

From the Multilevel International Legal Framework Towards a New Principle of International Law to Protect Cultural Heritage in Times of Peace and War by States, IOs and Private Actors

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Abstract Detrimental conditions really affecting CH at risk in conflict and post-conflict situations are the result of new warfare modalities and of the new role of public and private actors in illegal activities damaging it since the beginning of the 21st century. So far, at present, the international legal framework in force is not anymore apt to prevent, preserve and restore all immovable and movable goods in times of war: it demands for a different and renewed legal interpretation to make principles, rules, mechanisms and procedures strongly equipped to cope with newfangled challenges attempting to the value and integrity of CH worldwide.

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Keywords International law. Cultural heritage. Contemporary conflicts.

1 Preliminary Remarks

The international legal framework on the protection of CH in times of peace and war is extremely complex: it has an accurate multilevel background whose provisions and recommendations are addressed to all concerned stakeholders (Frigo 1986; Forrest 2010; Vigorito 2013; Blake 2015).

Traditional international actors such as States and IOs, but also private collective and individual players, work to protect CH on the global, regional and national scenario. Their commitment is to prevent, protect and punish any damage intentionally causing a loss of the intrinsic value

of the world CH: this definition encompasses all immovable and movable goods that witness ancient historical, geographical, political, social and cultural roots of populations (Fitz Gibbon 2005; Hoffman 2006).

This commitment could be jointly pursued by the aforementioned stakeholders even if according to different approaches: in line with international binding norms in force and with soft laws by States; in reiterating it with the political support of Member States within and by IOs; involving private entities as legal respondents in relation to a new meaning of the commitment itself based on the attribution of a global common value to CH at large (Prott, O'Keefe 1992; Francioni 2007, 2012, 2013).

Detrimental conditions really affecting CH at risk in conflict and post-conflict situations are the result of new warfare modalities and of the new role of public and private actors in illegal activities damaging it since the beginning of the twenty-first century. So far, at present, the international legal framework in force is not anymore apt to prevent, preserve and restore all immovable and movable goods in times of war: it demands for a different and renewed legal interpretation to make principles, rules, mechanisms and procedures strongly equipped to cope with newfangled challenges attempting to the value and integrity of CH worldwide.

2 Conceptual Thesis and Related Analytical Methodology

The international legal framework in force in matter of prevention, preservation and restoration of the WCH in times of peace and war has been progressively and clearly defined, mainly in the second-post war age. States have contributed by elaborating customary principles, then included in key-conventions and translated into binding provisions (Francioni, Del Vecchio, De Caterini 2000; Ciampi 2014). In compliance with these provisions, States have also promoted the elaboration of soft laws, reiterating the relevance of legal commitments but also extending their legal significance and related implementation, especially with reference to CH at risk in conflicts.

At the same time IOs with technical mandate have cooperated issuing their Member States with new operational mechanisms and instruments. The challenge of actualization of international treaties governing the protection of CH, through their implementation by Contracting Parties, could be considered as a means to promote the elaboration of new customary principles: these address public and private entities, beyond institutional stakeholders, to reinforce the prevention, preservation and restoration of CH at risk.

The multiple nature of actors on the scene as well as the intrinsic tangible and intangible value of CH might support the thesis according to which these new principles are based on the recognition of the global common

domain of cultural resources at large. CH compressed protection could endanger their enjoyment by the members of the international community as a whole, and inappropriate management could not ensure the compliance with international binding norms in force while attempting to their uniqueness.

The analytical intent of the Author is to demonstrate that the legal instruments representing the international CH law and including both hard and soft laws are yet relevant but could be reinforced through the elaboration and adoption of new customary principles: the recognition of CH as a global common is at the core of the investigation concerning several examples of rules to be viewed in a new perspective under a mixed public and private global governance.

3 Normative Framework

3.1 International Treaties and Conventions (Hard Law) to Preserve and Protect Cultural Heritage/Property/Objects in Times of Peace and War

The international legal framework in force embraces both general norms and principles as well as some *lex specialis* regimes covering both hard and soft laws: as for hard laws (O’Keefe, Prott 2011), they deserve a targeted analysis aimed at focusing on the root causes which put CH in danger (Litton 2011). In this analysis the compliance of Contracting Parties in terms of prevention, preservation and restoration of CH at risk in times of peace and war (Panzera 1993; Chamberlain 2004; R. O’Keefe 2006; Benvenuti, Sapienza 2007; Gerstenblith 2009; Lambert, Rockwell 2010; Lijnzaad 2012; Viejo-Rose, Stig Sørensen 2015) needs to be investigated to confirm their legal commitment to ensure the full implementation of binding norms at stake. This is a plain precondition for the ongoing global action to protect the uniqueness of the international cultural property (Siehr 2012) represented by tangible, movable and immovable property for every people, irrespective of origin and ownership.

Several treaties and conventions have been elaborated, adopted and implemented mainly in the post-WWII period in some of the most relevant institutional systems (mainly UNESCO but also the ICRC system): in this wide legal framework, several definitions of CH in danger are included and unambiguous obligations must be undertaken by Contracting Parties.

For example in the *1954 Hague Convention and related Optional Protocols* aimed at protecting CH in danger in times of war cultural property entails a double protection according to peace and conflict (of international and non-international character, art. 19) situations (art. 2). The

High Contracting Parties must safeguard it in times of peace foreseeing the effects of a potential armed conflict (art. 3); they also undertake to respect cultural property

by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property. (art. 4(1))

In such situations, they

further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party. (art. 4(3)) (Carducci 2000)

Moreover, to ensure appropriate safeguarding in times of peace

The High Contracting Parties undertake to introduce into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples. The High Contracting Parties undertake to plan or establish in peace-time, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it. (art. 7)

Sometimes specific conditions of conflict should encompass the granting of a special protection of cultural property: in these circumstances, it has to be moved to *ad hoc* refuges or to be placed in *ad hoc* centres; so far it obtains a special immunity status, being marked with a distinctive emblem which covers urgent transfer to secure its integrity (arts. 8-10, 13-14).

As it concerns the violation of the Convention

The Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention. (art. 28)

Furthermore the adoption of two optional Protocols to 1954 UNESCO

Convention has been intended to reinforce this legal background.

The first Protocol envisages a preventive approach to avoid exportation of cultural property from an occupied territory during an armed conflict; it also provides for taking it into custody, for returning it to the Country of origin at the end of hostilities and for giving adequate indemnity to the holders in good faith.

The second Protocol details the preventive approach in times of peace, as shown by relevant measures such as

the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property. (art. 5)

It also introduces the imperative military necessity clause for protecting cultural property against an act of hostility (art. 6) and the precautionary approach for acting when an alarming conflict is supposed (arts. 7-8).

An ordinary and an enhanced protection of cultural property is also granted to avoid

a. any illicit export, other removal or transfer of ownership of cultural property; b. any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property; c. any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence. (arts. 9-10)

Finally, the Protocol deserves special attention to the establishment of criminal offences against cultural property in domestic legislations of Parties in order to exercise jurisdiction, prosecution and extradition measures (arts. 15-18). As it regards investigations, criminal or extradition proceedings the greatest measures of mutual legal assistance should be granted by the Parties (art. 19) and completed by other forms of international cooperation and international assistance from UNESCO, in situation of serious violation of the Protocol or in ordinary circumstances respectively (arts. 31-2).

According to the international legal discipline introduced by 1954 UNESCO Convention, it is apparent the creation of relevant binding norms, in coherence with former customary principles and post-WWII treaties' provisions. They deal with specific circumstances, including all pre-in-post conflict settings, asking High Contracting Parties to adopt proper measures to be in compliance with legal commitments contained therein.

In a very different perspective affecting CH at risk in times of war UNESCO Member States have promoted the drafting and adoption of the

1970 UNESCO Convention (Francioni, Lenzerini 2008; Scovazzi 2014). Any dangerous factor touching upon the intrinsic value of the WCH is represented by the “illicit import, export and transfer of ownership of cultural property [as] one of the main causes of the impoverishment of the CH of the countries of origin of such property” (art. 2(1)).

By means of the 1970 UNESCO Convention we tackle a further kind of obligation on behalf of Contracting Parties, which translates the domestic obligation to protect the national CHs as enshrined in many Constitutions of UNESCO’s Member States. The duty to preserve the cultural property is essentially preventive. In other words Contracting Parties are required

to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations. (art. 2(2))

This duty is complemented by other legal commitments undertaken by Contracting Parties such as: the setting-up of national services to counteracting illicit import, export and transfer of ownership of cultural property; the introduction of an appropriate certificate authorizing the exporting State; a constructive dialogue with museums and antique dealers to prevent and prohibit them from acquiring cultural property originating in another State Party which has been illegally exported.

In this legal context, the concept of ‘risk’ damaging CH has a partial direct link with any form of hostilities. Only one reference is made to this assumption:

The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit. (art. 11)

In addition to the legal commitments undertaken by States as Contracting Parties of the aforementioned international treaties concerning the protection of CH, also international private law has contributed to reinforce the level of compliance to prevent, preserve and protect cultural goods.

The relevant codification promoted by concerned States and other (private) stakeholders resulted into the *1995 Unidroit Convention*, whose provisions are crucial for implementing individual and joint measures and actions to prevent and contrast their illicit trafficking (Carducci 1997; Prott 1989; Bergé 2015).

Even if the robbery of cultural goods occurs in times of peace the 1995 Unidroit Convention could be also applied in relation to situations where hostilities have put at risk or unfortunately destroyed the beauty and the traditional signs and emblems of ancient cultures. In both cases different situations could be legally faced off attempting to the value and integrity of a cultural object.

Contracting Parties have the duty to act for the restitution of stolen cultural objects pertaining to public collections immediately or in due time (“a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place” (art. 3(2)) also providing a fair and reasonable compensation for the possessor in good faith and having exercised due diligence (art. 4) (Prott 1995; Roehrenbeck 2010).

At the same time Contracting Parties must return to Countries of origin illegally exported cultural objects without any agreed permissions and if

the removal of the object from its territory significantly impairs one or more of the following interests: (a) the physical preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation of information of, for example, a scientific or historical character; (d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State. (art. 5) (Greenfield 2015; Scovazzi 2015)

So far the 1995 Unidroit Convention envisages situations that could touch upon immovable and movable CH, without drafting new customary or hard law but trying to harmonise the domestic legislations of Contracting Parties to reinforce the prevention, preservation and restoration of the CH in danger.

3.2 Soft Law Aiming at Preventing, Preserving and Restoring CH in Times of Peace and War

The legal significance of the above mentioned international treaties and conventions is confirmed by the high number of Contracting Parties and the effective compliance to the provisions addressed to public and private competent authorities and entities.

Their content has been progressively complemented to be expanded and updated according to a more general approach, as occurred in the elaboration of soft laws by UNESCO statutory bodies (Carducci 2006). In this perspective we could affirm that the concept of CH at risk or in danger is in line with the provisions of the 1954 UNESCO, 1970 UNESCO and 1995 UNIDROIT Conventions. At the same time we cannot overlook that the prevention, preservation and restoration of CH in times of (new) wars might encompass a multilevel insight (Francioni, Lenzerini 2003, 2008; Bauer 2015). The proposal for an interpretative reading of the abovementioned treaties in drafting soft laws in the last three years could encourage the elaboration of a new customary principle to adopt

a common standard against CH looting and smuggling in conflict zones, preventing and repressing all forms of illicit trafficking and illegal trade of cultural properties.

Just to make a few examples to this scope, the *UNESCO WHC Bonn Declaration* adopted by Member States on 28 June 2015 committed them to

condemn barbaric assaults, violence and crimes committed in recent times by the so called Islamic State of Iraq and the Levant (ISIL) also known as Daesh against the cultural heritage of Iraq. (para. 17)

and “deplore the exposure of and use of cultural heritage sites in military operations” (para. 18) as occurred for Aleppo and the site of Palmyra (para. 19).

The same approach, more in detail, was adopted by the UNESCO DG in the *Declaration of 16 October 2015* on escalating violence around and against cultural and religious heritage in the Middle East: it calls all UNESCO Member States to ensure that CH, including religious sites, is preserved and accessible to all and to resume dialogue in the spirit of mutual understanding. In particular UNESCO 1954 Convention/Protocols and 1970 UNESCO Convention Contracting Parties are

call[ed] upon to refrain from military use or targeting of cultural and natural heritage sites and monuments that constitute flagrant violation of international law (para. 22)

and are reminded

to safeguard cultural and natural heritage of outstanding universal value at the national and international; they are requested to strengthen their national legislation and practice for the protection of cultural and natural heritage. (para. 25)

They are also requested to introduce “more effective measures to combat illicit trafficking and illegal trade of cultural properties” (para. 27) (Bogdanos, William 2005; Bogdanos 2007; Farchakh Bajjaly 2008) as well as to promote intergovernmental and law-enforcement cooperation on the protection and preservation of CH, under the UNESCO leadership and guide, also involving third parties (paras. 28-30-31). In the Declaration, the UN SC is recommended

to analyze the possibility of introducing a specific dimension of heritage protection in the mandates of peacekeeping missions where appropriate and of delivering complementary training modules to military and civil personnel. (para. 23)

In effect the UN SC has progressively deserved special attention to these situations since the early 2015: the adoption of *Res. 2199* of 12 February 2015, co-sponsored by 35 UN Member States, represents a strong message on the issue of the protection of CH in times of war.

The core of the Res. are points 15, 16, 17: the SC firstly “condemns the destruction of CH in Iraq and Syria (in particular by ISIL and ANF) whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects” (Cunliffe, Muhesen, Lostal 2016) (Warren 2008; Vrdoljak 2010).

Because of the illegal activities carried out by ISIL, ANF and other individual groups (“generating income from engaging directly or indirectly in the looting and smuggling of CH items from archaeological sites, museums, libraries, archives, and other sites in Iraq and Syria, which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks”), the SC firstly introduces a general ban on Iraq antiquities; then it requests from UN Member States appropriate steps for preventing the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011 (including by prohibiting cross-borders trade as well as arms-for-antiquities in such items); thirdly it makes a final reference to the cooperative approach from UNESCO, UNODC, Interpol and other international organisations for a joint effective and preventive action to this scope (Sandholtz 2007; Miles 2008).

The strong wording of Res. 2199 resulted into another relevant soft law instrument: the *Declaration* adopted at the end of the *Conference on Safeguarding Endangered CH*, held in Abu Dhabi on 3 December 2016. All the participants, recalling the main contents of the UNESCO Conventions, have been committed to pursue two goals:

The creation of an international fund for the protection of endangered CH in armed conflict, which would help finance preventive and emergency operations, fight against the illicit trafficking of cultural artefacts, as well as contribute to the restoration of damaged cultural property. The creation of an international network of safe havens to temporarily safeguard cultural property endangered by armed conflicts or terrorism on their own territory, or if they cannot be secured at a national level, in a neighbouring country, or as a last resort, in another country, in accordance with international law at the request of the governments concerned, and taking into account the national and regional characteristics and contexts of cultural property to be protected.

Again we could affirm that the soft commitments undertaken by all public and private entities as signatories of the above mentioned Declaration have

encouraged the drafting process of a customary principle to tackle with the unlawful destruction of CH and the looting and smuggling of cultural property from archaeological sites, museums, libraries, archives, and other sites, in the context of armed conflicts, as reported in the recent *Res. 2347* adopted by the UN SC on 24 March 2017 (para. 1). Assumed that

directing unlawful attacks against sites and buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments may constitute, under certain circumstances and pursuant to international law a war crime and that perpetrators of such attacks must be brought to justice. (para. 4)

in any case “Member States have the primary responsibility in protecting their CH and that efforts to protect CH in the context of armed conflicts” (para. 5). This commitment has to be put into practice by introducing national legislative and operational measures to prevent and counter trafficking in cultural property and related offences (para. 9) and by adopting preventing measures *i.e.* documentation and consolidation of their cultural property in a network of ‘safe havens’ (para. 16, complemented by details contained in para. 17). Also preventive coordination and judicial cooperation with private entities and IOs countering all forms and aspects of trafficking in cultural property and related offences is recommended by the SC to Member States (paras. 11-12).

4 Operational Framework: the Contribution from Some IOs for the Elaboration of Soft Laws to Prevent, Preserve and Restore CH in Times of Peace and War

As demonstrated in relation to the role and contribution of States/Contracting Parties of the most significant international treaties and soft laws to protect CH in times of peace and war, the proposal for the elaboration of a customary principle concerning the present global challenge countering CH looting and smuggling in conflict zones and preventing and repressing all forms of illicit trafficking and illegal trade of cultural properties could be supported also by some IOs.

In this perspective their contribution might result from several practical and procedural instruments and tools aimed to prevent, preserve and restore CH through the financial and technical assistance offered by their Member States.

The role of ICOMOS, ICCROM and ICOM in this field has a specific significance. They have elaborated and adopted codes of conducts addressed to professionals working in places where CH is in danger. So far the aim is

to prevent and manage damages and restoration, and to avoid intentional pillage of movable objects pertaining to historical, artistic, archaeological collections in cultural sites or museum to be sold in the international market illegally. To this scope they have carried out plenty of programmes and projects and they have promoted and implemented practical tools and processes to protect immovable and movable CH as part of collections located in public or private museums, institutions and foundations being at risk to be damaged and/or illegally pillaged and to be transferred out of the Country of origin (Atwood 2006; Chappell, Polk 2011; Campbell 2013).

4.1 ICOMOS

All the threats impacting on the preservation of CH in times of natural disasters or conflict situations have been taken into proper account by ICOMOS.

It has supported for example the elaboration of its Heritage@Risk Programme in 1999, involving its National Committees, International Scientific Committees and professional networks. The purpose of this programme is: to collect information over heritage places, monuments and sites at risk; to monitor and yearly reporting about their conditions; to propose and share risk management solutions. In order to suggest standard measures and tools the ICORP was established to enhance the level of preparedness within public and private institutions and professionals in relation to natural or human disasters, and to promote better integration of the protection of heritage structures, sites or areas as far as early, response and recovery activities.

In order to preventively assessing alert circumstances putting the CH at risk, ICOMOS launched the *Heritage Alert process*. It is based on a preliminary assessment of cultural property under alert, followed by its inclusion in an *ad hoc* list, to monitor its conditions and to determine the best actions for its conservation in line with a standard alert template. This process entails a very comprehensive assessment covering the analysis of the history, the fabric, the form, the function, the use and design intent as well as the idea and the philosophy behind a building, structure or landscape and its use.

Finally, in relation to conflict situations endangering CH ICOMOS has provided for the adoption of a sort of cultural distinctive emblem reproducing the Blue Shield introduced in the 1954 UNESCO Convention. Its protection is monitored by the competent ICBS - with the support of National Committees: it is composed of representatives of the main five NGOs, *i.e.* the ICA, the ICOM, the ICOMOS, the International Federation of Library Associations and Institutions, the Co-ordinating Council of Audiovisual Archives Associations. This tool represents a practical reply to the new war challenges attempting to the integrity of cultural property at risk, as recently happened in Libyan and Syrian territories.

4.2 ICCROM

The potential natural and armed conflicts' risks impacting on CH management have been put under the attention of ICCROM Member States to draft the 10 year multi-partner programme to counter the global losses of cultural immovable and movable property.

The main goal of this complex action is to build capacities in CH disaster risk management. The programme provides for interdisciplinary training addressed to professionals: to undertake first aid as well as integrated risk assessments; to build integrated systems for disaster risk management incorporating disaster preparedness and urban planning; to formulate international and regional risk management plans to face easy or complex emergencies on damaged CH.

The practical approach adopted by the Organization is fully preventive. It aims at reducing negative impacts of risks, adapting interventions in relation to identified CH at risk, releasing first aid and humanitarian measures in conflict and post-conflict situations. This approach also encompasses actions to counter every form of illicit trafficking of cultural property (theft, illicit excavation and removal, illicit export and import, illegal transfer of ownership, production, trade and use of forged documentation, traffic of fake or forged cultural property).

4.3 ICOM

To counter CH illicit trafficking ICOM has elaborated common rules addressed to all public and private institutions and museums to harmonise the procedures for the acquisition and transfer of movable objects pertaining to relevant artistic collections.

Along these rules it promotes fruitful cooperation with its partners to support sharing of information, experiences and good practices; it has launched awareness-raising campaigns to sensitise the public opinion as well as professionals and experts; it has elaborated and released *ad hoc* training modules to professionals and experts; it has further created standard inventories of collections and practical guidelines to strengthen the level of security of CH collections.

To reinforce countering CH illicit trafficking ICOM has established an international observatory: it is an innovative network involving public actors (law enforcement agencies) and private entities (research institutions and centres) for data collection and exchange of information on practical tools to prevent and fight against illegal trade in cultural property as well as on domestic legislation and jurisdictional and prosecution means to punish the offenders committing such crimes, in compliance with international norms in force.

Through this body the Organization has created relevant preventive tools to protect CH at risk, mainly in times of peace: the identification procedure named *Object Identification* to classify cultural objects in danger; the *One Hundred Missing Objects collection* that is a list of stolen cultural objects in some regional areas the most exposed to the illicit trafficking; the *Red Lists* which include specific categories of cultural objects in danger in some Countries.

The same tools are useful also with reference to potential conflict situations. ICOM proposal to launch a *Museums' Emergency Programme* goes in this direction. It is based on the collaboration among museums and similar institutions in countries at risk of crisis. The Programme develops training tools addressed to professionals and experts to give a short and long-term response adapted to local contexts. In other terms the Programme is intended to design preventive strategies to be implemented when a potential disaster is foreseen for a better management of endangered CH located in a museum, as occurred in 2005 in Southeast Asia and in 2006 in the Balkans.

5 From International Treaties/Hard Laws to Soft Laws, Towards the Elaboration of a New Customary Principle to Prevent, Preserve and Restore CH at Risk in Times of War from Illicit Trafficking

According to the main features of the above examined legal and operational frameworks, which are the crucial challenges calling for a comprehensive and effective joint response from all concerned stakeholders committed to the protection of CH at risk in times of war?

Indeed the conceptualisation of the global commons is essential to this scope if we consider how the global governance, in particular the UN system, has contributed to its definition beyond the traditional environmental meaning (Kaul, Grunberg, Stern 1999; Schrijver, Prislán 2009; Schrijver 2016).

In general terms

global commons have been traditionally defined as those parts of the planet that fall outside national jurisdictions and to which all nations have access. International law identifies four global commons, namely the High Seas, the Atmosphere, the Antarctica and the Outer Space.

So far, the traditional set of global commons has been progressively extended comprising science, education, information and peace (Baudot 2001; Hess 2008). Also UNESCO has assumed a role of 'international norm-setting' to guide the governance of global common goods such as

knowledge, education, and tangible and intangible CH (Caruthers 1998; Francioni 2003).

In line with general considerations proposed in this contribution in relation to the legal and the operational frameworks, it is evident that neither hard laws nor soft laws in force have deserved specific attention to the unique value of CH in conflict zones at risk from being endangered by illicit trafficking. Only the UN SC started to reflect on the seriousness of this kind of risk, by referring to CH looting and smuggling in conflict zones and to preventing and repressing measures against all forms of illicit trafficking and illegal trade of cultural properties.

Following the tentative definition of global commons to strengthen the intrinsic value of CH as natural or human-made resource, that is accessible to all people, managed by public and private entities (Baslar 1998; Lenzerini, Vrdoljak 2014), but very often in danger, we are in condition to adapt it to our case (Merryman 1989; Gerstenblith 2000; R. O'Keefe 2004).

The joint use of CH by the components of the international community entails the full compliance with international commitments undertaken by States, IOs and private stakeholders, the latter ones getting into contact with public authorities managing the access to and the enjoyment of CH.

All the aforementioned UNESCO and UNIDROIT Conventions deal with preventing, preserving and restoring immovable and movable cultural objects in times of peace and war addressing multiple public and private interests.

Such legal and operational frameworks must be enough severe to ensure the compliance and to avoid an over-exploitation, and/or a misuse of the CH, as well as the illicit trafficking from the country of origin to a new destination, especially when in the former the conflict situation encourages the violation of international norms to protect it (Symeonides 2005).

This consideration has been recently introduced by the ICC to define a new crime pertaining to the international criminal *lex specialis*: the intentional destruction of CH. With reference to the 2012 al-Mahdi's case, being guilty for the commission of a war crime under the ICC Rome Statute (art. 8) for damaging Sufi mausoleums, shrines and mosques in Timbuktu, several provisions of UNESCO 1954, 1970 and 1972 Conventions have been mentioned. The attacks on CH amounted to an assault to shared cultural identity in contemporary conflicts and cannot be unpunished: they attempt to global security and compress cultural human rights (Carcano 2013; Drazewska 2015).

For similar cases, as we have seen in Iraq and Syria, there must be a strong and coordinated action to fight against impunity and to impose accountability on offenders carrying out deliberate destructions of CH. In our opinion, this could go beyond the international criminal law special regime (Ostrom 2006; Grove, Thomas 2008; Ulph 2010; Frulli 2001; Manacorda, Chappell 2011).

Indeed, moving from the 1954 UNESCO Convention and Protocols as well as the assertion contained in Res. 2347 of the UN SC that condemns

the unlawful destruction of CH, inter alia destruction of religious sites and artifacts, as well as the looting and smuggling of cultural property from archaeological sites, museums, libraries, archives, and other sites, in the context of armed conflicts, notably by terrorist groups,

and that “Member States have the primary responsibility in protecting their CH and that efforts to protect CH in the context of armed conflicts”, a new customary principle to prevent, preserve and restore CH in danger *per se* in contemporary conflicts could be proposed. It might encompass the following components (Francioni 2007):

- CH is at risk/in danger in its integrity, to be pillaged, stolen and illegally transferred abroad;
- individual and collective commitment of States, IOs, and all the concerned public and private stakeholders is called for, aimed at strengthening preventive and countering legal and cooperative measures to cope particularly with the preservation of the cultural movable heritage representing the common historical, artistic, archaeological intrinsic values of peoples.

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