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Right to Cultural Life: Panacea or Problem?

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The Right to Participation in Cultural Life and Heritage Destruction: Panacea or Part of the Problem?

Lucas Lixinski*

1. Introduction

In discussing the matter of heritage destruction, recent and sadly ongoing events around the world come to mind, usually related to conflict. Those events have prompted UNESCO to drive some of its most significant action in the field of culture in the recent decades, including articulating a new mechanism to coordinate the multiple treaties under its aegis that may be implicated in conflict situations. We no longer speak only of the 1954 Hague Convention about the protection of heritage in wartime and its protocols;¹ rather, the destruction of World Heritage Sites also invokes the 1972 World Heritage Convention;² and the looting of archaeological sites (often to fund conflict) also brings the 1970 Convention on cultural objects into discussion.³ Traditionally, these treaties have operated separately, even though the bureaucratic offices within UNESCO were all on the same floor of Annex I to the UNESCO building. Now, new circumstances have finally pushed UNESCO to consider the coordination among these mechanisms.⁴

With this action, UNESCO proves once again its ability to rise to the occasion around large international campaigns, much like the campaign around the Aswan Dam in the 1950s helped put UNESCO on the map.⁵ UNESCO's action in this area, though valuable, can also have an unintended negative effect in resetting the yardstick against which we measure changes to heritage. In other words, when we speak of heritage destruction, it is hard to think of it as anything other than the product of conflict and / or fundamentalism; it is even hard to think of changes to heritage as anything other than the beginning of a steep slippery slope that leads to its destruction, to the detriment of all of humanity. In other words, in the same way as much of international law, conversations about heritage destruction are tethered to the language of crisis which can prevent analytic progress.⁶

And, yet, heritage changes every day, and it is meant to. That is so for two reasons: first, because of intangible cultural heritage (ICH); second, because of the pushback against overuse of heritage

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¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (1954 Hague Convention); Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358 (Hague Protocol I); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 (Hague Protocol II).

² Convention concerning the Protection of the World Cultural and Natural Heritage 1972 (adopted 23 November 1972, entered into force 15 December 1975) 1037 UNTS 151 (WHC).

³ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231 (1970 Convention).

⁴ See, eg, UNESCO, UNESCO reiterates call for unity and coordination to protect Syrian Cultural Heritage, <http://whc.unesco.org/en/news/1475>; and UNESCO, International Coordination Committee for the Safeguarding of the Cultural Heritage of Iraq, <http://whc.unesco.org/en/activities/181/>.

⁵ For a commentary in connection to the WHC, see Vrdoljak, Ana Filipa, 'Article 13: World Heritage Committee and International Assistance', in Francesco Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press, 2008) 219-241.

⁶ Hilary Charlesworth, 'International Law: A Discipline of Crisis', 65(3) *The Modern Law Review* 377-392 (2002), at 384.

categories. With respect to ICH, the rise of the concept (enshrined in the Convention for the Safeguarding of the Intangible Cultural Heritage)⁷ means we think of heritage no longer as static things to gaze at, but rather living culture.⁸ Living culture changes over time, as do our attachments to material remnants of the past.

Secondly, David Lowenthal has argued that the push towards heritage protection risks turning us into a society of hoarders.⁹ There is thus good reason to think about heritage selectively. Heritage is already selected every day; the only caveat being that, under the current international system, once something is declared heritage, it is very hard to think of it as anything but.¹⁰

Considering these two arguments (living culture and anti-hoarding), the question we must ask is how to draw and steady the line between (arguably permissible) changes to heritage and (illegal) destruction as a result of conflict or fundamentalism. The answer lies in the connection between heritage and the communities that live in, with, or around it. Through the eyes of those communities, because they live the heritage, and have the closest attachments to it, one should be in a position to decide whether heritage is changing or being destroyed.

A problem arises in how to engage communities in international heritage law. UNESCO mechanisms are notoriously ill-equipped to do the job, and, whenever communities are present, it is only at the domestic level, with their voices necessarily filtered by states (which, as the Bamiyan Buddhas destruction reminds us, are not always apt to be the spokespeople for communities). But another body of international law that has traditionally given a voice to individuals (and, increasingly, communities and other groups) in international law is international human rights law.

International human rights law, in particular, articulates a right to participate in cultural life in a series of instruments.¹¹ This right can offer an avenue to engage communities in decision-making around its own heritage. I argue in this contribution that the right to cultural life can be used to prevent heritage destruction done by people other than the community, while still allowing the community to engage with its own heritage in a way that changes or even discards it. In other words, the right to cultural life is a useful way of thinking about heritage both within and beyond the language of crisis that anchors much of our conversation about the destruction of heritage.

At stake is the notion that heritage should be allowed to change, and the possibility of enabling this change. In the process, we also bring communities closer to the international governance over their own cultural resources. We are also better able to accommodate the intangible dimensions of cultural

⁷ Convention for Safeguarding of the Intangible Cultural Heritage 2003 (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (ICHC).

⁸ For a discussion, see generally Lixinski, Lucas, *Intangible Cultural Heritage in International Law* (Oxford University Press, 2013).

⁹ Lowenthal, David, 'Why Sanctions Seldom Work: Reflections on Cultural Property Internationalism', *International Journal of Cultural Property* 12 (2005), 393-423.

¹⁰ With few exceptions of sites removed from the World Heritage List.

¹¹ Universal Declaration of Human Rights (adopted 10 December 1948), Article 27 (UDHR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Article 15; African Charter on Human and Peoples' Rights ("Banjul Charter") (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 17 (Banjul Charter); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") A-52, Article 14 (Protocol of San Salvador). These are only articulations of the right in more general instruments. Specific instruments also contain versions of this right. See a list in Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 1177-1179.

heritage (important since, as Laurajane Smith once famously put, all heritage is at its core intangible),¹² and to contextualize heritage in broader projects of community emancipation.

What follows engages first with the idea of heritage destruction as a moment of crises, drawing from the framework set by Hilary Charlesworth in her seminal article.¹³ Next, I discuss the right to participate in cultural life in its multiple dimensions, but chiefly through the lenses of the ICESCR. After that, I will discuss the advantages (or bright sides) of using the right to cultural life as a means of negotiating decisions about whether heritage exists and / or should continue existing. Following that, I will engage in the parallel possible disadvantages (or dark sides) of the use of this right, before discussing in more depth the question of whether the right to cultural life can be useful in this context, and how it can be articulated not only in the context of heritage, but also in relation to other human needs and aspirations. Concluding remarks follow.

2. The Limitations of Heritage as Crisis

Over fifteen years ago, in the immediate aftermath of the attacks against the World Trade Center in New York City and the corresponding invasion of Afghanistan, Hilary Charlesworth engaged with the idea of how international law is chiefly shaped in response to international crises, using the Kosovo crisis of the 1990s as a backdrop.¹⁴ In her reasoning, the framing of international law in times of crisis brings with it several drawbacks, related to facts, analysis, and the connection between the two.

Relative to international law's engagement with the reality it is responding to, the language of crisis makes facts uncontroversial, and the parties to a dispute easily characterizable as polar opposites of good or evil.¹⁵ Or, in Charlesworth's words

International lawyers typically do not report on the basis of their own experiences and lives, and the 'facts' we deal with are gathered from the media, government reports and other sources. Our discipline does not encourage the weighing up of competing versions of events. What we glean then as 'facts' may be inaccurate or partial and the way we report and emphasise them is an act of political interpretation. We do not acknowledge this in the way we write.¹⁶

In the specific context of heritage destruction as a crisis, our reception of facts makes heritage destruction necessarily wanton, and precludes alternative accounts. One key example is the destruction of the Bamiyan Buddhas, which has led to the formation of norms precisely against the intentional destruction of cultural heritage.¹⁷ The facts of the destruction of the Buddhas have been repeatedly characterized by lawyers as the result of fundamentalism and an iconoclastic, anti-

¹² See LAURAJANE SMITH, *THE USES OF HERITAGE* 56 (Routledge 2006); and Charlotte Andrews, Dacia Viejo-Rose, Britt Baillie and Benjamin Morris, *Conference Report: Tangible-Intangible Cultural Heritage: A Sustainable Dichotomy? The 7th Annual Cambridge Heritage Seminar*, 2 *INTERNATIONAL JOURNAL OF INTANGIBLE HERITAGE* 124, 126 (2007) (discussing a presentation by Laurajane Smith).

¹³ Charlesworth, cit.

¹⁴ *Id.*, 377-379.

¹⁵ *Id.*, 382-383.

¹⁶ *Id.*, 384.

¹⁷ UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (17 October 2003) UNESCO Doc 32/Resolution 33 (Declaration concerning the Intentional Destruction of Cultural Heritage).

minoritarian impulse.¹⁸ There is, however, one famous alternative account an alternative account by Sayed Rahmatullah Hashimi suggests that the statues were destroyed instead because of the reluctance of international (heritage) bodies (more specifically, the UNESCO delegation in Afghanistan to investigate the destruction of artefacts in the Kabul Museum) to perceive interests other than those of heritage conservation:

The scholars told them that instead of spending money on statues, why didn't they help our children who are dying of malnutrition? They rejected that, saying, 'This money is only for statues'. The scholars were so angry. They said, 'If you are destroying our future with economic sanctions, you can't care about our heritage'. And so they decided that these statues must be destroyed ... If we had wanted to destroy those statues, we could have done it three years ago [when Mullah Mohammed Omar originally ordered the destruction of the statues]. So why didn't we? In our religion, if anything is harmless, we just leave it. If money is going to statues while children are dying of malnutrition next door, then that makes it harmful, and we destroy it.¹⁹

Framing the destruction of the Buddhas as a moment of crisis prevented us from querying the ways in which heritage was being used (and, at least in the opinion of this representative of the local community, misused) to promote heritage as a goal in itself, and neglecting other needs of the local population.²⁰ The language of crisis thus turns us blind to the ways in which heritage is used, and we ignore them in favor of a mentality of heritage preservation at all costs, even if the specific cost is (in this case) other human goals.

Secondly, Charlesworth posits that the crisis framing makes us "rediscover" an issue constantly, and never based on previous knowledge, leading to a lack of analytical progress.²¹ We engage with the crisis at hand trying to address it, and then move on to the next moment of crisis. In the heritage context, an example is the plethora of scholarship engaging with the International Criminal Court's *Al Mahdi* case,²² without necessarily tying it to previous conversations about heritage destruction as an international crime, and the stakes of understanding heritage destruction outside of the crisis context.²³

Third, Charlesworth charges international lawyers in crisis mode with engaging in thin descriptions that miss the big picture of a situation in our attempt to digest it into smaller pieces and apply narrowing legal concepts to understand it.²⁴ Therefore, in decrying the destruction of heritage in Mali and Syria, and applauding the efforts of the ICC in this area, we miss the fact that the destruction of these monuments masks broader and deeper atrocities, and that deeming this destruction as essentially irreparable (a position that heightens the stakes of the crisis) prevents us from being aware

¹⁸ O'Keefe, Roger, *World Cultural Heritage Obligations to the International Community as a Whole?*. 53 ICLQ 189 (2004); and Francioni, Francesco and Lenzerini, Federico, *The Destruction of the Buddhas of Bamiyan and International Law*, 14(4) EJIL 619 (2003).

¹⁹ Quoted in Rodney Harrison, *Heritage: Critical Approaches* 186 (Routledge 2013).

²⁰ For an additional discussion, see Lixinski L, 2013, 'International cultural heritage regimes, international law, and the politics of expertise', *International Journal of Cultural Property*, vol. 20, pp. 407 – 429.

²¹ Charlesworth, cit., 384.

²² Judgment and Sentence, *Al Mahdi* (ICC-01/12-01/15-171), Trial Chamber VIII, 27 September 2016 (hereafter '*Al Mahdi*, Judgment').

²³ Even if there are some notable exceptions, which form the basis for the discussion of this chapter, and in this volume.

²⁴ Charlesworth, cit., 384.

of, let alone engage with, the reasons that led to the destruction of heritage to begin with, or preventing similar situations from happening ever again (a point related as well to the lack of analytical progress, in Charlesworth's typology).

In other words, the language of crisis should not be a trope to how we think about heritage changing. Neither should the UNESCO style of large international campaigns responding to crises be our default mode of analyzing changes to heritage. Instead, we should resist paying the three main "ethical costs of crises",²⁵ in Charlesworth's typology. First, we should avoid narrowing the agenda of our response,²⁶ and to that effect efforts like this volume come a long way in building critical mass around the issue of heritage destruction both wedded to and divorced from crises. Secondly, we must resist the urge to cast ourselves as heroes in the defense of cultural heritage,²⁷ and be mindful that our role is not to speak on behalf of heritage or its holders, but rather to allow heritage holders themselves to speak about their wishes for the heritage they live in, with, or around. Lastly, we must create the conditions to think of heritage destruction not only as the highly publicized, even weaponized, events in Syria, Iraq, and other contemporary conflicts. In listening for the "silences of crises",²⁸ we can engage more deeply with heritage's connection not only to warfare and tragedy, but also the connection to the structural problems that may lead to these tragedies, and therefore expand the possibilities of engagement with heritage destruction in the law in a way that does not necessarily fetishize or demonize it. To that effect, thinking more deeply about the language of human rights connected to heritage, and the right to participate in cultural life, is a means of taking a step back from the language of crisis within a legal framework that engages with the possibilities of changes to culture. The next section discusses this right in greater depth.

3. The Right to Participate in Cultural Life

As indicated above, the key international treaty of general applicability to include cultural rights is the ICESCR, in Article 15(1)(a),²⁹ which is based on a draft initially prepared by UNESCO.³⁰ Ratified by 167 states,³¹ the ICESCR provides the key articulation of this right in international law, and, as such, it will form the bulk of the analysis of this right for our present purposes. The Committee on Economic, Social and Cultural Rights issued a General Comment (GC21) to this provision in 2009,³² which will also be relevant for our purposes, particularly in that it adds cultural heritage explicitly to the content of the right to participate in cultural life.

GC21 starts by framing the right to participate cultural life as an integral part of human rights, proclaiming it to be "universal, indivisible, and interdependent".³³ Like all other rights, too, it includes

²⁵ Charlesworth, cit., 386.

²⁶ Id.

²⁷ Id., 387.

²⁸ Id., 388.

²⁹ "Article 15. 1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; [...]"

³⁰ Saul et al., cit., 1177.

³¹ Office of the High Commission for Human Rights, Status of Ratification Interactive Dashboard, at <http://indicators.ohchr.org/>

³² Committee on Economic, Social and Cultural Rights, General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21 (21 December 2009) (GC21).

³³ Id., para. 1.

both negative (abstention) and positive (action) obligations.³⁴ This statement is probably intended to raise the status of cultural rights, often under-explored as part of the body of international human rights law. As we will see below, though, it also has the effect of making cultural rights one of the rights that should be taken into account when thinking of heritage and its status.

In defining culture, GC21 evolves the interpretation of the ICESCR. The drafting history suggests that, when thinking of culture, drafters had in mind cultural products and expressions (in the present context, tangible heritage) rather than a broad definition of culture that includes living culture and ways of life.³⁵ The latter interpretation, though, has been the standard adopted by the CESCR,³⁶ and therefore the treaty is to be interpreted in reference to subsequent practice under it (a primary means of interpretation under international law),³⁷ rather than the drafting history (a supplementary means of interpretation under international law).³⁸ The importance of interpreting culture as including living culture for our present purposes is clear: it helps to reassert the discursive move pointed in the introduction also in the domain of human rights, with the implication that culture (and cultural heritage as its embodiment) can and should be allowed to change.

While GC21 recognizes that the right has important collective dimensions,³⁹ ultimately, the right is individual, as GC21 indicates that that people should individually choose “whether or not to exercise the right to take part in cultural life” as part of “a cultural choice [that] should be recognized, respected and protected on the basis of equality.”⁴⁰ Therefore, under the terms of international human rights law, this right is still for the most part individual, in spite of ambitions to collectivize it (possible, for instance, under the Banjul Charter and jurisprudence under it).⁴¹ The tensions between international cultural heritage law’s ambitions to collectivize heritage as part of bottom-up implementation and the individualization of rights are discussed below.

GC21 also tells us that there are three main components to the right to participate in cultural life: participation; access; and contribution to cultural life.⁴² Heritage is only expressly mentioned with respect to the access dimension (which is also reinforced in a 1976 UNESCO Recommendation on the matter),⁴³ but it also is presumably included in the other dimensions, particularly as new heritage is

³⁴ Id., para. 6.

³⁵ Saul et al., cit., 1180.

³⁶ GC21, cit., para. 11.

³⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331, Article 31(3)(b) (VCLT). It bears stating the obvious: even though the VCLT did not come into existence until after the adoption of the ICESCR, its provisions on interpretation reflect customary international law already well-established at the time, and are therefore applicable to the ICESCR.

³⁸ VCLT, Article 32.

³⁹ GC21, cit., para. 9.

⁴⁰ Id., para. 7.

⁴¹ Even though Article 17 of the Banjul Charter frames the right to participate in cultural life as an individual right, it has been interpreted by the African Commission on Human and Peoples’ Rights as having collective dimensions, too. See Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, African Commission on Human and Peoples’ Rights, 4 February 2010. For commentary on this case in connection to the right to cultural life, see Manisuli Ssenyonjo, ‘The Protection of Economic, Social and Cultural Rights under the African Charter’, in Danwood Mzikenge Chirwa and Lilian Chenwi eds., *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press 2016) 91-120, 114-115.

⁴² GC21, cit., para. 15.

⁴³ Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It (26 November 1976) (1976 Recommendation). Recommendation 2: “2. For the purposes of the Recommendation: (a) by access to culture is meant the concrete opportunities available to everyone, in particular through the

created at the behest of communities (contribution dimension), and communities participate in cultural life by choosing their own cultural identities and participating in the political life of society.

There are a number of necessary conditions for the exercise of the right to cultural life: availability; accessibility; acceptability; adaptability; and appropriateness.⁴⁴ These are reflected in a number of legal obligations by states parties to the ICESCR, which, like all other rights, include obligations to respect, protect, and fulfil.⁴⁵ Among those obligations, in the view of the CESCR, heritage features most prominently in the obligation to protect, indicating that the CESCR perceives heritage as a passive object of protection, rather than something that is constantly and actively (re)created. But the Guidelines on Treaty-Specific Documents to the ICESCR also discusses the obligation to enhance access, as well as the intergenerational transmission of knowledge about heritage.⁴⁶

The obligation to respect includes in particular the freedom to choose one's cultural identity, as well as the right to have access to cultural heritage, and, importantly, the right to take part in all decision-making processes with respect to culture.⁴⁷ The obligation to fulfil includes awareness-raising programs with respect to cultural heritage (a common goal of international cultural heritage law treaties),⁴⁸ as well as the obligation upon states to have programs "aimed at preserving and restoring cultural heritage."⁴⁹

The obligation to protect, where heritage features most prominently, includes the obligation to "respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters"; the obligation to "respect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups in economic development and environmental policies and programmes"; and the obligation to protect the cultural productions of Indigenous peoples.⁵⁰ This relatively static character of heritage is denied not only by the very definition of culture in GC21, but also by other international documents that suggest heritage (understood as tangible and static) needs should be reconciled with current cultural creation and other social needs.⁵¹

This section of GC21 also defines heritage as "a record of human experience and aspirations."⁵² Importantly for present purposes, heritage is thus placed at the center of the obligation to protect the right to participate in cultural life. Not much is said about the production of heritage in the context of key legal obligations under the right to cultural life in the ICESCR, meaning that GC21 treads difficult and ambiguous terrain: while it wishes to protect culture (and heritage) as a living process, it falls short of fully operationalizing that concept in fleshing out relevant legal obligations. Also relevant is that heritage is not mentioned in GC21's listing of core obligations under the right to participate in cultural

creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property; [...]"

⁴⁴ Id., para. 16.

⁴⁵ Id., para. 48.

⁴⁶ Saul et al., cit., 1191.

⁴⁷ GC21, cit., para. 49.

⁴⁸ Id., para. 53.

⁴⁹ Id., para. 54.

⁵⁰ Id., para. 50.

⁵¹ 1976 Recommendation, cit., Recommendation 4: "4. It is recommended that Member States, if they have not already done so, adopt legislation or regulations in conformity with their national constitutional procedures, or otherwise modify existing practices in order to: [...] (p) reconcile the duty to protect and enhance everything connected with the cultural heritage, traditions and the past with the need to allow the endeavours of the present and the modern outlook to find expression; [...]"

⁵² GC21, cit., para. 50.

life.⁵³ But as a record of aspirations, heritage speaks to far more than just itself, and that message is key to thinking about the role of the right to cultural life in respect to heritage destruction.

4. Bright Sides

The right to participate in cultural life's ability to provide guidance in contexts involving the potential destruction of or changes to cultural heritage is contingent not only on its content, but also other factors related to its status, the limits of its application, and its addressees. These matters, once brought to bear, add more nuance to the relevance of this right with respect to heritage more generally, and specifically with the idea of changes to heritage. This section and the next discuss some of these factors. First, I will focus on the potentials of these aspects to amplify the weight of the right to participate in cultural life.

a. Pervasive Ratification and Customary Status

As discussed above, the right to participate in cultural life is enshrined not only in a widely ratified human rights treaty, part of the international bill of rights, but also across a range of regional and other international instruments serving special interest groups (like women, children, and Indigenous peoples, to name but a few). The pervasive ratification lends great weight and legitimacy to the right to participate in cultural life; it further means the right should be an important consideration not only within the area of human rights, but also when applying international heritage law, given the requirement that treaties be interpreted taking into account other applicable international obligations.⁵⁴

The idea of interpretation in accordance with other international obligations, of course, cuts both ways. So, it is not only international heritage law that needs to be applied in accordance with the right to cultural life, but the right to cultural life also needs to be reconciled with international heritage obligations. Among UNESCO treaties, the WHC and ICHC both enjoy greater acceptance than the ICESCR. Therefore, if pervasiveness of the acceptance of an international treaty is anything to go by in lending weight to an international legal obligation (whether as a treaty obligation per se, or in its customary or *erga omnes* dimensions),⁵⁵ then the idea of cultural heritage is certainly a part of the right to cultural life. And, considering that the ICHC is the latest treaty, its conception of cultural heritage as living culture, constantly recreated, must be taken into account.

To a large extent, too, these treaties (ICESCR, WHC, ICHC) can be taken into account also as formulations of customary international law which, if they did not exist at the time the treaties were created, have since crystallized. The practical effect of the assertion of customary status is that the rule requiring the interpretation of treaties to take into account other legal obligations now brings all of these instruments together without requiring their formal ratification by all states, and simply by virtue of their customary status. In other words, it may be said that the right to cultural life, alongside its inclusion of (particularly living) heritage, are norms that apply to all states, and therefore create

⁵³ Id., para. 55.

⁵⁴ VCLT, Article 31(3)(c).

⁵⁵ Francioni, Francesco. 'Au-delà des traités: l'émergence d'un nouveau droit coutumier pour la protection du patrimoine culturel', RGDIP 111 (2007) 19-42.

rights related to heritage for all parties. And, as suggested above, the influence of the right to cultural life in particular comes to make heritage relevant primarily as living heritage.

With respect to changes to heritage, customary rules against the intentional destruction of heritage apply as well.⁵⁶ Chief among them are the rules enunciated in the 2003 UNESCO Declaration that resulted from international outcry in the aftermath of the demolition of the Bamiyan Buddhas, mentioned above.⁵⁷ The 2003 Declaration is categorical in saying that “any form” of intentional destruction should be combatted.⁵⁸ That language would suggest that heritage should never be altered. However, the same Declaration also states that it only applies to destruction that is in violation of international law.⁵⁹ And the ICRC, adopted on the same day as the Declaration, also implies that heritage is constantly evolving and recreated. So, there is a case to be made that changes to heritage are allowed, as long as they conform to the combined interpretation of all of these instruments, which requires the central involvement of communities, as discussed below.

b. Application in Peacetime

Another important implication of the right to participate in cultural life’s influence on international heritage law is that it makes norms surrounding its use applicable not only in times of emergency like warfare (Hague Convention) and disaster (WHC), but also in regular, peaceful times.⁶⁰ In other words, the right to cultural life allows us to think of cultural heritage’s status in relation to change detached from any grave threats (and, in doing so, also allows us to think of heritage beyond the definitions in the Hague Convention or the WHC).⁶¹ Change is therefore normalized, inasmuch as heritage is living culture, and because it is not only part of conflict or other emergencies. Applied to the context of heritage destruction or changes to heritage, the peacetime facet allows us to think of changes outside of the grave emergencies that have focused our efforts in recent times. It therefore urges us to think of heritage as not only engaged through the emergency of an international campaign, but as part of everyday life, more nuanced, and less absolute.

c. Potential Bottom-Up Implementation

The right to participate in cultural life also evokes the need to implement heritage law and policy with the participation of those whose (cultural) lives are directly impacted by it. Therefore, another positive

⁵⁶ Discussed in detail in Francioni, Francesco and Lenzerini, Federico, ‘The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq’, in B. T. Hoffman (ed), *Art and Cultural Heritage: Law, Policy and Practice* (2006), 28-41.

⁵⁷ UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, cit.

⁵⁸ Id., Article I: “1 – Recognition of the importance of cultural heritage. The international community recognizes the importance of the protection of cultural heritage and reaffirms its commitment to fight against its intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding generations.”

⁵⁹ Id., Article II: “II – Scope. [...] 2. For the purposes of this Declaration “intentional destruction” means an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, **in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience**, in the latter case in so far as such acts are not already governed by fundamental principles of international law.” (emphasis added)

⁶⁰ See particularly Zoe Niesel, ‘King Tut and Tahrir Square: the Egyptian Revolution of 2011 and the Advantage of Viewing Cultural Heritage Destruction through a Right to Culture Lens’, 20 Sw J Int’l L 283 (2014).

⁶¹ Id., 307.

influence of the right to cultural life on thinking about international heritage law is that it requires international heritage law to be inclusive in decision-making at all levels. People who live in, with, or around heritage need to be brought to the table not only for consultation or to lend legitimacy to decisions of experts and nation-states normally made without their input,⁶² but rather to be the central agents in considering whether, how, and why heritage is to be safeguarded.

With respect to changes to cultural heritage, the key rests on the systemic interpretation of international law, as indicated above. The ICHC is clear in indicating that communities should be made central to this decision-making.⁶³ And the interpretation of this requirement in conjunction with the right to participate in cultural life subordinates the requirement of implementation of heritage obligations to the wishes of communities living in, with, or around heritage, inasmuch as heritage is recreated by these communities to provide them with a sense of identity.⁶⁴

d. Heritage's Relational Value

Lastly, another significant advantage of invoking the right to participate in cultural life with respect to cultural heritage is in its balancing against other rights. If the right to cultural life is indivisible and interdependent, as GC21 makes it out to be, then it is but one of the aspirations that needs tending to. Therefore, heritage safeguarding through the prism of the right to participate in cultural life is only good inasmuch as heritage advances the realization of a spectrum of human rights goals. The human dimension of heritage thereby comes alive and gains deeper meaning.⁶⁵ The trade-off is that, seen as serving a human right, heritage loses the intrinsic value that many heritage treaties and scholars suggest it has.⁶⁶

With respect to modifications to heritage, heritage's relational value makes heritage less than an absolute good, and therefore more amenable to change. That is, if the change happens in the pursuance of other human rights goals, which can include the right to housing,⁶⁷ or development more generally,⁶⁸ not to mention cultural practices like female circumcision that are specifically targeted by

⁶² On expert rule, see Lixinski, Lucas, 'International Cultural Heritage Regimes, International Law and the Politics of Expertise', *International Journal of Cultural Property* 20(4) (2013), 407-429; on state centrality in selecting heritage, at least with respect to ICH, see Lixinski, *Intangible Cultural Heritage in International Law*, cit.

⁶³ ICHC, Article 15: "Article 15 – Participation of communities, groups and individuals. 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."

⁶⁴ ICHC, Article 2(1).

⁶⁵ Francioni, Francesco, 'The Human Dimension of International Cultural Heritage Law: An Introduction', *European Journal of International Law*, 22(1) (2011), 9–16. Tying the human dimension of heritage specifically to heritage destruction, see Berenika Drazewska, 'The Human Dimension of the Protection of the Cultural Heritage from Destruction during Armed Conflicts', 22 *International Journal of Cultural Property* 205-228 (2015).

⁶⁶ Id.

⁶⁷ Amelia Thorpe, 'Between rights in the city and the right to the city: Heritage, character and public participation in urban planning', in Durbach, Andrea and Lixinski, Lucas (eds), *Heritage, Culture and Rights Challenging Legal Discourses* (Oxford, Hart Publishing, 2017).

⁶⁸ Scott Hawken, 'The Urban Village and the Megaproject: Linking Vernacular Urban Heritage and Human Rights-based Development in the Emerging Megacities of Southeast Asia', in Durbach, Andrea and Lixinski, Lucas (eds), *Heritage, Culture and Rights Challenging Legal Discourses* (Oxford, Hart Publishing, 2017) 91-117.

the influence of international human rights law on cultural heritage law,⁶⁹ then it should be permissible, or even encouraged.

These factors considered, thus, it seems that the right to participate in cultural life has much to offer to how we think about cultural heritage in general, and to issues surrounding changes to and destruction of cultural heritage in particular. However, every bright side of a coin has a flip side, and the next section explores the counterpoints.

5. Dark Sides

The dark sides analyzed below are in many respects mirrors of the bright sides and aim to underscore possible unintended consequences of excessive reliance on the right to participate in cultural life. In other words, the objective is to provide greater awareness to potentials and pitfalls of this human right as being not necessarily a panacea, and in some respects even possibly part of the problem with the way we think about heritage in absolute terms.

a. Progressive Realization and Other Defenses

If the right to cultural life has a pervasive effect due to the widespread ratification of the ICESCR and even arguably its customary status, the same effect is undercut by the notion of progressive realization that applies to it. Progressive realization is the idea that states will endeavor, within their means, to make sure the rights protected in the ICESCR are eventually achieved.⁷⁰ The idea of progressive realization has admittedly been subject to the core of each of the rights protected in the ICESCR, which can be demanded at any point, and are not subject to this defense. However, as noted above, heritage is not listed among the core obligations in the right to participate in cultural life, meaning it is effectively subject to the idea of progressive realization.

A version of progressive realization is also contained in the 1976 Recommendation, which provides for language that is simultaneously about progressive realization and the idea of common but differentiated responsibilities (i.e., that differences among countries should be taken into account when considering the realization of the right).⁷¹ Progressive realization's effect is to weaken the benefits brought by the right to participate in cultural life.

Further, there are other defenses available when invoking the right to participate in cultural life, even if progressive realization is not at stake. For one, heritage protection is limited by other human rights, and even GC21 recognizes that.⁷² The balancing required here has in practice meant that states are

⁶⁹ Saul et al., cit.

⁷⁰ The relevant language in the ICESCR on progressive realization is Article 2(1): "Article 2. 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

⁷¹ 1976 Recommendation, cit., preamble : "Considering that while it is essential and urgent to define objectives, contents and methods for a policy of participation by the people at large in cultural life, the solutions envisaged cannot be identical for all countries, in view of the current differences between the socio-economic and political situations in States".

⁷² GC21, cit., para. 64.

given a wide margin of discretion in implementing this right.⁷³ However, that is not to say it is open to multiple limitations. As stated by the Independent Expert in the Field of Human Rights (now replaced by the Special Rapporteur), limitations “should be a last resort only and be in accordance with certain conditions.”⁷⁴ And in the African context the right to culture should be subject to few limitations, in the absence of a specific claw-back clause in the Banjul Charter.⁷⁵ That said, available international jurisprudence has accepted that, once a possible ground for restricting the right has been established as a threshold matter for a limitation, states are given a wide margin of discretion.⁷⁶

With respect to changes to heritage in the name of the exercise of the right to participate in cultural life, progressive realization can be read as meaning that poorer states in particular can excuse themselves from adopting measures to prevent wanton destruction of heritage on the basis of progressive realization. One example is the collapse of parts of the Pompeii World Heritage site in Italy in 2010, amid accusations of neglect and lack of funding by the Italian government.⁷⁷

Further to progressive realization in its own terms, there is also the situation in which, by recalling other priorities, and the limits of available resources, states can (and often do) focus on programs other than heritage, which are seen as more urgent, while neglecting (or at least obscuring) the power of heritage in promoting social cohesion, among other desirable human rights goals. Thus, the right to development of a region may take priority over preserving heritage, even if the gains from the development project do not benefit the community that loses heritage with which it is connected. Possible scenarios include the development of hydroelectric dams that lead to the submergence of archaeological sites, or mining operations that can impact on tangible sites and the intangible heritage of communities where mining takes place.⁷⁸ In both these scenarios, other priorities (the right to development) come ahead of heritage interests, regardless of the local community’s will. These cases reflect a situation that is neither deliberate destruction, nor relatively mundane changes to heritage in peacetime. A crucial element in condemning these changes is the lack of community involvement in the decision-making leading to the modification of heritage, as well as their exclusion from reaping the benefits of heritage change.

Further, the wide margin of discretion given to states can be read as meaning that the state can intervene to prevent a community from altering their own heritage if the state deems that interference to be in pursuance of a broader goal (including compliance with a more conservative reading of international heritage obligations). One example is *Chapman v The United Kingdom*, in which the preservation of a cultural landscape’s integrity was seen as taking priority over a Roma family’s ability to modify the landscape by living in it.⁷⁹

⁷³ GC21, cit., para. 66.

⁷⁴ Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights, UN Doc. A/HRC/14/36 (March 2010), para. 35. Cited in Saul et al., cit., 1212.

⁷⁵ Endorois case, cit. Discussed in Saul et al., cit., 1201-1202.

⁷⁶ For a survey, see Lixinski, *Intangible Cultural Heritage in International Law*, cit.

⁷⁷ Philip Pullella, Pompeii collapse prompts charges of official neglect, Reuters (7 November 2010), at <https://www.reuters.com/article/us-italy-pompeii/pompeii-collapse-prompts-charges-of-official-neglect-idUSTRE6A51BE20101107>

⁷⁸ For a case study, see Nicholas A Bainton, Chris Ballard, Kirsty Gillespie and Nicholas Hall, ‘Stepping Stones Across the Lihir Islands: Developing Cultural Heritage Management in the Context of a Gold-Mining Operation’, 18 *International Journal of Cultural Property* (2011) 81-110.

⁷⁹ ECtHR, *Chapman v. The United Kingdom*, Judgment of 18 January 2001. For a discussion of landscape protection in the context of human rights, see Amy Strecker, *Landscape Protection in International Law* (OUP 2018), particularly chapters 8 and 9.

Therefore, pervasive as it is, there is more wiggle room to skirt obligations under the right to participate in cultural life than with respect to international heritage treaties. The potential of the right to cultural life in this respect needs to be taken with these important caveats. Connected to this discretion is the issue of whether peacetime application of the right in some ways also lessens the sense of gravity around the obligation not to destroy heritage.

b. Lessened Urgency of Peacetime

If international law is a discipline of crisis, as discussed above,⁸⁰ then the application of the right to cultural life to heritage during peacetime lies somewhat in the shadows of crises. To be sure, the bulk of literature referring to the destruction of heritage refers to situations of extremism and urgency. And moments that have prompted the international community into action are related to destruction by extremist regimes or during conflict. An example is the United Nations Security Council's largely praised resolution in 2017 on the protection of heritage and its connection to international peace and security.⁸¹ The waves of praise have failed to consider the effect of securitization of heritage's importance, and the distortion this angle can have on how we think of cultural heritage.

Heritage destruction as a symptom of crisis is embraced as well in the framing of these situations beyond legal circles. In response to the destruction of Palmyra in 2015, for instance, the human rights or humanitarian perspective was only one of the frames used to describe the conflict in broader media.⁸² But it is noteworthy that this perspective was one of the most present in media reporting of destruction of the site, over even an analysis of the site's archaeological, historical, or artistic value. These framings remind us, therefore, that international law responds to crises because of a human element, and heritage is only a way of giving focus to human suffering on the ground. In the destruction of Timbuktu, too, the African Commission on Human and Peoples' Rights responded on the basis of the right to culture protected in the Banjul Charter.⁸³

Hence, even if peacetime is not enough to prompt legal responses from the international community, the humanitarian element is still present in the imaginary and discourse of crisis. Further, the separation of the right to cultural life as primarily applicable in peacetime and the crisis angle is not necessarily a bad thing. As suggested above, separating change to cultural heritage from extremism and conflict allows us to think about heritage as an evolving thing, rather than a passive absolute that needs to be protected from the horrors of crisis. That said, the absence of a crisis (and a crisis' power of in many situations preventing more nuanced debate) still lessens the potentials of the right to cultural life.

c. The Challenges of Individualization, Rhetorical Capture, and Democratic Deficits

⁸⁰ Charlesworth, cit.

⁸¹ S/RES/2347 (24 March 2017). For some commentary, see Andrzej Jakubowski, 'Resolution 2347: Mainstreaming', QIL, Zoom-in 48 (2018), 21-44; and Kristin Hausler, 'Cultural heritage and the Security Council: Why Resolution 2347 matters', QIL, Zoom-in 48 (2018), 5-19. For an overview of the antecedents to this resolution, see also Catherine Fiankan-Bokonga, 'A historic resolution to protect cultural heritage', UNESCO Courier (2017), at <https://en.unesco.org/courier/2017-october-december>.

⁸² Morgan Cloud, *Bulldozers in the Desert: The Framing of Cultural Heritage Destruction in Palmyra in 2015* (MA thesis submitted to the Graduate Faculty of George Mason University, 2016. Manuscript on file).

⁸³ As discussed by Drazewska, cit., 218.

As indicated above, the right to cultural life offers the potential of promoting better bottom-up implementation of heritage law and policy. And that is certainly a welcome step, which, connected to the separation from crisis discussed in the previous subsection, allows us to think of change to heritage as not inherently bad, but rather possibly in alignment with a community's wishes.

However, the human right to cultural life lens still offers some limitations. For one, international human rights law has a problem with the recognition of collective or group rights, even if it has made some progress in this area, particularly with respect to adjudication.⁸⁴ The 1976 Recommendation also encourages a group rights approach to cultural life.⁸⁵

In spite of these developments, though, the translation of collective rights into individual interests is still a required step for much of human rights law, and this translation effort can muddy the waters and allow for capture of the potential benefits of the human right to cultural life. In the difficulty of defining community and working out the related agency and representation issues, it is easy for the human right to be captured by foreign or even top-down actors, who, purporting to act as translators of community interests, do not necessarily act as such. In particular, the over-reliance on international legal terminology, which not always finds echoes in the domestic law communities more often access, can lead to additional layers preventing access by communities to international legal processes.

With respect to changes to cultural heritage, excluding communities allows international law to not really consider the possibility of changes to heritage as permissible or even desirable. Rather, it is actors committed to heritage as an end in itself, and propelled by the urgency of crisis, that construct the international legal responses to the matter.

Further, participation presumes community engagement in stable democratic conditions, whereas it is a fact that democracy does not necessarily work well in many parts of the world. Even in countries where deliberative procedures exist with respect to heritage, their implementation is often captured by bureaucratic procedures and "box-ticking" engagements with the idea of participation.⁸⁶ In this sense, the failure of domestic processes can itself lead to human rights concerns, but these need to be articulated possibly outside the right to cultural life, and with respect to public participation rights instead. As the European Court of Human Rights noted in *Ahunbay v Turkey*, the destruction of heritage, unless it is minority or Indigenous heritage, does not in itself fall under the purview of the European Convention.⁸⁷ In other words, the destruction of heritage itself does not necessarily trigger a human rights violation in the absence of an individualizable victim, and claims on the basis of the rights to life, freedom of religion, freedom of expression, non-discrimination, or the right to liberty and security (which were the claims in *Ahunbay*)⁸⁸ are insufficient to compel a state to accommodate community interests.

⁸⁴ Case of the Kaliña and Lokono Peoples v Suriname (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 309 (25 November 2015).

⁸⁵ 1976 Recommendation, cit., preamble: "Considering that the problem of access and participation can be solved by collective approaches extending to many sectors and aspects of life; that such approaches should be diversified according to the special characteristics of each community, the whole forming a true design for living calling for basic policy options".

⁸⁶ On this discussion, see generally Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (OUP 2019).

⁸⁷ *Zeynep Ahunbay and others v Turkey* (Application 6080/06), Admissibility Decision of 29 January 2019, paras. 23-25.

⁸⁸ *Id.*, para. 16.

d. Still Excludes the Possibility of Destruction

Finally, while relational value brought to heritage by the human right to cultural life is a very positive development, it still falls short of embracing the consequences of this new approach in full. More specifically, if heritage is to serve the aspirations of the communities living in, with, or around heritage, as suggested above, then, should these aspirations no longer be served, heritage loses an important part of its value.

However, international human rights law aligns with international heritage law in making little room for changes to heritage. International human rights law may favor removal of cultural heritage in certain contexts like the recent controversy over Confederate Monuments in the United States, but, even then, competing human rights values like freedom of expression (which is prioritized by the United States in the form of reservations to the relevant human rights instruments) end up ultimately protecting those monuments.⁸⁹

Anne-Laura Kraak, in her analysis of this context, has suggested that even the UN Special Rapporteur on Cultural Rights, by framing cultural heritage as irreplaceable, and destruction as motivated by ideology and / or warfare, makes change to heritage on the basis of human rights and the relational value of heritage brought by human rights difficult.⁹⁰ In particular, she asserts that heritage is supposed to change in a variety of contexts (particularly in Buddhist cultures, her case study), and that international heritage law does not allow for that change to happen.⁹¹ Human rights can have some potential in this space, but the reading of cultural heritage in the discourse of crisis, discussed above, prevents ideas of change to heritage from being seriously considered.

Further, heritage can be itself created through destruction. Examples of this type of heritage abound, and a few World Heritage sites are worth mentioning. The city center of Warsaw, for instance, was listed as cultural heritage site as an example of reconstruction in the aftermath of war (even if the World Heritage Committee did so as an exceptional measure at the time). Likewise, the city center of Dresden, also reconstructed after World War II, was listed (but as a cultural landscape, which does not require authenticity, but rather just integrity). The Mostar bridge, destroyed during the Yugoslav wars, was listed as a World Heritage site after its reconstruction, with the old and new elements being both factored into the assessment of the bridge's value.⁹² These sites' recognition of heritage is intrinsically tied to their destruction, reconstruction, and changes to the site. Their value is therefore tied to the changes they suffered, and their role is in reminding us of the legacies of conflict, and thereby enabling UNESCO's mandate of promoting peace through culture.

It seems, thus, that the same hand that giveth taketh it away. The human right to cultural life, by bringing intangible cultural heritage values to bear on how we conceptualize all of heritage, makes heritage relational to its ability to promote human rights goals and other community aspirations. At the same time, though, the human rights discourse frames destruction as necessarily a violation of human rights, because of reliance on negative examples (the crisis mode) or skirting the issue by selective engagement with human rights (like in the Confederate Monuments context), and therefore

⁸⁹ For a more in-depth discussion, see Lucas Lixinski, 'Confederate Monuments and International Law', 32 *Wisconsin International Law Journal* (2018) 549-608.

⁹⁰ Anne-Laura Kraak, 'Heritage destruction and cultural rights: insights from Bagan in Myanmar', *International Journal of Heritage Studies* (advance publication 2018).

⁹¹ *Id.*, 2.

⁹² For a discussion of these examples, see Harold Kalman, 'Destruction, mitigation, and reconciliation of cultural heritage', 23(6) *International Journal of Heritage Studies* 538-555 (2017).

makes changes to heritage a violation of human rights (not to mention situations in which it prefers heritage conservation over the exercise of human rights, like in the context of religious heritage).⁹³

To each potential positive effect of the right to cultural life, therefore, there is a corresponding backlash. The next section therefore considers the key question animating this contribution. Is the human rights approach a solution, or part of the problem?

6. Panacea or Part of the Problem?

The case for the use of the right to participate in cultural life in the context of heritage destruction or changes to heritage in some respects echoes discussions about the possible relationships between human rights law and international heritage law. It does not bear repeating that argument exhaustively here,⁹⁴ but many of the advantages of the relationships between heritage and human rights (visibility, giving effect to heritage's human dimension, possibilities of enforcement) and risks (cooption, translation into individualized claims) are echoed in the context of heritage destruction or changes to heritage.

Specifically in the realm of heritage destruction or changes to heritage, it bears noting that the language of the ICESCR, as interpreted in GC21, is largely neutral on the matter, only hinting at the need to protect heritage, but for the most part embracing heritage as a part of culture to which relational value is attributed, in the context of other human rights. As the ICHC and analyses such as Anne-Laura Kraak's remind us, in some contexts change is not only welcome, but even a requirement of the cultural heritage we hope to safeguard. Even UNESCO made that case in its 1976 Recommendation, as indicated above. Given UNESCO's role in drafting Article 15 ICESCR, this Recommendation should be tied authoritatively to the interpretation of that right.

Further, the connection between the right to cultural life and heritage change reminds us of important, if too often overlooked, considerations. First and foremost is the idea that our interest in heritage needs to be balanced with lots of competing human priorities. As mentioned above, the right to cultural life is interdependent and indivisible. Therefore, much like other human needs should not prevail over cultural rights (probably intention in adding that language), cultural heritage should not take priority over competing human needs (the flip side and logical consequence of that language).

Relatedly, there may be a case for lessening the legal stakes, and, with it, the treatment of heritage as an absolute good usually given to it by international heritage law. As Roger O'Keefe has reminded us, "governmental decisions as to the allocation of limited resources to cultural ends implicate an almost bewildering array of competing interests, and necessarily involve trade-off and compromise. They are, in short, the stuff of political judgment, not legal adjudication."⁹⁵

⁹³ Lucas Lixinski, 'Religious Cultural Heritage: The Law and Politics of Conservation, Iconoclasm, and Identity', In: *Heritage at the Interface: Interpretation and Identity* 121-135 (Glenn Hooper ed) (Gainesville, University Press of Florida 2018).

⁹⁴ For a summary, see Francesco Francioni and Lucas Lixinski, 'Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage', In: *Heritage, Culture and Rights – Challenging Legal Discourses* 11-34 (Andrea Durbach, Lucas Lixinski eds.) (Oxford, Hart Publishing 2017)

⁹⁵ Roger O'Keefe, 'Cultural Life, Right to Participate in, International Protection', *Max Planck Encyclopedia of Public International Law*, at <http://www.mpepil.com>.

The destruction we usually refer to in other contexts is the exception (bad conflict, fundamentalist regimes).⁹⁶ In other situations, human rights may actually require us to destroy heritage. With respect to the conundrum of intentional destruction and its customary status, we need to look at the motive behind the destruction (the why), as opposed to just the intention to destroy (the what). The human rights approach can get in the way of assessing the why, because it can treat heritage destruction as an absolute violation.

The destruction of heritage, through its change, can in many instances be precisely what keeps the intangible, living heritage alive, by ensuring the possibility of transmission of certain practices and modes of engagement with built, tangible heritage.⁹⁷ We must therefore be mindful that, when we speak of intentional destruction, it is intentional in the sense of wanton, and not just as purposeful, in spite of the fact that the language of the 2003 Declaration suggests the latter. If the 2003 Declaration is considered outside the crises contexts it responds to, it may protect heritage, but it is likely to do so at the cost of human rights.

The human rights approach may not actually be able to prevent destruction of heritage at all times, and it may in fact suggest its destruction. But, at any rate, the right to cultural life does lead to better thought-out decision-making in this respect, and adds international oversight and enforcement. It is thus far from resolving all matters, but it is also not as much of a part of the problem as some contemporary readings suggest.

7. Concluding Remarks

In taking the right to cultural life in the ICESCR to task, and transcending the crisis framing, it is clear that there is more nuance to the international community's commitment against intentional destruction of cultural heritage than its good intentions may allow. A more self-aware international heritage law is possible, but it is by no means a given. The right to participate in cultural life does more good than harm in this space, by reminding us of heritage's relational value, and how heritage is supposed to enable a range of human needs and aspirations, and not be an end in itself. At the same time, though, the human rights discourse's ability to coopt heritage can cloud the conversations around heritage's fate, lest there are well-established background rules allowing for full and effective participation of the communities that live in, with, or around heritage. We also need to think strategically about the ways in which the human rights toolbox can be deployed to pursue heritage goals on behalf of these communities, particularly when they do not belong specifically to visible minorities or Indigenous peoples.

⁹⁶ See, eg, Patty Gerstenblith, 'The Destruction of Cultural Heritage: A Crime against Property or a Crime against People', 15 *J Marshall Rev Intell Prop L* 336-393 (2016); Caitlin v Hill, 'Killing a Culture: The Intentional Destruction of Cultural Heritage in Iraq and Syria under International Law', 45 *Ga J Int'l & Comp L* 191-220 (2016).

⁹⁷ Kraak, *cit.*, 12.