

The Faro Convention, the Legal European Environment and the Challenge of Commons in Cultural Heritage

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Abstract The paper aims at investigating the role of CH, both tangible and intangible, from the perspective of 'why' it means for individuals and societies and whether, and eventually 'how', this approach has been incorporated into the international legal framework, also through the concept of commons. The analysis thus will focus on: a) the Faro Convention in its more interesting and innovative aspects; b) the extent that the Faro Convention exercises in a pan-European environment; c) the relationship among the concepts of CH and commons, common goods, common heritage of humankind in international law. At this stage, the reflection raises more questions than solutions; but this is a good starting to introduce an investigation that involves so relevant issues for the lives of individuals and collectivities.

Summary 1 Introduction. – 2 The Faro Convention. – 3 The Role of the Faro Convention in a Pan-European Environment. – 4 Cultural Heritage and the Common Heritage of Humankind in International Law. – 5 Cultural Heritage and Commons.

Keywords Commons. Cultural heritage. Europe.

1 Introduction

In the last decades, the international community has been caught up in a 'heritage fever' as manifested by the adoption, at both universal and regional level, of several international instruments, policies and initiatives on the safeguard of CH. The most recently adopted instruments, additionally, view a shift in the notion of CH for which CH should not be protected and preserved solely for its intrinsic or scientific value, or because it contributes to cultural diversity, but also by reason of its capacity to contribute to the human development and a better social cohesion within and among States. Indeed, the promotion of cultural diversity, the improvement of the quality of life and of the living environments where citizens wish to prosper, as well as the enhancement of the civil society's democratic participation may favour human and social development in all its aspects (CoE Explanatory Report to the Council of Europe Framework Convention on

the Value of Cultural Heritage for Society, 27 October 2005; Fojut 2009).

The Faro Convention is the most far-reaching example of the latter type of international agreements. It recognizes that CH is a basic dimension of people's lives and their identity, an essential component of 'place', and a driver for sustainable development of the whole society, at environmental, economic and social level (Carmosino 2013).

The idea behind seems to be a concept of *commonness* that stems from the values connected to CH and to dynamic HCs committed to safeguard and transmit CH to present and future generations.

Against this background, the paper will examine the most interesting features of the Faro Convention and the authority it exercises in a pan-European environment. It will then provide for some initial considerations on the relationship between the CH and notions of common heritage of humankind and commons in the international-law frame.

2 The Faro Convention

The Faro Convention on the value of CH for society, in force since 1 June 2011, is an open treaty: CoE non-members States may ratify it if invited by. This Convention - assessed as a highly innovative treaty (Lixinski 2013, 79) - sets clearly contemporary approaches towards the safeguarding of CH in the European context: potentially, as the most far-reaching in terms of its influence (Blake 2015, 325, 327). It will be thus significant to briefly clarify the nature and extent of this influence.

The Faro Convention complements previous CoE Conventions related to CH:¹ but, where that generation of European instruments was concerned with the *fabric of heritage*, the Faro Convention, in line with the Florence one, considers heritage from the viewpoint of the living people who construct, make, use and celebrate, or *oppose* it. CH and the human right to have such a heritage recognized are the key aspects (Wolferstan, Fairclough 2013, 43).

This "focus on values, rather than constitutive elements of heritage" is also a way of avoiding commodification of heritage, because all references to heritage or culture, as "concrete entities", are avoided (Lixinski 2013, 79, 80). Rather, the definition of CH in art. 2(a) highlights particularly the idea of "constantly evolving values", which indicates a living culture:

the main frontier that Faro urges us to cross is therefore to change heritage from being treated as a limited number of assets to be kept

1 The European cultural Convention (1954), the Convention on the architectural heritage (1985), the Convention on the archaeological heritage (1992) and the ELC (2000).

from harm, to being something universal and ubiquitous. This is about the use of the past in the present and its renewal into the future. A living heritage is a changing heritage. (Wolferstan, Fairclough 2013, 43)

Through the consideration of “all aspects of the environment that are the result of interaction between the human beings and the places over time”, Faro also introduces a concept of heritage that goes beyond the single monument to include the “places around which people gather together”. Therefore, people create heritage both in the conventional physical sense and in the sense of meaning and significance (*i.e. values*) to things that do not intrinsically have such value.

Thanks to this holistic approach, the ‘ordinary’, vernacular, local heritage is retrieved, departing, for example, from the vision of the 1972 UNESCO Convention.

The Faro Convention makes a *unicum* also in the perspective of human rights.

Although human rights have gradually come to the centre stage of heritage conventions, the Faro Convention goes beyond “any earlier international agreement toward making the relationship between people and cultural materials and sites a human rights issue” (Zagato 2012b, 2016).

In speaking of a right to CH as an inherent aspect of the right to participate to cultural life, as proclaimed in the UDHR,² Faro is innovative.³ The connection among the right of everyone to take part in cultural life, in all its components, and all other human rights has been stated also by the CoE Parliamentary Assembly Rec. 1990(2012), according to which that right

is pivotal to the system of human rights. To forget this is to endanger that entire system, by depriving human beings of the opportunity to responsibly exercise their other rights, through lack of awareness of the fullest of their identity.

The human-rights approach is to be valued also for the *responsibility dimension* that the right to CH calls into play: it does not build only on States’ obligation to ensure the implementation and enforcement of the said right in their domestic legal systems, but also on the responsibility of even

2 Art. 1 and preamble (4): “Every person has a right to engage with the cultural heritage of their choice, while respecting the rights and freedoms of others, as an aspect of the right freely to participate in cultural life enshrined in the United Nations Universal Declaration of Human Rights (1948) and guaranteed by the International Covenant on Economic, Social and Cultural Rights (1966)”.

3 Relevant is also art. 4(c): “the exercise of the right to CH may be subject only to those restrictions which are necessary in a democratic society for the protection of the public interest and the rights and freedoms of others”.

individuals and communities to respect and take care of other people's heritage, on one side, and thus to avoid conflicts or to promote cultural solutions to conflicts, post-conflict reconstruction and development, on the other (Wolferstan, Fairclough 2013, 45). Indeed, the Faro Convention aims at contributing to the achievement of the broader CoE's political and social objectives: respect of human rights, rule of law and democracy.⁴

This innovative way of conceptualizing CH is not, however, unproblematic.

The definition of CH in the Faro Convention is extremely wide and near to the dissolution of the distinction line between what is heritage and what is not, since everything could, in theory, fall under the umbrella of CH as defined in art. 2(a). Faced with such an extensive notion, the functions of protection, management and valorization of CH to be ensured by Member States have to be concretely detailed.⁵

Issues concern also the innovative notion of a HC, that

consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations. (Faro Convention, art. 2(b))

Also this notion has been criticized for being too wide and of an ambivalent nature (De Marinis 2011, 25-6). A push on communities to participate in the definition and safeguarding of CH would tend to reveal the potential of civil society's actions, by favouring the empowerment of these communities and the development of democratic processes. However, it could constitute a trap set by the supporters of the subsidiary character of State's intervention in view to further reduce social expenditures (see Zagato, Pinton 2017 for a criticism). Besides, the reallocation of roles and responsibilities between public authorities and heritage communities in the process of defining CH, its value and the most representative elements of the CH to be transmitted to future generations, is blurred by the weight played by a potential plurality of values that do not necessarily coincide with the scientific criteria developed by experts. This issue is particularly true where the process of CH's definition and identification is centralized in governmental hands.

Undeniably, the Faro Convention recognizes to HCs an innovative role since it helps to democratize the valuing process of CH: that is

⁴ CoE, *Action Plan for the Promotion of the Faro Framework Convention on the Value of Cultural Heritage for Society 2013-15*, 25 November 2014. Indeed, CH is a precious resource: in the integration of the cultural, ecological, economic, social and political dimensions of development; for the protection of cultural diversity and sense of place in the face of growing standardization; on which to develop dialogue, democratic debate and openness between cultures.

⁵ The new heritage paradigms do not 'solve' the heritage problem but reformulate it, by asking different questions, not least 'so what' and what (and whom) for?

expert, official or orthodox ways of seeing or valuing heritage remain valid but they are now set increasingly against all the other plural ways of seeing and acting. (Wolferstan, Fairclough 2013, 45)

It is still true that the same concept and role of a HC require some clarifications. First, we need to understand which aspects of the CH might or should be sustained and transmitted. Secondly, the reference to the HC's wish to transmit to future generations aspects of CH within the framework of a *public action* raises the issue of what is a public action and which are the forms that the communities' participation to cultural policies decided at institutional level, both nationally and locally, could take. The Faro Convention encourages reflection about the role of citizens in the process of defining, deciding and managing the cultural environment in which they live, but the provisions are vague. Possibly, the drafters wanted to 'intentionally' remain generic on these themes.

Finally, from a general perspective, Faro is a 'framework' Convention that sets out principles and suggests broad areas for action as agreed between States Parties, encouraging them to undertake the legislative and administrative steps necessary to implement consistent specific actions. The right to CH itself is not an enforceable right.

The Convention is also very flexible in terms of follow-up, indicating a voluntary best-practice sharing and development process based on State Parties' commitment to build up cooperation networks to exchange, share experiences and launch new projects jointly. In this spirit, Faro *does create* for States obligations for action, where it imposes the obligation

to establish a monitoring body through the CoE, to cover legislations, policies and practices concerning CH, consistent with the principles established by the Convention; and to maintain, develop and contribute data to a shared information system, accessible to the public, which facilitates assessment of how each Party fulfils its commitments under [the] Convention. (art. 15)

Repertoires of best practices as systematized by the SCCHL would significantly explain how the participation of HCs is taking place in the territory of States Parties.⁶ HEREIN is the shared database for States Parties to

⁶ The SCCHL oversees the implementation of the Faro Convention and currently manages the information system on the national implementation. Further action should strengthen the effective protection of CH, not only through preventive protection via educational programs and awareness raising, but also through the establishment of an enforceable right to heritage within the national legal systems (Lixinski 2013, 80).

enter information.⁷ This system marks a significant departure from the *typical control mechanism* established by human rights treaties based on reports that States Parties have periodically to submit. HEREIN may then contribute to democratize the cooperation also because individuals and communities may insert data, projects and situations about CH.

3 The Role of the Faro Convention in a Pan-European Environment

The Faro Convention is a regional treaty that pays attention to the idea of *commonness in Europe*, in the attempt to seek an enriched understanding of what it means to be European, and of what Europe means. This understanding is advocated by the concept of ‘common heritage of Europe’ (art. 3), on one side, and by recognizing “the importance of creating a Pan-European framework for co-operation in the dynamic process of putting the principles of the Faro Convention into effect” (Preamble, recital 8), on the other.

According to art. 3, the *common heritage of Europe* includes

all forms of CH in Europe which together constitute a shared source of remembrance, understanding, identity, cohesion and creativity and the ideals, principles, values derived from the experience gained through progress and past conflicts, which foster the development of a peaceful and stable society.

The ‘common heritage of Europe’ thus embraces two inseparable elements: the CH as a source of collective memory for people in Europe (Preamble 1) and a resource for the exercise of freedoms (Preamble 3 and art. 2); and the shared intellectual heritage coming from an agreed set of social values, rooted in history, which form the *European ideal* of how a society should operate (2005 Explanatory Report). The mutually-supporting interaction of these two elements constitutes a unifying theme of the Convention, developing on the principles already set forth in the Opatija Declaration that calls for respect and fair treatment of

⁷ HEREIN - the *European Cultural Heritage Information Network* - is common to all CoE heritage conventions. It provides: a network of 46 national coordinators appointed by relevant Ministries that ensures the definition of themes and areas of work depending on the current challenges and issues to be addressed; a database, with input from the coordinators, providing a regularly updated inventory of European heritage policies, a program for sharing, exchanging and analysing information and a monitoring function for conventions, legislation, policies and practices relating to CH; a thesaurus with more than 500 cultural and natural heritage terms in 14 European languages, see <http://www.herein-system.eu/> (2017-12-15).

cultural identities and practices and the expression of the corresponding forms of heritage, provided that these comply with the principles upheld by the Council of Europe.

States Parties thus attempt to create a European perspective on CH as one based on the values in society, trying to leave aside the political weight that may be attributed to CH.

Whether it is interpreted as cross-border heritage, the right to express culture, a shared responsibility for heritage or a troubled past of dissonant and difficult memories, it should be managed as a whole rather than in terms of parallel aggressive competing nationalisms. (Wolfershan, Fairclough 2013, 46)

The conceptualization of the ‘common heritage of Europe’ in terms of both a shared experience and the commitment to fundamental respect for human rights and democracy thus feeds the *European ideal* of social organization and “instead of preserving difference, cultural heritage here is used to create commonality” (Lixinski 2013, 78).

As for the notion of CH, central to the notion of ‘common heritage of Europe’ is the idea of the *ordinary*: the concern is to move away from monumental and outstanding (universal) worth, once CH arises also locally, from the grassroots. The European common heritage is thus connected to a sort of a ‘truly international’ attitude based on the mutual respect for diverse cultural heritages. Even though a person, a people, might not share the same heritage values as mine, his/her respect for them should be a right for me across Europe: CH offers reminders of Europe’s often troubled history, during which lessons have been learned towards the current consensus on specific shared values in different societies (2005 Explanatory Report).

In conclusion, the European common heritage is a primary resource for democratic engagement in support of cultural diversity and sustainable economic development, while at the same time it advances the common European identity based on respect for human rights (Ferracuti 2011), namely on the right for the diversity of CH.

The reach of the Faro Convention beyond the borders of the CoE Member States is then emerging from the unique influence that Faro has played and plays on the EU internal and external policies on CH, contributing to form a *pan-European* legal environment dealing with CH.

Interestingly, art. 167(3) of the TFEU states:

The Union and the Member States shall foster cooperation with third countries and the competent international organizations in the sphere of culture, in particular the Council of Europe.

According to art. 3(3) of the TEU, then, the EU “shall ensure the preservation and development of the European cultural heritage”,⁸ and

shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures. [art. 167(4) TFEU]

The remaining paras. of art. 167 state:

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

The acts of the EU shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

1. improvement of the knowledge and dissemination of the culture and history of the European peoples, 2. conservation and safeguarding of CH of European significance, 3. non-commercial cultural exchanges, 4. artistic and literary creation, including in the audiovisual sector.

Thus, in the recent EU approach to culture and CH we can find an *echo* of the Faro Convention’s arts. 2 and 3, and this should be welcomed, especially by those scholars who argue that the EU should adopt a more aggressive bearing towards the protection and safeguarding of CH (Lixinski 2013, 87).

The year 2014 has been particularly significant in EU policy on CH. The Council of Ministers on Culture adopted the Conclusions on “cultural heritage as a strategic resource for a sustainable Europe”,⁹ and on “participatory governance of CH”.¹⁰ CH has been also the object of the EC Communication “towards an integrated approach to cultural heritage for Europe”.¹¹ CH has been then identified by the Ministers of Culture as one of four priorities of the new cycle of intergovernmental cooperation,

8 On the relation between the Faro Convention and the Lisbon Treaty, in a perspective of contamination among international instruments see Zagato 2015.

9 EU Council Conclusions on *Cultural heritage as a strategic resource for a sustainable Europe* (2014/C 183/08) GUCE no. C 183/36, 14.6.2014.

10 EU Council Conclusions on *Participatory governance of cultural heritage* (2014/C 463/01) GUCE no. C 463/1, 23.12.2014.

11 Communication from the EC to the EP, The Council, The European Economic and Social Committee and the Committee of the Regions, *Towards an integrated approach to cultural heritage for Europe*, COM(2014)477 final, 22.7. 2014.

launched by the Work Plan for Culture 2015-19 (Schiacchitano 2015).¹²

These acts witness an increasing recognition of the CH's value as a common wealth for Europe, of the structuring role of culture for sustainable development, of participatory approaches to the CH management, and of the CH's significance for EU external relations. Let's propose few more details on these aspects.

1. At EU institutional level, a debate started on how to bring more attention to CH in the construction of the European political processes, considering that often CH cuts across several other policies (as those related to regional development, social cohesion, agriculture, maritime affairs, environment, tourism, education, the digital agenda, research and innovation) and offers a strong potential for the achievement of the relative objectives. The Declaration of Intent on "Cultural Heritage. A resource for Europe. The interaction benefits"¹³ is the launching pillar thanks to which Member States have then created a voluntary and informal coordination platform through the Reflection Group on 'EU and CH' that gathers more and more national institutions from different EU States. The Declaration underlines the *subsidiarity approach* for which

The EU only plays a facilitating role in culture. Indeed, while it can further support the exchange of competencies and knowledge, its regulating powers are limited. The day-to-day management and preservation of CH is organized on a national and/or regional level. [...] The broad CH field does contribute to the implementation of the policy of the European institutions, but could organize itself so as to better serve its interests and concerns at EU level.

2. The structuring role of culture for sustainable development,¹⁴ and the importance of a focus on people and communities,¹⁵ emerges also from the 2012 EU Council Conclusions "on cultural governance".¹⁶ These Con-

¹² Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a *Work Plan for Culture (2015-18)* (2014/C 463/02) GUCE no. C 463/4, 23.12.2014.

¹³ Promoted by the Belgian Presidency in 2010, at <http://www.europanostra.org/UPLOADS/FILS/Declaration-of-Bruges2010-eng.pdf> (2017-12-15).

¹⁴ UN Conference on *The future we want* (Rio de Janeiro, 2012); UNESCO International Congress on *Placing Culture at the Heart of Sustainable Development Policies* (Hangzhou 2013).

¹⁵ UNESCO Forum on *Culture, Creativity and Sustainable Development. Research, Innovation, Opportunities* (Florence, 2014).

¹⁶ EU Council Conclusions on *Cultural Governance*, GUCE 393, 19.12.2012, 8-10.

clusions stress the importance of a more open, participatory, informed, effective and transparent cultural governance, and call on Member States to promote participation in the definition of cultural policies. The adoption of a more locally rooted, and more people-centered, approach to CH is indeed increasingly present in EU programs – Horizon 2020, Cultural Heritage and Global Change¹⁷ – and in the Structural Funds on support to local development. European institutions seem more aware that sustainable valorization goes not only through the discovery, classification and analytical passive defence of heritage values, but through their *reinvention*, by means of participatory processes that are both re-appropriation by the local communities and a *co-design process*, creating new opportunities thanks to which a community can plan future progress starting from the cultural resources of the territory. This approach echoes the notion and role of heritage communities introduced by the Faro Convention.

3. Culture and CH are recognized as an essential asset of Europe's diplomacy. This asset plays an important role in the EU's external policy, because it is often around this important 'aggregator' that a favourable environment for diplomatic relations can be built, so as to promote the circulation and exchange of ideas and values and to contribute to mutual understanding, sustainable development, social cohesion and peaceful relations. The EU, as a matter of external policy, deals with CH in terms of development aid. By fostering programs in its partner countries for the protection of heritage the EU attempts to build an appropriate environment for responsible and sustainable development, respecting cultural diversity and creating opportunities for *cultural tourism* in those regions. Nevertheless, in so doing, the EU has been criticized for imposing a determined set of values in the selection of heritage 'worth protecting' (*i.e.* by selecting the programs it will support and also by exercising some interference in the management of the programs it has selected) (Lixinski 2013, 236).

All that said, the EU organs re-affirmed, in line with the Faro's spirit, how the European ideal of social organization springs not only from the appreciation of the uniqueness of one's own heritage but also from *the interest in and respect for the others' CH*.

¹⁷ EC Recommendation on the research joint programming initiative *Cultural Heritage and Global Change: a New Challenge for Europe*, 26 April 2010, C(2010)2535 final.

4 Cultural Heritage and the Common Heritage of Humankind in International Law

In March 2001, the Taliban forces destroyed the Buddhist statues of Bamiyan and other cultural goods in Afghanistan, a destruction then condemned as crime against the common heritage of humanity.¹⁸

On 27 September 2016, the ICC (Trial Chamber VIII) convicted Mr. Al Mahdi for the war crime of attacking protected objects as a co-perpetrator under Articles 8(2)(e)(iv) and 25(3)(a) of the ICC Statute and sentenced him to 9 years of imprisonment.¹⁹ The Chamber qualified the crimes of attacking building of religious and historical relevance as a grave crime, not only for the people of Timbuktu, but also for the international community as a whole.

In the 2014 Communication, the EC defined CH as a shared resource and a *common good*. Like other similar goods, CH can be vulnerable to over-exploitation and under-funding, which can result in neglect, decay, and in some cases oblivion.²⁰ As seen, according to the Explanatory Report to the Faro Convention, CH, understood as a common good, justifies the widest possible democratic participation of people in the process of defining and managing CH.²¹

These references in normative instruments to *common heritage of humankind*, on one side, and to *commons*, on the other, need some investigation *from the legal point of view*, to understand the conceptual meaning they convey and their implications for States and individuals.

Since time international law knows the *principle on common heritage of humankind*. The principle has been shaped in the '60s and since then has been accepted as an essential element of the law of the sea - from where it found its way into the national legislation relating to sea-bed activities - but was extended to the outer space regime too and, to a lesser degree, to the legal framework for the protection of the Antarctic environment (Wolfrum 2009). In the '70s the notion of *cultural common heritage of mankind* entered into the scenario and was legally accepted (Goy 1973, 117; Zagato 2007). Nevertheless, the idea that a range of other

18 See WHC.01/CONF.208/23 at <http://whc.unesco.org/en/documents/1268> (2016-1-10).

19 ICC, *Situation in the Republic of Mali in the Case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, No. ICC-01/12-01/15.

20 COM(2014) 477 final, 2.

21 In the Faro Action Plan 2014-15, the SCCHL introduced the notion of *common asset* around which the community can be structured and projected into the future. A common asset is, first, what sustains co-existence between persons, *i.e.* the surety for everyone to be able to enjoy relational well-being, and to lead a peaceable co-existence with the other. It is then all kind of places, unique practices and traditions that HC rediscover or reveal and turn to account, see CDCPP(2015)12, 5.

non-common space resources that are essential to humans and of widely shared interest should be governed under a common heritage regime remained controversial.²² For some authors, to reconnect the concept of common heritage of humankind to the milieu of CH is more an ideal than a concrete development, namely

la possibilità di una prossima evoluzione nel senso della creazione di un concreto patrimonio culturale internazionale basato su un nuovo tipo di proprietà internazionale dei beni di cui sia titolare la comunità internazionale e la cui amministrazione sia affidata ad una competente organizzazione (e cioè all'UNESCO) che renda possibile a tutti l'effettivo godimento di tale patrimonio... è una ipotesi da scartare. (Frigo 1986, 303)

Nonetheless, in the last decades States and IOs have more and more cherished, in their normative practice,²³ the notion of a cultural common heritage of humankind to consider its safeguarding as a concern of the whole humankind.²⁴

But what are the legal implications of these developments?²⁵ Do inter-

22 In 1945 Brazil proposed to include in the UN Charter a clause recognizing the role of culture and common heritage of humankind, and creating an international organ to maintain the cooperation in the preservation of the CH. This proposal was not accepted but the theory behind became the basis for the formation of UNESCO, see Wolfrum 2009. The 1954 Hague Convention then introduced the notion for which a “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind since each people makes its contribution to the culture of the world”, 249 UNTS 215.

23 The WHC is based on the premise that “parts of the cultural and natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole” (preamble 6); “the destruction or deterioration of the CH constitutes a harmful impoverishment of the heritage of all the nations of the world” (preamble 2). Art. 6 declares that “State Parties [...] recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate”. The 2001 UNESCO Convention refers to underwater cultural heritage as “an integral part of the cultural heritage of humanity” and a “particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage”. The 1972 Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage regards the CH as constituting “an essential feature of mankind’s heritage”. Similarly, the 1976 Recommendation Concerning the International Exchange of Cultural Property contains the statement: “bearing in mind that all cultural property forms part of the common heritage of mankind”. The 1966 Declaration of the Principles of International Cultural Co-operation states that “in their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind”.

24 An example is the 2005 UNESCO Convention Preamble: “Conscious that cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all”.

25 Principles at the core of the notion at stake include: the non-appropriation of the resource, the establishment of an international regime to manage the activity connected to

national obligations upon States and IOs to safeguard CH, in general, exist and, in the affirmative, are they *erga omnes obligations*? Are States and IOs legally entitled, as a result, to invoke the responsibility of international subjects for failing to safeguard the CH placed in their, let alone any, territory?

The answer to these questions might clarify the possible normative nature of the concept of common heritage of mankind, its applicability to CH and thus the possible legal consequences of its emersion and crystallization, if any, in legal norms.

In general terms, when the notion of common heritage of humankind is applied to specific goods such as cultural or natural goods, it may gain a different significance than when it is referred to specific spaces and resources; for example, in the first case the element of 'appropriability' does not exist (Scovazzi 1984, 258).

Still, although the innovative features of the CH notion as proposed by Faro is quite widely accepted, the qualification of CH as a common heritage is rather vague: is it a universal common heritage? For whom and in which spatial context does it extend?

It is unlikely and almost impossible for States to conceive to set up a common heritage authority that would manage the common CH, and UNESCO does not, or even cannot, represent such an authority. Moreover, the characterization of the concept in terms of ownership of the area where both tangible and intangible resources are found may not work in international law.

Rather, at this stage of international law, the notion of CH of humankind should be grounded in the idea of *commonness* intended as a concern over elements that are of significance to all States, and the people living under their jurisdiction. This common interest of States opens to the idea of a 'functional conception' of the common heritage of humankind, that then may be translated into a *functional indicator* for States on *how* to regulate the safeguard of the cultural and natural heritage in their territory. That is, States should regulate the conservation, safeguard and valorization of cultural goods being aware of the fact that they may benefit the humankind.

Some authors give content to this idea as that of a *trusteeship* according to which States in whose territory the CH is located or finds expression are called to act as trustees on behalf of a wider beneficiary, *i.e.* humankind (Forrest 2007, 134). Weiss (1992), for example, argued that since States are long-lasting entities, they represent past, present and future generations and, as such, are required to act as trustees for these different generations of persons. The recognition of this would lead States to act in the interest of all humankind, and not simply in the interests of

the resource, the peaceful use of the area where the resource is located, and the equitable sharing of benefits derived from the resource.

their own citizens. So envisioned, the application of the concept of the common heritage of humankind is a 'unifying principle' for CH, wherever found, and imposes on States the obligation of trusteeship. The principle of trusteeship is evident, for example, in the Declaration of Santo Domingo according to which "underwater cultural resources is the property of the State in which it is found and through this it is heritage of humanity".²⁶ According to us, the practice is still not conclusive on the acceptance in international law of an obligation of trusteeship as more than an ethical principle and, therefore, a State should not require that organs within its jurisdiction, also *de facto* organs such as heritage communities, act in compliance with the duties of a trusteeship.

The endorsement in international instruments of CH as common heritage of humankind is at any rate positive evidence that the international community has recognized its essential interest in the safeguard of CH and wants to be engaged in its management and promotion, as the Faro Convention provides for.

This endorsement, however, has not been translated yet into a right under general international law to compel a State to protect the CH in its territory, or in other States' duty to invoke the responsibility of that State if the CH is in danger or 'attacked' in some way or other. We will see if the international practice will favour more the formation of an international customary rule envisaging an obligation *erga omnes* to safeguard CH as it is present in the entire world.

5 Cultural Heritage and Commons

As seen, CH has been characterized also as a common good (Blake 2015, 327). The notion of common goods is not very deeply explored in international law and has a complex relationship with CH; a more extensive debate about commons/common goods exists in domestic legal systems.²⁷ To us this notion recalls features of the common heritage of humankind concept, and of collective/common interests in international law.

There is no space here to critically reason on the qualification of CH as commons, but it is the author's interest to suggest some issues for future analysis.

²⁶ See 10th Forum of Ministers and Officials Responsible for Cultural Policies of Latin America and the Caribbean (Barbados, 4-5 December 1998).

²⁷ In Italy, for example, the commons movement started in 2008 when the Rodotà Commission proposed to the Minister of Justice an Enabling Law Bill which contained the first legal official definition of commons. The Bill provided for *Delegated Legislation to Reform the Civil Code Articles Concerning Public Property*, at http://iuccommonsproject.wikispaces.com/file/view/Rodota+Commission+Bill_+EN.pdf (2017-12-15).

As seen, by serving the well-being of both present and future generations CH owns a value that goes beyond its current occurrence in the world. Hence, a legal system driven by a logic focusing on the 'here and now' needs to be re-considered through a vision of the law as an institutional asset able to take care of the interests of both present and future generations. This vision is made possible by regaining from the past the meaningful elements for the development of policies and of a normative framework that ensure a *sustainable safeguarding* of CH for societies.

It is on the interests of present and future generations that the critique to the distinction between the public and private notion of commons finds roots (Marella 2012; Mattei 2014). The principle upheld by the notion of commons is the following: the community – inclusive of those who are not born yet – has received the CH from the past and has the responsibility to live and safeguard its elements and meaning for transmission to future generations.

From a political-legal point of view, the idea of commons may represent a correction against the institutional and constitutional unbalance imposed by the western traditional structure of power. This tradition, indeed, is very much built around the protection of individual private property against the State; but it does not recognize a similar protection when the goods belong and are representative of the heritage of a larger society. These goods uphold interests of longer period which are the interests also of future generations. By means of the notion of commons, the attempt is then to shape a legal category that will ensure protection against both market's dynamics and the short-term action of States. This category embodies its own 'apparatus of values' (Mattei 2014).

According to this approach, the notion of commons becomes a *driver* in elaborating efficient policies and a normative framework to deal with the safeguarding and valorisation of CH. Following this approach, the notion of commons adopted in 2009 by the Italian Rodotà Commission is useful. Commons are

such goods whose utility is *functional to the pursuit of fundamental rights and free development of the person*. Commons must be upheld and safeguarded by law also for the benefit of future generations. The legal title to the commons can be held by private individuals, legal persons or by public entities. No matter their title, their *collective fruition must be safeguarded*, within the limits of and according to the process of law. When the holders are public juridical persons the common properties are managed by public entities and are considered out of commerce; their concession to privates is admitted only in cases allowed by law and for a limited time, without the possibility of extension. [...] The commons legal regime must be coordinated with that of civic uses. Anyone may have access to the jurisdictional protection of the rights connected

to the safeguard and use of commons. (Mattei, Reviglio, Rodotà 2010)

In this perspective, commons, unlike private goods and public goods, are not commodities and cannot be reduced to the language of ownership. They express *a qualitative and functional relation*, in light of a conception that links individuals, communities, and the natural and cultural ecosystems.

Commons must be promoted to an institutional structure that genuinely questions the domains of private property (and its ideological apparatuses such as self-determination and 'the market') and that of the State: not a third way but an ecologically legitimized foe of the alliance between private property and the State. (Mattei s.d.)

The shift now politically, not only theoretically, to be accomplished is to adjust the current dominant wisdom from the absolute domination of the subject (as owner or State) over the object (tangible and intangible cultural and natural elements) to a focus on the relationship of the two, and on an active participation in the recognition and management of cultural goods. A new common sense is needed that recognizes how each individual's survival depends on its relationship with others, with the community, with the natural and cultural environment. This idea certainly evokes the Faro Convention's spirit.

A legal system that recognizes and promotes commons values the community of individuals and/or social groups who are linked by a horizontal mutual connection; it values a network where a participatory and collaborative model is developed, that is a model that puts community interests at the centre and tries to balance the concentration of power and individualistic views. In this perspective, the State should take up the interests which are of a more general nature. Undoubtedly, the demanding challenge is to find a legal mechanism able to regulate the way of being of the commons. For now, the notion of commons, as also applied to CH, serves the cause to drive the attention of States to safeguard CH for the well-being and wealth of all peoples and societies, by means of promoting a further path in the legal texture, and pushing, by so doing, their conduct towards the *protection and promotion of common and collective interests*.

As a consequence, we can reason on the role that international law may play. Being international law a legal system that regulates the relations first among States, but also among other international subjects, it may regulate a conduct that should be aimed at safeguarding CH in the interests of human beings in general too. This perspective appeals, at the same time, to the collective dimension of the right to CH, namely a collective good of humanity to be enjoyed by present and future generations of the group directly interested by CH and (then) by humanity itself (Zagato 2017).

It is thus by its nature and structure that international law may limit the free will and potential abuse of a State also regarding CH: international law, through the explicit or implied consent of States, may actively choose to preserve the interests of future generations as those surely enclosed in the safeguarding of CH and of other commons.

In redirecting States' actions towards the respect of present and future generations, the international community may rely upon the *theory of intergenerational equity*, a theory that has been normally applied to the natural environment, but according to us it may well apply to the cultural environment, too. This theory states that the human species holds the natural environment of the planet in common with other species, and with past, present and future generations. As members of the present generation, we are both responsible for the robustness and integrity of our planet, and beneficiaries, with the right to use and benefit from it for ourselves and the future human beings (Weiss 1992, 20).

It is from this line of reasoning that a most fascinating challenge comes to current international law as to CH.

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