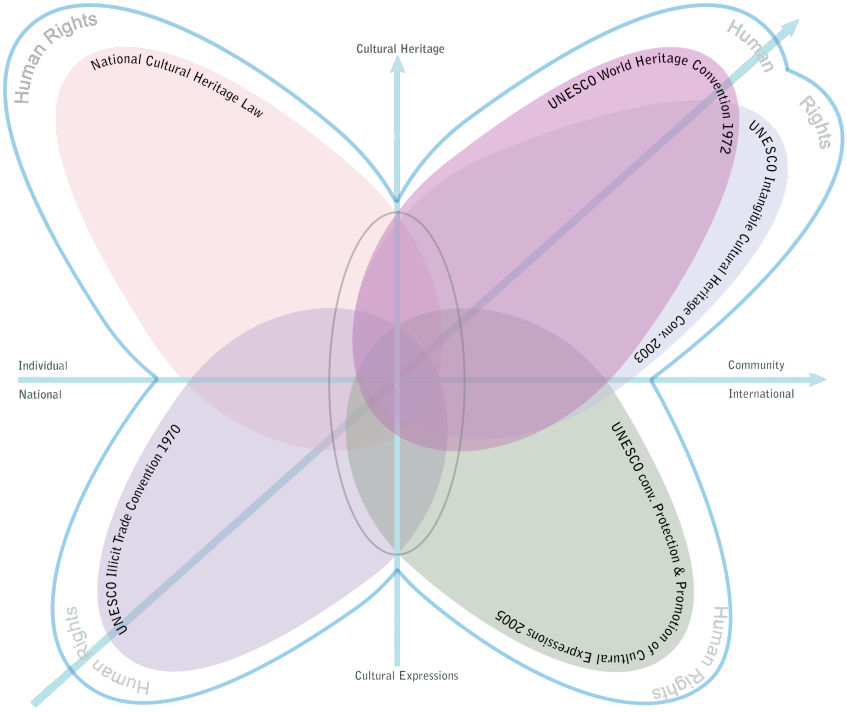

Figure 3

The second conclusion illustrated by the butterfly figure is that it would not be too difficult to imagine that the World Heritage Convention and the Intangible Heritage Convention in the top right-hand square could merge into one, without having a major effect on the schematic representation of the scope of the Conventions. This would be in tune with the developments in the Operational Guidelines of the World Heritage Convention, which increasingly incorporate the changing approach to cultural heritage as a body of objects and manifestations that bear witness to a shared cultural past, present and future.

The third and fourth conclusions concern Dutch cultural heritage law and the necessity to adapt the protection of cultural heritage in Dutch national law to the standard set by the developments in the World Heritage Convention and the Intangible Heritage Convention. As was explained in Chapter 3B, the implementation of the EU Directive 93/7/EEC, the Regulation 3911/92, 1970 Illicit Trade Convention and the World Heritage Convention has to date have led to protective mechanisms regarding a strict regime of control on the export of designated cultural objects that are in private hands as regulated in Articles 1-13 of the Dutch Cultural Heritage Preservation Act. In case of the intended export of an object from a public collection, Article 14A of the Dutch Cultural Heritage Preservation Act only provides for the requirement of a written statement of consent by a representative of the owning public institution. If we consider the tendency towards the increasing emphasis on the international and national obligation to safeguard the ongoing regeneration of cultural heritage, it is clear that this also implies the obligation to safeguard continuous access to cultural heritage in public collections.
The fourth conclusion regards the fact that the protective regime on the export of designated cultural objects only regards archaeological objects and objects as categorised in the Annex of the 1970 Convention, i.e., older then 100 or 50 years. The result is that contemporary cultural objects in public collections, whatever their importance the cultural heritage, are not protected by cultural heritage law. And, as was demonstrated in the Dumas case, there are no other effective mechanisms to prevent the sale and export of artworks more recent than 50 years old from public collections. It is a matter of urgency that this omission in effective control is addressed by the Dutch legislator.

8.5.3. Concluding remarks

This research project aimed to describe the developments in the protection of cultural heritage in international law by looking at the ways this protection affects the access to and control by individuals, communities and governments over their cultural heritage. This focus of the research implies that also the context of cultural rights had to be included. The major Culture Conventions of the UNESCO served as a starting point, because these Conventions are the result of a long process of international negotiations within the UN framework, demonstrating global consensus on matters of urgency. Likewise, the developments in the corpus of cultural rights were discussed on the level of UN law. The previous chapters have demonstrated an increasing tendency to include indigenous peoples and local communities in decision-making processes with regard to cultural heritage and cultural rights. During the research it became increasingly clear how close the UNESCO Culture Conventions and the UN Cultural Rights are connected. In a way this was to be expected beforehand; after all, they all deal with the same subject-matter: the protection of cultural heritage and access to culture. However, at the practical level, these Conventions, each having their own regime of States Parties, seem to operate as independent units.
The chapters on the culture conventions have resulted in recommendations in view of their implementation in Dutch law. Pervading conclusion was that each Convention, and its obligations should be explained with the other Conventions in mind. The protection of cultural heritage can only be realised if all the commitments of the State Parties to the major culture conventions are taken into account in toto.

For the purpose of this final chapter it is relevant to make a short inventory of the most important recommendations that follow from the concluding remarks in the previous chapters. Chapter 3 concentrated on the 1970 UNESCO Convention on illicit trade of cultural property, and the UNIDROIT Convention of 1995. Together with the implementation of the EU Directive 93/7 and EC Regulation 3911/92 , these international treaties provide a framework for the Dutch law on the international trade of cultural heritage, within the limits of the age threshold. However, it seems that it is assumed implicitly that a strict regime of regulation of art trade is only necessary when it regards the activities of private parties. The commitments to the provisions in the UNESCO cultural heritage Conventions cannot but lead to the conclusion that to protect and safeguard cultural heritage includes a system of control over public heritage collections that is equal to the control over designated cultural objects in private hands. Likewise, in view of the increasing awareness of intangible 'living' cultural heritage, the system of age thresholds needs to be reconsidered. It is therefore recommended to add a provision in the Dutch Cultural Heritage Preservation Act, stating that the transfer of objects from public cultural heritage collections to private owners in the Netherlands, or to private owners or other public collections abroad is subject to a regime of formal consent similar to the regime on export of designated

cultural heritage objects that are the property of private owners.

With regard to chapter 4 and 5 in the UNESCO Cultural Heritage Conventions it became clear that in the course of the work of the World Heritage Convention of 1982 and the 2003 Intangible Heritage Convention, the tendency is to come from top down policy mechanisms, that are governed by the national state, towards a bottom-up approach, in which the objectives of the Conventions are carried and realised by the communities that are closely related to this cultural heritage. This calls for policies that are aimed at the collecting and the dissemination of information on cultural heritage in order to contribute to the awareness in and among the relevant communities not only of ones own and each others cultural heritage, but also of the links in between. At the same time that local communities are to be encouraged to participate in the work of the WHC, as well as encouraged to see their tangible cultural heritage in connection with their intangible cultural heritage. It is therefore to be recommended that the operationalisation of the 2003 Safeguarding of Intangible Heritage Convention is to be developed in combination with the work on the World Heritage Convention.

The digitisation of cultural heritage collections is but a first step in the realisation of these policies. Increasingly, the availability of digital documentation will provide for new ways of research and of new ways of communicating information on cultural heritage on a global scale. This calls for innovation and legislation policies that aim for an optimum of conditions in which these new technological facilities can be deployed. This also calls for a balanced approach to the protection of intellectual property rights, which means that the rights of individual rightholders are considered in the context of the rights of other stakeholders in the process of communicating cultural heritage.

In view of the work on the implementation of the UNESCO Convention on the protection of the diversity of cultural expressions of 2005 a similar reminder is recommended. The fact that in the Convention cultural expressions are presented as having both cultural and economic value is an important milestone in thinking about cultural heritage. This consideration has added value to policies to support of the creative industries. It is to be reminded though, that this protection is not only to be regarded from the viewpoint of the interests of the creative, or the industry for that matter, but also from the viewpoint of the audience. And this also, because the role of (social) media in the networked society has altered the relation between the creative and the audience. The ongoing communication between the two makes it necessary to discuss new policies in which the audience is not only regarded as consumer, but also as an active participant and as medium for cultural heritage.

The 2005 Convention also contains important provisions with respect to the protection of the diversity of cultural expressions in developing and least developed States Parties including the cultural expressions of indigenous communi-

ties. Together with the increasing attention for the positions of indigenous communities in the body of cultural rights, this Convention is positioned to provide an important contribution to the emancipation of these communities. However, this may not be realised without a firm commitment of all States Parties to contribute to the sustainable development of these indigenous communities in the context of the development of the States Parties where they live.
If we consider the 2005 Convention as a major step towards a changing perspective on international cooperation in protecting the diversity of cultural expressions, this should lead to a new standard in the norms in international trade and the protection of individual interests. Not only with regard to the protection of the cultural expressions of indigenous communities, but also to the protection of the interests of other cultural communities.

At the same time, the 2005 Convention also confirms the trend of the increasing recognition of the position of the individual and his right to participate in the cultural community of his choice. Especially in a global networked society, this calls for the careful consideration of all the interests involved. And here we return to the work of Manuel Castells as referred to in the first chapter, in which the global networked society was presented as the conceptual image of a society in transition, in which economic, social and cultural structures are changing rapidly.[14] In his network theory, societies are cultural structures, that are build on networks of communication. The organisation of modern media make it possible to communicate instantly with everyone everywhere. The result is a society of networked individualism, in which individual citizens choose their cultural communities. The protection and safeguarding of cultural heritage in this new networked society is conditional to strengthening of the connections between individuals and their cultural communities.

Thus, the legal protection of cultural heritage takes place in a network of relations. We may understand this network of relations as a representation of the connections between actors like the individual, the community, the national state, or the international community. In this network the legal protection of cultural heritage is in itself an expression of the connections between separate actors. The international treaties discussed in chapters 3 to 7 all are examples of those relations. In chapter 3 on the protection against illicit trade of cultural property, the emphasis was on the normative framework regarding the network of relations between private (legal) persons, and the national state, as well as the relation in between national states, and the international community. In the following Chapters 4, 5, 6 and 7 the network became more elaborate, illustrating the importance of the protection of cultural heritage as well as the access to cultural heritage to the benefit of the individual, his chosen community, as well as to

[14] Chapter 1, paragraph 1.

the benefit of the international community. Thus, this legal framework on the protection of cultural heritage also contributes to the strengthening of the network by strengthening and expanding the relations between the actors. The legal framework provides for an established 'route' for these relations, and thereby makes this 'route' more solid, and more robust.

The recommendations above demonstrate that it is important that the States Parties to these Conventions are aware that these Conventions exist in a network of cultural rights and cultural policies. These Conventions represent aspects of what may be considered as a minimum level of protection for cultural heritage as well as a minimum level of agreement concerning towards what purpose this level of protection should be maintained. And this whole body of protective mechanisms for culture heritage and cultural rights is to support the increasing awareness that protecting cultural heritage is not only to support the protection of history but also the protection of the future.

SAMENVATTING

Dit boek geeft een overzicht van de belangrijkste ontwikkelingen in de juridische bescherming van cultureel erfgoed in het internationaal recht sinds de jaren '60. Daarbij wordt ook aandacht besteed aan de culturele rechten, die niet alleen tot uiting komen in de bescherming van het cultureel erfgoed zelf, maar ook in de bescherming van het recht op toegang tot dit culturele erfgoed. Het doel van dit boek is een bijdrage te leveren aan de interpretatie van de Erfgoed Conventies ten behoeve van de implementatie ervan in Nederland. Het onderzoeksproject werd geleid door drie deelvragen die kenmerkend zijn voor de belangen die een rol spelen in de bescherming van cultureel erfgoed: Op welke wijze komen de belangen van de nationale staat naar voren; ii. Hoe worden de rechten van de individuele rechthebbenden geregeld; en iii. Hoe wordt de positie van de gemeenschappen in relatie tot hun culturele erfgoed beschermd.

Hoofdstuk II geeft de lezer een overzicht van de belangrijkste ontwikkelingen in het denken over cultureel erfgoed in de moderne westerse samenleving. Dit hoofdstuk is gebaseerd op het ordenend principe van twee assen die het denken over cultureel erfgoed symboliseren. De horizontale as is gebaseerd op een tijdlijn, die de ontwikkelingen in het denken over de bescherming van cultureel erfgoed in de 19e en 20e eeuw laat zien. De tweede, verticale as loopt van het denken over culturele erfgoed als goederen en diensten aan de ene kant tot het denken over cultureel erfgoed als over een publiek goed aan de andere kant.

Hoofdstuk III behandelt de bescherming van cultureel erfgoed tegen illegale handel en is verdeeld in deel 3A dat gaat over de bescherming tegen de illegale handel in het kader van het internationaal recht en deel 3B over het Europese perspectief van de bescherming tegen illegale handel in de Raad van Europa, in de primaire en secundaire wetgeving van de Europese Unie en de implementatie daarvan in de Nederlandse wetgeving. Na het bespreken van de achtergronden van de illegale handel in materiele cultuurgoederen richt deel A van dit hoofdstuk zich in het bijzonder op het UNESCO-Verdrag inzake onrechtmatige invoer, uitvoer of eigendomsoverdracht van cultuurgoederen van 1970 en het UNIDROIT-verdrag inzake gestolen of onrechtmatig uitgevoerde cultuurgoederen van 1995. Dit deel 3A laat zien dat het UNESCO Verdrag van 1970 de maatstaf is geworden voor een systeem van classificatie van cultuurgoederen dat uitgaat van de nationale staat als centrale actor in de bescherming van cultureel erfgoed. Dit heeft tot gevolg dat nationale staten cultuurgoederen kunnen opeisen die zich in andere landen bevinden nadat ze op onrechtmatige wijze buiten de landsgrenzen

zijn gebracht. Het is aan de nationale staten of zij het mogelijk maken dat ook een particuliere eigenaar een claim kan indienen. De datum van inwerkingtreding van dit Verdrag is een ijkpunt geworden in de kunsthandel, die zich gedwongen ziet om toe te zien op de herkomst van aangeboden cultuurgoederen, die mogelijkerwijs binnen een van de categorieën van dit Verdrag vallen.

3 B betreft de juridische bescherming tegen de illegale handel in cultuurgoederen in Nederland en geeft een overzicht van het relevante juridische kader van de Raad van Europa, de Europese Unie, en de implementatie daarvan in Nederland in de "Wet tot Behoud Cultuurbezit" (WBC) in het Nederlands Burgerlijk Wetboek (BW), het Wetboek van Burgerlijke Rechtsvordering en het Wetboek van economische delicten. Daarbij wordt ook de recente implementatie van het UNESCO-verdrag 1970 betrokken.

Het hoofdstuk concludeert dat de WBC zich voornamelijk richt op het verhinderen van (illegale) export van Nederlands cultureel erfgoed van nationaal belang. Ook na de implementatie van de EU-Verordening, de Richtlijn en het UNESCO-Verdrag van 1970, richt de strenge administratieve regeling zich alleen op dat gedeelte van het Nederlands cultureel erfgoed van nationaal belang dat particulier eigendom is. Om cultuurgoederen die een integraal onderdeel uitmaken van collecties van de openbare instellingen, religieuze instellingen of door de overheid gefinancierde private rechtspersonen buiten Nederlands grondgebied te brengen is alleen de schriftelijke verklaring van instemming van een vertegenwoordiger van de bezittende instelling vereist. De aanbeveling is dan ook dat het regime van controle op de export van cultuurgoederen uit publieke collecties als vermeld in artikel 14a van de WBC aangescherpt moet worden tot een niveau als dat voor cultuurgoederen van nationaal belang in particulier bezit.

Een bijkomend punt is de leeftijdsbegrenzing voor te beschermen cultuurgoederen in zowel de particuliere als openbare collecties zoals eerst vastgesteld in het UNESCO Verdrag van 1970 en ook in de bijlage van de EU-verordening en Richtlijn. Beperkende regels gelden alleen ten aanzien van cultuurgoederen die ouder dan 100 jaar zijn, of geheel handgemaakt en ouder dan 50 jaar en niet in de handen van de maker . Deze leeftijdsgrenzen zouden moeten worden herzien. Het is gebaseerd op een verouderd historisch perspectief van cultureel erfgoed dat geen rekening houdt met het belang van het contemporaine cultureel erfgoed, noch op de potentiële bijdrage van dit erfgoed aan de toekomst. Omdat ook de hedendaagse kunst van grote betekenis is voor het nationale cultureel erfgoed, is het daarom noodzakelijk om het regime van uitvoervergunningen aan te passen.

Hoofdstuk IV. heeft betrekking op de bescherming van het monumentale cultureel erfgoed. Deel A van dit hoofdstuk concentreert zich op het Wereld Erfgoed Verdrag, en presenteert een algemeen overzicht van de achtergrond en de

doelstellingen van de relevante bepalingen met betrekking tot de bescherming van culturele uitingen. Dit wordt gevolgd door een bespreking van de te hanteren criteria voor opname van cultuuruitingen in de twee lijsten van cultureel erfgoed. In dit hoofdstuk wordt verder ingegaan op het te voeren beleid van nationale staten in de uitvoering van de doelstellingen van het Verdrag, en hoe dit private en publieke belangen, en ook de rol van de gemeenschappen in het Verdrag beïnvloedt.

Deel A concludeert dat na 40 jaar Wereld Erfgoed Verdrag de belangrijkste doelstelling is bereikt: De noodzaak van bescherming en het behoud van de materiële erfgoederen is algemeen geaccepteerd. De erkenning van het belang van gemengde sites, het samengaan van culturele en natuur erfgoed criteria, en van het belang van culturele landschappen en culturele routes, geeft bovendien blijk van de ontwikkeling naar een visie waarin het belang van de sociale en geografische context van cultureel erfgoed is geïntegreerd in de werkzaamheden van de Conventie.

Deel B van dit hoofdstuk begint met een bespreking van het Europese juridische kader voor de bescherming van het culturele erfgoed in het Nederlandse recht. Het bespreekt in het kort het Verdrag van de Raad van Europa inzake de bescherming van Archeologisch Erfgoed van 1992 (Het Valetta Verdrag) en de 2005 Convention on the Value of Cultural Heritage for Society (Het FaroVerdrag). Het Valetta Verdrag is van grote invloed op de Nederlandse wet en regelgeving ten aanzien van de bescherming van de archeologisch erfgoed. Het Faro Verdrag kan wordt wel gezien worden als een markeerpunt voor de vernieuwing van het conceptuele kader van de bescherming van cultureel erfgoed.

Vervolgens wordt met name aandacht besteed aan de EU cultuur paragraaf in artikel 167 VWEU, dat voor het eerst in het Verdrag van Maastricht werd opgenomen als artikel 128, en later vernummerd tot artikel 151 in het Verdrag van Amsterdam. Deze bepaling geeft de kaders voor de EU-bevoegdheden op het gebied van cultuur. Dit leidt tot de conclusie dat Nederland, als een nationale staat haar eigen verplichtingen heeft in cultureel erfgoed bescherming. Dit wordt gevolgd door een bespreking van de Nederlandse implementatie van het UNESCO Wereld Erfgoed Verdrag en het Valetta Verdrag inzake de bescherming van archeologisch erfgoed. Daarbij komt naar voren dat dat de Nederlandse Monumentenwet voor particuliere eigenaren van monumenten leidt tot een zorgplicht en een verplichting om wetenschappelijk onderzoek mogelijk te maken. Opgemerkt wordt dat vooral oudere monumentale panden in de Monumentenwet beschermd worden, maardat sinds de 2007 herziening van de Monumentenwet gemeentes kunnen besluiten om de beschermde status toe te kennen aan monumenten, ongeacht hun leeftijd.

Deel A van Hoofdstuk V beschrijft de bescherming van het immaterieel erfgoed

in het internationale recht. Zoals blijkt was dit in eerste instantie vooral gericht op het scheppen van de mogelijkheid van bescherming van uitingen van folklore door middel van het auteursrecht, maar later ontwikkelde dit zich meer tot het vaststellen van een internationale verantwoordelijkheid ten aanzien van het waarborgen van traditionele cultuuruitingen. Deel A van dit hoofdstuk concentreert zich vervolgens op het UNESCO-Verdrag betreffende de Bescherming van het Immaterieel Cultureel Erfgoed van 2003, gevolgd door een overzicht van de activiteiten in de WIPO inzake de ontwikkeling van regelgeving ter bescherming van de rechten van het individu, groepen en gemeenschappen ten aanzien van hun traditionele cultuuruitingen. Het Immateriëel Cultureel Erfgoed Verdrag betekent een nieuwe ontwikkeling in de relatie tussen nationale overheid en lokale gemeenschappen. Waar het Wereld Erfgoed Verdrag nog vooral uitging van de maatregelen vanuit de overheid, staat in het Immaterieel Erfgoed Verdrag de actieve betrokkenheid van de gemeenschappen die betrokken zijn bij het immaterieel erfgoed centraal. Het onderhandelingsproces over een nieuw sui generis instrument ter bescherming van traditionele cultuuruitingen in WIPO bevestigt de tendens naar de toenemende erkenning van de rechten van lokale gemeenschappen. Echter, zoals blijkt uit de ontwerp-tekst van 2004 en de daarop volgende discussiestukken, moet dit instrument vooral worden beschouwd als aanvulling op het bestaande internationale kader van intellectuele eigendomsrechten. Op dit moment is niet duidelijk of er voldoende overtuiging is onder de Westerse staten om de besprekingen te laten leiden tot een internationaal verdrag. Anderzijds worden de onderhandelingen ook gezien als een forum voor inheemse gemeenschappen en ontwikkelingslanden, dat zal bijdragen aan een groeiend bewustzijn van de problematiek, en daarmee ook aan nationale, regionale en lokale beschermingsmaatregelen.

Deel B van dit hoofdstuk ziet op de Nederlandse implementatie van het 2003 UNESCO-verdrag betreffende de bescherming van immaterieel erfgoed. Nederland heeft het Verdrag geratificeerd in maart 2012, met als gevolg dat het verdrag in werking is getreden in augustus 2012. Er is geen Nederlandse wetgeving die specifiek ziet op de bescherming van immaterieel cultureelerfgoed als zodanig, maar bescherming zou kunnen worden afgeleid uit de Nederlandse bepalingen ten aanzien van de bescherming van het auteursrecht en de bescherming van fonogrammen en uitvoerende rechten. Maar ook daarin zijn er geen specifieke bepalingen die relevant zijn voor de bescherming van de TCE. Het ontbreken van enige wettelijke bepaling met een directe verwijzing naar traditionele cultuuruitingen betekent niet dat het immaterieel cultureel erfgoed niet belangrijk wordt geacht voor de Nederlandse samenleving. Nationaal gezien, zoals ook blijkt uit de brief van de minister van 2011, is de voornaamste verplichting de inventarisatie en de periodieke rapportage. Tijdens het ratificatie proces van het Verdrag in Nederland overheerste echter de mening dat de bescherming van het immaterieel erfgoed in ontwikkelingslanden de belangrijkste factor is. Ook belangrijk is het ondersteunen van activiteiten met betrekking tot bewustmaking

met betrekking tot de betekenis van immaterieel cultureel erfgoed in culturele en sociale context. Daarbij staat een bottom-up benadering voorop. In het hoofdstuk wordt geconcludeerd dat de interpretatie van het Immaterieel Erfgoed Verdrag vooral gezien moet worden in de context van het Wereld Erfgoed Verdrag en het Verdrag inzake de diversiteit van cultuuruitingen. Vooral in (handels) contacten met landen buiten de Europese Unie kan dit Verdrag bijdragen aan de versterking van de culturele uitwisseling en een beter begrip van andere culturen. Het is daarom aan te bevelen in de diplomatieke en handelsrelaties met derde landen rekening te houden met dit Verdrag. De laatste aanbeveling met betrekking tot de uitvoering van dit Verdrag is dat de organisaties die actief zijn op het gebied van de bescherming van immaterieel erfgoed worden aangemoedigd om ook aandacht te besteden aan het immaterieel erfgoed van gemeenschappen die relatief nieuw zijn in de Nederlandse samenleving.

Hoofdstuk VI betreft de bescherming van de diversiteit van cultuuruitingen, Deel A van dit hoofdstuk behandelt het UNESCO-verdrag betreffende de bescherming en bevordering van de diversiteit van cultuuruitingen (Diversiteit Verdrag) van 2005. De bespreking van de ontstaansgeschiedenis van dit Verdrag wordt daarbij ook geleid door de drie onderzoeksvragen met betrekking tot de relatie tussen nationale en internationale belangen; de verhouding tussen private en publieke belangen en de positie van de gemeenschappen ten opzichte van de belangen van de internationale handel. Deel B van dit hoofdstuk richt zich op de positie van de Europese Unie in de operationalisering van het Verdrag. Daarvoor wordt de betrokkenheid van de Europese Unie bij de onderhandelingen tijdens de totstandkoming van het Verdrag besproken. Daarnaast wordt ook de relevantie van het Verdrag voor de economische partnerschapsovereenkomsten besproken. Dit hoofdstuk beschrijft vervolgens het Nederlandse intern perspectief met betrekking tot cultuurbeleid ten aanzien van de bescherming van de diversiteit van cultuuruitingen en de Nederlandse Media Wet van 2008-2010. Dit wordt gevolgd door een korte bespreking van het Nederlandse beleid ten aanzien van culturele uitwisselingen met derde landen. Geconcludeerd wordt dat het Diversiteit Verdrag relevant is voor het brede spectrum van de handel en culturele betrekkingen tussen de staten die partij zijn bij het Verdrag. Hoe dit beleid vorm krijgt is een zaak van Europese als ook de nationale politieke besluitvorming processen. De veranderingen in de houding van de Nederlandse overheid ten aanzien van de Code Culturele Diversiteit is daar een voorbeeld van. Politiek verschuivingen in de nationale overheden zouden echter niet in de weg mogen staan aan de operationalisering van het Diversiteit Verdrag. De Europese Unie, als medeverdragspartij heeft daarin een specifiek verantwoordelijkheid.

Hoofdstuk VII behandelt de bescherming van culturele rechten. Het UNESCO Immaterieel Cultureel Erfgoed Verdrag, en ook het Diversiteit Verdrag verwijzen in hun considerans expliciet naar de bestaande internationale mensenrechten instrumenten, en met name naar de Universele Verklaring van de Rechten

van 1948, het Internationaal Verdrag inzake Economische, Sociale en Culturele Rechten van 1966, en het Internationaal Verdrag inzake burgerrechten en politieke Rechten van 1966. De bespreking van culturele rechten toont aan dat in de historische ontwikkeling van culturele rechten, de positie van het individu, zijn culturele identiteit, en zijn identiteit als onderdeel van zijn gemeenschap centraal staat. De UNESCO verdragen zien daarmee niet alleen op de bescherming van het cultureel erfgoed, maar ook op de bescherming van de rechten van de rechthebbenden, zowel individueel als ook als gemeenschap, ten aanzien van dit culturele erfgoed.

Hoofdstuk VIII concludeert vervolgens dat de ontwikkeling van de bescherming van cultureel erfgoed en de bescherming van culturele rechten in het internationaal recht heeft geleid tot een een fijnmazig netwerk van regelgeving. Daarmee is de bescherming van het culturele erfgoed uitgegroeid tot een belangrijk onderwerp dat zich op haar beurt beweegt in een netwerk van beleidsterreinen, waardoor het noodzakelijk is om deze regelgeving in context te interpreteren en uit te leggen. Uit de hoofdstukken blijkt dat cultureel erfgoed in toenemende mate wordt gezien als en publiek goed, dat door middel van een specifiek regime van regelgeving wordt gewaarborgd. Ook wordt vastgesteld dat in toenemende mate de directe belanghebbenden dienen te worden betrokken bij de besluitvorming rond de bescherming van cultureel erfgoed, met daarbij een bijzonder rol voor lokale gemeenschappen. Het hoofdstuk presenteert daarbij een schematische afbeelding, waarin is af te lezen dat hoe meer cultuuruitingen gezien worden als cultureel erfgoed, hoe meer de regelgeving wordt beheersd door internationaal publiek recht, en dat hoe meer men uitgaat van cultuuruitingen als cultureel erfgoed, hoe meer de bescherming niet zo zeer uitgaat van het beschermen van private belangen, of nationale belangen, maar naar internationale, dan wel gemeenschaps belangen. Een conclusie die daaraan verbonden wordt is dat de UNESCO Wereld Erfgoed Conventie en de Immaterieel Erfgoed Conventie in hun onderlinge samenhang moeten worden geinterpreteerd, waarbij het aanbeveling verdient deze op den duur te laten samengaan.

SUMMARY

This book provides an overview of the main developments in the legal protection of cultural heritage in international law since the 1960s. this includes a discussion of the cultural rights which are reflected in the protection of cultural heritage, and more in particular in the protection of the right of access to the cultural heritage. The purpose of this book is to contribute to the interpretation of the Heritage Conventions for the implementation in the Netherlands.
The research was guided by three research questions that are typical of the interests involved in the protection of cultural heritage: What is the position of the nation-state, ii. What is the position of the individual right holders, and iii. What is the position of the communities in relation to their cultural heritage.

Chapter II provides the reader with an overview of the main developments in thinking about cultural heritage in modern Western society. This chapter is based on the organising principle of two axes that represent thinking on cultural heritage. The horizontal axis is based on a timeline representing the evolution in thinking about the protection of cultural heritage in the 19th and 20th centuries. The second, vertical axis runs between thinking on cultural heritage as goods and services on one side to thinking on cultural heritage as a public good on the other side.

Chapter III regards the protection of cultural heritage against illicit trafficking. Part 3A considers the protection against illegal trade in the framework of international law and section 3B considers the European perspective on the protection against illicit trade in the Council of Europe, in the primary and secondary legislation of the European Union and in its implementation in the Dutch legislation. After discussing the background of the illegal trade in tangible cultural focus of Part A of this chapter, in particular the UNESCO Convention on Illicit Import, Export and Transfer of Ownership of Cultural Goods of 1970 and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995. This section 3A demonstrates that the UNESCO Convention of 1970 has become the benchmark for a system of classification of cultural emanating from the national state as the central actor in the protection of cultural heritage. This means that national states can claim the return of cultural heritage objects after they have been exported without a license or explicit permission. It is for the national states to decide if they facilitate a private owner to claim for the return of a stolen object. The date of entry into force of this Convention has become a benchmark in the art trade, as they are now under the obligation to monitor the

provenance of cultural goods that are part of one of the categories in the 1970 Convention. 3B regards the legal protection against illicit trafficking in cultural goods in the Netherlands and provides an overview of the relevant legal framework of the Council of Europe, the European Union, and its implementation in the Netherlands in the Cultural Heritage Preservation Act (Dutch CHP Act), in the Dutch Civil Code (BW), the Code of Civil Procedure and the Code of Economic Crimes. It is also the recent implementation of the UNESCO 1970 Convention in question.The chapter concludes that the Dutch CHP Act focuses mainly on the prevention of (illegal) export of Dutch cultural heritage of national importance. Even after the implementation of the EU Regulation, the Directive and the UNESCO Convention of 1970, the strict administrative regime on export of cultural goods only regards that part of Dutch cultural heritage of national interest that is privately owned. Cultural properties that are an integral part of collections of public institutions, religious institutions or publicly funded private entities only require the written statement of consent of a representative of the owning institution. It is recommended that the regime of control on the export of cultural property from public collections listed in Article 14a of the Dutch CHP Act should be tightened to a level similar to the level of protection regarding cultural heritage of national importance in private ownership.

An additional issue is the age limit for protecting cultural property in both the private and public collections as first established in the UNESCO Convention of 1970 and later in the Annex of the EU Regulation and Directive. Restrictive rules apply only in respect of cultural objects more than 100 years, or entirely handmade and older than 50 years and not in the hands of the creator. These age limits should be revised. It is based on an outdated historical perspective of cultural heritage that ignores the importance of contemporary cultural heritage, nor on the potential contribution of this heritage in the future. Because contemporary art may be of great importance for national cultural heritage, it is therefore essential to adapt the rules on export accordingly.

Chapter IV. relates to the protection of the monumental heritage. Part A of this chapter focuses on the World Heritage Convention, and presents a general overview of the background and objectives of the relevant provisions relating to the protection of cultural expressions. This is followed by a discussion of the criteria to be used for inclusion of cultural expressions in the two lists of cultural heritage. This chapter further discusses the policies of national states in the implementation of the objectives of the Treaty, and how this affects private and public interests, and the role of communities in the Convention.
Part A concludes that after 40 years World Heritage Convention, its main objective has been achieved: the need to protect and preserve cultural heritage is generally accepted. The recognition of the importance of mixed sites, the combination of cultural and natural heritage criteria, and of the importance of cultural landscapes and cultural routes, gives evidence of the development of a vision in

which the importance of the social and geographical context of cultural heritage is integrated into the work of the Convention.
Part B of this chapter begins with a discussion of the European legal framework for the protection of cultural heritage in Dutch law. It discusses briefly the Convention of the Council of Europe Convention on the Protection of Archaeological Heritage, 1992 (The Valetta Convention) and the 2005 Convention on the Value of Cultural Heritage for Society (The Faro Convention). The Valetta Convention is considered as a major influence on the Dutch laws and regulations regarding the protection of the archaeological heritage. The Faro Convention is seen as a marker for the renewal of the conceptual framework of the protection of cultural heritage. The chapter continues with the EU culture paragraph in Article 167 TFEU, which was first included as Article 128 in the Maastricht Treaty and later renumbered into Article 151 in the Treaty of Amsterdam. This provision provides the framework for the EU's competence in the field of culture. This leads to the conclusion that the Netherlands, as a nation state has its own obligations in cultural heritage protection. This is followed by a discussion of the Dutch implementation of the UNESCO World Heritage Convention and the Valetta Convention on the protection of archaeological heritage. It shows that the Dutch Monuments Act for private owners of monuments leads to a duty and an obligation to facilitate scientific research. It is noted that since the 2007 revision of the Monuments municipalities may decide to grant protected status to monuments, regardless of their age.

Part A of Chapter V describes the safeguarding of the intangible heritage in international law. As can be seen, this was primarily focused on creating the possibility of protection of expressions of folklore by copyright, but that later this evolved more to establish an international responsibility towards safeguarding traditional cultural expressions. Part A of this chapter then focuses on the UNESCO Convention on the Safguarding of Intangible Cultural Heritage of 2003, followed by an overview of the activities in WIPO regarding a sui generis instrument on the protection of the rights of individuals, groups and communities regarding their traditional cultural expressions. The Intangible Cultural Heritage Convention is a new development in the relationship between the national government and local communities. Where the operationalisation of the World Heritage Convention is mainly a top-down, expert based process, the Intangible Heritage Convention is based on the active involvement of the communities related to the intangible heritage. The negotiation of a new sui generis instrument to protect traditional cultural expressions in WIPO confirms the trend towards the increasing recognition of the rights of local communities. However, as is apparent from the first draft text of 2004 and the subsequent discussion papers, this instrument should primarily be regarded as complementary to the existing international framework of intellectual property rights. At present it is not clear if there is sufficient agreement among Western states to lead to an international treaty. On the other hand, the negotiations also may be regarded as a forum for

indigenous communities and developing countries, which will contribute to a growing awareness of the problem, and therefore to national, regional and local protection.Part B of this chapter looks at the Dutch implementation of the 2003 UNESCO Convention on the protection of intangible heritage. The Netherlands ratified the Convention in March 2012, with the result that the Convention entered into force in August 2012. There is no Dutch legislation that specifically refers to the protection of intangible cultural heritage as such, but protection could be derived from the Dutch provisions regarding the protection of copyright and the protection of phonograms and performers rights. But these also do not contain specific provisions which are relevant to the protection of the TCE. The absence of any statutory provision with a direct reference to traditional cultural expressions does not mean that the intangible cultural heritage is not considered important for Dutch society. The letter of the Minister of 2011 explains that on the national level the main obligation is to make an inventory and periodic reporting. However, during the ratification process of the Treaty in the Netherlands, the opinion prevailed that the safeguarding of the intangible cultural heritage in developing countries is the most important factor. The chapter concludes that this Treaty should be interpreted in the context of the World Heritage Convention and the Convention on the diversity of cultural expressions. Especially in (business) contacts with countries outside the European Union could make use of this Convention to contribute to strengthening the cultural exchange and understanding of other cultures. It is therefore recommended in the diplomatic and trade relations with third countries to take account of this Convention. The last recommendation concerning the implementation of this Convention is that the organizations active in the field of the protection of intangible heritage are encouraged to also pay attention to the intangible heritage of communities that are relatively new in Dutch society.

Chapter VI concerns the protection of the diversity of cultural expressions, Part A of this Chapter deals with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Diversity Convention) of 2005. The discussion of the genesis of this Convention, is thereby guided by the three research questions regarding the relationship between national and international interests, the relationship between private and public interests and the position of the communities in relation to the interests of international trade. Part B of this chapter focuses on the position of the European Union and the operationalisation of the Convention in the Netherlands. The EU involvement in the negotiations during the drafting of the Convention discussed, this is also relevant as, at the international level, the obligations in the Diversity Convention also relate to the negotiations on Economic Partnership Agreements. This chapter then describes the Dutch internal perspective on cultural policy regarding the protection of the diversity of cultural expressions and the Dutch Media Act 2008-2010. This is followed by a brief discussion of the Dutch policy on cultural exchanges with third countries.

It is concluded that the Diversity Convention is relevant to a broad spectrum of commercial and cultural relations between the States Parties to the Convention. How this policy takes shape is a matter of EU - as well as national political decision-making processes. The changes in the attitude of the Dutch government regarding the Code Cultural Diversity is an example. Political shifts in national governments should not stand in the way of the operationalisation of the Diversity Convention. The European Union, as state party has a specific responsibility in this.

Chapter VII regards the protection of cultural rights. The UNESCO Intangible Heritage Convention, and the UCDCE explicitly refer in their preamble to the existing international human rights instruments, in particular the Universal Declaration of Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966. The discussion of cultural rights demonstrates the central position of the individual, his cultural identity, and his identity as part of his community. UNESCO Conventions thus not only regard the protection of cultural heritage, but also the protection of the rights of the rights holders, both individually and as a community, in respect of this cultural heritage.

Chapter VIII concludes that the development of the protection of cultural heritage and the protection of cultural rights in international law has led to a fine network of rules and regulations. Thus, the protection of cultural heritage has become an important subject that is relevant in a network of policy areas. It is therefore necessary to interpret and explain these rules and regulations in context. Chapter VIII includes a schematic representation, demonstrating that the more cultural expressions are considered as cultural heritage, the more the regulatory framework is covered by public international law, and that the more cultural expressions are regarded as cultural heritage, the more protection thereof is not so much based on the protection of private interests, or national interests, but on the protection of international or community interests. A related conclusion is that the UNESCO World Heritage Convention and the Intangible Heritage Convention should be interpreted in each other's context, and that it may be advised that in time these two Conventions should merge into one.

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Biography

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