

Edited by Silvia Borelli
and Federico Lenzerini

Cultural Heritage,
Cultural Rights,
Cultural Diversity

*New Developments
in International Law*

Cultural Heritage, Cultural Rights, Cultural Diversity

New Developments in International Law

Edited by

Silvia Borelli and Federico Lenzerini



MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN • BOSTON

2012

Cultural heritage, cultural rights, cultural diversity : new developments in international law / edited by Silvia Borelli and Federico Lenzerini.

p. cm. – (Studies in Intercultural Human Rights ; 4)

ISBN 978-90-04-22839-9 (hardback : alk. paper) – ISBN 978-90-04-22838-2 (e-book) 1. Cultural property – Protection (International law) 2. Cultural property – Protection – Law and legislation. 3. Cultural pluralism. 4. Culture and law. I. Borelli, Silvia. II. Lenzerini, Federico.

K3791.C84 2012

344'.09—dc23

2012019097

This publication has been typeset in the multilingual “Brill” typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities. For more information, please see www.brill.nl/brill-typeface.

ISSN 1876-9861

ISBN 978-90-04-22839-9 (hardback)

ISBN 978-90-04-22838-2 (e-book)

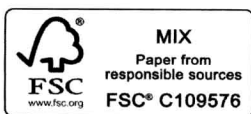
Copyright 2012 by Koninklijke Brill NV, Leiden, The Netherlands.

Koninklijke Brill NV incorporates the imprints Brill, Global Oriental, Hotei Publishing, IDC Publishers and Martinus Nijhoff Publishers.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher.

Authorization to photocopy items for internal or personal use is granted by Koninklijke Brill NV provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers, MA 01923, USA.
Fees are subject to change.

This book is printed on acid-free paper.



Printed by Printforce, the Netherlands

Foreword

The past twenty years have witnessed a far reaching and intense development of international legal standards concerning the safeguarding of cultural heritage and cultural diversity. At the same time as the 1972 World Heritage Convention was achieving an almost universal scope of application, a new international conscience has progressively matured within the international community as to the proper scope of the notions of culture and cultural heritage. That new conscience is rooted in the awareness that the concept of cultural heritage represents a holistic notion which reaches far beyond the original conception encompassing only tangible artistic and monumental expressions. Recent international practice has emphasized the strong connections between the various and multi-faceted expressions of cultural heritage and the identity of peoples, the safeguarding of which represents a fundamental prerequisite for ensuring the enjoyment in practice of basic human rights at both the collective and individual level. These developments constitute a sea-change in the way in which the international community deals with questions concerning cultural heritage and cultural diversity and provides a new legal background against which to address the new and difficult challenges that the international community faces in matters relating to cultural heritage as it progresses into the new millennium. Among the new elements of reflection raised by the said developments, the process of “humanization” of international cultural heritage law is prominent. The inextricable connection between culture and human rights is today evident, both in terms of their mutually supporting nature, as well as in the sense that enjoyment of one’s own culture represents an essential prerequisite for allowing the person concerned fully to benefit from her internationally recognized human rights. This interconnection has been made even more evident due to the affirmation of collective human rights, the justiciability of which is today increasingly recognized, thus contributing to the promotion of a new holistic and spiritual vision of culture.

The present volume examines these challenges and their legal implications from the perspective of the *lex ferenda*. In the various contributions, the link between cultural heritage, cultural diversity and human rights, emphasizing the indivisibility of these elements in construing the identity of the human person, of human communities and, ultimately, of the world’s community is apparent. Assessments of how the international approach to the protection of culture has evolved – shifting from a sovereignty-based

idea of cultural property to a fuller perception of the human dimension of cultural heritage – are carried out through the lens of the most significant and recent problems faced by the international community in the context of the international and domestic protection of cultural heritage. The numerous cutting-edge topics addressed in the various chapters making up this book include cultural rights and identity, cultural diversity, the safeguarding of intangible cultural heritage, the protection of underwater cultural heritage, the evolution of the concept of “cultural landscape”, as well as the inter-relation of cultural heritage law with other international legal regimes, including international investment law and the legal framework on climate change.

The philosophy underlying the project of which this book is the product was to offer a fresh and original assessment of the current reality and future perspectives of international cultural heritage law, in an epoch in which – as noted above – a fundamental transformation has taken place in the perception of the significance of culture by the international community. If this collection of essays fulfils its aims, the lion's share of the merit is undoubtedly attributable to the contributors, who have offered their expertise, their time, as well as their dedication to the subject with a spirit of cooperation and friendship, thereby greatly facilitating our work as editors. Taken as a whole, their contributions offer a rich variety of viewpoints which we believe enrich the volume and enhance its value. Nevertheless, we are aware that some of the views expressed may be open to debate from either a legal or ideological perspective. It of course goes without saying that the author is personally responsible for the positions expressed in each contribution, and those positions are not necessarily shared by the editors.

This book is the result of a research project (PRIN 2007) financed by the Italian Ministry of Education, University and Research and supervised by Professors Francesco Francioni, Laura Pineschi and Tullio Scovazzi, to each of whom a huge debt is due. We also wish to thank Amy Strecker for her excellent linguistic assistance, as well as Simon Olleson for his willingness to provide advice on sundry linguistic and scientific questions during the course of the editorial work. Last but not least, we wish to express our gratitude to the publisher and in particular to Marie Sheldon, Alexandra Mitton and Melissa Andersen for their courtesy and continuous assistance, as well as to the Editor-in-Chief of the Series of Studies in Intercultural Human Rights, Professor Siegfried Wiessner, for having encouraged the inclusion of this book in the series.

London – Siena, 10 February 2012

Silvia Borelli and Federico Lenzerini

List of Contributors

Silvia Borelli	<i>Principal Lecturer in International Law, University of Bedfordshire</i>
Alessandro Chechi	<i>Post-doctoral Researcher, Art-Law Centre, University of Geneva</i>
Nicola Ferri	<i>Ph.D. candidate, University of Milano-Bicocca, Milan</i>
Francesco Francioni	<i>Professor of International Law, European University Institute, Florence</i>
Andrzej Jakubowski	<i>Assistant Professor, Institute of Law Studies, Polish Academy of Sciences, Warsaw</i>
Alessandra Lanciotti	<i>Professor of International Law and EU Law, University of Perugia</i>
Federico Lenzerini	<i>Assistant Professor of International Law and EU Law, University of Siena</i>
Maria Clara Maffei	<i>Assistant Professor of International Law, University of Parma</i>
Robert Peters	<i>Ph.D. in Law, European University Institute, Florence. Legal Officer working for the German Federal Government Commissioner for Culture and the Media</i>
Laura Pineschi	<i>Professor of International Law, University of Parma</i>
Ottavio Quirico	<i>Lecturer, School of Law, University of New England, New South Wales</i>
Tullio Scovazzi	<i>Professor of International Law, University of Milano-Bicocca, Milan</i>
Ami Strecker	<i>Ph.D. candidate, European University Institute, Florence</i>
Sabrina Urbinati	<i>Post-doctoral Researcher, University of Milano-Bicocca, Milan</i>
Valentina Sara Vadi	<i>Marie Curie Postdoctoral Fellow, Maastricht University</i>
Patrizia Vigni	<i>Assistant Professor of International Law, Faculty of Law, University of Siena</i>
Ana Filipa Vrdoljak	<i>Professor, Faculty of Law, The University of Technology, Sydney; and Visiting Professor, Legal Studies Department, Central European University, Budapest</i>

Selected Abbreviations

African Charter / ACHPR	African Charter on Human and Peoples' Rights (1981)
African Commission	African Commission on Human and Peoples' Rights
<i>AJIL</i>	<i>American Journal of International Law</i>
American Convention / ACHR	American Convention on Human Rights (1969)
American Declaration on Human Rights	American Declaration on the Rights and Duties of Man (1949)
Biodiversity Convention	Convention on Biological Diversity (1992)
<i>BYIL</i>	<i>British Yearbook of International Law</i>
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women (1979)
CETS	<i>Council of Europe Treaty Series / European Treaty Series</i>
CERD	Convention on the Elimination of All Forms of Racial Discrimination (1965)
ESCR Committee	Committee on Economic Social and Cultural Rights
Cultural Diversity Convention	Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)
ECHR / European Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
ECJ	European Court of Justice
ECtHR / European Court	European Court of Human Rights
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>FYIL</i>	<i>Finnish Yearbook of International Law</i>
Hague Protocol I	Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)

Hague Protocol II	Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999)
ICRC	International Committee of the Red Cross
IACommHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (1966)
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
ICH Convention	Convention for Safeguarding of the Intangible Cultural Heritage (2003)
ICJ	International Court of Justice
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
<i>IJCP</i>	<i>International Journal of Cultural Property</i>
ILA	International Law Association
ILM	<i>International Legal Materials</i>
ILR	<i>International Law Reports</i>
<i>IYIL</i>	<i>Italian Yearbook of International Law</i>
Kyoto Protocol	Kyoto Protocol to the UN Framework Convention on Climate Change (1997)
<i>OJ</i>	<i>Official Journal of the European Union</i>
<i>RDI</i>	<i>Rivista di diritto internazionale</i>
<i>Recueil des Cours</i>	<i>Recueil des Cours de l'Académie de Droit International</i>
<i>RGDIP</i>	<i>Revue Générale de Droit International Public</i>
UCH Convention	Convention on the Protection of the Underwater Cultural Heritage (2001)
UDHR	Universal Declaration of Human Rights (1948)
UN Charter	Charter of the United Nations (1945)
UN Minorities Declaration	UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)
UNCCC	United Nations Framework Convention on Climate Change (1992)
UNCLOS	United Nations Convention on the Law of the Sea (1982)
UNDRIP	UN Declaration on the Rights of Indigenous Peoples (2007)

UNESCO Cultural Diversity Declaration	UNESCO Universal Declaration on Cultural Diversity (2001)
UNESCO Intentional Destruction Declaration	UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (2003)
UNTS	<i>United Nations Treaty Series</i>
VCLT	Vienna Convention on the Law of Treaties (1969)
World Heritage Convention	Convention concerning the Protection of the World Cultural and Natural Heritage (1972)
1954 Hague Convention	Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)
1970 UNESCO Convention	Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)

Table of Conventions and International Instruments

Convention (II) with Respect to the Laws and Customs of War on Land and Annex, Regulations concerning the Laws and Customs of War on Land (The Hague, 29 July 1899); entered into force 4 September 1900; Parry's CTS, vol. 187 (1898-99), p. 429; *AJIL Supp.*, vol. 1 (1907), p. 129.

Convention (IV) respecting the Laws and Customs of War on Land, and Annex, Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907); entered into force 26 January 1910; Parry's CTS, vol. 208 (1907), p. 77; *AJIL Supp.*, vol. 2 (1908), 90.

Charter of the International Military Tribunal, Nuremberg annexed to the Agreement by United Kingdom, United States, France and USSR for the Prosecution and Punishment of the Major War Criminals of the European Axis (London, 8 August 1945); *AJIL Supp.*, vol. 39 (1945), p. 257; 82 UNTS 279.

American Declaration on the Rights and Duties of Man (American Declaration), OAS Res. XXX (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); *AJIL Supp.*, vol. 43 (1949), p. 133.

Geneva Convention (VI) relative to the Protection of Civilian Persons in Time of War, 12 August 1949; entered into force 21 October 1950; 75 UNTS 287.

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950); entered into force 3 September 1953; CETS No. 5; 213 UNTS 221.

Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), entered into force 7 August 1956; 249 UNTS 240.

Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954); entered into force 7 August 1956; 249 UNTS 358.

Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965), entered into force 4 January 1969; GA Res. 2106 (XX), Annex, p. 20; 660 UNTS 195.

International Covenant on Civil and Political Rights (New York, 16 December 1966), entered into force 23 March 1976, GA Res. 2200A (XXI); 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), entered into force 3 January 1976; GA Res. 2200A(XXI); 993 UNTS 3.

Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966), entered into force 23 March 1976; GA Res. 2200A(XXI); 999 UNTS 171.

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), entered into force 27 January 1980, UN doc. A/CONF.39/27; 1155 UNTS 331.

American Convention on Human Rights (San José, 21 November 1969), entered into force 18 July 1978; OAS Treaty Series No. 36; 1144 UNTS 123.

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in Accordance with the Charter of the United Nations, GA Res. 2625(XXV), 24 October 1970; ILM, vol. 9 (1970), p. 1292.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 November 1970), entered into force 24 April 1972; 823 UNTS 231.

Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX), 12 December 1974; ILM, vol. 14 (1975), p. 251.

Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Geneva, 8 June 1977); entered into force 7 December 1979; 1125 UNTS 3.

Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Geneva, 8 June 1977), entered into force 7 December 1978; 1125 UNTS 609.

Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979); entered into force 3 September 1981; GA Res 34/180; 1249 UNTS 13.

African Charter of Human and Peoples' Rights (Banjul, 27 June 1981), entered into force 21 October 1986; OAU doc. CAB/LEG/67/3 rev.3; ILM, vol. 21 (1982), p. 58.

United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982); entered into force 16 November 1994; 1833 UNTS 3.

Declaration on the Right to Development, GA Res. 41/128, 4 December 1986.

ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, 27 June 1989); entered into force 5 September 1991; 1650 UNTS 383.

Convention on the Rights of the Child (New York, 20 November 1989), entered into force 2 September 1990; GA Res. 44/25; 1577 UNTS 3.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (New York, 18 December 1990); entered into force 1 September 2003; GA Res. 45/158, Annex; 2220 UNTS 3.

United Nations Framework Convention on Climate Change (New York, 9 May 1992); 1771 UNTS 107.

Convention on Biological Diversity (Rio de Janeiro, 5 May 1992); entered into force 29 December 1993; 1760 UNTS 79.

UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135, 18 December 1992.

Vienna Declaration and Programme of Action, adopted 25 June 1993; UN doc. A/CONF.157/23; ILM, vol. 32 (1993), p. 1661.

Framework Convention for the Protection of National Minorities (Strasbourg, 1 February 1995); entered into force 1 February 1998; CETS No. 157.

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995), entered into force 1 July 1998; ILM, vol. 34 (1995), p. 1322.

Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997); 2303 UNTS 148.

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999); entered into force 9 March 2004; 2253 UNTS 172.

UN Convention against Transnational Organized Crime, adopted by GA Res. 55/25, 15 November 2000; entered into force 29 September 2003; 2237 UNTS 319.

Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001); entered into force 2 January 2009; 2562 UNTS 1.

Universal Declaration on Cultural Diversity, adopted by the General Conference of UNESCO, 2 November 2001; UNESCO doc. 31C/Res. 25, Annex I; ILM, vol. 41 (2002), p. 57.

Convention for Safeguarding of the Intangible Cultural Heritage (Paris, 17 October 2003); entered into force 20 April 2006; 2368 UNTS 3.

Declaration concerning the Intentional Destruction of Cultural Heritage, adopted by the General Conference of UNESCO, 17 October 2003; UNESCO doc. 32C/Res. 33, Annex.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 20 October 2005); entered into force 18 March 2007; 2440 UNTS 311.

2005 World Summit Outcome Final Document, adopted by GA Res. 60/1, 24 October 2005.

Convention on the Rights of Persons with Disabilities (New York, 13 December 2006); entered into force 3 May 2008; GA Res. 61/106; 2515 UNTS 3.

UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 September 2007.

Table of Contents

<i>Foreword</i>	ix
<i>List of Contributors</i>	xi
<i>Select Abbreviations</i>	xiii
<i>Table of Conventions and International Instruments</i>	xvii

PART I

THE EVOLUTION OF INTERNATIONAL LAW ON CULTURAL HERITAGE

CHAPTER 1	The Evolving Framework for the Protection of Cultural Heritage in International Law	3
	<i>Francesco Francioni</i>	

PART II

BEYOND TANGIBLE PROPERTY: CULTURAL DIVERSITY, INTANGIBLE
CULTURAL HERITAGE AND HUMAN RIGHTS

CHAPTER 2	Cultural Diversity as a Human Right? General Comment No. 21 of the Committee on Economic, Social and Cultural Rights	29
	<i>Laura Pineschi</i>	
CHAPTER 3	Of Veils, Crosses and Turbans: The European Court of Human Rights and Religious Practices as Manifestations of Cultural Diversity	55
	<i>Silvia Borelli</i>	
CHAPTER 4	Food as a Cultural Choice: A Human Right to Be Protected?	83
	<i>Maria Clara Maffei</i>	

CHAPTER 5	Human Rights and Illicit Trade in Cultural Objects <i>Ana Filipa Vrdoljak</i>	107
CHAPTER 6	“Remedying Historical Injustice”: Ethical and Historical Considerations in Returning Cultural Materials <i>Robert Peters</i>	141
CHAPTER 7	The Tension between Communities’ Cultural Rights and Global Interests: The Case of the Māori <i>Mokomokai</i> <i>Federico Lenzerini</i>	157
CHAPTER 8	The Definition of Intangible Cultural Heritage <i>Tullio Scovazzi</i>	179
CHAPTER 9	The Role for Communities, Groups and Individuals under the Convention for the Safeguarding of the Intangible Cultural Heritage <i>Sabrina Urbinati</i>	201
CHAPTER 10	Culinary Traditions as Cultural Intangible Heritage and Expressions of Cultural Diversity <i>Maria Clara Maffei</i>	223

PART III

NEW DYNAMICS OF INTERNATIONAL CULTURAL HERITAGE LAW

CHAPTER 11	The Right to Recovered Underwater Cultural Heritage: The Neglected Importance of Article 149 of the UN Law of the Sea Convention <i>Nicola Ferri</i>	253
CHAPTER 12	The Merits of the UNESCO Convention on the Protection of the Underwater Cultural Heritage <i>Tullio Scovazzi</i>	267
CHAPTER 13	Historic Shipwrecks and the Limits of the Flag State Exclusive Rights <i>Patrizia Vigni</i>	279

CHAPTER 14	The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the “Getty Bronze” <i>Alessandra Lanciotti</i>	301
CHAPTER 15	The Human Dimension to Landscape Protection in International Law <i>Amy Strecker</i>	327
CHAPTER 16	Multi-Level Cooperation to Safeguard the Human Dimension of Cultural Heritage and to Secure the Return of Wrongfully Removed Cultural Objects <i>Alessandro Chechi</i>	347
CHAPTER 17	The Human Dimension of State Succession to Cultural Property: The Balkan Lesson <i>Andrzej Jakubowski</i>	369
CHAPTER 18	Key Issues in the Relationship between the World Heritage Convention and Climate Change Regulation <i>Ottavio Quirico</i>	391
CHAPTER 19	Culture, Development and International Law: The Linkage between Investment Rules and the Protection of Cultural Heritage <i>Valentina Sara Vadi</i>	413
INDEX		435

PART I

The Evolution of International Law on Cultural Heritage