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Donders, Y.

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3. Protection and promotion of cultural heritage and human rights through international treaties: two worlds of difference?

Yvonne Donders

INTRODUCTION

For a number of years, the link between human rights and cultural heritage, in particular intangible cultural heritage (ICH), has been firmly established. One of the first reports of the UN Special Rapporteur on Cultural Rights addressed the topic of access to and enjoyment of cultural heritage as a human right.¹ Where the UNESCO Convention on Natural and Cultural Heritage, adopted in 1972, did not mention human rights explicitly, the UNESCO Convention on Intangible Cultural Heritage, adopted in 2003, put this form of heritage firmly within a human rights framework. This treaty not only refers to international human rights instruments in the preamble, but it also lays down in Article 2 that only ICH that is compatible with international human rights instruments falls within the scope of protection of the treaty.

Despite the recognition of the link between cultural heritage and human rights, it should be noted that the two topics are often discussed in different intergovernmental fora. At the level of the United Nations (UN), cultural heritage protection is laid down in several treaties adopted by the General Conference of UNESCO in Paris. Human rights protection is laid down in treaties adopted by the UN General Assembly in New York and prepared by the UN Human Rights Council supported by the UN Office of the High Commissioner for Human Rights in Geneva. Cultural heritage and human rights have their own separate international legal instruments, which have commonalities, but also important differences. Although at the European level both human rights and cultural heritage are part of the work of the Council of Europe, here, also, the treaties

¹ Farida Shaheed, Report of the independent expert in the field of cultural rights, UN Doc. A/HRC/17/38, 21 March 2011.

concerning the two show interesting differences in terms of their nature and approach.

In other words, while at the conceptual level the interlinkages between human rights and cultural heritage are increasingly reaffirmed, the international legal instruments and mechanisms for their protection and promotion show important differences. These differences make the connection between human rights and cultural heritage more complex than it may seem at first glance. It may also explain why States may find it difficult at national level to reconcile human rights laws and policies with those in the field of cultural heritage.

This chapter compares several treaties on human rights and on cultural heritage and analyses their similarities and differences. A comparison will be made between on the one hand two international and one regional treaty on cultural heritage: the Convention concerning the Protection of the World Cultural and Natural Heritage (Convention on World Heritage),² the Convention for the Safeguarding of the Intangible Cultural Heritage (2003 Convention),³ and the Convention on the Value of Cultural Heritage for Society (FARO Convention 2005),⁴ and on the other hand two international and one regional treaty on human rights: the Covenant on Civil and Political Rights (ICCPR),⁵ the Covenant on Economic, Social and Cultural Rights (ICESCR),⁶ and the European Convention on Human Rights (ECHR).⁷ Attention will be paid to the different nature of these treaties and the differences resulting therefrom in relation to several issues, such as the scope of application, rights and obligations, reciprocity, reservations, denunciation, and monitoring.

² Convention concerning the Protection of the World Cultural and Natural Heritage, adopted by the General Assembly of UNESCO, Paris, 16 November 1972. The Convention has 192 States parties (February 2017).

³ *Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted by the General Assembly of UNESCO, Paris, 17 October 2003. The Convention has 175 States parties as of October 2017.

⁴ Convention on the Value of Cultural Heritage for Society (Faro Convention), adopted by the Committee of Ministers of the Council of Europe, 13 October 2005. The Convention has 17 States parties (February 2017).

⁵ *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200 A (XXI), adopted 16 December 1966, entry into force 23 March 1976. The Covenant has 169 States parties (February 2017).

⁶ *International Covenant on Economic, Social and Cultural Rights*, General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976. The Covenant has 165 States parties (February 2017).

⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted by the Member States of the Council of Europe, 4 November 1950. The Convention has 47 States parties (February 2017).

The treaties and these issues are analysed on the basis of the general principles of treaty law that are laid down in the Vienna Convention on the Law of Treaties (VCLT).⁸

The main purpose of this chapter is to analyse and show the main similarities and differences between human rights treaties and cultural heritage treaties, seen from the perspective of several tenets of public international law.⁹ This analysis shows that although human rights and cultural heritage are clearly linked as concepts or values and that the protection of cultural heritage has important human rights components, the international legal underpinning of these concepts is different and the international legal instruments protecting one or the other are of a different character. This may explain the fact that their protection may not always run parallel but seems to operate in two different worlds.

NATURE OF INTERNATIONAL TREATIES

International law is traditionally the playing field of States; they are the main subjects of international law. States are the main creators of the sources of public international law, including the primary source of treaties. The VCLT defines a treaty as ‘an international agreement concluded between States in written form and governed by international law’.¹⁰ In other words, treaties are the reflection of the consent of States to be bound to certain jointly agreed rules. Explicit consent is guaranteed by the fact that States need to sign international treaties and ratify them via national

⁸ Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, United Nations Treaty Series, vol. 1155, 331.

⁹ The intention of this chapter is not to extensively discuss whether international human rights law is a special branch or sub-discipline of public international law or whether human rights treaties as such are a special branch or category of treaties within general public international law. See on this for example, Matthew Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (2000) 11(3) EJIL 489; Frédéric Megret, ‘Nature of Obligations’ in Daniel Moeckli, Sangeeta Sha and Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2014) 96; Menno T Kamminga and Martin Scheinin, *The Impact of Human Rights Law on General International Law* (OUP 2009); Linos-Alexander Sicilianos, ‘The Human Face of International Law – Interactions between General International Law and Human Rights: an Overview’ (2012) 32(1–6) *Human Rights Law Journal* 1.

¹⁰ VCLT, Art 1. The VCLT is a treaty to which States can become parties, but it is also said to incorporate international customary law, thereby being binding upon all States.

procedures in order for them to become parties and be legally bound to the treaty.¹¹

Treaties are thereby similar to contracts: they are horizontal agreements between two or more parties creating a reciprocal exchange of rights and obligations, of goods and benefits. Public international law includes all kinds of treaties whereby two (bilateral) or more (multilateral) States agree on certain issues or activities, creating rights and obligations of the States parties towards each other. The Charter of the United Nations and the VCLT itself are prime examples, but there are also numerous treaties on specific topics of international law, such as war and conflict, trade, investment, borders, arms control and the environment.

Most of these treaties are classic contract treaties or reciprocal treaties (*traités-contrats*) in which States as equal partners formulate and accept mutual rights and obligations. Another form of treaties are the so-called law-making or normative treaties (*traités lois*), the main purpose of which is not merely to create mutual rights and obligations between States parties, but to create a normative framework to be implemented by States parties at national level. These normative treaties thereby have a more constitutional character. The character of the treaty can be discerned by the general object and purpose of the treaty, as well as by the formulation of its provisions.

Human Rights Treaties: Normative Treaties with Limited Reciprocity

Human rights treaties are the main examples of such normative treaties. It should be noted that human rights treaties have the *form* of contract treaties, since they are, just as other treaties, drafted, agreed upon, signed, ratified and acceded to by States. However, the *substance* of human rights treaties does not so much concern the horizontal agreement between States parties on mutual rights and obligations between them, but instead, as normative treaties, they contain provisions that give rights to individuals and communities and define obligations of States to guarantee these rights. In other words, human rights treaties are meant to give substantive rights not to other States parties but to individuals and communities. Human rights treaties thereby explicitly recognize individuals as beneficiaries or subjects of the treaties. Human rights treaties have a constitutional character, dealing directly with the relationship between the State and persons

¹¹ In the period between the signing and ratification of a treaty, a State is not legally bound yet to the treaty, however, it must refrain from acts which would defeat the object and purpose of a treaty, see VCLT, Art 18.

at the national level. Of course, human rights are also seen as world values, creating so-called *erga omnes* obligations for States, owed to the world community as a whole.¹² These *erga omnes* obligations are, however, not directly aimed at other individual States parties, but at the collective of States parties, or the world community at large. In other words, the prime obligations of States parties are directed towards others than the individual contracting States parties.¹³

The normative character of the human rights treaties of the UN and the Council of Europe is reflected in their general object and purpose: the promotion and protection by States parties of the human rights of individuals and communities. The preambles of the ICCPR and the ICESCR as well as the ECHR recognize the inherent dignity and the equal and inalienable rights of all members of the human family as well as the obligation of States to promote universal respect for, and observance of, human rights and fundamental freedoms. The ECHR also states in Article 1 that the States parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined'. In other words, the purpose of these human rights treaties – the advancement of human rights for individuals and communities – clearly goes beyond the mere contractual model.

The fact that human rights treaties differ from the strict contractual treaty model, since they regulate States' domestic behaviour more than States' behaviour *inter se*, has important consequences as regards the concept of reciprocity between the States parties. As stated above, the obligations of States parties to human rights treaties are owed not so much to fellow States parties, but to individuals and communities as subjects or beneficiaries. The International Court of Justice (ICJ) in its Advisory Opinion on reservations to the Genocide Convention maintained that humanitarian treaties do not maintain a 'perfect contractual balance between rights and duties' and States do not have individual advantages or disadvantages nor interest of their own, but merely a common interest.¹⁴

¹² The concept of *erga omnes* obligations was recognized by the International Court of Justice in the cases of *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 1962, ICJ Rep 3, para 33; and *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 2012, ICJ rep, paras 68–69.

¹³ Craven (n 9) 515–16.

¹⁴ International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, ICJ Reports (1951) 19, 28 May 1951, at 12. See, also, Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties – Ratify or Ruin?* (1994) 107; Vassilis Pergantis, 'Reservations to Human Rights Treaties, Cultural Relativism and the Universal Protection of Human Rights' in Kalliopi Koufa (ed), *Multiculturalism and International Law* (Sakkoulas Publications 2007) 110–11.

The Human Rights Committee (HRC), supervising the implementation of the ICCPR, formulated it as follows: 'Such treaties, and the Covenant specifically, are not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-state reciprocity has no place.'¹⁵ The European Commission on Human Rights, formerly monitoring the ECHR, also stated that:

[W]hereas it follows that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.¹⁶

In other words, the contractual form or dimension of human rights treaties is complemented by the moral, broader dimension of fulfilling certain legal obligations not towards the contractual counterparts, but to third parties, being individuals and communities. While reciprocity formally exists as regards the form of the treaty, it does not apply to most of the substance of the treaty. This lack of, or limited, reciprocity in relation to human rights treaties is reflected in several treaty related issues. For instance, it explains the exception made to the general rules on the possibility to suspend these treaties in case of material breach. Normally, according to Article 60 VCLT, States parties are allowed to terminate the treaty or suspend its operation following a material breach of the treaty by one of the parties. However, Article 60(5) states that this rule does not apply to 'provisions relating to the protection of the human person contained in treaties of a humanitarian character'. Other issues where the lack of reciprocity plays out, such as the making of reservations and the denunciation of treaties, are discussed below.

Cultural Heritage Treaties: Contractual Treaties with Normative Elements and Reciprocity

Cultural heritage treaties not only have the form of contractual treaties, but their approach and substance also lean more towards a contractual

¹⁵ Human Rights Committee, *General Comment No. 24*: 'Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant', Fifty-Second Session (4 November 1994), UN Doc. CCPR/C/21/Rev.1/Add.6, at 17. Pergantis (n 14) 439.

¹⁶ European Commission on Human Rights, *Austria v. Italy* (Pfunders case), Appl. No. 788/60, decision on the admissibility, 11 January 1961, p 19.

model. They are primarily formulated as agreements between States parties, including provisions defining rights and obligations of States parties towards each other. At the same time, cultural heritage treaties are not totally ignorant of the position of individuals and peoples in relation to cultural heritage, including recognition of their role as participants in the determination of heritage and as beneficiaries of the protection of heritage. But cultural heritage treaties do not include substantive (human) rights for individuals and communities. In other words, the overall purpose of cultural heritage treaties may have some normative elements, and these have become more prominent over the years, but individuals and communities are not seen as subjects of these treaties.

Cultural heritage treaties are first and foremost drafted and meant to create obligations for States parties to recognize, respect and protect cultural heritage, including the development of laws and policies at national and international level. The Convention on World Heritage, after defining the definitions of different concepts in the treaty, includes in Article 4 the main idea of the Convention, which is that:

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State.

Article 5 then lists a number of obligations States parties take upon them, such as to ensure that effective and active measures are taken to protect, conserve and present cultural and natural heritage, to adopt relevant policies, to develop studies and to establish an institutional framework. The treaty also includes a specific reference to respect for the sovereignty of States in Article 6. The treaty thereby reflects the contractual character of the treaty by which equal States parties agree and accept mutual rights and obligations.

The 2003 Convention on Intangible Cultural Heritage has a similar approach. The aims of the 2003 Convention, listed in Article 1, include:

- (a) To safeguard the intangible cultural heritage; (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned; (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof; (d) to provide for international cooperation and assistance.

This provision does not include a direct reference to the State, but its text and the rest of the treaty reflect the inter-State agreement to create mutual rights and obligations for States parties, not rights for individuals and communities. The 2003 Convention does, however, include several

normative elements. By referring to human rights treaties in the preamble, the treaty explicitly recognizes the link between ICH and human rights. Human rights also serve a role in the definition of ICH as articulated in Article 2, which includes that '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'. Furthermore, Articles 11 and 15 of the 2003 Convention give individuals and communities a prominent role in the determination and protection of this heritage. But, again, the provisions are formulated as assignments to States parties to ensure involvement and participation of communities; they are not given any substantive rights.

The FARO Convention (2005) seems at first glance to be different in this respect. This Convention states in Article 1 that one of its aims is that States parties to the Convention 'recognize that rights relating to cultural heritage are inherent in the right to participate in cultural life, as defined in the Universal Declaration of Human Rights'. It also explicitly recognizes human rights related to cultural heritage in Article 4, such as the right of everyone, alone or in collectivity, to benefit from the cultural heritage and to contribute to its enrichment. But the FARO Convention (2005) also explicitly states in Article 6(c) that 'no provision of this Convention shall be interpreted as to create enforceable rights'. In other words, the references to human rights in this treaty are not meant to create substantive rights, but serve as a reminder of the link between cultural heritage and human rights. The Explanatory Report to this treaty confirms that provisions of the FARO Convention (2005) should be interpreted in accordance with human rights, but that Article 6(c) was added 'for absolute clarity, to emphasize that this Convention does not create any enforceable rights in respect of the subjects with which it deals'.¹⁷ In other words, although the FARO Convention (2005) may have a stronger normative approach than the UNESCO Conventions, it should still be considered a more traditional inter-State agreement. Moreover, the FARO Convention (2005) is a 'framework' convention. According to the Explanatory report, framework conventions:

... define broad objectives and identify areas for action, as well as the directions in which the Parties agree to progress. Instruments of this type may identify generic activities but, unlike ordinary Conventions, do not create obligations to specific actions. There will often be alternative means of achieving the

¹⁷ Council of Europe, *Explanatory Report to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society*, Council of Europe Treaty Series – No. 199, Faro, 27 October 2005, section D, Art 6.

objectives, and it is open to Parties to choose the route most suited to their own national traditions of law, policy and practice . . .¹⁸

In other words, the legal obligations stemming from the FARO Convention are rather flexible.

In short, the cultural heritage conventions have a mainly horizontal character as agreement between States parties, whereas human rights conventions have a triangular character, composed of a horizontal relationship between States parties, as well as a vertical relationship with the subjects of the rights. The human rights treaties are thereby strongly directed towards application and implementation at the national level, whereas cultural heritage treaties, although also necessitating implementation at national level, focus more on international coordination and cooperation. The reciprocity of the cultural heritage treaties is thereby largely upheld. For instance, States parties cannot rely on the exception of Article 60(5) VCLT, because cultural heritage treaties cannot be seen as 'treaties of a humanitarian character' containing 'provisions relating to the protection of the human person'.¹⁹

The general difference between the more inter-State character of cultural heritage treaties and the more normative and triangular character of human rights treaties, including the difference in reciprocity of these treaties, has consequences for several other aspects of these treaties, such as their scope of application, reservations, denunciation and monitoring.

SCOPE OF APPLICATION: TERRITORY AND JURISDICTION

All treaties typically apply to the territory of the State party. Most human rights treaties however apply broader than the territory only. For instance, the ICCPR includes in Article 2 that States parties undertake 'to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant' (emphasis added). Accordingly, the application of the treaty is broader than merely the territory. The term 'subject to its jurisdiction' has been elaborated by the HRC as covering situations where States parties have power or effective control over territory beyond its own borders or over persons.²⁰

¹⁸ Ibid., section C.

¹⁹ VCLT, Art 60(5).

²⁰ Human Rights Committee, *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, UN Doc. Supp. No. 40 (A/36/40) at 176 (1981),

The ECHR defines in Article 1 that States parties should ensure the rights in the treaty 'within their jurisdiction'. The European Court of Human Rights (ECtHR) has on several occasions reaffirmed that the ECHR may apply extraterritorially, when States parties have effective or overall control.²¹ The ICESCR does not include a jurisdiction clause. This has not prevented the Committee on ESC Rights to conclude that States parties may have legal obligations to ensure ESC rights beyond State territory.²² The possible extraterritorial application of the ICESCR has further been elaborated by a group of scholars in the Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights.²³ Principle 9 refers to situations where States exercise authority or effective control. It adds, however, another factor which is that the State is in a position to 'exercise decisive influence or to take measures to realize' ESC rights.²⁴ Although this document is not legally binding upon States and its content is still subject to (academic) debate, it shows that in principle, the application of the ICESCR is not confined to merely a State party's territory.

In contrast, the cultural heritage treaties focus solely on the territory of the States parties. The World Heritage Convention and the 2003 Convention include that States parties have duties to identify, protect, conserve etc. the cultural heritage *situated on or present in their territory*

para 12.2: 'is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred'; Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.1326, May 2004, para 10: 'This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'

²¹ ECtHR, *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII; *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004, para 68; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011, paras 137–139; *Jaloud v. the Netherlands* [GC], no. 47708/08, ECHR 2014, paras 152–153. See, more generally, Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

²² Committee on ESC Rights, *General Comment 3*, The Nature of States Parties Obligations (Art 2 para 1 of the Covenant), 14 December 1990, UN Doc 14/12/90, paras 13–14: The CESCR explains that the 'available resources' refer both to the resources within a State and those available from the international community.

²³ Olivier de Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (2012) 34 *HRQ* 1084.

²⁴ Principle 19(c).

(emphasis added).²⁵ No link is made with jurisdiction. The term jurisdiction is only used in relation to the working of the Conventions in federal States. Although both Conventions refer to cultural heritage in the broader context of its value and interest for mankind (World Heritage Convention) and humanity (2003 Convention), and to the universal will to preserve and protect heritage, the concrete obligations following from the Conventions are territorial. The 2003 Convention includes an obligation to internationally cooperate in Article 19, through the exchange of information and experiences, joint initiatives, and the establishment of assistance mechanisms, but this is a different aspect of the treaty than the application of the provisions extra-territorially. The FARO Convention is a bit more ambiguous on its application. In Article 5 it is stated that States parties 'recognise the value of cultural heritage *situated on territories under their jurisdiction*' (emphasis added). The formulation of this provision opens the possibility that cultural heritage outside the State's territory, but within its jurisdiction, falls within the scope of the Convention. It may be logical to apply the concept of jurisdiction in analogy with that of the ECHR, so if a State has power or effective control over the territory in question. But it remains unclear whether States indeed meant for such application.

RESERVATIONS

Reservations allow States to become parties to a treaty, while exempting themselves from certain specific obligations in this treaty. In other words, reservations are States' expressions that they do not want to be bound to certain elements or provisions of the treaty.²⁶ The international legal regime for reservations is laid down in the VCLT. According to Article 2(d) VCLT a reservation is:

[A] unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

²⁵ See, for instance, Arts 4 and 5 of the World Heritage Convention and Arts 11–13 of the 2003 Convention.

²⁶ Lijnzaad (n 14) 107; Pergantis (n 14) 435. See also, Yvonne Donders, 'Cultural Pluralism in International Human Rights Law: The Role of Reservations' in Ana F Vrdoljak (ed.), *The Cultural Dimension of Human Rights* (OUP 2013) 205.

The traditional contractual character of treaties with reciprocal rights and obligations for States parties is clearly reflected in the rules on reservations. According to Article 21(1) VCLT the reservation:

[M]odifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and . . . modifies those provisions to the same extent for that other party in its relations with the reserving State.

An important limitation for making reservations is laid down in Article 19 VCLT. States parties may not formulate reservations when such is prohibited by the treaty or when only specified reservations are allowed. Furthermore, reservations may not be 'incompatible with the object and purpose of the treaty'.²⁷ The question is how the object and purpose of the treaty are determined and, perhaps even more important, who determines these and assesses the validity of reservations.²⁸ This assessment is traditionally done by other States parties who may object to reservations made by their counterparts in accordance with Article 20 VCLT. However, for human rights treaties, the working and assessment of reservations operates somewhat differently.

Reservations to Human Rights Treaties

The working and effect of reservations to human rights treaties is strongly influenced by the limited importance of reciprocity in relation to these treaties.²⁹ The ICJ in its Advisory Opinion on reservations to the Genocide Convention argued that the effect of a reservation to a humanitarian treaty would not be subjected to the express or tacit agreement of all of the contracting parties. Similarly, a reservation would not merely be accepted if none of the other States parties has objected to it.³⁰ The ICJ

²⁷ VCLT, Art 19(c).

²⁸ See, for an extensive analysis of the object and purpose theory, Lijnzaad (n 14) 80–102.

²⁹ This matter has been extensively discussed in academic literature. See, for example, Craven (n 9) 489–519; Lijnzaad (n 14); Ineta Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004); Yogesh Tyagi, 'The Conflict of Law and Policy on Reservations to Human Rights Treaties', *British Yearbook of International Law* (2000) 181–258; Jan Klabbers, 'Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties' (2000) 69(2) *Nordic Journal of International Law* 179.

³⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, ICJ Reports (1951) 19, 28 May 1951, at 13.

concluded that the 'appraisal of a reservation and the effect of objections [. . .] depend upon the particular circumstances of each individual case'.³¹ The ICJ in the same Advisory Opinion confirmed, however, that it is in principle States as contractors that assess the validity of reservations by other States parties.

Because of the importance of human rights treaties for individuals and communities as beneficiaries, apart from States, international monitoring bodies have increasingly involved themselves in the assessment of the compatibility of reservations with the object and purpose of the treaty. The HRC has given itself this role by its General Comment 24, in which it maintained that:

[I]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because . . . it is an inappropriate task for States Parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions . . . Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.³²

In other words, the HRC finds itself the appropriate body to assess the compatibility of reservations with the object and purpose of the treaty.³³ The ECtHR has also assessed the validity of reservations in some of its jurisprudence.³⁴ The role of monitoring bodies is, however, not undis-

³¹ Ibid., 15.

³² Human Rights Committee, *General Comment 24*, General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), at 18.

³³ It should be noted that several States, including the United States of America, the United Kingdom and France, expressed formal objections to this General Comment, disagreeing with this role the Committee gave itself. See Human Rights Committee, Annual Report, GAOR, Suppl. No. 40 (1994–1995) in UN Doc. A/50/40, Vol. I, 26–131, at 5–16 and Human Rights Committee Annual Report, GAOR, Suppl. No. 40 (1996) in UN Doc. A/51/40, Vol. I, 104–106, at 1–2.

³⁴ See, for instance, the following cases: *Temeltasch v. Switzerland* (Commission, Application 9116/80) (1983) DR 31, 120; *Belilos v. Switzerland*, ECHR (1988) Series A, No. 132; *Weber v. Switzerland*, ECHR (1990) Series A, No. 177; *Chorherr v. Austria*, ECHR (1993) Series A, No. 266-B. The Inter-American Court of Human Rights took a similar position in its Advisory Opinion on the Effect of Reservations on the Entry into Force of the American Convention (Arts 74–75), 24 September 1982, at 29. See, for a discussion, S Marks, 'Three Regional Human Rights Treaties and their Experience of Reservations', in Christine Chinkin and

puted. The International Law Commission (ILC), for instance, stated that although monitoring bodies may be competent to comment upon and make recommendations with regard to the admissibility of reservations, this does not 'affect the traditional modalities of control by the contracting parties' as laid down in the VCLT.³⁵ In other words, there is the traditional role for States parties to assess reservations, but this role is complemented in practice by international monitoring bodies.

The consequences of an invalid reservation once again show the primacy of the normative character of human rights treaties over their contractual character. International monitoring bodies broadly adhere to the so-called 'severability thesis', whereby a State is bound by the treaty even if a reservation made by that State to the treaty is invalid. The reservation is 'severed' from the rest of the treaty. 'Non-severability' would, namely oblige a State to withdraw from the treaty and to re-enter without the invalid reservation, which might mean that the State does not become a party anymore and falls outside the monitoring by international bodies.³⁶ The ILC, again, has been critical about the severability approach, emphasizing that it is the responsibility of the reserving State to take action in case of inadmissibility of a reservation, for example by modifying or withdrawing it.³⁷

Neither the ICCPR nor the ICESCR include a specific provision on reservations. This means that the VCLT regime applies and that reservations should be compatible with the object and purpose of the treaty. The HRC has elaborated on the object and purpose test for the ICCPR and determined that reservations that offend peremptory norms, reservations on provisions that represent customary international law and reservations to non-derogable rights are not allowed. Furthermore, reservations may not be formulated in general terms, but must refer to a particular provision of the Covenant and indicate their scope in precise terms.³⁸ Many States have issued reservations to the Covenants. To the ICCPR more than 50 States have made reservations of different sorts and to the ICESCR 45 States have made reservations. Several of these reservations have been

JP Gardner (eds), *Human Rights as General Norms and a State's Right to Opt Out - Reservations and Objections to Human Rights Conventions* (London: B.I.I.C.L., 1997), at 37-63.

³⁵ International Law Commission, 'Preliminary Conclusions on Reservations to Normative Multilateral Treaties including Human Rights Treaties', *Yearbook of the International Law Commission*, Vol. II, Part 2, 1997, at 57, para 6.

³⁶ Klabbers (n 29) 188-90.

³⁷ International Law Commission (n 35) para 10.

³⁸ Human Rights Committee, *General Comment 24* (n 32) paras 8-10, 19.

objected to by other States parties.³⁹ The ECHR allows reservations under Article 57 only 'to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.' About 25 States parties have issued reservations to the ECHR on different provisions and with different justifications. No other States parties have objected to these reservations.

A thorough analysis of the reservations to these human rights treaties falls outside the scope of this chapter. The analysis and figures are meant to show that in the case of human rights treaties, reservations are often made and are subject to debate and objection by other States parties as well as by international monitoring bodies. Reservations seem to serve in reconciling the interests of the international community with those of individual States. It is in the interest of the international community to have the largest amount of States parties possible, because of the importance of international and national human rights promotion and protection. At the same time, reservations allow individual States to express that they do not want to be bound to certain provisions of the treaty, instead of having to reject the treaty as a whole.⁴⁰ Moreover, by introducing the possibility to sever the reserved provision from the rest of the treaty, States can become parties to the treaty, be legally bound to it and be part of the international monitoring process.

Reservations to Cultural Heritage Treaties

The cultural heritage conventions do not include a general clause on reservations, which implies that the VCLT regime applies. The World Heritage Convention and the 2003 Convention do, however, include a provision on a specific possibility for reservations in Articles 16 and 26 respectively. These provisions include in paragraph (a) the obligation of States parties to pay every two years to the World Heritage Fund, followed in paragraph (b) that States parties may declare not to be bound to this provision. Several States parties have made use of this possibility.⁴¹ Overall, however, States ratifying cultural heritage treaties hardly make reservations. In the

³⁹ See, for an overview of reservations to the ICCPR: available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en> and to the ICESCR: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en> accessed 20 June 2018.

⁴⁰ Klabbers (n 29) 150, 166.

⁴¹ For the Convention on World Natural and Cultural Heritage: Brazil, Bulgaria, Cape Verde, Denmark, France, Germany, Holy See, Moldova, Norway, Oman, United States of America, South Africa, South Sudan. For the Convention

case of the World Heritage Convention several States, including Iraq, Syria and Oman have filed reservations that ratification of this treaty would not mean recognition of Israel. In the case of the 2003 Convention Malaysia has filed a reservation with a reference to national law. Several other States parties, including The Netherlands, Sweden and Romania, have objected to this reservation. No reservations have been made by States parties to the FARO Convention.

The above shows that reservations to cultural heritage treaties are much less common than for human rights treaties. This may well be explained by the fact that these treaties are more inter-State agreements on the basis of which individuals and communities cannot derive substantive rights. Accordingly, obligations in cultural heritage treaties are directed towards States parties, leaving them room to implement these as they find best. Consequently, States parties may feel less need to issue reservations. Another reason can be found in the fact that cultural heritage treaties are not seen as treaties from which reserved provisions can be severed, as this is only recognized for human rights treaties. States parties may therefore feel more hesitant to submit reservations.

DENUNCIATION

States as the main subjects of international law can determine to become a party to a treaty or not. They can also decide to no longer be a party to a treaty. The general rules on denunciation are laid down in VCLT Article 56:

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) A right of denunciation or withdrawal may be implied by the nature of the treaty.

In other words, it is in principle up to the States drafting the treaty to determine ways, or lack thereof, to denounce or withdraw from the treaty, by including a specific provision on this topic. If such a provision is not included, the principle rule is that such a treaty cannot be denounced or withdrawn from, unless the two exceptions as formulated are applicable. As regards denunciation, again, human rights treaties differ from the cultural heritage treaties.

on Intangible Cultural Heritage: Argentina, Germany, Indonesia, Saudi Arabia, Seychelles.

Denunciation of Human Rights Treaties

Interestingly, the ICCPR and the ICESCR do not contain a provision on denunciation. In other words, it seems that the drafting States felt that these treaties should not be withdrawn from. This reaffirms the felt importance of international and national human rights promotion and protection and consequently, to have and keep as many States parties as possible. The impossibility to withdraw from the ICCPR was confirmed by the HRC in its General Comment 26. While acknowledging that the treaty does not contain a specific provision, it applied the rules of the VCLT, in particular the two exceptions possible for non-denunciation. It dismissed both by arguing that: ‘the drafters of the Covenant deliberately intended to exclude the possibility of denunciation’ and that ‘it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation’.⁴² In other words, the HRC was of the opinion that denunciation or withdrawal was not possible. A similar argument could be made for the ICESCR.

The ECHR does include a provision on denunciation. Article 58 ECHR includes that:

A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months’ notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

In other words, withdrawal from the ECHR is possible.⁴³ However, such withdrawal may come at a high price. The question is to what extent a State which is not a party to the ECHR can still be a Member State of the Council of Europe, since the promotion and protection of human rights, through its human rights treaties, is such a crucial component of membership.⁴⁴ Article 58 ECHR permits denunciation of the Convention,

⁴² Human Rights Committee, *General Comment 26*, adopted by the Committee at its 1631st meeting (8 December 1997) CCPR/C/21/Rev.1/Add.8/Rev.1, paras 2 and 3.

⁴³ Greece denounced the ECHR and left the Council of Europe in December 1969 during its military regime. In 1974, Greece joined the Council of Europe again and re-accepted the ECHR.

⁴⁴ There is currently a debate in the United Kingdom on possible withdrawal from the ECHR, see: Will Worley, ‘Theresa May “will campaign to leave the European Convention on Human Rights in 2020 election”’ (Independent, 29 December 2016) <<http://www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexit-a7499951.html>> accessed 20 June 2018.

but it is silent about whether such will affect membership of the Council of Europe. However, Article 3 of the Statute of the Council of Europe states that '[e]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'. It has also become practice that new Member States of the Council of Europe have to ratify the ECHR as part of their accession. Reading Article 58 ECHR in this light implies that it seems to be impossible to withdraw from the ECHR and remain a full member of the Council of Europe. In short, the normative character of human rights treaties implies that States when becoming a party to these treaties take obligations upon them that they cannot easily withdraw from.

Denunciation of Cultural Heritage Treaties

This is different in the case of cultural heritage treaties. All heritage treaties contain a provision which makes it possible for States parties to withdraw from the treaty. For instance, the World Heritage Convention includes in Article 35 a traditional denunciation clause:

1. Each State Party to this Convention may denounce the Convention.
2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.
3. The denunciation shall take effect 12 months after the receipt of the instrument of denunciation. It shall not affect the financial obligations of the denouncing State until the date on which the withdrawal takes effect.

The same clause is included in Article 36 of the 2003 Convention.

The FARO Convention (2005) also contains a denunciation clause in Article 21:

- a. Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
- b. Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General.

These provisions reaffirm that the States are the central subjects of these treaties and they have the complete freedom to join and to leave the treaty.

At the same time, it should be noted that it has not actually happened that a State party withdrew from one of the cultural heritage treaties. Thailand announced its intention to withdraw from the World Heritage Convention in June 2011, but it seems that this did not take effect, since the country is still, or again, a party to this Convention.⁴⁵ This may show the serious commitment of States to these treaties or, from a more sceptical point of view, it may be argued that the obligations in the cultural heritage treaties leave States sufficient flexibility to remain parties even if they are unable or unwilling to fully implement them.

MONITORING

States are free to decide on the monitoring or supervision of the implementation of and compliance with the treaty. The general contractual and reciprocal character of treaties implies that they are first and foremost supervised in terms of compliance by the other contracting parties. This can be clearly seen in relation to the cultural heritage treaties, where bodies composed of States parties' representatives are tasked with supervising the implementation of these treaties. This is different from human rights treaties, which are monitored by independent bodies.

Monitoring Human Rights Treaties

Human rights treaties are all monitored by bodies composed of independent experts or judges. The ICCPR and the ICESCR are supervised by the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (Committee on ESC Rights) respectively, whereas the ECHR is monitored by the European Court of Human Rights (ECtHR).⁴⁶

⁴⁵ 'UNESCO Director-General regrets the announcement of Thailand's intention to denounce the 1972 World Heritage Convention', (UNESCO, 26 June 2011) <<http://whc.unesco.org/en/news/772/>> accessed 20 June 2018; 'Thailand Denounces the 1972 UNESCO World Heritage Convention' (Cultural Property and Archaeology Law, 30 June 2011) <<https://culturalpropertylaw.wordpress.com/2011/06/30/thailand-denounces-the-1972-unesco-world-heritage-convention/>> accessed 20 June 2018. No information could be found that confirms that Thailand actually denounced the Convention and it is currently listed as a State party, see 'States Parties Ratification Status' <<http://whc.unesco.org/en/statesparties/>> accessed 20 June 2018.

⁴⁶ The HRC was established in Part IV of the ICCPR Arts 28–45, which set out the composition and functions and procedures of the HRC. The ICESCR did

The HRC, the Committee on ESC Rights and the ECtHR have various procedures at their disposal to carry out their monitoring function. The HRC and the Committee on ESC Rights conduct a State reporting procedure. This means that States parties have to report periodically on the ways they have implemented the treaty. The Committees formulate on the basis of the State reports as well as information from other stakeholders (NGOs, UN agencies) a list of issues to be discussed in a meeting with representatives of the States parties. The Committees then adopt Concluding Observations on each State party in which they indicate the positive aspects as well as recommendations for improvement of their implementation and compliance. The ECtHR does not have such a reporting procedure.

The Committees as well as the ECtHR furthermore have two complaints procedures at their disposal. First, there is a possibility for States parties to submit a complaint to the HRC or the Committee on ESC Rights about an alleged violation of the respective treaty by another State party.⁴⁷ This inter-State procedure is an optional procedure to which States have to consent explicitly. The State complaint procedure shows that there is at least some reciprocity in human rights treaties as well, whereby States can hold each other accountable for (alleged) non-compliance.⁴⁸ It should however be noted that no inter-State complaint has ever been brought to

not contain provisions on a monitoring body, but the Committee on ESC Rights was established by a Resolution of the Economic and Social Council (ECOSOC) 1985/17 of 28 May 1985 to carry out its monitoring functions. The European Court of Human Rights was established in Part II of the European Convention on Human Rights.

⁴⁷ ICCPR, Art 41; ICESCR Optional Protocol Art 10; ECHR Art 33.

⁴⁸ Similarly, States can bring cases against other States before the ICJ if both have accepted the jurisdiction of the ICJ. These cases may also concern alleged violations of human rights treaties. See, for instance the case of *LaGrand* (Germany v. United States of America), judgment of 27 June 2001; *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), judgment of 14 February 2002; *Avena and Other Mexican Nationals* (Mexico v. United States of America), judgment of 21 March 2004; *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), judgment of 24 May 2007; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), judgment of 26 February 2007; *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), judgment of 20 July 2012. Pending cases: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation).

the HRC or the Committee on ESC Rights and the number of inter-State complaints to the ECtHR is low.⁴⁹

Secondly, all three bodies have a procedure for the submission of individual complaints. These procedures are optional for the ICCPR and the ICESCR, but compulsory for the ECHR. One important element of all three procedures is that all local remedies have to be exhausted before a complaint can be submitted to the international body. The outcome of the procedure is a non-binding view in the case of the HRC and the Committee on ESC Rights and a binding judgment by the ECtHR. Again, a thorough analysis of these procedures is not intended here. The existence of these independent monitoring bodies and their procedures merely reaffirms the different character of human rights treaties as compared to cultural heritage treaties.

Monitoring Cultural Heritage Treaties

The cultural heritage treaties do not have independent monitoring bodies; they are monitored by intergovernmental committees composed of representatives of the States parties. The UNESCO Conventions' bodies are the conferences of parties, which established intergovernmental committees.⁵⁰ The World Heritage Committee and the Committee for the Safeguarding of the Intangible Cultural Heritage both review States parties' reports every six years and advise the States Parties on the implementation of their respective treaties and other matters arising from their reports.⁵¹ There is no systematic input by NGOs or other stakeholders in this procedure, although they can participate in the debates. No mechanisms exist under these treaties for other States or individuals to submit complaints to the monitoring bodies about (alleged) violations of the treaty provisions.

The FARO Convention (2005) states in Article 16 that the Committee of Ministers of the Council of Europe shall 'appoint an appropriate committee or specify an existing committee to monitor the application of the Convention'. It is not clear from this sentence whether this

⁴⁹ There have been about 20 inter-State complaints submitted to the ECtHR. Several years ago, Ukraine filed a complaint against Russia concerning Russia's actions in Crimea and Eastern Ukraine, see <http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf> accessed 20 June 2018.

⁵⁰ *UNESCO Convention on Cultural and Natural Heritage* Pt III Arts 8–10; *UNESCO Convention on Intangible Cultural Heritage* Pt II, Arts 4–8.

⁵¹ *UNESCO Convention on Cultural and Natural Heritage* Art 29; *UNESCO Convention on Intangible Cultural Heritage* Art 29.

committee is composed of States parties' representatives or of independent experts. However, the last sentence of Article 16 that the 'Committee may involve experts and observers in its work' seems to imply that this was supposed to be an intergovernmental committee. According to Article 16(b) this Committee manages a shared information system and can give advisory opinions on 'any question related to the interpretation of the Convention'. The same provision provides that the Committee can 'on the initiative of one or more Parties, undertake an evaluation of any aspect of their implementation of the Convention'. The Committee eventually reports back to the Committee of Ministers on its activities. Since there is no firmly established reporting procedure and no complaints procedure at all, the monitoring of the FARO Convention seems to be rather flexible. The Explanatory Report also indicated that '[t]he broadly defined objectives of the Framework Convention will, by their nature, be harder to monitor than those of narrower, more specific Conventions'.⁵²

In other words, in relation to cultural heritage conventions, States have decided to keep the main responsibility for supervising the implementation of and the compliance with the treaties in their own hands. The procedures under the cultural heritage conventions are limited to reporting procedures; there is no possibility for individuals or communities to submit cases or complaints. Since cultural heritage conventions do not create substantive rights for individuals, it is logical that an individual complaints procedure does not exist. An inter-State complaint procedure whereby States can hold each other to account could be envisaged also for cultural heritage treaties, especially for the UNESCO Conventions, which are not framework conventions. At the same time the effectiveness of such a procedure can be doubted, since States parties themselves play a crucial role in the monitoring of cultural heritage treaties.⁵³

⁵² Council of Europe, *Explanatory Report* (n 17) section D, Art 16.

⁵³ There is however also some positive experience with inter-State supervision in the UN Human Rights Council, which is composed of States' representatives. The Human Rights Council conducts a Universal Periodic Review of the human right situation in all UN Member States. It also deals with complaints by individuals about (alleged) gross and systematic human rights violations. This procedure is fully confidential. See for the working of the Human Rights Council: <<http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx>> accessed 20 June 2018.

CONCLUSION

Several chapters in this volume show that the protection of cultural heritage has very important human rights components and that the human rights to access to and enjoyment of cultural heritage are important for individuals and communities. The purpose of this chapter was to look at the link between cultural heritage and human rights from a different perspective than the interrelationship between the concepts themselves and the content of the norms established in international and regional law. This chapter looked at several international and regional treaties on cultural heritage and human rights as sources of international law and compared them as regards their nature, scope, application, working and monitoring.

Both treaties on cultural heritage and on human rights have a similar form as agreements drafted, signed and ratified by States. Looking beyond their form it was shown that their character and substance differ significantly. The most important difference is that human rights treaties are normative treaties, including not merely mutual rights and obligations between States parties, but obligations for States parties at a vertical level, to respect and protect rights for individuals and communities within their jurisdiction. Cultural heritage treaties have a more contractual character as horizontal agreements between States parties. They imply obligations of States parties to protect and preserve cultural heritage, but they do not create substantive rights for individuals and communities. The horizontal inter-State character of the cultural heritage treaties is also reflected in the strong link with sovereignty and territory, the much more limited number of reservations to these treaties, the possibility for denouncing the treaties and the inter-governmental monitoring of their implementation. Human rights treaties on the other hand include a crucial vertical aspect and as such they are much less centred around reciprocity, having repercussions on their application beyond the territory, the more regular use of reservations, the constraints on denouncing the treaties and the monitoring by independent international bodies.

The above shows that although human rights and cultural heritage are clearly linked as concepts or values, the international legal instruments protecting one or the other are of a different character. At the international level, States have chosen to treat cultural heritage and human rights in different fora and to adopt different sorts of treaties. The technical legal differences between the treaties should, however, not lead to the protection of human rights and cultural heritage drifting apart. Since States need to implement the different treaties in their national legal orders, they could

at least try to link the different obligations in the fields of human rights and cultural heritage. From their reporting on the implementation of UNESCO Conventions, it appears that most States indeed make a link between cultural heritage, cultural diversity and human rights.⁵⁴ Although the treaties may have been drafted and operate in different worlds, practice by States parties should make them run more in parallel.

⁵⁴ See Yvonne Donders, 'Cultural Rights and the UNESCO Convention: More than Meets the Eye?' in Christiaan De Beukelaer, Miikka Pyykkönen and J P Singh (eds), *Globalization, Culture and Development – The UNESCO Convention on Cultural Diversity* (Palgrave Macmillan, 2015) 117.