Int J Semiot Law (2021) 34:743–768
https://doi.org/10.1007/s11196-020-09739-0

# The Notion of "Cultural Heritage" in the International Field: Behind Origin and Evolution of a Concept

**Sabrina Ferrazzi**[1]

Published online: 30 June 2020


**Abstract**
The introduction of the concept of 'cultural heritage' is a relatively recent achievement of international law. Over the years, the enthusiasm for the protection of cultural property has enriched the term of new shades of meaning, while maintaining the older ones. At the same time, 'cultural heritage' is only one of the terms used in international treaties and other normative instruments. Hence, its comprehension needs to pass through a comparison of the other legal terminologies adopted. In such a context, the paper aims at providing a broad understanding of the idea of 'cultural heritage' by investigating its origin and evolution in the legal framework. In order to do so, the analysis begins with a brief discussion of the notion of 'culture' by analyzing how it has come to convey the current meanings. The paper then describes the main aspects influencing the linguistic choice within the field of Cultural Heritage Law. The central part of the paper deals with the different terminologies used to refer to cultural property within the international legal instruments (among them, 1954 Hague Convention, 1970 UNESCO Convention, and 1972 World Heritage Convention). Finally, the paper explores the existence of constructions of belongings in the legal terminologies examining the impact of territorial or communitarian linkage in the cultural legal discourse. The aim of this work is to reveal the inner system of interconnections in an effort to shed light on the multiple meanings of the term 'cultural heritage' by exploring how the concept evolved within the socio-legal context over time and space.

**Keywords** Cultural heritage law · International law · Cultural heritage · Cultural property · National treasure · UNESCO

✉ Sabrina Ferrazzi
sabrinaferrazzi1@gmail.com; sabrina.ferrazzi@univr.it

[1] University of Verona, School of Law, Via Carlo Montanari, no. 9, 37122 Verona, Italy

## 1 Introduction

Notwithstanding the legal protection of cultural heritage can be indisputably traced back at least to the 15th century, the use of the word 'heritage' in connection with the concept of 'culture' is quite new. In fact, this is only one of recent terms developed at the international level; one within a long list of legal terminologies used throughout the world, over time and space. In the same list, it is possible to find terms such as 'cultural property', 'cultural treasures', and 'works of art'.

Nevertheless, the general definitions of each term are not set forth. In fact, at the national level, each legal order has its own definition, while, at the international level, each of the international instruments provides specific descriptions for defining their respective scope of application.

As stressed in the legal semiotics literature, both clarity and obscurity are natural parts of 'legalese' [55, p. 1]. However, when referring to cultural heritage law, it is possible to shed some light and trace certain converging concepts and overlapping criteria through the analysis of international legal instruments as a complex. As a result, it becomes possible to identify a broadly accepted notion beyond each expression.

Before going further, it is important to stress two significant points. First, the meaning of each open compound word—as 'cultural heritage'—is necessarily related to the deep meaning of each word used to form the new term (in the example, 'cultural' and 'heritage'). The usage of one word instead of another illustrates the significance of the newborn, original and autonomous concept.

Second, it is important to keep in mind that the creation of new terminologies is usually the result of the actual experience that something is missing in the already existing ones. Therefore, a neologism is created to adapt to a new idea, to 'a new concept of human spirit' [25, 18 April 1822]. Terminology evolves in order to meet emerging needs of the society and in order to reflect culturally grounded categories.

So, the term 'heritage' has been borrowed from a different field of law, known as inheritance law. Why it has been borrowed and what is the meaning that has been given to it will be discussed hereinafter. In so doing, we will consider the above. The scope is to analyze the narrative behind the term and to identify the inner system of interconnections clarifying the deep meaning of 'cultural heritage' within the socio-legal context. As stated by Lev Vygorsky in the 30s:

> we all have reasons to consider a word meaning not only as a union of thought and speech, but also as a union of generalization and communication, thought and communication. The conception of word meaning as a unit of both generalising thought and social interchange is of incalculable value for the study of language and thought [54, p. 9].

## 2 The *Cultural* Component

Nowadays, the existence of 'cultural' objects is something that is commonly taken for granted, but it has not always been so. At the same time, as worldwide destructions such as the 1993 Mostar Bridge or the 2001 Bamiyan Buddhas have shown,

the very understanding of the concept of 'culture' is far from being universally agreed upon.

The word originated in the ancient Indo-European root $k^{w}el$, which is associated with the idea of rotation and to the meanings of 'revolve', 'pivot', 'walk in circle'. This is where the English word 'wheel' came from. This is also where the Latin word *colĕre* (to farm the land) came as well, conveying the sense of rotation given by the tilling, the turning over of the land [2; 14, p. 23 ff.; 3, p. 213]. Finally, when conjugating the verb *colĕre*, one ends up with *cultura* (the English, 'culture'). The tense is one that does not exist in modern English: the future-participle. It is used to convey the idea of something that is about to happen; a shade of meaning nowadays translatable with the grammatical construction 'to be going to' or with 'to be about to'. The Latin future-participle has accidentally reached a wide variety of audience through quite a few blockbusters on ancient Roman gladiators that have acted as a medium bringing worldwide celebrity to the sentence '*Ave, Caesar, morituri te salutant!*' (literally, 'Hail, Emperor, those who are going to die salute you!').

In this perspective, *cultura*, in its original sense, refers to the things that are going to grow, are about to develop. It is exactly from this first image that Latin authors elaborated the suggestive idea of *cultura* as personal development, cultivation of virtues, and soul nourishment [cfr. M.T. Cicero, *Tusculanae disputationes* Liber II, § 13; T.M. Plauto, *Miles Gloriosus*, Act II, Scene II]. In other words, it is the 'farming' of the individual.

This is why—in the current language—the lemma maintains several meanings. Among them, in addition to the tillage (referenced above), the word is universally used to indicate the shared outcome of the development of individuals and human societies. So, the concept passes from the Latin sense, focused on the elevating phase, to the modern one, referred to as the output of such a phase [1, p. 203]. To use the most widely accepted definition at the academic level, culture can be defined as the 'complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society' [49, p. 1]. Based on this understanding, it is possible to comprehend at least the basic sense of the cultural component in all of the different legal terminologies: the adjective 'cultural' evokes the idea that all those 'objects', 'property', and 'heritage' are the concrete manifestation of a culture, of a civilization.

Clearly, such a premise needs to be specified both in a strict and in a broad sense. In a strict sense, one must acknowledge the fact that not all of the outputs of human activities are per se able to be described as cultural. There is something more of being an artifact. All the objects of the category share a core and transcendent element that characterizes their status, as opposed to the one confined to everyday generic objects. This appears quite clear when juxtaposing a painting with an ordinary fork. Indeed, not all the outputs of human societies are cultural.

On the other hand, in a broader sense, the 'cultural' connection should not be limited only to items showing direct links with human practices. Indeed, some objects reveal a cultural nature notwithstanding the absence of any relationship with what it is generally referred to as 'culture' or 'civilization'. This is the case, for instance, of paleontological finds that fill natural science museums all over the world. They are not directly related to the history of mankind, but their cultural value is undisputed

and their sale is currently representing an emerging trend in the global auction market [6]. Accordingly, we need to wider the category to include all those kinds of objects fostering the knowledge and the cultural development of mankind. In this respect, then, the adjective 'cultural' encompasses also entities, 'objects', 'property', 'heritage' that are not directly derived from human practices.

In conclusion, the adjective 'cultural' has a twofold connotation: active and passive. In fact, it entails that the relevant 'objects', 'property', 'heritage' are either a manifestation of a culture with an enhanced outcome of human invention (active aspect) or an elevating element with the capacity of contributing to advance human knowledge (passive aspect).

Besides, the concept remains still too vague when applied to an entity. Actually, it is not easy to define the cultural component in an exhaustive way. This is due to the fact that the concrete assessment needs to be conducted by disciplines others than legal science. Indeed, it is up to archeologists, ethno-graphics, paleontologists, art historians, etc. to recognize the value of the things falling in the respective field of study. In this regard, the cultural element acquires a concrete significance in its practical application to the point of changing and evolving with the scientific progress. In this context, the role of the law is to provide a conceptual framework defining the general category. So, to grasp the legal significance of the adjective 'cultural' requires an investigation of the very idea of developing an autonomous and unifying concept of cultural property.

Since time immemorial, the world has experienced the development of expressive forms nowadays considered to have a cultural value. It seems pertinent to mention the rock paintings of Lascaux in France or the Sydney aboriginal rock engravings. At the same time, the categorization of these objects as being cultural is not part of the original view. It appears to be historically connected from the previous recognition of a noteworthy artistic element. In this respect, for example, even if it is beyond doubt that statues, such as the one of Athena Parthenope, were already admired in ancient times, it is also generally known that their role was primarily instrumental since they were sculpted essentially for religious or propagandistic purposes. It is problematic, however, to identify a tipping point, namely a moment in which the focus of the observer was placed on the pure artistic value of such objects. Ultimately, this is due to the fact that the rise of artistic consciousness is not a phenomenon easy to be perceived. As a result of this, there is a lack of direct sources on the topic.

Over the years, art had served several social functions, within these: emphasizing the commissioners' *status quo*; fulfilling propagandistic purposes; and, serving other human activities (from hunting to religion, from magic to the art of warfare) [34, pp. 254 ff.; 10; 17; 15; 18; 11; 56; 57; 58]. At the same time, masterpieces like the Khafre's pyramid or the Marcus Aurelius' equestrian statue are still remembered today; but they are mainly remembered in association with the names of their commissioners rather than creators. The reason primarily lies on the fact that, generally speaking, artists had been considered for centuries nothing more than ordinary workers. Art was a job and, as all the remunerated activities, was disregarded and usually relegated to lower social classes [18, pp. 141 ff.; 19, pp. 53 ff.; 33; 9, pp. 18 ff.; 27; 39, pp. 24 ff.; 17, pp. 429 ff.]. In the *Life of Pericles*, Plutarch declares that:

> II. [1] […] οὐδεὶς εὐφυὴς νέος ἢ τὸν ἐν Πίσῃ θεασάμενος Δία γενέσθαι Φειδίας ἐπεθύμησεν, ἢ τὴν Ἥραν τὴν ἐν Ἄργει Πολύκλειτος, οὐδ' Ἀνακρέων ἢ Φιλήμων ἢ Ἀρχίλοχος ἡσθεὶς αὐτῶν τοῖς ποιήμασιν. οὐ γὰρ ἀναγκαῖον, εἰ τέρπει τὸ ἔργον ὡς χαρίεν, ἄξιον σπουδῆς εἶναι [2] τὸν εἰργασμένον.[1]

A shifting in perspective emerged during the Italian Renaissance [52, pp. 103 ff.]. During this fervent period, the artists redeemed their position as being common craftsman for assuming the role of a practical philosopher, a person gifted by God whose works were the result of the divine inspiration. In synthesis, an intermediary between man and God. Therefore, their 'products' were recognized to have an intrinsic value insofar they were a manifestation of the divine [39, p. 202, pp. 383 ff.]. In Giorgio Vasari's landmark work *Lives of the Most Excellent Painters, Sculptors, and Architects*, the 16th century artist states that the original core of sculptural art is rooted in the act of God who formed man from the dust of the ground [51, p. 64; in a comparable manner, also 4, p. 3–4].

It is no coincidence that the first legal rules on the protection of cultural objects are rooted back in the 15th century (*cfr* Papal Bulls: 1425—*Etsi de cunctarum*; 1462—*Cum almam nostram Urbem*; 1474—*Cum provvida Sanctorum Patrum decreta*) [22]. An emblematic example of the change in mindset is provided by the 1517 Baldassare Castiglione's letter to Pope Leone X testifying the invention of cultural property policy. In the letter, the author emphasizes the paramount importance of protecting cultural goods as part of our historical legacy. Quite interestingly, he wisely suggests to safeguard also the areas surrounding ancient monuments in order to preserve the context [39, p. 205].

In the same vain, Enlightenment fostered this new awareness thanks to cultural reforms. During this period, the birth of modern museums offered to the public the opportunity to admire some of the before inaccessible extraordinary collections [39, p. 205]. In such a framework, on 15th January 1753 the British Museum opened to the public.

Nevertheless, the real historical transformation occurred with the French Revolution. At the beginning, the full wrath of revolutionaries led to destroy each and every works of art since they were all considered to represent the hated *ancient régime*. Subsequently, in the effort to put a stop to the ravages, some intellectuals tried to delegitimize the destruction by reinventing the artistic language [38; *see* the illustrative 1793 report of Mr. Romme on behalf the Public Education Committee, 43, pp. 661–662;]. Artists were not considered anymore in the service of the despised powers but as oppressed slaves whose works need to be respected. Thus, works of art were disassociated by their content and became the plain output of national genius. On that basis, the process of liberation and salvation of all works of art from tyranny begun. At first only in France; later, all over the world (*cfr* the logic behind Napoleon's looting). The new cultural approach was supposed to reflect the well-known

[1] "No brilliant young man on seeing the Jupiter in Pisa or the Hera in Argos has ever desired to be Phidias or Polycletus nor [has ever desired to be] Anacreon o Philetas or Archilochus for having enjoyed their poems. Indeed, appreciating a work as gracefulness does not implies any equal esteem for its creator" [Author's translation].

ideals expressed by the motto '*Liberté, égalité, fraternité*' (i.e., 'Freedom, Equality, Fraternity'). Under those circumstances, works of art lost any residual linkage with their commissioners. Quite the reverse, they acquired an autonomous value insofar as vital resources for both cultural development (being representative of human capabilities) and economic growth (being a manifestation of the genius at the service of the civil society).

Even if the terminology appeared only later on, it seems possible to infer that this is the period during which the unification of all works of art as being *cultural* objects was finally reached. And so, the roots of the universal cultural patrimony were born as well. The current connotation of the adjective *cultural* as a legal term was ready to be acquired, whenever a need would arise.

## 3 Cultural Heritage and Legal Discourse: The Relationship Between Terminological Choices and Protected Objects

In the field of cultural heritage law, a unifying legal term is a recent achievement. Until the first half of the 20th century, at both the national and international level, the normative instruments opted for providing only heterogeneous lists of objects or interchangeable periphrasis. At the national level, for example, the English 1882 Ancient Monuments Protection Act refers to 'ancient monuments', 'sites', and 'works of art', while the 1863 Instructions of the Governance of Armies of the United States in the Field refers to 'classical works of art'. At the international level, the same is illustrated by the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (which names 'buildings dedicated to religion, art, science', 'historic monuments', 'works of art and science') and by the 1935 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, s.-c. Roerich Pact (which opts for 'historic monuments', 'museums' as well as 'scientific, artistic, educational and cultural institutions') [42, p. 541].

One of the few exceptions is the 1919 s.-c. Treaty of Saint-Germain-en-Laye that instead names generically 'objects of artistic, archaeological, scientific or historic character forming part of collections'. However, this legal instrument is a peace treaty. Thus, such a reference is not fully comparable to the previous ones. It is not intended to have a general and abstract nature. Quite the opposite, it serves as a special provision aimed at governing certain items; all the items of the kind 'which formerly belonged to the Government of the Crown of the Austrian-Hungarian Monarchy' (Article 196).

Despite the theoretical common ground reached at the social level, the creation of a unifying legal concept is not an easy task. In fact, every selection has to deal with three aspects:

1. the socio-cultural environment,
2. the historical moment, and
3. the legislative intent.

Indeed, the *socio-cultural environment* exerts influence on a particular legal system. This is true in at least two dimensions. First of all, law is deeply embedded within the socio-cultural environment. Legal rules both change in function of the social transformation and accelerate the cultural shifts [26]. Secondly, the language and the law forms a symbiosis in which the legal discourse reflects and influences culture [44, pp. 137–140]. Consequently, the drafting of a new rule is effected by the socio-cultural background. So, the choice of words and the content given to a notion reflect the cultural tradition of the law-maker [53, p. 541]. This is why, even between the same legal families, it is easy to find diverging definitions of the same concept. Just to provide an example on how the same object can be perceived differently, one should recall what happened in 1881 to the French Egyptologist Gaston Maspero, who was at that time Director General of excavation and antiquities for the Egyptian government. After having discovered the mummies of some of the mayor ancient pharaohs, he moved them to Cairo. At customs, the officer was unable to find a designed duty for mummies and, so, he selected the more resembling one: dry fish [21, p. 5]. Mummies considered so much by Europeans were neglected by locals.

Another key aspect of the construction of a legal terminology is the *historic moment* during which the legal concept is created. The historic setting has a double impact on the possible identification of an object as cultural. First, 'the socio-cultural environment' and 'the historic moment' are two sides of the same coin since society evolves. Therefore, the very concept of 'culture' may change, not only over space (as a consequence of the socio-cultural environment), but also over time (in relation to the historic moment). For instance, the artistic production of quite a few famous painters have not been appreciated at all during their lifetime while, later on, their works have been considered masterpieces. Just to mention one, Vincent Van Gogh. In a similar way, in Italy, the early twentieth century have witnessed the willful destruction of historical centers seen as the reflection of old urbanistic policies rather than cultural value worthy of special protection [8, pp. 148–149]. Second, the historic moment has another effect that is specifically connected to the course of time. The interval between the creation of the object and the moment in which its nature is determined could modify the very nature of the good. Let's think, for instance, of a fork. Normally we tend not to consider it as cultural. And, indisputably, not even an ancient Roman would have ever considered a fork artistic at all. However, in present time, an ancient Roman fork is deemed to be a cultural object. It is not the approach towards the single object that has changed, such as when society itself evolves, but it is the same object that has improved in quality. The course of time renders valuable even common objects. In fact, they identify a former way of life and, as such, they play a role in tracing the 'history of things' [23, pp. 1, 9].

Finally, the *legislative intent* shapes the formation of a legal concept. It is universally known that picking up one word or another, providing definition "A" instead of definition "B" has direct effect on the sphere of application of the corresponding legal instrument. This is why the ultimate aim of each law-maker influences not only the content of the act as a whole, but also every words chosen to draft it. With respect to cultural heritage, we should consider that the world is traditionally divided into 'source nations' and 'market nations' [29, p. 832]. The dichotomy has an economic appearance and arises from the interaction between supply and demand

of cultural products in the international art market. Countries such as Italy, Mexico, Egypt and India are usually identified as source nations since all of them are very rich of cultural objects and the international demand for such goods is quite wide. On the contrary, United States, Germany and Scandinavian countries have a strong internal demands and not enough goods to fulfill it. For this reason, they are perceived as market nations.

The duality (and its intermediate shadings) results into distinctive needs that shape national policy objectives. In this framework, the source/market distinction is reflected in another conceptual division looking at the same phenomenon from a legal policy perspective. The one between 'cultural internationalism', 'cultural nationalism' and, 'object-oriented view' [31, 41].

*Cultural internationalism* describes the tendency to promote a free art market fostering the circulation of cultural objects. Such an interest is typical of market nations. Generally speaking, this policy is reflected in terminologies referring to cultural objects as something that is not strictly related to a specific country but has a transnational value. For instance, 'world cultural heritage'.

At its opposite, *cultural nationalism* is the typical policy of source nations. The term denotes the efforts to protect culturally rich traditions by avoiding the dispersion of national patrimonies. We can perceive this mindset in expression as 'national cultural heritage' or 'national cultural treasures'.

Finally, the *object-oriented view* has been suggested as a distinctive interest of cultural specialists as archeologists, paleontologists, ethnographies [28, p. 114]. It condemns the very existence of an art market. Instead, it focuses on the object and its necessities; among them, primarily, the preservation of the original context. The context is of paramount importance for documenting history. Finding an object in one place, rather than in another, influences the interpretation of the good and, at the same time, can also reverse previous knowledge. A notable example is the supposed discovery of a Roman artifact in a Columbian grave in Mexico during an archaeological excavation in 1933. The presence of such an ancient piece in a site at the other part of the world have opened the possibility of pre-Columbian transoceanic contacts [20, 45]. Illicit excavation and traffic of cultural objects result in losing track of the original context. With this respect, the object-oriented view draws attention to the risk connected to the existence of a licit market as well. A rich and attractive market, such as the art market, fuels the demand. Besides, confidentiality pays a role also in the licit market so that even a legitimate sale could interfere with preserving basic information.

In conclusion, at the national level the clashing of divergent interests influences the final adoption of one term, as opposed to another, as well as the corresponding definition. At the international level, the phenomenon of tension between the different national legal policies arises from the prompting of national delegations for a solution that adheres to their domestic interests. As a result, the final decision represents a compromise. Keeping in mind the clashing of interests within which any legal terminology in the field has to deal with, it is now possible to move to the examination of the most important instrument at the international level in order to understand from where the word 'heritage' originates.

## 4 The Rise of a Uniform Terminology at International Level, 'Cultural Property'

As abovementioned, international conventions and treaties used to opt for generic periphrasis or heterogeneous list of objects. Thus, the creation of a unifying term is quite a recent achievement. It dates back to 1954 Hague Convention for the protection of cultural property in the event of armed conflict. The Convention broke with the past, leaving the previous wording for the new term 'cultural property'.

However, this was not the very first appearance of the term. The first use appears to be in a joint declaration of the United States, United Kingdom and France in 1946: the Statement of Policy with Respect to the Control of Looted Articles. In that context, 'cultural property' has been used as a handy shortcut to facilitate the discussion over a wide variety of objects that were illicitly moved in a neutral States during WWII [36, p. 26].

During years, 'cultural property' has become a common way to sum up lists or avoid twisted periphrasis. So, the term is unifying; nevertheless, a legal definition is needed. There is no an actual layperson's meaning that renders 'cultural property' transparent and able to identify the scope of application of each legal instrument. With this respect, the 1954 Hague Convention not only adopts the term 'cultural property' but it also provides an explicit definition of it [35, 48]. Specifically, Article 1 states the following:

> For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:
>
> (a) *movable or immovable property of great importance to the cultural heritage of every people*, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
> (b) *buildings whose main and effective purpose is to preserve or exhibit the movable cultural property* defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
> (c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as "*centres containing monuments*".
>
> [*Emphasis added*]

The definition is clearly an open one. As a matter of fact, even if it is based on the compulsory belonging of a good to one of the three categories provided, their content is not as limited as it would appear at first sight. In fact, the lists of items provided *sub* (a) and (b) are not exhaustive but only illustrative.

In details, letter *a* includes all those movable or immovable goods having 'great importance to the cultural heritage of every people'. The very heart here is the 'great importance'. Such requisite guarantees the protection of objects integrating a substantial cultural component independently by their financial value. This is the case, for instance, of Rosetta Stone. A piece of rock not particularly valuable in itself, but outstanding for its content. In synthesis, it is the demarcation among 'importance' and 'economic value', between a cultural and an economic value assessment.

Moving to letters *b* and *c*, it is possible to appreciate a practical application of how legal policy shapes definitions. They include as 'cultural property' also buildings and centers not having in itself any cultural nature. Nevertheless, they are deemed cultural for the scope of the 1954 Hague Convention insofar they contain cultural movables or immovable. The fact is that the definition of what is a 'cultural property' is influenced by the ultimate goal of the lawmaker. In the case of the 1954 Hague Convention, in order to protect items commonly considered as having a cultural quality is essential to expressly include within the notion also buildings and spaces closely connected with those items. That explains the broad and not exhaustive definition.

The same term 'cultural property' has been adopted, among the others, by a very important instrument: the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transport of Ownership of Cultural Property [36].

Despite the identity of terminology, the definition provided here is quite different. Article 1 of the Convention states the following:

> For the purposes of this Convention, the term 'cultural property' means *property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories*:
>
> (a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
> (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
> (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
> (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
> (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
> (f) objects of ethnological interest;
> (g) property of artistic interest, such as:
>
> (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;
(iii) original engravings, prints and lithographs;
(iv) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
(i) postage, revenue and similar stamps, singly or in collections;
(j) archives, including sound, photographic and cinematographic archives;
(k) articles of furniture more than one hundred years old and old musical instruments.

[*Emphasis added*]

Leaving aside details falling outside the scope of this analysis, the text generates an immediate impression of a list by far wider and more detailed if confronted to the 1954 Hague Convention one. The Hague list includes three categories, each of them limited only by the vague concept of 'great importance'. Whereas, the 1970 UNESCO one is exhaustive. There is no room for the States to label as 'cultural property' for the purposes of 1970 Convention objects that are not included in the list.

The diversity in definitions lays in the purposes of the two normative instruments. On the one hand, the 1954 Hague Convention aims at safeguarding cultural objects in the event of armed conflicts. As such, a heterogeneous list of objects as the ones used in the past would risk to be not as comprehensive as necessary. With this respect, a unifying term (i.e. 'cultural property') helps in creating such a wide notion giving the sense of the whole ensemble of goods protected, whilst the 'great importance' requisite perimeters the scope of the Convention to avoid an almost unlimited application of the related restraints. On the other hand, the 1970 UNESCO Convention has a completely different goal. It targets the black market in antiquities limiting the import of cultural goods illicitly exported from their country of origin. Thus, the designation of a good as a Member State's 'cultural property' has a direct impact on another State's legitimate power to import such goods. For this reason, as well as for limiting any risk of vagueness, the list must be clear and exhaustive.

Almost 20 years later, a practically identical definition was selected for the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (cfr. Article 2 of the Convention in combination with its Annex) [40]. But here the term is different: 'cultural object'. So, why 'object' and not 'property'? To investigate this issue, it is important to examine the rise of the term 'cultural heritage' first. We will return to this issue in the conclusion.

## 5 One Small Step for a Man… Stepping into 'Cultural Heritage'

In the international legal field, the term 'cultural heritage' appeared at the same time of 'cultural property'. However, during years, it has evolved in function and meaning. Three are the dimensions to which 'cultural heritage' refers. The first

one is the most ancient. We find it in the pivotal 1954 Hague Convention as well as in the contemporary 1954 European Cultural Convention. The Hague Convention uses the term three times:

> [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; […]
> [Preamble] […] 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; […]
> [Article 1] […] movable or immovable property of great importance to the *cultural heritage* of every people […]

The European Cultural Convention, instead, uses it twice:

> [Article 1] Each Contracting Party shall take appropriate measures to safeguard and to encourage the development of its national contribution to the common *cultural heritage* of Europe.
> [Article 5] Each Contracting Party shall regard the objects of European cultural value placed under its control as integral parts of the common *cultural heritage* of Europe, […]
>
> [*Emphasis added*]

When reading the texts, the words 'cultural' and 'heritage' stand out. They are joined but they are both conserving their autonomous and original meaning with the word 'heritage' referring to the legacy of the past. In this respect, the phrase is not creating a new concept. There is not any actual neologism. Indeed, in such texts, 'cultural heritage' is not a tangible collection of objects as are the phrases 'cultural property' or 'cultural objects'. Actually, those texts do not use 'cultural heritage' to substitute generic periphrasis or lists of objects. Conversely, the term is used to identify a more abstract idea. Not a combination of objects but the same notion of 'culture' introduced in the first part of the paper: the complex whole of values, knowledge, art, and customs. The addition of the word 'heritage' serves at describing the concept in the context of a dynamic process. Actually, it characterizes the said ensemble as a treasure of the past which is projected to the future. The result is a legacy handed down to future generations.

In conclusion, the word in such textual contexts conveys the underlying goal of preserving tangible cultural objects for the future benefit of mankind. A statement of intent. These very first international instruments dedicated to the protection of cultural objects are somehow highlighting the distinctive nature of cultural objects. At the same time, they are building a collective conscience on the importance of the protection of cultural heritage. In this respect, the view is quite old. This first dimension is commonly found in legal rules providing special provisions on cultural property. It has been expressed through multiple terminologies. This is the case, for instance, of the s.-c. Roerich Pact that—as

abovementioned—was adopted during the descriptive practice era. In its Preamble it states that the Treaty is concluded

> […] in order thereby to preserve in any time of danger all nationally and privately owned immovable monuments which form the *cultural treasure of peoples* […] [*Emphasis added*].

An equivalent view is shared also in a historical case on the *ius predae* (i.e. the right to take possession of enemy's properties), the *Marquis de Somerueles.* The case concerned an American vessel (the 'Marquis de Somerueles') carrying works of art addressed to the Philadelphia Museum of Art. In 1812 the British Navy captured it on board. The judgment of the Court of Admiralty dealt with the issue of the restitution of the items. It concluded for sending the works of art to Philadelphia stating that they were the 'property of mankind at large' and 'belonging to the common interests of the whole species' [46, p. 212].

It is only with the landmark 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (universally known as World Heritage Convention) that the term 'cultural heritage' acquires also a second dimension, becoming an autonomous concept able to describe a concrete category of cultural property. 'Cultural heritage' is no more an abstract concept, but a concrete ensemble. This semantic leap is connected to the intent to include in the Convention a new category worth of special protection, the nature. Such a new vision came from the American experience [12, 47]. It is in this country that the very first national parks born in the nineteenth century. The oldest was the famous Yellowstone park in 1872, followed by the Yosemite park in 1890. The plan of transposing the model at the global level was formulated during a White House Conference in 1965 and presented to the 1972 United Nations Conference on the Human Environment in Stockholm. The core idea was to develop the management both of natural and cultural areas, preserving them for future generations.

As a consequence, the World Heritage Convention shows a twofold nature. It combines the protection of natural features and sites with the safeguarding of cultural heritage. This is expressed by the Convention's official emblem (Fig. 1), which represents the linking and interdependence of the two aspects: a central square to indicate the output of humans' creativity (i.e. the cultural heritage) within a circle symbolizing the nature's gifts (i.e. the natural heritage). They are all inscribed in an emblem as circular as the Earth to underline the global reach of the goals.


**Fig. 1** World Heritage Emblem

In the quest for a common term to be characterized as cultural or natural, the word 'heritage' was the chosen option. The Article 1 of the Convention defines the umbrella notion of 'cultural heritage' in a very concrete way. It states that:

> For the purpose of this Convention, the following shall be considered as "cultural heritage":
>
> *monuments* Architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
> *groups of buildings* Groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
> *sites* Works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.
>
> [*Emphasis added*]

Article 1 transforms the usage of the term so that it comes to identify an actual ensemble of goods. No more a simple abstract legacy to set a normative goal, but the direct object of the application of the legal instrument. From this moment on, the term starts covering the same semantic field of 'cultural objects' and 'cultural property'.

The third dimension of 'cultural heritage' is in the between. A concrete, but not tangible ensable, the s.-c. intangible cultural heritage. The very same concept of 'culture' looses its role of a qualifying element to become the actual object of protection, a intangible but vital part of civilizations. Folklore, languages, knowhow, customs, etc. become an element worhty of special attention by the international community. Because of its evolving nature, this ensemble of traditions, practices, knowledge, skills are also referred to as 'the leaving heritage' [24]. An example, may be of help in highlighting the importance of this aspect as a fundamental part of the human culture. Let's take the case of the French technique of Alençon needle lace-making practiced in Normandy since the 17th century. This rare technique requires between 7 and 10 years of training. The same is true also for the traditional Chinese medicine form known as acupuncture. Both of them were inscribed on the Representative List of the Intangible Cultural Heritage of Humanity.

The acceleration of the process of globalization in the last decades of the 20th century resulted in the definitive loss of a significant part of traditional knowledge. The promotion of stereotypical cultural models jeopardizes such cultural diversity. Until that moment, such a knowledge was considered as self-existing and automatically passed over from one generation to another. At the same time, the world was realizing that it was disappearing. This awareness of the emerging of a new social need produced a shift in perspective. First, the existence of traditional knowledge to be preserved is recognized, and, second, it is felt the necessity of finding a term able to cover the entire range of cultural manifestations. The term used is 'cultural heritage'.

Already in the 1982 Mexico City Declaration on Cultural Policy, the phrase 'cultural heritage' was seen to have included '[…] both tangible and intangible works through which the creativity of that people finds expression: languages, rites, beliefs, historic places and monuments, literature, works of art, […]' [UNESCO Declaration, p. 43 at § 23].

In 2003, was finally adopted an international instrument dedicated to this issue, the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage. Article 2 provides the following definition:

> The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. 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.

The 2003 legal definition drives the attention on several qualities of the intangible cultural heritage [24]. Specifically, such a heritage depends on the relevant

community or group. Indeed, intangible cultural heritage is not the output of individual talent, as cultural objects could be. It is the commonality, i.e. the shared life of a community that creates it during years and centuries; a community that recognizes it 'as part of their cultural heritage'. This living process implies that intangible heritage could not be frozen at a given point in history. It keeps evolving and growing by being 'constantly recreated by communities and groups'. In this respect, it forms part of their cultural identity and, thus, its same existence enriches 'cultural diversity and human creativity'. Therefore, notwithstanding the community-linked origin of such a heritage, it must be worldwide respected and protected by the whole international community since it is a fundamental expression of humankind. To use the words of the 2001 UNESCO Universal Declaration on Cultural Diversity, culture

> 'takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations' [Article 1].

There is one last topic that deserve special attention before comparing the terminologies. That is the impact of territorial or communitarian linkage in the cultural legal discourse.

## 6 Linking Factors and Forms of Nationality

While the terms scrutinized so far do not make per se any express reference to a territorial connection, the international trade agreements' terminology appears to be the most sensible to the topic. This is true in particular for Article XX of the General Agreement on Tariffs and Trade (s.-c. GATT) and for its equal at European level, Article 36 of the Treaty on the Functioning of the European Union (s.-c. TFEU). These two provisions are practically identical. For both of them, the term chosen in the English version of the texts is 'national treasures possessing artistic, historic or archaeological value'.

Therefore, the concept of nationality emerges as an essential part of the wording. Its interpretation is a sensitive topic both at a socio-political and at a legal level. On one hand, the issue is connected with the origin of modern States promoted by the creation of national sentiment as well as with contemporary claims of cultural identity and heritage (as illustrated by the long-lasting dispute over the name 'Macedonia' between Greece and the former Yugoslavian territory). On the other hand, the term constitutes a parameter for building one of the few exceptions to the free trade of goods and, as such, it influences directly the extend of the cross-border trade.

As shown by the large number of international debates for the rights over cultural objects, the common adjective 'national' is far from being interpreted univocally. Leaving aside the issue of ownership, to determine the nationality of an object is not an easy task. Instinctively, one would imagine that the nationality is essentially related to the place where an archeological find is discovered or a

more recent cultural object was created. In doing so, imaging a principle similar to the citizenship's *lex soli* (i.e. all the people born in the State "A" acquired automatically the nationality of that State. This is the case, for instance, of the law of the United States of America). However, this is only one possible connecting factor.

There are some hypotheses in which the same territorial origin is in doubt. In fact, it is not unusual that tomb raiding, illicit trading and the passing of the time erase any tracks of the actual State where the object originated from. This is especially true for archeological finds. Indeed, not only borders have changed so many times during years but also ancient empires were so vast and their borders so mutable that an object could, in some cases, not reveal a lot about its provenance.

Neither the GATT nor the TFEU says anything on this point. At the same time, neither the GATT nor the TFEU says anything on what falls within the category of 'treasure'. At the European level, this could appear quite surprising considering the repeated interventions in the field of cultural heritage law. Just to mention, Regulation (EEC) No 3911/92 and Council Regulation (EC) No 116/2009 on the export of cultural goods; Council Directive 93/7/EEC and Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State; and, recently, Regulation (EU) 2019/880 on the import of cultural goods.

As a matter of fact, there are several issues connected with the creation of a European official definition. Above all, the very same existence of the competence of the European Union to provide one is contested [16, pp. 136–137]. Without going in the details, the problem is that the area of culture figures among the areas of EU s.-c. supporting competence. In such areas, the Union has only a subordinate role since it is entitled to intervene only to support, coordinate or complement State Members' action (cfr. Article 6 TFEU). Additionally, the Union should contribute to the flowering of Member States' cultures, while respecting national and regional diversity (see Article 167). With this respect, a national based approach for defining national treasures could be read as a diversity in culture and, accordingly, as a dimension that should be respected by the EU.

Furthermore, even recognizing the right for EU bodies to create at least a framework definition, the fact remains that, as recent tendencies have highlighted, a supranational body interfering with national policies is not easy to accept. When the specific power deals with cultural heritage, the difficulties are even greater since they have to deal with a public sense of national belonging that it is easily enflamed by external interferences. It is not a case that the area of culture is indicated between the area of supporting competence and not between the exclusive or shared ones. As a result, we face divergent applications of the rule at the national level.

A brief look at two legal orders providing an ad hoc definition could serve as an example: Bulgaria (between the last to join the Union in 2007) and France (part of the founders of the then European Community). Bulgarian 2009 Cultural Heritage Act differentiates between movable cultural values in general and those, among them, that may acquire the status of national treasure. Specifically, if we look at the English translation of Article 54, we can observe that to be considered a 'national treasure' the object has to be of such an outstanding importance that its damage or

disappearance would constitute an irreparable loss to society. Furthermore, it has to meet at least one of the following criteria:

1. to be a unique, most typical or rare specimen of human activity or creativity for the period of its origin;
2. to have proven authenticity and high scientific and artistic value;
3. to be related to or to represent evidence of ideas, beliefs, events or outstanding personalities of decisive importance to the development of society.

On the other hand, the French approach is far broader. Article L111-1 of the *code du patrimoine* defines national treasures ('trésors nationaux'):

1. objects included in French museums;
2. public archives and historical archives;
3. historical monuments;
4. public movables with historical, artistic, archaeological, scientific value;
5. others objects having a relevant value for the national patrimony from an historical, artistic or archaeological point of view.

Indeed, it is possible to perceive the qualitative gap that denotes a cultural good as Bulgarian 'national treasure' in contrast to the French approach. The latter has led the French judicial system to confer the status of national treasures, for instance, on the Korean Royal Archives [Cour administrative d'appel de Paris, 1ère chambre, 19 July 2013, n. 10PA00983 (Inédit au recueil Lebon). Cfr. 7]. Such archives arrived in France in 1866 as a result of a military operation in Korea. Apart from the issue connected with the events on occasion of which the acquisition occurred, interestingly the French court confirms their qualification as national treasures of public ownership on the fact that they are an essential part of the National Library (*Bibliothèque nationale*) where they have been located for public use since their arrival.

European case-laws and doctrine have developed further linking factors capable of characterizing a good as important for a national patrimony and, consequently, of limiting its circulation. For example, it has been suggested that a close link with a State could be created simply by the place the cultural property represents, even if it was not created in that territory [31, p. 55].

Similarly, a connection could be created with a national artistic or social movement. With this respect, it is not unusual that a foreign work of art inspires a foreign author or movement, in so becoming a paramount part of that cultural tradition. It is enough to recall probably the most known painting in the history, the Leonardo's Monna Lisa, which has been reproduced in so many different styles by artists all over the world. Dalì, Botero, Andy Warhol, Duchamp, to name just a few.

Moreover, a highly sensitive topic is the recognition of an 'historicized acquisition'. That is to say, a connection originated as a consequence of the time the object has spent in the territory of a State. This is the case, for instance, of the

Egyptian obelisks brought to Rome by ancient romans and that from that moment on have remained in the city.

Finally, it is worth remembering a quite interesting Italian case that transferred the economic concept of 'marginal utility' to a cultural heritage level. Specifically, the case dealt with a French *commode* (i.e. dresser) of the eighteenth century, made in France by a French artist for the private use of the French king Luis XV in his French Castle of Choisy. The *commode* happened to be in Italy because its former (not Italian) owner had moved to this country in 1962. The Ministry imposed an administrative lien on it in 1986. When the lien was removed in 2009, a foundation for the protection of the Italian cultural heritage brought an action against the removal in order to stop the export of the *commode* to France.

The administrative court of first instance [TAR (Tribunale Amministrativo Regionale) Lazio, 22 March 2011, n. 2540], expressly challenged the issue of the notion of 'patrimonio nazionale' affirming that it is not legitimate to include each and every cultural object located within the Italian territory. Instead, there must be a real assessment. Such an assessment may take into account, among the others, the cultural 'marginal utility' of the good with respect to the protection and diffusion of culture in the community. Hence, even without any other kind of link with Italy, it is possible to consider as part of Italian national treasures, for the effect of limiting the export, all the works of art that constitute a rare example of that kind within the Italian territory. In fact, in consideration of their qualitative scarcity they may result to be particularly valuable for enriching Italian culture. In consideration of its characteristics, the French *commode* was judged free to move back to France. However, the same did not happen in a more recent case on a Dalì's painting in which the administrative court of first instance confirmed the export ban for the object. The decision was taken in consideration of its cultural relevance in relation of others Dali's works of art available in Italy [TAR Lazio, Roma, 7 April 2017, n. 4395].

Generally speaking, these cases illustrates a flexible concept of nationality. One thing is the nationality of the object; another is the national relevance of that object and, as a result, the being a part of the cultural patrimony of that State. The crucial aspect to assess is the cultural value of the object for the Italian culture. In this respect, the court did not deny neither the community-link nor the universalistic value of cultural objects. It is precisely the community-link that creates the universalistic value. The being evidences of the civilization that produced them renders cultural objects so valuable. In fact, they serve that original aspect of culture illustrated in the first part of the paper, that is, the ability to foster the cultural development of a society contributing to the advancement of knowledge.

The above illustrates that, even when nationality is a normative prerequisite, its real meaning is in practice left open to determination by each Member State. Actually, even affirming the existence of EU competence on the issue, as of now, no European institutions have ever expressly dictated a framework definition, nor has the European Court of Justice ever been asked to challenge a national decision on the point.

And what about territorial connections related to the phrase 'cultural heritage'? No linking factor is made explicit in the very wording, but what about the concept? In this respect, it seems advisable to look at the topic from each of the three

examined meanings. As aforesaid, in its third dimension (intangible cultural heritage), the 2003 UNESCO Convention has explicitly affirmed the genetic link of the heritage not with a country but with the corresponding community or group.

When referring to the second dimension (cultural heritage as an ensemble of cultural objects) it seems possible to find a legal reference suggesting the existence of a direct link of the 'cultural heritage' with the territory of a State in the 1970 UNESCO Convention. Actually, such Convention endorses an explicit definition of the national element, even without naming it. In details, for the purposes of the Convention, Article 4 identifies five different categories affirming that every object which belongs to one of them 'forms part of the cultural heritage of each State'. The first group, is related to the creation of the object. In this respect, it refers to the nationality of the creator(s) or the place where it was created (provided that the creator was resident within such territory too). The second group, is discovery-oriented. Accordingly, all the objects discovered within the national boundaries of a State form part of its cultural heritage. The third group addresses the issue of scientific missions, stating that the nationality of a scientific mission creates a link of the acquired object with the mission's national country (provided the consent of the competent authorities of the country of origin of the object). The fourth and fifth groups regulates hypotheses of exchanges. The former refers to freely agreed exchange of cultural property, while the latter refers to the acquisition of goods as a gift or in consequence of a legal purchase. In both cases, they provided that the competent authorities of the country of origin of such property have expressed their consent.

Different is the situation of the first dimension of 'cultural heritage' (the legacy of the complex whole of values, knowledge, art, and customs). This aspect is somehow neutral; a legacy could have a multiplicity of heirs. The territorial or community connection is related to which heir the legal instrument refers to. When the scope of the wording is to underline the responsibility of the entire international community to protect cultural property, the 'cultural heritage' will be given a transnational facet. Thus, 'cultural heritage of all mankind' [1954 Hague Convention]. When the instrument applies to an enclosed community, as the European Union, some drafters have opted to limit the transnationality to that territory. Namely, 'cultural heritage of Europe' [European Cultural Convention]. Finally, when the aim is to draw the attention on the protection of cultural diversity and, thus, on the cultural heritage of wide or narrow groups others than ours, the connection will be made explicit. Hence, 'part of their cultural heritage' [2003 UNESCO Convention].

In conclusion, notwithstanding a general reluctance of the international legal instruments to discuss extensively the spatial dimension of culture, it seems possible to follow the trail to a heightened awareness. Cultural heritage law reveals several shapes of belonging, net of ownership issues. The first one is connected with the international circulation of cultural objects. In this perspective, both the GATT and the TFEU uses the blurred element of 'nationality' as an express requisite for the cultural object to be barred from the free flow of goods. The second one is directly related to the term 'cultural heritage'. In this respect, as said, connections change depending both on the dimension under consideration and on the policy motivating the relevant international instrument. The third one is related to a new branch of Cultural Heritage Law, the rights of indigenous people. In this field the issue is far

more sensitive. There do arise claims within the same national territories on who is supposed to decide on heritage and how heritage should be safeguarded. Even without any denial of the origin of the heritage within a particular community or group, the interferences of the wider group that share the same national boundaries tend to be contested. To the point that scholars have been deemed as 'cultural looters' [5, p. 21].

In general, it seems possible to affirm that the global dimension of heritage appears twofold. On one hand, several scholars have stated that a 'global cultural heritage' is in contradiction with the narrower dimension to the point of delegitimizing retentionist policies [30; 5, p. 20]. In this regard, it seems like the statement for international responsibility is used to support claims of market nations as if the being a 'world heritage' gives to everyone not a duty to protect the object respecting the trustee, but the right to claim the legacy.

On the other hand, the key facet of 'cultural heritage of all mankind' lies in the very origin of all these legal instruments: the new awareness risen on the ashes of WWII and developed following natural catastrophes, as the 1966 Florence flood. That is, the goal of fighting war through culture by funding mutual understanding and cooperation among peoples for the mankind's sake. In such a context, cultural heritage is both a medium and an objective.

Cultural heritage is a medium, since it is a fundamental part of the process of human enrichment and helps in setting a strong moral and ethical framework. In this perspective, the UNESCO Constitution, signed 2 months after the end of WWII, states that

> […] ignorance of each other's ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war; […] the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern […]

Cultural heritage is an objective because every loss of cultural elements 'means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world' [1954 Hague Convention]. As such, the solidarity among peoples seems to impose a global duty of safeguarding, more than a global right on the legacy.

## 7 Conclusions, Clarifying Concepts

In the international field, culture heritage and its nuances are expressed through a wide variety of legal terms some of which covering the same semantic meaning. For instance, notwithstanding the identity in definition, the 1970 UNESCO Convention favors the term 'cultural property', while the 1995 UNIDROIT Convention opts for 'cultural object'.

This apparent interchangeability and permeability may, at first sight, suggest that choosing one term or the other does not have an impact at all on the content itself. However, a deeper analysis shows that the diversity in terminologies matches with different values to convey or to stress. Thus, in keeping in mind what has being argued before:

*National treasure*—At the international level, this term is not as popular since it is essentially limited to expressing the afore-examined exception to the free flow of merchandises. Its scope is discussed in doctrine in consideration of the discrepancies with the other linguistic versions of the TFEU. Among them, it is worth noting that the French text uses 'trésors nationaux' as the English one, while the Italian, and Spanish version favors the term 'patrimonio'. A further expression is adopted in the German language, 'Kulturgut' (i.e. 'cultural good'). These latter terms appear broader in scope since, on the one hand, the 'patrimony' commonly identifies the whole assets of a natural or legal person and, on the other hand, 'Kulturgut' embraces each and every cultural good. So, confronting the different linguistic versions, the term 'treasure' seems to be able to convey an additional requisite; i.d. a special value worthy of an enhanced protection in comparison to other goods of the same kind.

*Cultural property*—This term is the oldest one and it is still used to refer to cultural tangibles in the legal discourse. However, its popularity has been challenged in favor of other expressions. The fact is that 'cultural property' is a relatively new term in the common law system [50, p. 488]. The same noun 'property' is ambivalent in English. It may refer both to the object and the right. As such, it is not used as a neutral terminology as its equal in French, 'biens culturels'. It does not identify a simple category of objects defined as cultural. Instead, it is linked with property law [37, p. 26]. Thus, it provides the idea of market goods with a cultural quality added. In the end, it is a fancy kind of merchandise.

This leads to a number of implications connected with the fact that, worldwide, property rights grant a set of powers and prerogatives. Among them, exclusive enjoyment, alienation, exploitation, and even the power to destroy the belongings. Even if international conventions do not use the term for implying any of such powers [13, pp. 236–237], still, speaking about cultural 'property' is not universally appreciated precisely for its possible connotations. Being a relatively new term in legal English did not give it the time to get rid of the discussed associations.

Thus, avoiding the term 'cultural property' is seen as a way to counter the risk of commodification of culture. In such a context, it does not appear to be a coincidence that, during the drafting, there were discussions about which concept using for the benefit of the 1995 UNIDROIT Convention, the person who urged for the adoption of this term was Professor John Merryman, one of the major advocate of limiting State of origin's claims against the free circulation [41, p. 226]. In this respect, it is renown the empirical definition given by Professor Merryman of cultural property as including 'the sort of things that dealers deal in, collectors collect, and museums acquire and display' [32, p. 12].

*Cultural objects*—'Object' does not suggest any connection with property law. Furthermore, there are not even any hidden references on principle of guardianships

*aut similia*. It is ultimately the most neutral terminology within the legal field. Thus, its use is per se uncontested.

As noted, 'cultural objects' is the term selected to identify cultural tangibles in the 1995 UNIDROIT Convention. This decision came as a compromise solution between the two divergent opinions expressed respectively by Professor Merryman, at one side, and Professor Lyndel Prott, on the other. The first—as just reported—pushed for the adoption of the notion of cultural 'property', whilst the second urged for cultural 'heritage' to underline the guardianship attitude. As a compromise, it was finally agreed on 'cultural objects' [41, p. 226].

*Cultural heritage*—As abovementioned, in the international field the term is used to convey three main meanings. First, 'cultural heritage' as a reference to the abstract cultural legacy of a political territory or of humankind in general. Second, 'cultural heritage' as a concrete category of cultural tangibles (as, 'property' and 'object'). Third, 'cultural heritage' as a concrete category able to combine all cultural values from cultural tangibles to cultural intangibles.

'Heritage' is the only one among the examined terminologies able to cover also the intangible aspects of culture. Furthermore 'heritage' conveys the idea of legacy. In doing so, it drives the attention on the public interest connected with the protection of cultural objects. In fact, since a 'heritage' has to be transmitted for the future benefit of descendants, such a reference expresses the intergenerational importance of the safeguarding as the unavoidable way to handing on the legacy.

In the international field, all the different terminologies and shades of meanings are still all used. They change from one instrument to another in consideration of the aspect that the relevant instrument wants to stress. However, the wider and richer in connotations is by far 'cultural heritage'. 'Cultural heritage', as an abstract legacy or as a merge of tangible and intangible values, is able to encompass the totality of culture(s); in so, assuming a symbolic value that brings a clear break with all other terminologies. In conclusion, 'cultural heritage' as a legal term has demonstrated more than any others to be a real ensemble of historical stratification and cultural diversity.

## References


1. Abbagnano, Nicola. 1971. Cultura. In *Dizionario di filosofia*, Turin: Unione Tipografico Editrice.
2. Angelini, Massimo. 2011. *Alle radici della parola « cultura »*. Montesquieu archive. http://www.montesquieu.it/biblioteca/Testi/Angelini_cultura.pdf. Accessed 21 Jan 2020.
3. Banfi, Emanuele. 2011. «Imperfezione » vs « perfezione » dei sistemi linguistici'. *L'analisi linguistica e letteraria* 19 (2): 211–222.
4. Bellori, Giovanni Pietro. 1672. *Le vite de' pittori, scultori et architetti moderni*. Roma.: per il success al Mascardi
5. Blake, Janet. 2015. *International Cultural Heritage Law*. New York: Oxford University Press.
6. Cluzeau, Taïna. 2019. Combien vaut réellement un fossile de dinosaure ?—Nouvelle tendance dans les salles de vente: les fossiles de dinosaures. Décryptage de ce marché en plein essor. *National Geographic* 16 October 2019. National Geographic archive. https://www.nationalgeographic.fr/animaux/2019/10/combien-vaut-reellement-un-fossile-de-dinosaure. Accessed 21 Jan 2020.

7. Contel, Raphael Bandle, Anne Laurel Renold, Marc-André. 2012. *Affaire Manuscrits Coréens—France et Corée du Sud*. Archive: ArThemis (http://unige.ch/art-adr): https://plone.unige.ch/art-adr/cases-affaires/affaire-manuscrits-coreens-2013-france-et-coree-du-sud-1. Accessed 26 Jan 2020.
8. De Falco, Vincenzo. 2005. Funzioni pubbliche e cultura. In eds Amirante, Domenico; De Falco, Vincenzo *Tutela e valorizzazione dei beni culturali—Aspetti sovranazionali e comparati*. Turin: Giappichelli.
9. Fadda, Carlo. 1894. *L'arte e gli artisti nel diritto romano*. Genova: Regio Stabilimento Tipo Litografico Pietro Martini.
10. Francastel, Pierre. 1945. *L'histoire de l'art, instrument de la propagande germanique*. Paris: Libr. De Médicis.
11. Francastel, Pierre. 1970. *Études de sociologie de l'art*. Paris: Denoël-Gonthier.
12. Francioni, Francesco, and Federico Lenzerini. 2008. *The 1972 World Heritage Convention—A Commentary*. New York: Oxford University Press.
13. Francioni, Francesco. 2007. Des biens culturels au patrimoine culturel: l'évolution dynamique d'un concept et de son extension. In *Elaboration de règles internationales sur l'éducation, la science et la culture*, vol. 5, ed. A.A. Yusuf, 231–247. Leiden: Martinus Nijhoff et Editions UNESCO.
14. Garbini, Riccardo. 2007. Che cos'è la cultura. In *Contaminazioni—Studi sull'Intercultura*, ed. D. Costantino. Milan: Franco Angeli Edizioni.
15. Gombrich, Ernst Hans. 1999. *L'uso delle immagini. Studi sulla funzione sociale dell'arte e sulla comunicazione visiva*. Milan: Leonardo Arte.
16. Graziadei, Michele, and Barbara Pasa. 2017. Patrimoni culturali, tesori nazionali: il protezionismo degli Stati membri dell'UE nella circolazione dei beni culturali. *Contratto e impresa/Europa* 22 (1): 121–159.
17. Gros, Pierre. 1983. Statut social et rôle culturel des architectes (période hellénistique et augustéenne). Architecture et société. De l'archaïsme grec à la fin de la République. *Actes du Colloque international organisé par le Centre national de la recherche scientifique et l'École française de Rome (Rome 2-4 décembre 1980)* 66: 425–452.
18. Hauser, Arnold. 1955–1956. *Storia sociale dell'arte—Preistoria Antichità Medioevo Rinascimento Manierismo Barocco*, vol. I. Turin: Einaudi.
19. Héritier, Annie. 2015. Le marché de l'art et le patrimoine culturel—Une histoire juridique européenne. In *Droit et marché de l'art en Europe—Régulation et normalisation du risque. Entre champs culturels et économie réelle : quelles régulations ?*, ed. G.C. Giorgini and S. Perez. Bruxelles: Bruylant.
20. Hristov, Romeo, and Santiago Genovés. 1999. Mesoamerican Evidence of Pre-Columbian Transoceanic Contacts. *Ancient Mesoamerica* 10 (2): 207–213.
21. Jacq, Christian. 2002. *L'Egitto dei grandi faraoni*. Milan: Mondadori.
22. Karmon, David. 2011. *The Ruin of the Eternal City—Antiquity & Preservation in Renaissance Rome*. New York: Oxford University Press.
23. Kubler, George. 1962. *The Shape of Time. Remarks on the History of Things*. London: Yale University Press/Londra.
24. Lenzerini, Federico. 2011. Intangible Cultural Heritage: The Living Culture of Peoples. *The European Journal of International Law* 22 (1): 101–120.
25. Leopardi, Giacomo. 1973. *Zibaldone di pensieri*. Turin: Einaudi Editore.
26. Mather, Lynn. 2013. Law and Society. In *The Oxford Handbook of Political Science*, ed. R. E. Goodin. Oxford University Press archive. https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-015#oxfordhb-9780199604456-bibliography-15. Accessed 23 Jan 2020.
27. Mayo, Margaret Ellen. 2007. Collecting Ancient Art—An Historical Perspective. In *Who Owns the Past?—Cultural Policy, Cultural Property and the Law*, ed. K. Fitz Gibbon. Piscataway: Rutgers University Press.
28. Merryman, John Henry, Albert E. Elsen, and Stephen K. Ulrice. 2007. *Law, Ethics and the Visual Arts*. Alphen aan den Rijn: Kluwer Law International.
29. Merryman, John Henry. 1986. Two Ways of Thinking About Cultural Property. *The American Journal of International Law* 80 (4): 831–853.
30. Merryman, John Henry. 1994. The Nation and the Object. *International Journal of Cultural Property* 3 (1): 61–76.
31. Merryman, John Henry. 2001. Cultural Property, International Trade and Human Rights. *Cardozo Arts & Entertainment Law Journal* 19: 51–68.

32. Merryman, John Henry. 2005. Cultural Property Internationalism. *International Journal of Cultural Property* 12 (1): 11–39.
33. Morel, Jean-Paul. 1997. L'artigiano. In *L'uomo romano*, ed. A. Giardina. Rome: Laterza.
34. Morris, Desmond. 2014. *La scimmia artistica. L'evoluzione dell'arte nella storia dell'uomo*. Milan: Rizzoli.
35. O'Keefe, Patrick J. 1999. The meaning of 'cultural property' under the 1954 Hague Convention. *Netherlands International Law Review* 46: 26–56.
36. O'Keefe, Patrick J. 2000. *Commentary on the 1970 Unesco Convention on the Illicit Trade*. Leicester: Institute of Art and Law.
37. O'Keefe, Patrick J. 2017. *Protecting Cultural Objects: Before and After 1970*. Builth Wells: Institute of Art and Law.
38. Pommier, Édouard. 1991. *L'art de la liberté—Doctrines et débats de la Révolution française*. Paris: Gallimard.
39. Pommier, Édouard. 2007. *L'invenzione dell'arte nell'Italia del Rinascimento*. Turin: Einaudi.
40. Prott, Lyndel V. 2000. *Biens culturels volés ou illicitement exportés—Commentaire relativf à la Convention d'Unidroit (1995)*. Paris: UNESCO.
41. Prott, Lyndel V. 2005. The International Movement of Cultural Objects. *International Journal of Cultural Property* 12 (2): 225–248.
42. Przyborowska-Klimczak, Anna. 1989–1990. Les notions des "biens culturels" et du "patrimoine culturel mondial" dans le droit international. *Polish Yearbook of International Law* 18: 47–72.
43. Romme, Gilbert. 1894. Rapport au nom du Comité d'Instruction publique. In *Procès-verbaux du Comité d'Instruction Publique de la Convention Nationale*, vol. II, ed. M.J. Guillaume. Paris: Imprimerie Nationale.
44. Sacco, Rodolfo. 2015. *Il diritto muto—Neuroscienze, conoscenza tacita, valori condivisi*. Bologna: per gli eredi del Dozza: il Mulino.
45. Schaaf, Peter, and Günther A. Wagner. 2001. Comments on "Mesoamerican Evidence of Pre-Columbian Transoceanic Contacts" By Hristov and Genovés, in *Ancient Mesoamerica* 10:207–213, 1999. *Ancient Mesoamerica* 12 (1): 79–81.
46. Stewart, James. 1814. *Reports of Cases Argued and Determined in the Court of Vice-Admiralty, at Halifax, in Nova-Scotia, From the Commencement of the Was, in 1803, to the End of the Year 1813, in the Time of the Alexander Croke, LL.D. Judge of the Court*. London: Butterworth and Son.
47. Stott, Peter H. 2011. The World Heritage Convention and the National Park Service, 1962–1972. *The George Wright Forum* 28 (3): 279–290.
48. Toman, Jiří. 1996. *The Protection of Cultural Property in the Event of Armed Conflict*. Paris: Dartmouth.
49. Tylor, Edward Burnett. 1920. *Primitive Culture—Researches into Development of Mythology, Philosophy, Religion, Language, Art, and Custom*, vol. I. London: John Murray.
50. UNIDROIT Secretariat. 2001. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report. *Uniform Law Review* 6 (3): 476–564.
51. Vasari, Giorgio. 1647. *Le vite de' più eccellenti architetti, pittori, et scultori italiani*. Bologna: per gli eredi del Dozza..
52. Verde, Simone. 2014. *Cultura senza capitale. Storia e tradimento di un'idea italiana*. Venice: Marsilio Editori.
53. Voulgaris, Ioannis. 2003. Les principaux problèmes soulevés par l'unification du droit régissant les biens culturels. *Uniform Law Review* 8 (1–2): 541–550.
54. Vygotsky, Lev. 1986. *Thought and Language*. London: M.I.T. Press.
55. Wagner, Anne, and Sophie Cacciaguidi-Fahy (eds.). 2008. *Obscurity and Clarity in the Law: Prospects and Challenges*. London: Ashgate.
56. Zanker, Paul. 1989. *Augusto e il potere delle immagini*. Turin: Einaudi.
57. Zanker, Paul. 1997. In Search of the Roman Viewer. *Studies in the History of Art* 49: 178–191.
58. Zanker, Paul. 2002. *Un'arte per l'impero. Funzione e intenzione delle immagini nel mondo romano*. Milan: Electa.

## International Legal Instruments (Chronological Order)

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. ICRC archive. http://www.icrc.org/ihl.nsf/full/195. Accessed 5 February 2020.Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. ICRC archive. http://www.icrc.org/ihl.nsf/full/195. Accessed 5 February 2020.

Treaty of Peace between the Allied and Associated Powers and Austria. St. Germain-en-Laye, 10 September 1919. AustLII archive. http://www.austlii.edu.au/au/other/dfat/treaties/1920/3.html. Accessed 5 February 2020.

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact). Washington, 15 April 1935. ICRC archive. https://ihl-databases.icrc.org/ihl/INTRO/325?OpenDocument. Accessed 5 February 2020.

Convention for the protection of cultural property in the event of armed conflict. The Hague, 14 May 1954. ICRC archive. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/400. Accessed 5 February 2020.

Statement of Policy with Respect to the Control of Looted Articles. Paris, 8 July 1946. In 1951 *Department of State Bulletin* 25(627): 340.

General Agreement on Tariffs and Trade. Geneva, 30 October 1947. WTO archive. https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.. Accessed 5 February 2020.

1954 European Cultural Convention. Paris, 19 December 1954. Council of Europe archive. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/018 Accessed 5 February 2020.

Treaty on the Functioning of the European Union. Rome, 23 March 1957. Eur-lex archive. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN. Accessed 5 February 2020.

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transport of Ownership of Cultural Property. Paris, 14 November 1970. Unesco archive. http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html. Accessed 5 February 2020.

Convention Concerning the Protection of the World Cultural and Natural Heritage (universally known as World Heritage Convention). Paris, 16 November 1972. Unesco archive. https://whc.unesco.org/archive/convention-en.pdf. Accessed 5 February 2020.

UNESCO, Declaration on Cultural Policies, World Conference on Cultural Policies, Mexico City, 26 July–6 Aug. 1982. Unesco archive. https://unesdoc.unesco.org/ark:/48223/pf0000052505. Accessed 5 February 2020.

1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Rome, 24 June 1995.Unidroit archive. https://www.unidroit.org/instruments/cultural-property/1995-convention. Accessed 5 February 2020.

UNESCO Universal Declaration on Cultural Diversity. 2 November 2001. Unesco archive. http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html. Accessed 5 February 2020.

UNESCO Convention for the Safeguarding of Intangible Cultural Heritage. Paris, 17 October 2003. Unesco archive. http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html. Accessed 5 February 2020.