Controls on the Export of Cultural Objects and Human Rights

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Abstract

Specialist instruments for the protection of cultural heritage have made oblique and overt reference to respecting established human rights norms since the adoption of the Universal Declaration of Human Rights. Explicit references to human rights and fundamental freedoms have become pronounced in instruments finalised in the last two decades.

This chapter considers the relevance of human rights for the control on export of cultural objects. It is divided in two parts. The first part details how human rights norms have been referenced in multilateral instruments for the protection of cultural heritage. The second part examines the relationship between controls on the export of cultural material and specific human rights, namely, the right to property, the right to self-determination, the right to participate in cultural life, and minority protection.

Introduction

Controls over the export of cultural objects have been largely, if not exclusively, driven by State interests. However, who identifies materials as culturally significant, determines how they are to be protected and preserved and who is to have access to them. How competing interests in these are resolved is increasingly recognised as having a human rights dimension. The adoption of a holistic definition of cultural heritage in recent multilateral instruments has been accompanied by greater awareness of the relevance of human rights norms for its protection. This development reiterates the integral importance of movable heritage and the detrimental effects of the illicit trade in cultural objects. The cross-fertilisation between cultural heritage law and human rights law highlights again the often competing claims of various right-holders. Yet, oversight mechanisms of human rights instruments, including national reports and individual complaints, provide a broader scope for the articulation and evolution of jurisprudence relating to the protection of cultural heritage, including cultural objects, resolution of competing claims, and sanctions and remedies for breaches.

The UN Independent Expert on Cultural Rights, Ms. Fahida Shaheed noted recently that:

Access to and enjoyment of cultural heritage as a human right is a necessary and complementary approach to the preservation/safeguard of cultural heritage. Beyond preserving/safeguarding an object or a manifestation in itself, it obliges one to take into account the rights of individuals and communities in relation to such object or manifestation and, in particular, to connect cultural heritage with its source of production.\(^2\)

In the light of these comments, this chapter considers the relevance of human rights for the control over the export of cultural objects. This chapter is divided into two parts. The first part details how human rights norms have been referenced in multilateral instruments for the protection of cultural heritage. The second part examines the relationship between controls on the export of cultural material and specific human rights, namely, the right to property, the right to self-determination, the right to participate in cultural life, and minority protection.

**Human rights and cultural heritage instruments**

Reflective of UNESCO’s mandate,\(^3\) specialist instruments for the protection of cultural heritage have made oblique and overt reference to respecting established human rights norms. Explicit references to human rights and fundamental freedoms have become pronounced in instruments finalised in the last two decades. The references arise in the preambular recitals and as saving provisions in the substantive text.

There are a number of multilateral agreements which are directly related to the control of the illicit traffic of cultural objects, namely, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 UNESCO Convention),\(^4\) the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the 1995 UNIDROIT Convention),\(^5\) and during belligerent occupation, the First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the 1954 Hague First Protocol).\(^6\) Other multilateral instruments which cover cultural heritage generally but are relevant for the control of illicit trade include: the Convention on the Protection of Cultural Property in the Event of Armed Conflict (the 1954 Hague Convention) and

\(^2\) UN Doc.A/HRC/17/38, para.2.

\(^3\) Art.1.1, Constitution of UNESCO, 16 November 1945, into force 4 November 1946, 4 UNTS 275 states:

The purpose of the Organization is to contribute to peace and security by promoting collaboration among nations through ... culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.


\(^6\) 14 May 1954, in force 7 August 1956, 249 UNTS 358.
the Second Protocol to the Convention,\textsuperscript{7} the Convention concerning the Protection of the World Cultural and Natural Heritage (the 1972 World Heritage Convention),\textsuperscript{8} the Convention on the Protection of the Underwater Cultural Heritage (the 2001 Underwater Heritage Convention),\textsuperscript{9} the Universal Declaration on Cultural Diversity (the 2001 Diversity Declaration),\textsuperscript{10} the Convention for the Safeguarding of the Intangible Cultural Heritage (the 2003 Intangible Heritage Convention),\textsuperscript{11} and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (the 2005 UNESCO Diversity Convention).\textsuperscript{12} Only the last three instruments explicitly refer to human rights norms.\textsuperscript{13}

Recent U.N. General Assembly Resolutions on the return or restitution of cultural property to countries of origin, adopted biennially since 1973, recall the importance of all of these cultural heritage instruments to curb illicit traffic of cultural objects, and call on Member States to ratify them.\textsuperscript{14}

Article 31 of the Vienna Convention on the Law of Treaties (the VCLT) provides that preambular recitals are to be used to interpret the substantive provisions of the relevant treaty.\textsuperscript{15} Accordingly, depending on the specific wording of any reference to human rights and fundamental freedoms in the preamble, the obligations contained within the treaty should be read consistently with these accepted norms.

The first overt reference to human rights in the preamble of a UNESCO instrument concerning cultural heritage was the 2001 Universal Declaration on Cultural Diversity. The opening preambular recital of this instrument states:

\begin{quote}
Committed to the full implementation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized legal instruments, such as the two International
\end{quote}

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\textsuperscript{8} 16 November 1972, in force 17 December 1975, 1037 UNTS 151.
\textsuperscript{11} 17 October 2003, in force 20 April 2006, 2368 UNTS 1.
\textsuperscript{13} See also specialist instruments, including Draft Guidelines on the Protection of the Cultural Heritage of Indigenous Peoples (2006), UN Doc.E/CN.4/Sub.2/AC.4/2006/5, p.5 lists as one of its objectives to: ‘Enrich existing international agreements, recommendations and resolutions pertaining to cultural and natural heritage, realizing that these need to be effectively supplemented, for example, with a human rights-based approach, in order to provide adequate protection for indigenous peoples’ cultural heritage.
\textsuperscript{14} GA Res.64/78 of 11 February 2010.
Covenants of 1966 relating respectively to civil and political rights and to economic, social and cultural rights….

It specifically cites the 1970 UNESCO Convention when listing existing UNESCO instruments in the field of cultural diversity and cultural rights. One of the enumerated ‘Main Lines of Action’ in Annex II of the Declaration covers policies and strategies for ‘combating illicit traffic in cultural goods’.

Two years later, the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, adopted by the General Conference in response to the destruction of the monumental Buddhas, in Bamiyan, Afghanistan, noted in its preamble that:

Mindful that cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights…

Paragraph IX of the 2003 Declaration reiterates that States must respect international obligations for the criminalization of gross violations of human rights, especially when they involve intentional destruction of cultural heritage.

Likewise the Intangible Heritage Convention, also adopted by the General Assembly in 2003, explicitly refers to the three constitutive instruments of the international bill of human rights in its preamble. It also reaffirms the importance of all UNESCO instruments concerning cultural (and natural) heritage for the protection of intangible heritage. The definition of ‘intangible cultural heritage’ covered by the Intangible Heritage Convention includes ‘instruments, objects and artefacts’ (Article 2.1). Indeed, the preamble notes that ‘the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage’. These characteristics are replicated in the 2005 Diversity Convention.

These recent cultural heritage instruments are intended to protect and promote cultural diversity. They were adopted in the context of period of elevated interest in the articulation, reinforcement and enforcement of human rights norms. Yet, these instruments invariably include a ‘saving’ provision which provide that cultural

16 Fourth preambular recital, Universal Declaration on Cultural Diversity.
17 Annex II, Universal Declaration on Cultural Diversity. See similar statements in regional instruments, for example, the Charter for African Cultural Renaissance (2006 African Charter), adopted by the African Union at its Sixth Ordinary Session 24 January 2006, art.26; and ASEAN Declaration on Cultural Heritage (2000 ASEAN Declaration), adopted by Foreign Ministers of ASEAN, 25 July 2000, art.10.
19 Seventh preambular recital, 2003 Intangible Heritage Convention.
20 Third preambular recital, 2003 Intangible Heritage Convention (emphasis added).
21 First preambular recital, 2005 UNESCO Convention.
diversity cannot be invoked as a justification for violation of human rights and fundamental freedoms guaranteed in the international bill of human rights and regional human rights instruments.\textsuperscript{22}

As explained in Part II below, control of the export of cultural objects can encompass one or more human rights norms and fundamental freedoms. Where there is more than one rightholder involved it may lead to a conflict of human rights norms. The international community had repeatedly reiterated that ‘all human rights are universal, indivisible and interdependent and inter-related.’\textsuperscript{23} Lyndel Prott has noted in respect to Article 15 (The Right to Participate in Cultural Life) of the International Covenant on Economic, Social and Cultural Rights that:

The rights guaranteed by it are not hierarchised: the rights of citizens are regarded both in their individuality and in their collectivity. International cooperation is essential; so is access. Neither has priority. So there is no priority among cultural rights themselves, and there is no priority between property rights and cultural rights.\textsuperscript{24}

However, while there may be no hierarchy or ‘priority’ of human rights norms, as explained below, their articulation in instruments often points a way forward in resolving perceived conflicts.

Several human rights provisions have been interpreted to encompass protection of movable heritage including: the right to property, the right to self-determination, the right to participate in cultural life, so-called minority protections, the right to privacy and family life,\textsuperscript{25} the right to freedom of expression including receiving and imparting

\textsuperscript{22} Art.4, Universal Declaration on Cultural Diversity (‘No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor limit their scope’); Art.2.1, Intangible Heritage Convention (‘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, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development’); and Art.2, Diversity Convention (‘No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.’).

Likewise, human rights instruments covering cultural rights have incorporated similar provisos. For example, Art.15 International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, in force 3 January 1976, GA Res.2200A(XXI), 21 UN GAOR Supp. (No.16), 49, and 993 UNTS 3; and CESCR has reiterated that: ‘[N]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope’: General Comment No.21 Right of everyone to take part in cultural life (Art.15, para.1(a) of the International Covenant on Economic, Social and Cultural Rights), CESCR, 21 December 2009, UN Doc.E/C.12/GC/21, para.18; UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135, 18 December 1992, art.8.2; UN Declaration on the Rights of Indigenous Peoples, GA Res.61/295, 13 September 2007, art.46.2.


\textsuperscript{25} Art.12 of the Universal Declaration of Human Rights (UDHR), GA Res.217A(III), 10 December 1948; art.17 of the International Covenant on Civil and Political Rights (ICCPR), 16
information and ideas;\textsuperscript{26} the right to education and full development of human personality;\textsuperscript{27} and the right to freedom of thought, conscience and religion.\textsuperscript{28} Only the first four human rights will be examined in detail in this chapter.

\textbf{a. The right to property}

\textit{(i) European Convention on Human Rights}

This part examines the relationship between controls on the export of cultural material and the right to property articulated in various multilateral human rights instruments. This will be considered primarily from the perspective of the European Convention on Human Rights and Fundamental Freedoms and the jurisprudence of the European Court of Human Rights, but will also include a brief examination of other regional and worldwide human rights instruments.

The Convention for the Protection of Human Rights and Fundamental Freedoms (also called the ‘European Convention on Human Rights’ and ‘ECHR’) is an international treaty to protect human rights and fundamental freedoms in Europe.\textsuperscript{26} Drafted in 1950 by the then newly formed the Council of Europe, the Convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity.

The Convention established the European Court of Human Rights. Any person who feels his or her rights have been violated under the Convention by a state party can take a case to the Court. Where the Court finds a State has violated an individual’s rights it has the power to award damages. The European Convention is still the only international human rights agreement providing such a high degree of individual protection. State parties can also take cases against other state parties to the Court, although this power is rarely used.

The Convention consists of three parts. The main rights and freedoms are contained in Section I, which consists of Articles 2 to 18. Section II (Articles 19 to 51) sets up the European Court of Human Rights and its rules of operation. Section III contains various concluding provisions. In addition to the main rights and freedoms contained

\textsuperscript{26} Art.19 UDHR, art.19(2) ICCPR, and art.5 ECHR.

\textsuperscript{27} Art.26(2) UDHR, Art.13(1) ICESCR, and art.2 ECHR.

\textsuperscript{28} Art.18 UDHR, Art.18(2) ICCPR, and art.9 ECHR. The Human Rights Committee’s General Comment No.22 defines right to freedom of thought, conscience and religion broadly to encompass a holistic understanding of cultural heritage, including tangible (buildings of worship, ritual objects) heritage: General Comment No.22, Article 18 ICCPR, 30 July 1993. UN Doc.CCPR/C/21/Rev.1/Add.4, para.4.

\textsuperscript{29} European Treaty Series No.5
in Section I of the Convention, the Convention also contains a number of separate Protocols with supplementary rights and freedoms.

In considering the relationship between export controls on cultural property and the European Convention, the most relevant provision is Article 1 of Protocol 1, which deals with the right to the peaceful enjoyment of one’s possessions. Article 1 states:

   Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.

   The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest, or to secure the payment of taxes or other contributions or penalties.

In effect therefore, Article 1 of Protocol 1 guarantees the right to peaceful enjoyment of possessions, but reserves the right to the State power to (a) deprive individuals of their possessions, and (b) to control the use of property, subject to certain qualifications.

The term ‘possessions’ in Article 1 has been interpreted broadly. It includes all property and chattels but also acquired rights with economic interests, such as shares, patents, fishing rights, alcohol licences, the ownership of a debt, and even a claim to negligence which had been removed by retrospective legislation. Welfare benefits and other similar benefits can also constitute possessions. ‘Peaceful enjoyment’ includes the right to do with one’s property as one wishes. This includes using it, selling it, exporting/importing it, altering/destroying it.

Article 1 of Protocol 1 distinguishes between deprivation and control of property. Deprivation of property is permitted only if it is in the ‘public interest’ and in accordance with general principles of international law. Control of property is permitted in a wider range of circumstances and reflects an assumption that some form of control over the enjoyment of possessions is inevitable in a democratic society.

In the case of deprivation of property the European Court of Human Rights has held that the ‘public interest’ requires (a) that any deprivation of property must be for a legitimate purpose, and (b) the achievement of that purpose must strike a ‘fair balance’ between the demands of the general interest of the community and the need to protect individual rights that is, not impose an excessive burden on the latter. Although Article 1 does not expressly guarantee a right to compensation, it is a highly relevant factor in determining whether a ‘fair balance’ has been struck. The Court has

30 Pressos Compania Naviera v Belgium (1996) 21 EHRR 483
31 James v UK (1986) 8 EHRR 123
held that deprivation of property without compensation is likely to be justifiable only in exceptional circumstances.\(^3^2\)

The principles to be applied in determining whether control of property complies with the Convention are similar but less strict. In particular, (a) the measure in question must have a legitimate aim, and (b) there must be a reasonable relationship of proportionality between the means employed and the achievement of that aim. Again there must be a ‘fair balance’ between the demands of the community and the need to protect individual rights.

In determining whether a ‘fair balance’ has been struck between the demands of the community and the need to protect individual rights the State is granted a degree of discretion, known as a ‘margin of appreciation’. In performing its supervisory function the European Court of Human Rights has been reluctant simply to substitute its own assessment as to whether a ‘fair balance’ has been struck for that of the domestic authorities. This because, in general, those authorities are in a better position to make the assessment in question than the Court. However the domestic authorities do not enjoy an unlimited discretion and in exercising its supervisory jurisdiction the Court will decide whether the interference at issue was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced to justify it are ‘relevant and sufficient’.\(^3^3\)

Controls on the export of cultural material may take a variety of forms. Typically the legislation will provide that the export of cultural property (defined by reference to age/value/category, such as archaeological material) can only take place where a licence has been obtained from the competent authorities of the country of export. The legislation may include a complete ban on the export of certain cultural material, e.g. where it is of supreme importance to the cultural heritage of the State, or it may provide for the export of certain items of national importance to be delayed until a buyer comes forward who would be willing to purchase the item with a view to it remaining within the country (such as under the Waverley system in the UK), or it may provide for the State to have a right of pre-emption, that is a right of the State to compulsorily purchase the item at the current market value. The legislation will also normally provide for it to be a criminal offence for items of cultural property to be exported without a licence, or where there has been a breach of the conditions of any licence that may have been granted. Where a criminal offence has been committed the legislation may also provide for the cultural object in question to be forfeited to the State.

A State-imposed restriction on the export of cultural property would be a \textit{prima facie} infringement of the right to peaceful enjoyment of one’s possessions since it would amount to a restriction on the right to dispose freely of one’s property. In \textit{Sporrong and Lonroth v Sweden}\(^3^4\) the European Court of Human Rights held that measures that severely restricted the applicants’ ability to dispose of their properties did not amount

\(^3^2\) Lithgow \textit{v} UK (1986) 8 EHRR 329

\(^3^3\) Lingens \textit{v} Austria (1986) 8 EHRR 407 para 40

\(^3^4\) (1983) 5 EHRR 35
to *de facto* deprivation because the applicants could still use them and, with difficulty, sell them. Accordingly, restrictions on the export of cultural property would amount to controls on the use of property, rather than deprivation.\(^{35}\)

The question then arises as to whether the controls on the export of cultural material pursue a legitimate aim and whether they are proportionate as a means of achieving that aim. As to being a legitimate aim, such controls have as their purpose the protection of a State’s cultural heritage. In *Beyeler v Italy*\(^ {36}\) the Court considered that the control by the State of the market in works of art was a legitimate aim for the purpose of protecting a country’s cultural and artistic heritage. It is therefore submitted that the protection of a State’s cultural heritage through export controls would be a legitimate purpose for the purposes of Article 1 of Protocol 1.

The case of *Beyeler v Italy* is the only case where the Court has had occasion to consider the application of Article 1 of Protocol 1 to restrictions imposed by a State on the market in cultural property. It is therefore worth examining this case in some detail to see what general conclusions can be drawn. In 1977 Mr Beyeler, a Swiss national and an art gallery owner, bought a painting by Vincent Van Gogh, ‘Portrait of a Young Peasant’, for 600 million lire through an intermediary without, however, disclosing to the vendor that the painting was being purchased on his behalf. Under Law no. 1089 of 1939 the Italian Ministry of Cultural Heritage must be notified whenever an important work of art changes hands and may exercise a right of pre-emption to purchase the work on behalf of the State. However, the declaration of sale which the vendor filed with the Ministry in accordance with the requirements of the 1939 law did not mention that the real purchaser was Mr Beyeler. In 1983 the Italian Ministry learnt that Mr Beyeler was the real purchaser of the painting but took no further action. On 2 May 1988 Mr Beyeler agreed to sell the work to an American corporation, which intended to include it in a Venetian collection, for 8.5 million dollars. On 24 November 1988 Italy exercised its right of pre-emption under the 1939 law, stating that Mr Beyeler had omitted to inform the Ministry that the painting had been purchased on his behalf in 1977, and compulsorily bought the painting at the 1977 sale price, which needless to say, was considerably lower than the 8.5 million dollars for which it sold in 1988.

The applicant alleged a violation of Article 1 of Protocol No. 1, contending, in particular, that the Italian authorities had expropriated the painting – of which he claimed to be the lawful owner – in breach of the conditions laid down by that provision. He also claimed that he had been discriminated against in violation of Article 14 of the Convention in that the authorities had expressly stated that the applicant’s Swiss nationality had made the measure all the more justified.

The Court considered that the measure complained of, that is, the exercise by the Ministry of Cultural Heritage of its right of pre-emption, had undoubtedly amounted to an interference with the applicant’s right to the peaceful enjoyment of his

\(^{35}\) Deprivation would of course occur where the controls were enforced through forfeiture of the item in case of breach

\(^{36}\) (2002) ECHR 466
possessions. The Court reiterated that an essential condition for an interference to be deemed compatible with Article 1 of Protocol No. 1 was that it should be lawful. Although there was nothing in the case from which the Court could conclude that the Italian authorities had applied the legal provisions in question manifestly erroneously or so as to reach arbitrary conclusions, the principle of lawfulness also presupposed that the applicable provisions of domestic law were sufficiently accessible, precise and foreseeable. The Court observed that in certain respects the statute lacked clarity, particularly in that it left open the time-limit for the exercise of a right of pre-emption in the event of an incomplete declaration without, however, indicating how such an omission could subsequently be rectified. That factor alone could not, however, lead to the conclusion that the interference in question had been unforeseeable or arbitrary. Nevertheless, the element of uncertainty in the statute and the considerable latitude it afforded the authorities were material considerations to be taken into account in determining whether the measure complained of had struck a fair balance.

The Court considered that the control by the State of the market in works of art was a legitimate objective for the purpose of protecting a country’s cultural and artistic heritage. As for works of art by foreign artists, the Court observed that the UNESCO Convention of 1970 accorded priority, in certain circumstances, to the ties between works of art and their country of origin. It noted, however, that the issue in this case did not concern the return of a work of art to its country of origin. That consideration apart, the Court recognised that, in relation to works of art lawfully on its territory and belonging to the cultural heritage of all nations, it was legitimate for a State to take measures designed to facilitate in the most effective way wide public access to them, in the general interest of universal culture.

As to whether there was a fair balance, the Court first examined the conduct of the applicant and noted that at the time of the 1977 sale the applicant (Mr Beyeler) had not disclosed to the vendor that the painting had been purchased on his behalf. The applicant had then waited six years (from 1977 to 1983) before declaring his purchase, contrary to the relevant provisions of Italian law of which he had been deemed to be aware. He had not approached the authorities until December 1983 when he had been intending to sell the painting to the Peggy Guggenheim Collection in Venice for 2 million dollars. The Court therefore considered that the Government’s submission that the applicant had not acted openly and honestly carried some weight, especially as there had been nothing to prevent him from informing the authorities of the true position before 2 December 1983 in order to comply with the statutory requirements.

As regards the conduct of the Italian authorities, the Court did not put in question either the right of pre-emption over works of art in itself or the State’s interest in being informed of all the details of a contract, including the identity of the end purchaser on a sale through an agent, so that the authorities could decide in the full knowledge of the facts whether or not to exercise their right of pre-emption. After receiving in 1983 the information missing from the declaration made in 1977, that is, the identity of the end purchaser, the Italian authorities had waited until 1988 before giving serious consideration to the question of ownership of the painting and deciding to exercise their right of pre-emption. During that time the authorities’ attitude towards the applicant had oscillated between ambivalence and assent and they had often treated him as the legitimate de facto owner under the 1977 sale. Furthermore,
the considerable latitude left to the authorities under the applicable provisions, as interpreted by the domestic courts, and the above-mentioned lack of clarity in the law had made the situation even more uncertain, to the applicant’s detriment.

In conclusion, the Court considered that the respondent Government had failed to give a convincing explanation as to why the Italian authorities had not acted in 1984 in the same manner as they had acted in 1988. Thus, taking punitive action against the applicant in 1988 on the ground that he had made an incomplete declaration, a fact of which the authorities had become aware almost five years earlier, hardly seemed justified. In that connection it had to be stressed that where an issue in the general interest was at stake it was incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency.

Furthermore, that state of affairs had allowed the Ministry of Cultural Heritage to acquire the painting in 1988 at well below its market value. The authorities had thus derived an unjust enrichment from the uncertainty that existed during that period and to which they had largely contributed. Irrespective of the applicant’s nationality, such enrichment was incompatible with the requirement of a ‘fair balance’. In the circumstances, the Court did not consider it necessary to pronounce on the applicant’s further claim that the Italian Government had acted in breach of the provisions of the Convention prohibiting discrimination.

Although the Beyeler case was not specifically concerned with export controls but with controls over the transfer of ownership of cultural material, the principles laid down by the Court in that case can be applied more generally to measures, including export controls, designed to regulate the movement of cultural property for the purpose of protecting the cultural heritage. Accordingly, export controls on cultural property, while amounting to an interference with the peaceful enjoyment of one’s property, fulfil a legitimate aim (the protection of the cultural heritage). One needs to look at how those controls are applied to determine whether the requirement of striking a ‘fair balance’ between the legitimate aim and the rights of the individual has been met. Firstly, the law under which the export controls operate must be certain so that those subject to the controls are able to ascertain their rights. The law should not be applied in an arbitrary manner. In the Beyeler case the Italian authorities waited nearly five years before exercising their right of pre-emption, resulting in a period of considerable uncertainty and an unjust enrichment in favour of the State representing the difference between the original purchase price and the market value when the right of pre-emption was exercised. Finally, any measures must be proportionate to the aim to be achieved. Thus, measures restricting the export of cultural material of importance to the cultural heritage are likely to be seen as proportionate, but there may be grounds for arguing that measures that restrict or prohibit the export of any cultural property, however minor, could be regarded as disproportionate.

As mentioned, legislation controlling the export of cultural property may frequently contain provision for the forfeiture of any cultural object that has been illegally exported, or attempted to be exported, or exported contrary to the terms of any licence that may have been granted for its export. The question therefore arises as to whether such provisions on forfeiture are compatible with Article 1 of Protocol 1 of the European Convention.
Although there is no case law of the European Court that applies specifically to forfeiture of a cultural object where an object has been exported or there has been an attempt to export such an object in contravention of the laws of a State designed to protect that State’s cultural heritage, there is ample case law where there have been challenges to forfeiture in other cases. For example, in *Air Canada v. the United Kingdom* 37 the Court found that there had been no breach of Article 1 when the United Kingdom authorities impounded an Air Canada aircraft when those operating the aircraft had allowed narcotic substances to be carried in the hold of the aircraft. In *Agosi v. the United Kingdom* 38 the Court found that there was no breach of Article 1 where the United Kingdom authorities obtained the forfeiture of 1,500 Kruegerrands that had been imported into the country in breach of legislation banning the import of gold.

In line with its established case law, the Court has held that the execution of a forfeiture order, though depriving the applicant permanently of the assets at issue, falls to be considered under the rule relating to the State’s right ‘to enforce such laws as it deems necessary to control the use of property in accordance with the general interest’ set out in the second paragraph of Article 1 of Protocol 1. However, a fair balance has to be struck between the demands of the general interest and the applicant’s interest in the protection of his or her right to peaceful enjoyment of his or her possessions. In making this assessment due regard is to be had to the wide margin of appreciation the respondent State enjoys in such matters 39.

In the case of forfeiture for failure to comply with a state’s laws restricting the export of cultural material one factor in determining whether a fair balance has been struck is whether the penalty (forfeiture) is proportionate to the public interest to be protected (the preservation of the cultural heritage). Given the wide margin of appreciation that a state possesses, it is likely that a penalty of forfeiture, where there has been a deliberate evasion of, or an attempt to evade, a state’s legislation prohibiting the export of cultural material, would not be regarded as excessive. It would be regarded as a proportionate response to the need to deter breaches of the legislation (see the *Agosi* case above where the forfeiture of illegally imported Kruegerrands was not held to breach Article 1). Possibly more questionable would be where there has been a technical infringement of the legislation, for example where incorrect information has been inadvertently included in an application form for an export licence. Also relevant in determining whether the requisite fair balance had been struck would be the possibility of challenging the order for forfeiture in the courts, the degree of culpability of the offender, and whether the law is clear and has been applied consistently and not in an arbitrary manner.

In conclusion, controls on the export of cultural property are likely to be compatible with the European Convention. Such controls pursue a legitimate aim (the preservation of the cultural heritage) and strike a fair balance between the rights of the individual and the wider community. Only where such controls are applied in an

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37 Series A no. 316-A judgement of 5 May 1995
38 Series A no. 108 judgement of 24 October 1986
39 *Saccoccia v. Austria* Judgment 18 December 2008, §§ 86, 88
arbitrary or disproportionate manner, would there be any issue of conflict with the European Convention. Provisions for forfeiture of cultural objects exported in breach of the law, would similarly be regarded as a legitimate control on the use of property and compatible with the Convention.

(ii) Other Human Rights Instruments

Article 17 of the Universal Declaration of Human Rights provides for everyone to have the right to own property and that no one shall be arbitrarily deprived of his property. Controls on the use of property, such as export controls on cultural property, would clearly not fall foul of this provision, although arguably forfeiture of cultural property for breach of export restrictions might, if exercised in an arbitrary or disproportionate manner.

The other human rights instrument of world-wide application is the International Covenant on Civil and Political Rights but this is not relevant in the present context since it contains no provision equivalent to Article 17 of the Universal Declaration of Human Rights.

Article 21 of the Inter-American Convention on Human Rights 1969 provides (1) that ‘everyone has the right to the use and enjoyment of his property and the law may subordinate such use and enjoyment to the interest of society’ and (2) that ‘no one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law’. Although there appears to be no case law of the Inter-American Court of Human Rights on the relationship between controls on the export of cultural property and Article 21, it would appear that controls on the export of cultural property would fall within the right of the State to enact laws to subordinate the use and enjoyment of a person’s property ‘to the interests of society’.

b. The Right to Self-determination

States imposing export controls on the transfer of cultural goods maintain that they can determine what is in the ‘interests of society’ within their territorial boundaries. Efforts to ensure the effectiveness of such export controls internationally has often been articulated within the right to self-determination, including cultural development.

It is generally accepted that there was no legally recognised right to self-determination prior to the finalization of the UN Charter in 1945. The Charter incorporates the right to self-determination as an aim and purpose of the new organization and its member states (Articles 1(2) and 55); in respect of former mandated territories (Chapter IX and XIII); and all ‘colonial’ territories’ (Chapter XI). Indeed, self-determination had its most enduring impact in the pursuit of decolonisation. The Universal Declaration of Human Rights (UDHR), which was approved by the UN

General Assembly in 1948, does not specifically refer to a right to self-determination.\textsuperscript{41} However, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Res.1514 (XV)), stated in part:

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.  \textsuperscript{42} (emphasis added)

Only in the aftermath of this and related developments was self-determination defined as a legally-binding, ‘human’ right. Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were both approved by the U.N. General Assembly in 1966.\textsuperscript{43} Article 1 of the two International Covenants replicates the wording of UNGA Res.1514(XV). With its inclusion in the international bill of human rights, the right of self-determination (so-defined) moved away from the narrow colonial context, and apparently became of universal application to all peoples.\textsuperscript{44}

Given the history of colonisation, it was no coincidence that the articulation of the legal right to self-determination during the 1960s and 70s was firmly tied to development and control of natural resources. Proponents of the New International Economic Order advocated a new international economic order that would also lead to a new international cultural order.\textsuperscript{45} These newly independent States maintained that self-determination was an ongoing process in which they endeavoured to attain equality with other States. From the outset, it was clear that the right to self-determination was not confined to the right of peoples to freely determine ‘by and for themselves’ their political status, but extended to include economic, social and cultural matters.\textsuperscript{46} In his report on the historical and current development of the right to self-determination, U.N. Special Rapporteur Aureliu Cristescu suggested that the right to self-determination as it referred to cultural matters is the ‘right of peoples to choose their cultural system and freely pursue their cultural development’ and ‘regain,
enjoy and enrich their cultural heritage'.\textsuperscript{47} He argued that the realization of this right was crucial because ‘all cultures, in their rich variety, multiplicity, diversity and interaction, form part of the common heritage of all mankind.’\textsuperscript{48}

During the decolonisation period, several initiatives were promoted as being essential to a people’s cultural development and exercise of the right to self-determination. Among the various demands was a call for the international regulation of the ongoing illicit export, import and transfer of cultural objects.\textsuperscript{49} This legislative framework was finally realised with the 1970 UNESCO Convention. The biennial General Assembly Resolution on Restitution or Return of Cultural Property to Countries of Origin from 1973 to 2009 has referenced the 1970 UNESCO Convention and GA Res.1514(XV).\textsuperscript{50}

Mechanisms for the return of cultural heritage removed contrary to export controls are also crucial to this task. Article 13(d) of the 1970 UNESCO Convention provides that:

> The States Parties to this Convention also undertake, consistent with the laws of each State:

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\text{(d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.}
\]

Following on from the adoption of the Convention, UNESCO Member States established the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation in 1978, to facilitate such returns.\textsuperscript{51}

UNESCO instruments and U.N. human rights bodies have gradually enabled non-state groups to have a voice in national and trans-national decision-making processes affecting their enjoyment of cultural rights and cultural heritage. Indeed, in the same year that the international human rights covenants were finalised, the UNESCO General Conference proclaimed the Declaration of the Principles of International Cultural Cooperation. The declaration enunciated principles concerning the right (and duty) of \textit{peoples} to develop their culture.\textsuperscript{52}

\textsuperscript{47} UN Doc.E/CN.4/Sub.2/L.625, para.31. See also Article 1, Charter of Economic Rights and Duties of States, UNGA Res.3281 (XXIX), 12 December 1974; 29 UN GAOR Supp.(No.31), p.50; (1975) 14 ILM 251; (1975) 69(supp.) AJIL 484, Chapter II.

\textsuperscript{48} UN Doc.E/CN.4/Sub.2/L.625, para.48.

\textsuperscript{49} Ibid, paras.61 and 63.

\textsuperscript{50} GA Res.3187 of 18 December 1973 and GA Res. 64/78 of 7 December 2009, Resolution on Restitution or Return of Cultural Property.

\textsuperscript{51} Res.20 C4/7.6/5 adopted by the General Conference at its 20th Session.

This link between self-determination and cultural development (including movable heritage) was extrapolated further with the negotiation and adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007. Prior to this initiative, the leading instruments in the field: the International Labour Organization Convention (No.169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries also emphasised the interrelatedness between self-determination and cultural rights in international law. In its preamble, the ILO No.169 of 1989 recognises:

[T]he aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the states in which they live. (emphasis added)  

ILO 169 presumes that indigenous and tribal peoples will continue as distinctive components of the State, and that governments will deal with them in accordance with the standards laid down in the Convention. These standards relate largely to economic, social and cultural matters which are within the remit of the International Labour Organization. It acknowledges the collective right of indigenous and tribal peoples to preserve and develop their cultural identity.  

The 2007 UN Declaration on the Rights of Indigenous Peoples acknowledges the right of self-determination of all peoples in its preamble; and makes specific reference to the U.N. Charter and the two International Covenants. Indigenous organisations have maintained that the recognition of their collective right to self-determination is a prerequisite to their full enjoyment of all human rights, including those pertaining to cultural heritage. States, like Australia and the United States, contended that indigenous peoples have a right to participate in national affairs on an equal basis like other citizens, and the right to preserve and develop their distinct cultural identity ‘with a power to take decisions over their own affairs’ but not a right to secede.  

Indigenous peoples inextricably tie such cultural rights to the right to self-determination. Indeed, the draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, presented by Daes in 1993, states that the protection of indigenous peoples’ heritage can only be effective if it is based ‘broadly on the principle of self-determination.’ This extension of the notion of self-determination as a process, which was articulated during the decolonisation period, is incorporated

54 See Articles 2(2)(b) and (c), 4, 5, 7, 23, 26-31, ILO 169.  
in the redrafted Principles and Guidelines on the Heritage of Indigenous Peoples, tabled in 2005. The 2005 draft stressed that, like other resources, indigenous peoples’ cultural heritage must not be exploited without their free, prior and informed consent.\(^{59}\) This emphasis is reflected in recent UN and UNESCO instruments providing for some measure of participation by indigenous peoples in state decision-making which impacts upon their cultural heritage.\(^{60}\)

References to the right to self-determination in cultural heritage instruments

Whilst the 1970 UNESCO Convention does not explicitly make reference to the right to self-determination in its preamble, it does recall the provisions of the Declaration of the Principles of International Cultural Cooperation which, as noted above, refers to the right of each state to develop its own culture.\(^{61}\) Also as explained earlier, a number of recent instruments refer to the two International Covenants, with their Common Article 1. Finally, UNESCO as an agency of the United Nations and pursuant to its own constitution, and the Member States of the United Nations are required to adhere to the UN Charter which articulates the right to self-determination. More broadly, recent instruments pertaining to cultural heritage and cultural rights speak of the need to involve stakeholders in decision making and information sharing.\(^{62}\)

c. The Right to Participate in Cultural Life

The overlap between human rights and protection of cultural heritage (including illicit traffic of cultural goods) is necessarily most overt in respect of those human rights specifically related to culture, namely, the right to participated in cultural life,\(^ {63}\) and the so-called minority protection provision.\(^ {64}\)

The right to participate in the cultural life of the community was incorporated into UDHR Article 27 and subsequently rearticulated in ICESCR Article 15.\(^ {65}\) While the

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\(^{63}\) Art.27 UDHR; and art.15 ICESCR.

\(^{64}\) Art.27 ICCPR.

\(^{65}\) The ‘interdependence’ of the right to participate in cultural life with other human rights including the right to education (arts.13 and 14 ICESR), right to self-determination (art.1) and right to
UDHR is a non-binding declaration, this human right’s subsequent inclusion in the ICESCR renders it legally binding on states parties. It has also been reiterated in numerous other human rights instruments.\(^6^6\)

During the drafting of the ICESCR, UNESCO presented a preliminary draft Article 15, which referred primarily the preservation and development of tangible cultural heritage – ‘the inheritance of books, publications, works of art and other monuments and objects of historic, scientific and cultural interest.’\(^6^7\) However, it also required states parties to ‘encourage[e] the free cultural development of racial and linguistic minorities.’\(^6^8\) A subsequent UNESCO submission provided an alternative, briefer draft Article which replicated the wording of UDHR Article 27.\(^6^9\) A recommendation by the organisation to include the words: ‘to take part in the cultural life of the communities to which he belongs’, was eventually defeated.\(^7^0\) Most delegations, during the negotiations, favoured an emphasis on the ‘national’ community.

The travaux préparatoires of UDHR Article 27(1) reveals that the drafters were preoccupied with the participation and enjoyment by the wider population of cultural manifestations ordinarily confined to a small élite. Culture was defined narrowly as ‘high’ culture including museums, libraries and theatres.\(^7^1\) UNESCO’s preparatory documents for Article 15 ICESCR embraced ‘folk arts, folklore and popular traditions in literature, religion, mythology, philosophy, architecture and the visual arts, music and dancing, drama, crafts, etc.’\(^7^2\) This definition was revived in the 1976 UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It which states: ‘The concept of culture has been broadened to include all forms of creativity and expression of groups or individuals, both in their ways of life and in their artistic activities.’\(^7^3\) More recently, the Committee on Economic, Adequate Standard of Living (art.11) acknowledged by the CESCR: General Comment No.21(2009), para.2.


\(^6^7\) UN Doc.E/CN.4/541, 2.

\(^6^8\) Ibid.

\(^6^9\) UN Doc.E/CN.4/541, Rev.1, 3.

\(^7^0\) UN Doc.A/C.3/SR.797, 178; and UN Doc.A.C.3/SR.799, 190-191.

\(^7^1\) See Y. M. Donders, Towards a Right to Cultural Identity? (2002), 139.

\(^7^2\) UNESCO Doc.CUA/42, 9-10.

\(^7^3\) Adopted on 26 November 1976 by the General Conference of UNESCO, 19th session, Nairobi.
Social and Cultural Rights (CESCR) in its General Comment No.21(2009), has endorsed a broader understanding of culture that includes its individual and collective dimension and accepts that it ‘reflects … the community’s way of life and thought.’

As noted below, the 1970 UNESCO Convention, in its preamble, links the right to participation in cultural life with international cultural exchange. It is no coincidence that in 1976 the UNESCO General Conference adopted the Recommendation on Participation by the People at Large in Cultural Life and their Contribution along with the Recommendation Concerning the International Exchange of Cultural Property. However, in its opening recitals, the Recommendation Concerning International Exchange also noted:

> Considering that the circulation of cultural property, when regulated by legal, scientific and technical conditions calculated to prevent illicit trading in and damage to such property, is a powerful means of promoting mutual understanding and appreciation among nations,

> Considering that the international circulation of cultural property is still largely dependent on the activities of self-seeking parties and so tends to lead to speculation which causes the price of such property to rise, making it inaccessible to poorer countries and institutions while at the same time encouraging the spread of illicit trading.

This cautionary note was reaffirmed in the 1978 UNESCO Recommendation on the Protection of Movable Cultural Property which noted that:

> [T]he great interest in cultural property now finding expression throughout the world in the creation of numerous museums and similar institutions, the growing number of exhibitions, the constantly increasing flow of visitors to collections, monuments and archaeological sites, and the intensification of cultural exchanges, …

> Considering that the growing desire of the public to know and appreciate the wealth of the cultural heritage, of whatever origin, has nevertheless led to an increase in all the dangers to which cultural property is exposed as a result of particularly easy access or inadequate protection, the risks inherent in

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75 See also Art.4(d) 1970 UNESCO Convention; and sixth preambular recital, 1995 UNIDROIT Convention.

transport, and the recrudescence, in some countries, of clandestine excavations, thefts, illicit traffic and acts of vandalism...  

It then called on states to ‘intensify and give general effect to such measures for the prevention and management of risks as will ensure the effective protection of movable cultural property’ including those contained in the 1970 UNESCO Convention, the 1954 Hague Convention and 1972 World Heritage Convention. 

Significantly, developments in recent years have gradually recalibrated the interpretation of this right in line with UNESCO’s original interpretation. In its General Comment No.21, CESC has observed that the right is to be enjoyed by persons ‘(a) as an individual, (b) in association with others, or (c) within a community or group, as such.’ Accessing cultural heritage relates not only to individuals being able to access movable heritage located in museums, archaeological sites and so forth but also the ability of non-dominant groups to access their own cultural heritage. Article 4(f) of the 1976 UNESCO Recommendation requires UNESCO Member states to:

guarantee the recognition of the equality of cultures, including the cultures of national minorities and of foreign minorities if they exist, as forming part of the common heritage of all mankind, and ensure that they are promoted at all levels without discrimination; ensure that national minorities and foreign minorities have full opportunities for gaining access, to and participating in the cultural life of the countries in which they find themselves in order to enrich it with their specific contributions, while safeguarding their right to preserve their cultural identity.

Similarly, the CESC has observed that ICESC Article 15(1)(a) encompasses the right of ‘minorities and persons belonging to minorities … to conserve, promote and develop their own culture.’ Adding that it places an obligation on States parties ‘to recognize, respect and protection minority cultures as an essential component of the identity of the States themselves.’ In respect of indigenous peoples’ enjoyment of this right, the Committee has stated that they have a right ‘to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage …’

This element has been reaffirmed with the State reporting requirements demanded by the Committee including:

78 Seventh and eighth preambular recitals, 1978 UNESCO Recommendation.
79 General Comment No.21(2009) para.9.
80 Ibid., para.32.
81 Ibid.
82 Ibid., para.36.
The measures taken to protect cultural diversity, promote awareness of the cultural heritage of ethnic, religious or linguistic minorities and of indigenous communities, and create favourable conditions for them to preserve, develop, express and disseminate their identity, history, culture, language, traditions and customs.\textsuperscript{83}

In addition, States must provide information on measures: ‘To ensure the protection of the moral and material interests of indigenous peoples relating to their cultural heritage and traditional knowledge.’\textsuperscript{84} Also, the International Court of Justice, the CESCR, and U. N. Human Rights Council have interpreted the application of the ICESCR generally (including the right to participate in cultural life) to extend to ‘both territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.’\textsuperscript{85} This accords with Article 12 of the 1970 UNESCO Convention.

In response to national reports from the 1990s onwards, the CESCR has confirmed that Article 15(1)(a) of the ICESCR requires positive ‘action’ and encompasses obligations to respect, protect and fulfil.\textsuperscript{86} In its General Comment No.21(2009), the Committee has noted that the specific obligation to respect includes the ‘right of all peoples to have access to, and to participate in, varied information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning.’\textsuperscript{87} The CESCR has noted that the minimum core obligation arising from this right entails access to culture, that is:

\begin{quote}
[T]he right of everyone – alone, in association with others or as a community – to know and understand his or her own culture and that of others… to follow a way of life associated with the use of cultural goods … and to benefit from the cultural heritage and the creation of other individuals and communities.\textsuperscript{88}
\end{quote}

It specifically requires states to ‘respect free access by minorities to their own culture, heritage and other forms of expression.… This includes a right to be taught about one’s own culture as well as those of others.’\textsuperscript{89} It also notes that the right entails obligations to respect and to protect ‘cultural heritage in all its forms, in times of war and peace, and natural disasters’. It states:

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84 Ibid., at para.71(c).
85 Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports (2004) 136 at 180; UN Doc.E/C.12/1/Add.90; and HRC Res.6/19, 28 September 2007, Religious and cultural rights in the Occupied Palestinian Territory, including East Jerusalem, UN Doc.A/HRC/RES/6/19.
86 General Comment No.21 (2009), paras.6 and 48.
87 Ibid., para.49(b).
88 General Comment No.21, para.15(b).
89 Ibid., para.49(d).
\end{flushright}
Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others.  

The CESCR observed that the obligation to respect and protect fundamental freedoms, cultural heritage and diversity was ‘interconnected’ and required states to take measures to prevent third party interference with such rights. This obligation to respect and protect is further elaborated in respect of the cultural heritage of the ‘most disadvantaged and marginalized individuals and groups’ when framing development and environmental policies whereby:

Particular attention should be paid to the adverse consequences of globalization, undue privatization of goods and services, and deregulation on the right to participate in cultural life.

This has been interpreted by the Committee to include protection of movable cultural heritage from theft and deliberate destruction through illicit traffic. Also, General Comment No.21(2009) notes that: ‘States parties should also bear in mind that cultural activities, goods and services have economic and cultural dimensions, conveying identity, values and meanings. They must not be treated as having solely a commercial value.’

While the States parties’ obligation to fulfil includes:

(a) The enactment of appropriate legislation and the establishment of effective mechanisms allowing persons, individually, in association with others, or within a community or group, to participate effectively in decision-making processes, to claim protection of their right to take part in cultural life, and to claim and receive compensation if their rights have been violated;

(b) Programmes aimed at preserving and restoring cultural heritage.

The Committee found that Article 15 ICESCR carries core obligations including:

To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and
implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.  

This in turn dovetails with the provisions of the UN Declaration of the Rights of Indigenous Peoples (as explained above); and Article 2(3) of the UN Declaration on Minorities. However, both instruments also provide that they cannot be construed as contrary to the UN Charter including sovereign equality, territorial integrity and political independence of States.

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights providing the CESCR with competence to receive and consider communications from individual complainants, was unanimously adopted by the General Assembly on 10 December 2008, but has not yet entered into force. In June 2007, the Human Rights Council adopted a new complaint procedure, following its review of the existing procedure adopted by Economic and Social Council Resolution 1503(XLVIII) in 1970. However, practice arising under its predecessor indicates that most of the communications brought under this procedure covered civil and political rights and not economic, social and cultural rights.

The ECHR does not specifically provide for the right to cultural life. The African Charter on Human and Peoples’ Rights, including the right to participate in cultural life, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights enunciate the right.

References to the right to participate in cultural life in cultural heritage instruments

Several of the specialist cultural heritage instruments make reference to the right to participate in cultural life. The travaux préparatoires of the 1970 UNESCO Convention defined its purpose as controlling the illicit transfer of the cultural heritage of ‘peoples’. The preamble of the preliminary draft provided that:

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96 Ibid., para.55(d).
97 Seventeenth preambular recital and art.46 UNDRIPand art.8.4 UN Minorities Declaration.
Under Article 27 of the Universal Declaration of Human Rights everyone has the right freely to participate in the cultural life of the community … which means that it is incumbent upon States to protect the cultural property existing within their territory against the dangers from the illicit export and transfer of such property.103

The United States rejected this interpretation of Article 27 and successfully negotiated its deletion from the final text.104

Several of the UNESCO Conventions on cultural heritage have alluded to this right, including the 1970 UNESCO Convention which states in part in its preamble: ‘that the interchange of cultural property among nations for scientific, cultural and educational purposes … enriches the cultural life of all peoples…’.105 The 2001 Convention on Underwater Cultural Heritage in its preamble states:

Noting growing public interest in and public appreciation of underwater cultural heritage…

Convinced of the public’s right to enjoy the educational and recreational benefits of responsible non-intrusive access to in situ underwater cultural heritage, and of the value of public education to contribute to awareness, appreciation and protection of that heritage….106

Article 7(2) of this Convention provides that: ‘Underwater cultural heritage shall not be commercially exploited.’107 The 2001 UNESCO Declaration on Cultural Diversity in Article 5 states in part:

The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons … have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.

This instrument was referred to subsequently in the preambles of the 2003 Intangible Heritage Convention,108 and 2005 Diversity Convention.109

103 UNESCO Doc.SHC/MD/3, paras.9 and 10.
106 Third, fourth and fifth preambular recitals, 2001 Underwater Heritage Convention.
107 Rule 2 of Annex of Rules of the Underwater Heritage Convention concerning activities directed at underwater cultural heritage provides for the general principle that: ‘The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.’
d. Minority rights

The elaboration of the interpretation of the right to participate in cultural life to minorities and indigenous peoples has led to an overlap with the dedicated minority protection provision in Article 27 ICCPR. Article 27 ICCPR is the first provision for the protection of minorities of universal application. The inclusion of minority protection within the international human rights framework reinforced the assumption that the right holder is an individual and not a group. During the drafting and negotiation of the covenant, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities expressed preference for the phrase ‘persons belonging to minorities’ over the term ‘minorities’ alone, because individuals, unlike minorities, are a recognised subject of international law. Furthermore, the complaint mechanism contained in the Optional Protocol to the Covenant provides standing to States or individuals but not to ‘communities’. The concession to the collective aspect of minority rights came with the words ‘in community with other members of their group’. The Human Rights Committee (HRC) has affirmed that the right of enjoyment of culture, practice of religion, or use of language can only be realised meaningfully when exercised ‘in a community’, that is as a group. The Human Rights General Comment No.23 (The Rights of Minorities) states that Article 27 protects ‘individual rights’, but that the obligations owed by States are collective in nature.

The right contained in Article 27 is negatively articulated, with the addition of the words ‘shall not be denied the right’. However, UN Special Rapporteur Francesco Capotorti rejected this narrow reading of this obligation. He argued that the principles of non-discrimination and protection of minorities were distinctive. He added that the protection of minorities, even if it was contained in the ICCPR, resembled the ‘economic and social’ rights that require a State to act proactively on behalf of the

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109 Twenty-first preambular recital, 2005 Convention on Diversity of Cultural Expressions.
111 See UN Doc.E/CN.4/Sub.2/384/Add.2, paras.125ff; General Comment No.23, UN Doc.HRI/GEN/1/Rev.1, 38, para.1.
114 General Comment No.23, para.6.2.
rights holders. General Comment No.23 also endorses the position that it imposes positive obligations on states parties.

Capotorti also suggested that ‘culture’ must be interpreted broadly. General Comment No.23 similarly endorses a wide concept of culture including, for example, a particular way of life associated with the use of land resources, especially in relation to indigenous peoples.

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Declaration on Minorities) was finally adopted in 1992. In its Preamble, the Declaration states that it is inspired, rather than based, on Article 27 ICCPR, and therefore not restricted by this provision. The Declaration reaffirms the principle of non-discrimination. Article 2 draws upon rights articulated in Article 27 ICCPR (restated as a positive right) and Article 15 ICESCR. The Declaration also details the obligations of States. Under Article 4(2), the relevant State must create favourable conditions to enable members of a minority to ‘express their characteristics’ and ‘develop their culture, language, religion, traditions and customs’ where they do not violate national or international law. While Article 5(1) provides that national policies and programmes must be planned and executed with ‘due regard for the legitimate interests’ of minorities. ‘Due regard’ being defined by the Commentary as ‘be[ing] given reasonable weight compared with other legitimate interests that the Government has to take into consideration.’

While indigenous peoples have persistently rejected being designated as minorities, the provisions of the UN Declaration on the Rights of Indigenous Peoples, in particular Articles 11, 12 and 13, reflect the structure of Article 27 ICCPR. However, these are tailored and elaborated to indigenous peoples’ specific concerns. These provisions confer positive and collective rights and each provision reflects indigenous peoples’ holistic understanding of culture as combining land, tangible and intangible heritage. Article 12, broadly covering the right to enjoy one’s culture, articulates indigenous peoples’ right to ‘maintain, protection and develop the past, present and future manifestations of their cultures’ including ‘archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.’ This provision also obligates states to effective mechanisms of redress for cultural objects removed without ‘free, prior and informed consent’ and in violation

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117 General Comment No.23, paras.6.1, 6.2 and 9.
119 General Comment No.23, para.7.
121 Fourth recital, Preamble, UN Minorities Declaration.
122 First and third preambular recitals and arts.2(1), 3 and 4(1), UN Minorities Declaration.
of customary law. Article 13 covering the right of indigenous peoples to profess and practice their religion, refers to ‘the right to use and control of their ceremonial objects; and the right to repatriation of their human remains’. It requires states to institute mechanisms in conjunction with indigenous peoples to facilitate access and repatriation.124

In her 1993 Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, Erica-Irene Daes observed:

In addition to the systematic ‘mining’ of archaeological sites for marketable antiquities, indigenous peoples must contend with continuing efforts by tourists, art dealers and scholars to purchase culturally-important objects which are still in use. Poverty, ignorance and loss of land rights are key factors in this illicit trade, since indigenous peoples stripped of their ability to subsist by their own means may be reduced to selling their heritage. Indigenous peoples’ own customary laws ordinarily forbid the sale of such objects by individuals but … it is difficult and costly to locate and recover the objects once they have been taken out of the community.125

She goes on to note that some States, including Australia had enacted legislation to address this issue ‘but [it] had not always been effective.’126 While the most recent draft Guidelines on the Protection of Cultural Heritage of Indigenous Peoples: ‘underline[s] the intrinsic value of indigenous peoples’ cultural heritage, including its social, cultural, spiritual, intellectual, scientific, ecological, technological, commercial and educational value’, the draft also recognises that ‘the human right to property applies equally to indigenous peoples and individuals as to other peoples and individuals …’.127 The 1993 Daes draft Guidelines provided:

19. Governments, with the assistance of competent international organizations, should assist indigenous peoples and communities in recovering control and possession of their moveable cultural property and other heritage.

20. In cooperation with indigenous peoples, UNESCO should establish a programme to mediate the recovery of moveable cultural heritage from across international borders, at the request of the traditional owners of the property concerned.

21. Human remains and associated funeral objects must be returned to their descendants and territories in a culturally appropriate manner, as determined by the indigenous peoples concerned. Documentation may be retained, displayed or otherwise used only in such form and manner as may be agreed with the peoples concerned.

124 The UN Declaration on the Rights of Indigenous Peoples is the subject of a detailed commentary being prepared by the ILA Committee on the Rights of Indigenous Peoples, for the 2010 biennial conference.


126 Ibid.; and Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).

22. Movable cultural property should be returned wherever possible to its traditional owners, particularly if shown to be significant cultural, religious or historical value to them. Movable cultural property should only be retained by universities, museums, private institutions or individuals in accordance with the terms of a recorded agreement with the traditional owners for the sharing of the custody and interpretation of the property.

23. Under no circumstances should objects or other elements of indigenous peoples’ heritage be publicly displayed, except in a manner deemed appropriate by the peoples concerned.\textsuperscript{128}

Inalienability has been raised as a bar in restitution claims made by indigenous peoples (including of ancestral remains) in several States, including most recently, France and the United Kingdom. However, the 1970 UNESCO Convention cannot operate as a block for material removed after the treaty came into effect; but expressly provides that States parties may enter into agreements for return of objects removed prior to the entry into force of the Convention (Article 15).

The Organisation for Security and Cooperation in Europe (OSCE) (previously the Conference on Security and Co-operation in Europe) has concerned itself with minority issues since the 1970s.\textsuperscript{129} OSCE standards have broken new ground and influenced UN and Council of Europe work in the area. The 1989 Vienna Concluding Document requires participating States to ensure equal treatment of all its citizens\textsuperscript{130} States are called upon to ensure that minorities on their territory can ‘maintain and develop their own culture in all its aspects, including language, literature and religion; and that they can preserve their cultural and historical monuments and objects.’\textsuperscript{131} It recognises collective rights and the need to provide different treatment for minorities so they can preserve their identity. The Copenhagen Document enunciates a broad statement on minority rights which ‘remains unmatched’.\textsuperscript{132}

The ECHR, American Declaration on the Rights and Duties of Man,\textsuperscript{133} American Convention on Human Rights,\textsuperscript{134} and the African Charter on Human and Peoples’


\textsuperscript{130} CSCE, Concluding Document of the Vienna Meeting, 17 January 1989.

\textsuperscript{131} Ibid., para.59.


\textsuperscript{134} 21 November 1969, in force 18 July 1978, OAS T.S. No. 36; 1144 UNTS 123.
Rights do not specifically contain minority protection provisions. However, the tribunal and commissions overseeing the implementation of these treaties have interpreted existing provisions broadly to encompass obligations to protect the cultural heritage of minorities and indigenous peoples.

References to the interests of non-state groups within cultural heritage conventions

The 1970 UNESCO Convention covers public international law obligations and rights between the relevant State parties. However, illicit trade in cultural objects often involves violation of the rights of non-states entities like private individuals, groups, institutions and so forth. Unless the relevant countries (requesting and holding States) are State parties to the Convention and are willing to represent these interests at the diplomatic level, the 1970 UNESCO Convention is ineffective. Despite its emphasis on State obligations and rights and national culture, the 1970 UNESCO Convention states in its preamble that: ‘it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export.’

The 1995 UNIDROIT Convention seeks to fill this lacuna by encouraging uniform application of ‘minimum’ private international law rules in such cases. Likewise the 1995 UNIDROIT Convention makes no specific reference to human rights norms but does stipulate in its preamble that it is: ‘Deeply concerned by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples...’. Both conventions only apply to transfers of cultural property of an international character. However, most recent General Assembly Resolutions on the Return or Restitution of Cultural Property to Countries of Origin not only list the 1970 UNESCO, 1995 UNIDROIT and 1954 Hague Conventions but note the impact of illicit traffic of cultural objects arising from international and internal armed conflict.

The 1954 Hague Convention contains within it the kernel of an early articulation of the promotion of cultural diversity and in turn the protection of the cultural heritage of minorities and indigenous peoples. Whilst not specifically referring to human rights norms, its preamble articulates an early recognition of the importance of cultural diversity and its relation to protection of cultural heritage. Its preamble states:

136 Fourth preambular recital, 1970 UNESCO Convention, supra note #.
137 Fifth and sixth preambular recitals, 1995 UNIDROIT Convention, supra note #.
139 GA Res.61/52 of 4 December 2006, preamble.
Being convinced that 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;

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection…

The 1954 Hague First Protocol is especially relevant in respect of the control of illicit traffic in cultural objects. The legal protection afforded by it is crucial because of the widespread destruction, loss and removal of cultural objects occasioned by war and belligerent occupation. However, most contemporary armed conflicts are internal, that is, within the territory of a state. It is unclear whether the 1954 Hague First Protocol was intended to cover internal armed conflicts. Article 11 of the 1970 UNESCO Convention provides that ‘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’. This position reflects the protection afforded cultural heritage under international humanitarian law (IHL), the specialist legal regime covering armed conflict and belligerent occupation.

The pronunciation in the preamble of 1954 Hague Convention concerning the contribution of peoples to the cultural heritage of humanity was reaffirmed in the 1972 World Heritage Convention, the 2001 Underwater Heritage Convention, the 2003 Declaration on Intentional Destruction, 2003 Intangible Heritage Convention, and 2005 Diversity Convention.

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142 See Article 56, Regulations of the Convention (IV) Respecting the Laws and Customs of War on Land, and Annex, 18 October 1907, (1907) 208 Parry’s CTS 277; and (1908) 2(supp.) AJIL 90; Article 53, Protocol Additional I to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, 8 June 1977, in force 7 December 1979, 1125 UNTS 3; and Article 16, Protocol Additional II to the Geneva Convention of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflict, 8 June 1977, in force 7 December 1978, 1125 UNTS 609.
143 Fifth and sixth preambular recitals, WHC.
144 First preambular recital, 2001 Underwater Heritage Convention.
145 Sixth preambular recital, 2003 Intentional Destruction Declaration.
146 Sixth preambular recital, 2003 Intangible Heritage Convention.
4. Conclusion

The recent surge in human rights jurisprudence through an increased emphasis on oversight and enforcement has facilitated a greater understanding of how various individual human rights norms overlap with the protection of cultural heritage in particular movable heritage protected through export controls. The relationship between the right to property and export controls is perhaps fairly straightforward - export controls are a classic example of controls on the use of property for the greater good and their compatibility with human rights norms depends on whether a fair balance has been struck between the right of the individual to the peaceful enjoyment of his or her possessions and the need of the state to protect the cultural heritage.

However, the linkage between export controls and the other human rights norms dealt with in the chapter, namely, the right to self-determination, the right to participate in cultural life, and minority rights, has not necessarily been self-evident. The right to self-determination includes the right of a people to determine how their cultural heritage is preserved and illicit traffic is seriously detrimental to that right. Accordingly, controls on exports are an essential tool to enable a people to preserve its cultural heritage. Similarly action by other states to return cultural objects forming part of the cultural heritage that have been illegally exported again preserves such heritage.

Along with the right to participate in cultural life, it is clear that export controls fulfil a dual purpose. On the one hand, they enable a country to appreciate its own culture by ensuring that objects of importance to that culture remain within the country. On the other hand, where applied in a controlled manner, they allow others to appreciate the culture of other countries through cultural exchanges; for example, where cultural objects are licensed for export for the purpose of a temporary exhibition in another country. But this right has more recently been interpreted as an obligation on states parties to ensure the right of members of minorities or indigenous communities to participate in the cultural life of their group. This interpretation overlaps with ICCPR Article 27 and where export controls on cultural property are a means of ensuring that the cultural heritage of minorities and indigenous peoples is protected. Conversely, it is increasingly clear that export controls should not be used as a means of preventing the return to minorities and indigenous peoples of objects of importance to their culture.

Human rights jurisprudence enables cognisance of the complex thicket of rights and obligations of various stakeholders in connection with movable heritage. While the international community has repeatedly stated that these rights are interdependent and equal, the drafting of these various rights invariably provides guidance in cases where conflict arises. When the right to property is recognised it is qualified by the proviso that ‘[n]o one shall be deprived of his [or her] possession except in the public interest and subject to the conditions provided by the law and by the general principles of international law.’ As noted above, the remaining three human rights are not so explicitly or immediately circumscribed. However, there is clear movement within various multilateral bodies which have emphasised the relationship between effective
enjoyment of human rights, especially cultural rights, and access to cultural heritage including movable heritage.  

This development has the effect of requiring States to engage relevant communities, individuals and groups through information sharing and participation in decision making, thereby going beyond the exclusively state-centred approach which has usually be associated with export control of cultural objects.  Accordingly, the UN Independent Expert on Cultural Rights in her 2010 report on access to cultural heritage, has not only encouraged UN member states to ratify relevant international and regional instruments for the protection of cultural heritage, she has also requested that when implementing them at the national level that they ‘adopt a human rights-based approach’.  

Inspired by the apparatus attached to the World Heritage Convention and the Intangible Heritage Convention, the General Assembly of States Parties to the 1970 UNESCO Convention in June 2012 adopted a resolution establishing a committee. It is anticipated that the committee will draft operational directives or guidelines like its predecessors. It is hoped that these directives or guidelines will likewise be a means of evolving interpretations of this instruments to embrace this ‘human rights based’ approach to the protection of cultural objects.

147 General Comment No.21, para.6; and UN Doc.A/HRC/17/38.
148 See recommendations of the Independent Expert on Cultural Rights on these points and the need for effective access to justice including judicial remedies for individuals and groups whose cultural heritage has been damaged or destroyed or whose access to cultural heritage has been infringed: UN Doc.A/HRC/17/38, para.80.
149 UN Doc.A/HRC/17/38, para.80(m).