



CULTURAL HERITAGE AND LEGAL ASPECTS IN EUROPE

*Edited by
Mitja Guštin and Terje Nypan*



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ARDUA PRIMA VIA EST (Ovid, Metamorphoses)

The meeting about the legal protection of cultural heritage in Europe, organized by the Institute for Mediterranean Heritage, Science and Research Centre Koper of University of Primorska (Prof. Mitja Guštin) and the European Heritage Legal Forum (Dr. Sc. Terje Nypan), brought forth and unveiled a series of culturally significant and legally relevant issues. It introduced European and other international legal documents in the field of cultural heritage, as well as opened questions about their implementation, which are greatly important for the European context.

The connection between scientific and professional research and policy-making is essential for a successful preservation of cultural heritage.

As a representative of the University of Primorska I am particularly pleased with the wider participation of international experts and researchers from different fields related to cultural heritage.

Heritage, both material and living heritage, represents something inherited from the past that expresses our values, identities, religious and other beliefs, knowledge and traditions. Heritage preservation is therefore carried out in the name of public good and is defined in accordance with the cultural, educational, developmental and symbolic significance of heritage. The recognition of heritage, its significance and values, its documentation, research and interpretation are areas where scientific research is an essential part of implementing the public good.

The active preservation of heritage can only be achieved through its public presentation, by raising awareness about its significance and integrating heritage issues into education and training. Special research and cultural significance is placed upon archaeological finds and historic remains, traces of human activity from the past worlds because their preservation and research contribute to the understanding of the historical evolution of mankind and its connection with the natural environment.

The social significance of heritage is a value shared by a community, meaning that anyone has the right to use heritage as a source of information and knowledge, and to contribute to its enrichment. However, everyone is also responsible for respecting the heritage of others just as they do their own.

The set rules about heritage, be it in national, EU or international documents, all aim to provide a framework that helps manage the preservation of cultural heritage. At the same time the preservation of cultural heritage is also affected by legislation from other fields, especially in the EU, whereby making the harmonizing of these laws and rules fundamental. The question of how these rules can be adapted for more efficient implementation is thus an extremely challenging research quest.

It is, therefore, more than welcome that this publication deals exactly with these questions; I am confident it will bring a useful contribution to the cultural and legal framework of this important issue.

**Prof. Rado Bohinc,
Rector of the University of Primorska**

Mitja Guštin, Terje Nypan

Why bother with legislation?

1.1

This publication "Cultural Heritage and Legal Aspects in Europe" presents some relevant examples of issues that arise in the attempt to preserve cultural heritage within the legislative and technical norms of contemporary European regulations. It is the result of a joint effort and collaboration between the Institute for Mediterranean Heritage of the University of Primorska in Slovenia, the European Heritage Legal Forum and the Directorate for Cultural Heritage at the Council of Europe. The contributions highlight the support for conservation policies in international Conventions and Charters and from UNESCO Conventions, the Conventions of the Council of Europe, European Union legislation, as well as national legislation issues.

The present book is structured in three sections in order to lead us through the themes from the European context to the global and from the general perspective to the detailed examples. The first section with the three texts introduces the general topic, it is followed by a series of five comprehensive texts where we are first introduced to the European legislation framework related to cultural heritage at the Council of Europe and the European Commission, and then to the global context of the international conventions. Section three encompasses a selection of national case-studies; while the biographies of the authors are found at the end of the book.

The preservation of spiritual and material heritage is a demanding task of contemporary society. There is general agreement that special measures need to be taken in order to conserve, maintain, communicate and transmit the material heritage¹ as a recognizable "document" of past eras.

The dilemma is that to maintain this heritage changes are necessary. Building regulations are enforced. New uses are required which have a wide range; from individual to collective solutions incorporated into territorial / urban development plans. Tourism or new economic activities also create new use demands while there is an increased use of physical heritage as a defining element of the identity of a place or community.

¹ We refer here first and foremost to material heritage with emphasis on immovable heritage (archaeology, buildings, cultural landscapes, historic towns, etc.).

The fact that new legislation sets criteria for buildings based only on modern technology is yet an additional challenge. Such legislation often ignores the special need of heritage. The use of historic buildings and areas cannot avoid conforming with contemporary society's norms by accommodating and adjusting to changing regulations. But how can this be achieved? And to what extent?

Cultural heritage connects to environmental policy. Environmental policy encompasses both natural and cultural heritage. Protection and conservation are intertwined and integrated with society's spatial policies. Both urban and rural built environments are subject to problematic developments that easily destroy their character in the encounter.

The spatial policies, the building regulations, health and safety regulations et al. all act together to set a "technical" framework with criteria for development projects and individual plans. Urban plans, individual buildings, the construction of traffic transversal links (like Barcelona – Kiev) or transport corridors (like the Southern corridor gas pipeline or Nabucco) cause immense change to the physical environment.

The present social development of urban centres and their wider surroundings (like satellite towns, shopping malls, industrial zones) confronts the society with what is already there, that which already exists – the inherited. This 'inheritance' is what has been passed on to us after millennia of cultivation and landscape use, shaping the heritage, the tradition and the identity of the place.

This heritage has become a driving force of European tourism and economic activities related to tourism. The built and natural heritage of Europe is among the most important assets for tourism. Cultural heritage generates revenues not far below those of the European automobile industry. Tourism generates economic development and consequently increases pressure to exploit it even more.

The heritage elements in a landscape or urban setting are essential to discern the historical genesis of an environment, as well as the individual human communities. It is essential to

give them identity and distinction. Yet in the need to preserve, reshape, and revitalize the historic built communities one often comes in contradiction with contemporary legislation. This legislation constitutes the framework for interventions into the spatial and urban tissue, containing also numerous regulations for modern building environments,² which must also be applied to historic buildings.

The legal basis for building activities (also within the cultural heritage sector) are the results of defined frameworks, which have fundamental implications for the safeguarding of cultural heritage. They are increasingly created by non-national institutions. The legal frameworks at the European level shape the practice of safeguarding cultural heritage. That is why we wished to look closer at the subject.

² Earthquake safety regulations, energy efficiency issues, traffic safety etc.

In the later years the concept of '*preventive maintenance*' as part of integrated conservation of built architectural heritage has become a well-defined part of policies. This sensitive and active attitude towards the environment should be "re-enacted" every time we want to enhance the identity of a place by means of heritage management and ensuing balanced development.

The application of these agreed rules has implications beyond regulating technological conservation solutions. Often the guiding philosophy and policy that assures the special consideration of heritage is lacking in them. It is essential that the wider society understands the notions of 'heritage', 'safeguarding', 'respect', 'activities in times of peace', which are used in international documents on cultural heritage. It is essential that the wider society understands the dangers of industrially-based regulations on their built heritage. It is important that our legal experts and decision-makers take into account how such regulations, incorporated into national cultural legislation, influence their work.

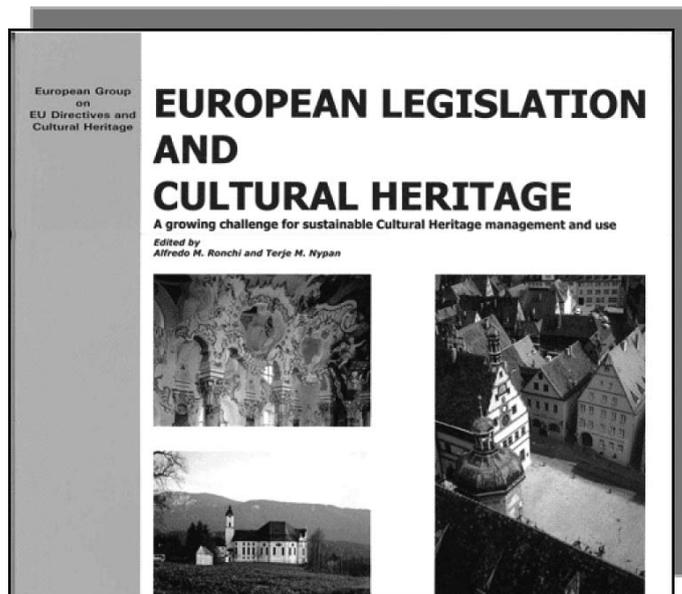


Fig. 1: »European Legislation and Cultural Heritage«, Ed.: A.M. Ronchi, T.M. Nypan, Delewa Editore, Milano 2006. ISBN88-88943-05-6.

Mitja Guštin, Neža Čebtron Lipovec

Heritage, Legislation and Tourism

1.2

Once upon a time

Several legal and philosophical issues in the protection of cultural heritage have followed the conscious and organized heritage conservation attempts since the Renaissance, especially since the early 19th century, and many are still topical today. Looking into the evolution of conservation practice through a European example several of these issues can be detected. Since the meeting on *Cultural Heritage and Legal Aspects in Europe* took place in the town of Piran in the northern Adriatic peninsula of Istria, the conservation tendencies and the related legal issues of this area will be pointed out as an example. The diverse and turbulent history of Istria along with its monument protection offers a handful of newsworthy themes.

The town of Piran/Pirano, together with its tourist pendant Portorož/Portorose, a former small village concentrated around the church of St. Mary of the Rose, has been a tourism destination for over a century now. It offers a set of heritage category examples, e.g. the Venetian architecture of Piran, the Istrian landscape and vernacular architecture, the old saltpans of Sečovlje with the related traditions, the thermal mud with its spa-tourism. All these elements were taken into account when the Yugoslav administration proposed a strategy for the development of tourism in the area after 1954 to find a way between the legal and societal requirements of protecting heritage and supporting development. The current situation shows that several pending issues in heritage protection have not yet been overcome.

Piran, an important Istrian town in the era of the Venetian Republic of the Serenissima, gained most of its new characteristics through industrialisation and the development of tourism in the mid-19th century. The north Istrian towns had a major economic role throughout the Venetian rule until 1797. By the mid-18th century the main economic and trade focus shifted from the Istrian coast to the city of Trieste, which became the Habsburg gate into the world. With the boosting development of the nearby tax-free port city of Trieste or the "porto franco" founded by Karl VI and Maria Theresa, the Istrian medieval towns faced decline. The new "promised land" of Trieste attracted businessmen and tradesmen from all over Europe and the world. The new economic

force steered the growth of the modern port and the building of splendid Eclecticist and Secession palaces on the seaside. At the same time the newly built Southern Railway connected Vienna (Austria) with the central and western Slovenian regions already in 1842 and was inaugurated in 1857.

Heritage preservation in the Austro-Hungarian period in Istria (1819-1918)

The first attempts of an organized protection of cultural heritage in Istria are tightly related to that of the Austro-Hungarian Empire. Although the first Austrian law on cultural monument protection was only passed in 1923, the activities of the Vienna *Centralkommission zur Erforschung und Erhaltung der Baudenkmale* (Royal Central Commission for the Research and Conservation of Architectural Monuments) played a fundamental role. The Commission was founded at the end of 1850 as an advisory body with no legal competence following an initiative of the Ministry for trade, in charge also of spatial planning. Its tasks consisted mainly of creating inventories of monuments, maintaining them, and writing topographies. After its transition under the auspices of the Ministry of Education and Religion in 1859, it was reorganised in 1872 and divided into three sections: I. Monuments from Prehistory and Antiquity; II. Monuments from the Middle Ages to the 18th century; III. Historic monuments until the 19th century – archival artefacts. The work was executed by voluntary professionals ("correspondents") that were of different backgrounds (directors of museums, libraries, mayors ...). These special conservators were only employed full-time after the major reorganisation in 1911 and worked in pairs (technical and art-historical conservator) in the regional conservation offices. With the reorganisation in 1911 the statute listing the principles and duties of the *Centralkommission* was written, representing the first attempt of establishing a legal background in the conservation field in the Austro-Hungarian Empire. However, no legal framework really existed in the area of the Empire until 1923.

For the region of Istria, which came under Austrian rule after the secession from the Venetian Republic followed by a decade of Napoleon's regime (1805-1813), some individuals played

major roles. The first conservator for Istria from Trieste, the lawyer Pietro Kandler, active between 1857-1871, is famous for his topographies and historiographies of the Istrian towns, among these significant is his historic monography about the town of Piran. Kandler was superseded as conservator in the Northern Istrian area by the architects Giovanni Righetti and then by Enrico Nordio.¹

Another prolific conservator was the Czech Anton Gnirs who worked in Istria from 1901 until 1914 and has the merit of having conducted large excavations of the Roman remains on the island of Brioni and Roman monuments in Pula/Pola and its rural architecture. His many publications concerned topographies, archaeology and architectural findings about the Roman period in Istria as well as about Early Christian and Medieval built heritage up to the 16th century. Gnirs' work is tightly connected to the figure of the archduke Franz Ferdinand² for whom he carried out a series of researches about the local movable heritage and art pieces. Anton Gnirs and the archduke Franz Ferdinand met during the archduke's rehabilitation vacation on the island of Brioni, when he spent his stay wandering around Istria and the Kvarner "as a normal tourist, without escorts", as we read in the *Adria* newspaper from 1910. Gnirs also showed him the Roman remains in Pula/Pola.

The archduke was himself fervently engaged in the conservation of monuments and remains of the past. He was honorary member of the Central Commission since 1905, while in 1910 the emperor Franz Joseph proclaimed him as the *protektor* of the Central Commission. With the new statute of 1911 the archduke also had direct influence on the work of the Commission. His personal philosophy about the remains of the past had three baselines: conservation in situ, stylistically adequate restoration, and the protection of the townscapes with a local or regional style, relating to his rejection of the arising modernism of Otto Wagner. A representative of the latter aim was the work of the

conservator Cornelio Budinich, author of a detailed research on Gothic architecture in Istria and some projects for new churches in Neo-Gothic style, e.g. in Portorož. The research about the typical Istrian churches served also as a baseline for the archduke's wish to build a new church in the gardens of Miramar, which was never realized. Franz Ferdinand sought an "Istrian style" that would meet the characteristics of the local landscape, especially in the fast growing building activity for a blossoming tourism in Istria. The need for more fine-tuned building was expressed also through the establishment of the Office for the approval of projects for new public buildings set up in 1908, which tried to face the "modest education of the builders". Most of the conservation interventions took place during the period of the archduke's presence and engagement in Istria.

We also recognize the archduke's proneness to in situ preservation in his engagement to prepare exhibitions with replicas and not the original objects. Such was the example of the "Istrian exhibition" in Koper in 1911 and the "Adriatic exhibition" in the rotunda of the Vienna Prater in 1913. For the latter the archduke accepted to be the protector only if none of the artefacts in the churches and convents from the Austrian Adriatic area left their original locations. Instead of transporting originals, replicas and reconstructions were built. In a way, such conservational attitudes conflicted with the archduke's personal passion as a collector, yet it stressed a situation already highlighted by the Istrian association for archaeology.

Important for the heritage conservation in Istria was also the contribution of the Istrian *Società istriana per l'archeologia e storia patria* (Association for archaeology and local history) from Poreč/Parenzo, contributing with exhaustive fieldwork and research over all Istria since its foundations in 1884. The *Association* was a filioitalian organisation that aimed to emphasize the Italian appurtenance of the Istrian land through research. Despite their political undertone, their activities highlighted a very topical issue – the export of historic objects. In order to prevent exportation and for the in situ conservation of movable items, small museums were set up in Istria (Poreč 1884, Koper 1911).

1 Sergio Tavano, »Wiener Schule« e »Central-Commission« fra Aquileia e Gorizia, *Arte in Friuli*, Udine, 1988, 97-139.

2 Brigitta Mader, *Sfinga z Belvederja, Nadvojvoda Franz Ferdinand in spomeniško varstvo v Istri / Die Sphinx vom Belveder – Erzherzog Franz Ferdinand und die Denkmalpflege in Istrien*, Annales Majora. Koper, 2000.

In the specific area between Koper/Capodistria and Piran/Pirano in the period of the Central-Commission conservators, the two successors of Pietro Kandler focused on built heritage. Giovanni Righetti, conservator II for Trieste and surroundings between 1876 and 1901, restored the interior of the church of St. George in Piran and designed the new townhall for the town in 1879. The architect Enrico Nordio, student of Righetti, took over the duties of conservator II for the county of Koper/Capodistria, Poreč/Parenzo and Trieste in 1902 and performed it until 1924. He restored the have representative building of the Venetian-Gothic house Fragiaco in Piran. His major merit is to have established with his salient building projects between Trieste-Vienna-Zagreb-Milan a link between the Vienna school and the Milano school, thus between the two grand schools of conservation theory, the one of Alois Riegl and Max Dvořák in Vienna and that of Camillo Boito in Milan.³

Piran

A parallel development to that of the monument protection was the local economy of Istria. An echo of the boosting development of Trieste also reached and embraced the coast of Piran. The area had a prolific industry of soap and glass, the factory Salvietti, and of ammonium. A significant development factor for the area was its mineral-rich soil and its traditional salt-production. In fact, the saltpan mud was used by doctor Giovanni Lugnano under the aegis of the consortium of the Saltpans of Piran from 1879 for healing rheumatism and other diseases.⁴ In 1894 a maritime resort and sanatorium developed out of this activity, built by the company *Società Stabilimento Balneare di Pirano* (Society for spa and bathing of Piran), the latter then expanded into the *Società per la costruzione e gestione degli alberghi* (Society for building and managing hotels) called *Portorose*. In 1897 the *Imperial-Royal company of the White Cross* from Vienna opened a special rehabilitation centre for its military officials. In the same year Portorose/Portorož was proclaimed a "climatic

area" and on this basis a resort company was established, the so-called *Azienda di cura per il circondario di Porto Rose presso Pirano*. The *circondario* comprised a dozen small private hotels, while several new vacation villas were built. The health tourism progressively turned into classic spa tourism. For richer guests the company built the luxury hotel Palace Cur Hotel in 1910 and in 1912 a modern beach with cabins on the wooden pier and timber armchairs for sunbathing were set up. The second half of the 19th century was marked by the steadily growing new economic source, tourism, and had a strong impact on the medieval town of Piran. In the late 19th century the city got a new town hall (1879) and a new theatre (1910)⁵. We need to point out that contrary to Trieste and Piran the other northern Istrian towns saw a much slower and less salient economic development during the same period.

Tourism also had a great impact on other Istrian towns with similar features, e.g. Opatija and Lovran in present-day Croatia. The guests of the tourist facilities came mainly from the hinterland of the northern Adriatic and from the Austro-Hungarian lands. Among these was the Austrian archduke Franz Ferdinand, who became acquainted with the land after his holidays in 1910, and played an important role in the recognition of the Istrian heritage through his *protektorat* in the Central Commission and the activities, which set the basis for later work in conservation in Istria, as well as for designing cultural heritage laws in Austria.

Italian kingdom

After World War I the tourist provenance changed together with the new borders. The area of Istria and Trieste, together with the *Adriatische Küstenland* (western Slovenian regions), passed under the rule of the Italian kingdom and was included in the Venezia Giulia region following the Treaty of Rapallo, which entered into force 1918.

Heritage conservation was first run by the *Ufficio di belle arti* (Office for arts) within the government body of the Julian region

³ Sonja Ana Hoyer, Prispevek k preučevanju zgodovine spomeniškega varstva – konservatorstva na Slovenskem – primer Slovenska Istra, *Šumijev zbornik – Raziskovanje kulturne ustvarjalnosti na Slovenskem*, Znanstveni inštitut Filozofske fakultete, Ljubljana, 1999, 365-374.

⁴ Mitja Guštin, Identiteta – dediščina kot temelj razvoja portoroškega turizma, *Turizem kot medkulturni dialog*, Turistica, Portorož, 2010.

⁵ Brigita Jenko, Arhitektura Tartinijevega gledališča v Piranu, *Annales*, 1992, 199-216.

in Trieste. Its first task consisted of the retrieval of objects that were taken out of their original location during the war. The mission was fully accomplished by the historian Pietro Sticotti and the objects brought back to Trieste and Istria. Other activities included the urban rearrangement and the "cleaning" of the Austrian additions to the buildings.⁶

The Italian law on cultural heritage issued by the king in 1902 also entered into force in the annexed land of Istria, but only in 1921, while it actually entered into practice in 1923 with the foundation of the *Regia soprintendenza alle opera d'antichità e d'arte* (Royal Office for Works of Antiquity and Arts) in Trieste. This way Istria was included in the network of the national offices in charge of the conservation of monuments performed by architectural conservators and conservators for movable objects. The offices in charge were organized into three sections according to the type of heritage: monuments; collections and movable objects from the Middle Ages to Modern times; excavations and art from Antiquity.

In terms of architectural conservation the most remarkable among the *soprintendenti* in Istria was Ferdinando Forlati, professor at the Faculty for architecture in Venice, who was appointed to the position in 1925 and remained in Istria until 1935. Forlati is reputed for his prolific activity and an attentive conservation attitude in tune with the principles of the first charter on the conservation of cultural monuments *Carta d'Atene* of 1931. During his service several buildings and squares in the historic cores of the northern Istrian towns were restored: in Koper the house of Carpaccio, the Romanesque baptistery, the Loggia, the Taverna, the Romanesque house, the Pretorian palace and the Tacco Palace; in Piran the groundfloor of the Venetian-Gothic house Fragiaco on the main Tartini square and the restoration works on the baptistery according to the project of the conservator Cornelio Budinich. Forlati was highly engaged in the protection of vernacular architecture tied to the goal of protecting the historic landscapes and townscapes, which

6 Remo Bitelli, *Claustra Alpium Iuliarum, il confine di rapallo e fascismo – Archeologia come esempio di continuità, Clastra Alpium Iuliarum, rapalska meja in fašizem – arheologija kot primer kontinuitete*, Annales, Koper, 1999.

we learn from his opposition to the drying of the saltpans around Koper (Capodistria) to make new building areas.⁷ Forlati's period highlights the ongoing *Congrès Internationaux d'Architecture Moderne* (CIAM) debate on the conflict between heritage preservation and development for a better living standard. On the same preservation basis stood Forlati's struggle with the local authorities in Piran, where he was trying to preserve the traditional character of the Tartini square, a typical Venetian "campo", by rejecting the placement of a second fountain. It is meaningful to recall here that France Stelé, the first conservator for the Carniolan region (majority of the Slovenian lands) and author of the first Slovenian conservation laws, pointed out Ferdinando Forlati as one of his main professional role models, next to Max Dvořak and Alois Riegl.⁸

In 1939 a new heritage preservation law entered into force in Italy. It empowered the administration with the restoration and maintenance of monuments and it enhanced the possibilities of expropriation in the name of conservation. It also involved the reorganisation of the *Soprintendenze* (heritage offices), so the main office for the Julian region was moved from Trieste to Padua. In the period between 1940 and 1945 the focus of conservation efforts was placed on the protection of movable and immovable objects from destruction, especially in air attacks.

Following the Italian laws nr. 1089 of 1 June 1939 and nr. 1041 of 6 July 1940 several artworks of Paolo Veneziano, Vittore Carpaccio, Cima da Conegliano, and other artists, as well as ecclesiastic garments and other objects from the Istrian churches, museums and town halls were sent to safer places in central Italy in order to shield them from bombings during the war between 1940 and 1945. The transfer was realized in June 1940 under the supervision of the *soprintendente* Fausto Franco. Eleven boxes with 25 artworks comprised artworks from

7 Daniela Milotti Bertoni, Delovanje tržaške soprintendenze v Slovenski Istri 1918-1945, *Kultura na narodnostno mešanem ozemlju Slovenske Istre, Varovanje naravne in kulturne dediščine na področju konservatorstva in muzeologije*, Znanstveni inštitut Filozofske fakultete, Ljubljana, 2002, 51-85.

8 France Stelé, Iz konservatorskih spominov, *Varstvo spomenikov XX*, 1965, Ljubljana, 1966, 37.



Figure 1: The pavilion in the form a triumphal arch, designed by the architect Renato Nobile, was the entrance to the Istrian exhibition of economic and cultural achievements. The exhibition that took up the model of contemporary world fairs was set up on several locations in Capodistria/Koper in 1910. The archduke Franz Ferdinand was its protector while the conservator Anton Gnirs was in charge of the historic documents. Photo from: Slobodan Simič Sime, *Koper na robovih stoletij*, 2002, 212.



Figure 2: The Venetian Gothic house called "Lassa pur dir" in Pirano/Pirano was one of the major restoration projects by the professor, architect and soprintendente Ferdinando Forlati, realized in 1935. Photo from: Slobodan Simič Sime, *Piran na robovih stoletij*, 2002.

the towns of Koper, Izola and Piran. Documents show that there had been active attempts of restitutions immediately after the war but these were not realized.

Piran

The geopolitical shift influenced the economy of the area since Piran and Portorož lost the majority of the usual tourist groups from Central Europe and became the hinterland of northern Italian cities of the Italian state. In fact, the tourist activity never recovered from this change because of the new numerous tourist centres on the western coast of the northern Adriatic (Lido di Venezia, Cervignano). In the new political circumstances the local enterprises looked for new tourist attractions. Thus, the infrastructure was much improved, also by offering hydroplane panoramic flights from 1921 (Italian air force society / *Societa Italiana Servizi Aerei – SISA*) and from 1926 panoramic flights based from the airport station in the hangars under the cliff of the abandoned monastery of San Bernardino, just outside Piran. The Italian presence and the establishment of the Italian wellness company *Società Stabilimento Balneare di Pirano* had a great impact on the historic centre of Piran as well. New tourist infrastructure was built and adapted in and around the town. Old buildings were adapted according to the scale and typical features of the historic core (hotel Miramare, hotel Metropol next to the Historicist-style theatre); the countryside residence Villa Tartini in Strunjan was restored and adapted. At the same time, the new Italian guests stirred the continuing building of villas with rooms to rent and small hotels in Portorož, which in the 1930s constituted a real tourist village.

Post-war period

World War II did not spare Piran either – tourism ceased to be a source of development for a while. After the war, a new period for the town and the region started. In the period between 1945 and 1954 many local inhabitants emigrated. The region became part of the Slovenian Republic in the Yugoslav federal state, of which we are today the heirs, and brought drastic changes. Reconstruction and industrialisation were the two principal activities of the 1950s and 1960s for the whole country, whereas Piran saw the rebirth of tourism.

Cultural heritage legislation in the Yugoslav period is marked by three main periods. The first laws (Federal law of 1945 and National Slovenian law of 1948) set the definitions of heritage and defined its administrative framework. The second phase comprises the laws of 1958, 1959 and 1961, which came also as a reaction to the fast development and industrialization. Thirdly, the last main turnover is represented by the law of 1981, which instituted the concept of integral and active conservation, and joined the natural and cultural heritage under one law again.⁹

In terms of topical issues and themes related to the evolution of conservation practice and its legal framework in Istria, two main features arise.

Missing heritage

The first one is strictly connected with the short and turbulent post-war period on the northern Istrian coast. For seven years (1947-1954) the area from Trieste to Novigrad (Cittanova) formed the *Svobodno tržaško ozemlje - STO (Free territory of Trieste)*, since the diverse ethnic appurtenance of the territory (mainly Italian speaking population in the urban centres and mainly Slavic – Slovenian and Croatian speaking population in the rural areas) raised the issue of division of land between Italy and Yugoslavia. Consequently, the temporary political entity was composed of two zones, A and B. The issue was solved in 1954 with the London memorandum, which appointed Zone A (Trieste and its hinterland) to Italy and Zone B (part of Karst and Istria to the valley of the river Mirna) to Yugoslavia. The geopolitical fracture caused massive migrations of local inhabitants from Istria to Italy and from other parts of Yugoslavia to Istria and had a specific impact on cultural heritage as well. Among others a salient issue concerns the restitution of movable, mostly sacred art works that had taken from their original locations in the towns of Istria,¹⁰ to be protected from

9 A detailed presentation of the evolution of Slovenian conservation laws and practice is exhaustively presented in this publication in the article by Savin Jogan.

10 In 2002 an exhibition was announced at Palazzo Venezia Roma entitled *I tesori dell'Istria*, where the long-searched for paintings from the Istrian towns were to be presented. The exhibition was never opened, though a press conference took place where Italian experts and politi-

war danger and bomb attacks during World War II. They were taken to Italy.

After 1954 the conservator for the district of Koper, Emil Smole, had started the restitution procedure with a list of missing objects. An Italian-Yugoslavian restitution delegation was set up decades later in 1987 to complete the list and start the official claim from Slovenia to Italy. Until today the masterpieces have not been returned to their original locations. The story about the restitution of these paintings highlights a specific legal issue of the protection of movable heritage and its tight connection with the philosophy of conservation on the one hand, and the influence of socio-political circumstances in solving legal matters on the other hand. In fact, the heritage conservation principles in different charters clearly state that in order to preserve all the values of art objects these are to be preserved in situ. Here we may recall the engagement of the archduke Franz Ferdinand, of the historian Pietro Sticotti, of the conservator Ferdinando Forlati, and recently by different researchers such as Federico Zeri, who strongly supported the return of the objects to their original locations.

Built environment

The post-war period strongly affected the built environment as well. The politically unstable period of the Free Territory of

cians explained the circumstances of the custody of these artworks in the last 50 years. The exhibition comprised 25 paintings, held in 11 boxes at different locations since 1940, belonging originally to the Museum of Koper (7), the cathedral of Koper (1), the church of St. Anna in Koper (5), the church of St. Mary of Consolation in Piran (1), the church of St. Francis in Piran (1), the church of St. Stephen in Piran (1), the town hall of Piran (4), the church of St. George of Piran (5). The exhibition was to be the first occasion after World War II that the public could actually see the paintings and get information about their existence. The event offered the possibility to finalize the list of missing objects and to actively restart the final debate about the restitution of the artworks to their original sites. Cfr. Sonja Ana Hoyer, ed., *V Italiji zadržane umetnine iz Kopra, Izole, Pirana / Le opere d'arte di Capodistria, Isola, Pirano, trattenute in Italia / Art works from Koper, Izola, Piran retained in Italy*, Zavod za varstvo kulturne dediščine Slovenije, Ministrstvo za kulturo Republike Slovenije, Ljubljana-Piran, 2005. An exhibition with the title "*Histria. Opere d'arte restaurate: da Paolo Veneziano a Tiepolo*" was held between 23 June 2005 and 6 January 2006 in the Museo Revoltella in Trieste, where the paintings were finally exhibited. While the return is still pending, the discussion was reopened again in 2009 because of an announced exhibition of the missing artworks that would also be hosted in Slovenia.

Trieste refrained from most activities both in preservation and in building. Based on the Yugoslavian laws of 1948, the Museum of Koper, in charge also of monument preservation, started assembling and updating the inventories of historic buildings and sites.

Development activities started immediately after the London Memorandum and the annexation of northern Istria to Yugoslavia. Thus, industrial buildings, the adjoining housing structures, as well as the first tourist structures were built already in 1954.¹¹ A first comprehensive Regional Development Plan for the Slovenian Coast was prepared together with the political authorities and designed by the architect Edo Mihevc in 1957.¹² This plan took into account the new geopolitical circumstances, but also the specific Mediterranean character and the potential of the territory.

Designed on the "zoning" principles of a late functionalist schemes, where the political development plan was mirrored in the attitude to the built environment and its historic sites, the Regional Development Plan presented some new functions and forms.

The town of Koper was to become the administrative and economic centre defined by the large port and factories; thus, the town was to be thoroughly rebuilt with modernist buildings within the existing urban pattern, retaining only the most prominent historic buildings. Izola was to continue developing the fish industry, awaiting newly built quarters adjoining the preserved historic core.

Piran was designated as the "crown jewel" and was to be preserved as a city-museum, mainly for tourist exploitation. New housing areas grew in Lucija, south of Portorož. Growing construction activities were supported also by the contemporary building laws¹³, which included a few articles on monuments,

11 Neža Čebtron Lipovec, *Modern architecture in historical city centres: case-study on Edo Mihevc in Koper and valorisation for re-use*, Raymond Lemaire International Centre for Conservation, Leuven, 2007.

12 Edo Mihevc, *Piano regolatore della costa slovena*, *Casabella*, 280, 1963, 40-48.

13 The first post-war building law issued in 1958 did not include notions about cultural heritage (Slovenian national law on building UL LRS

but only referred to major historic buildings, despite the contemporary laws on heritage protection which highlighted the importance of sites and vernacular architecture. The Austro-Hungarian spa resort of Portorož was to develop into a modern leisure infrastructure with a series of hotels and dependant facilities. Old hotels were renovated to enter into the European tourism market.



Figure 3: Portorož in 2008. View over the Riviera hotel; its right wing was built as early as 1963 by the architect Edo Mihevc. In the following years the entire town received a comparatively unified likeness of a modern "mass tourism" resort. Photo from: Mitja Guštin, *Identiteta – dediščina kot temelj razvoja portoroškega turizma*, *Turizem kot medkulturni dialog*. Portorož 2010, fig. 7.

In Portorož, the spa culture continued, although the general summer-leisure activities expanded largely and quickly after 1954. In their offer, the tourist managers and agents often

127-22/1958, while by 1967 some articles did integrate the concepts of landscape and monument surroundings protection in three different laws (Slovenian national law on the arrangement and maintenance of green spaces in the towns UL SRS 11-105/1965; Slovenian national law on regional spatial planning UL SRS 1-118/1967; Slovenian national law on urban planning UL SRS 16-119/1967). Cfr. Neža Čebtron Lipovec, *Modern architecture in historical city centres: case-study on Edo Mihevc in Koper and valorisation for re-use*, Raymond Lemaire International Centre for Conservation, Leuven, 2007; Maja Črepinšek, *Prenova stavbne dediščine v Sloveniji / The renovation of the Slovene architectural heritage*, Restavratorski center Republike Slovenije, Ljubljana, 1993.

referred to cultural heritage, but national sites of interest, such as the Caves of Postojna, the historic royal stud farm of Lipica, lake Bled, and national folklore were promoted rather than the regional items.

Hotels were being built from the early 1960s until the end of the 1970s when the building activities in the tourism sector were halted by the economic situation of the 1980s. The continuity of the so-called syndical tourism was, however, not disrupted. Larger buildings, syndical holiday houses, were either built or adapted to host workers from factories and public employees. At the same time, however, the 1980s also witnessed the development of private beds and breakfasts, rented rooms and more locally and individually managed tourist offers, especially in Portorož.

Last decades

In 1981, the first comprehensive law on integrated conservation was issued, which steered documentation projects on architectural heritage.¹⁴ Nevertheless, the three decades of inaction in Piran that kept it intact, but without major preservation actions, brought its built heritage to a state of disrepair due to minimal maintenance. Thus, historic buildings and traditions like the salt production in the saltpans continued to live, but were not the focus of investors and developers. On the other hand, in this way the town maintained its primarily residential role, since it was inhabited all through the year, but even more importantly, no major demolitions took place. In a way, it maintained its vernacular character.

The situation changed thoroughly after 1991 with the Slovenian independence, when the system shifted from the social economy of self-managed socialism into market-capitalism, and especially with the denationalisation and rise of private property. Hotels and villas were slowly denationalised and came under private/state management or ownership; by the last decade most of them became part of a business chain. Due to the Balkan wars, the tourism in the former Yugoslavian country faced a drastic collapse.

14 Jelka Pirkovič, *Osnovni pojmi in zasnova spomeniškega varstva v Sloveniji*, Vestnik, XI, Ljubljana, 1993.

From the early 1990s up to today several examples of "integral heritage", meaning a valuable example of merged cultural and natural heritage, were included in the register of monuments and received their specific management strategies and teams, as in the case of the Sečovelje saltpans park. The Slovenian "integral heritage" is its primary tourist brand and cultural tourism promotion symbol. Therefore, the Slovenian applications for listing on the UNESCO World Heritage List also mainly encompass cultural landscapes.

Two main laws from 1999 and the recent one from 2008 elaborated and extended the notion of cultural heritage with the notions of intangible heritage and cultural landscape. The most recent law (2008) pays special attention to the documenting and preservation of archival material on the one hand, while on the other hand it emphasizes new aspects of the role of development and the rights of the owner.

However, fast development and a boosting economy with big investments, especially in the tourism sector, is a knife that cuts both ways. While growing profit can be a great stimulation for enhanced heritage care, big profits often call for more profit. So, only the most profitable aspects of cultural heritage are considered in rather short-term projects. Usually this means only preserving the "image", so only facades remain – literally speaking. Two significant conflicts are discernible in this "evolving scenario" and they are common in a number of new European countries. Namely, the contrast between the rights stemming from private property versus the duties and needs of caring for heritage as a public good, as well as the opposition between the demand for short-term profit as opposed to the long-term sustainable effect.¹⁵ In fact, this conflict, recurrent in almost all former Eastern bloc countries, recalls the situation of the 1960s in the Western countries and we may trace it back to its roots in the 19th century in the period of the first large industrialisation. Both problems are dominant in the present Slovenian context, even more obviously on the coast, since we find innumerable

15 Erik Kerševan, *Upravnopravni vidiki obveznosti države in lastnikov do spomenikov v zasebni lasti / Administrative law perspective on obligations of the State and the proprietors regarding monuments and private property*, *Javna uprava*, 42, 1, 2006, 29-44.

examples of private owners that feel threatened and disabled by the heritage legislation, especially in the historic urban centres. At the same time, in cases of big investments the use value of the building and especially its real-estate value often takes over the long-term cultural value of heritage.

At the end

We have seen throughout the contribution that northern Istria, including Piran, is an eloquent example of the development of heritage practice and its legal backgrounds in Central Europe. Due to its transient character in geographical terms it gives an additional insight into the different conservation contexts, the Austro-Hungarian, the Italian, and later the Yugoslavian. The cases demonstrated that many of the issues dealt with at the break of the 19th century are still present today; namely, the preservation of movable heritage in situ, as well as the always recurrent issues of protecting built ensembles and vernacular heritage. Furthermore, we also outlined the importance of some determined persons, e.g. archduke Franz Ferdinand, the conservator Anton Gnirs, the conservator Ferdinando Forlati or the architect Edo Mihevc, who fundamentally affected the protection and/or promotion of cultural heritage. What we tried to pinpoint as well is the relation between heritage protection and tourism.

The cases of Portorož and Piran provide a valuable overview of the role of historic environment as an object of tourism

promotion, while the tourist infrastructure in itself becomes today's heritage. Finally, the Istrian region itself is a remarkable case that demonstrates how shifts in society can irreversibly affect the role and presence of cultural heritage.

In the end, we may identify parallels between the presented recent investment boom into the built environment and that of the Austro-Hungarian period in the town core of Piran and in the building of the resort in 1890. Yet, we are more than a century further in time – we have undergone a period of crucial development in heritage protection ethics and its implementation tool – legislation. The collaboration of the state is needed in the form of a comprehensive strategy. Some good advice is provided by the European Union's Directive on the Environmental Impact Assessment and the Importance of a Sustainable and Ecological behaviour that directly involves heritage. In the cases of Piran and Portorož, history offers good solutions to reach this aim: connections with the hinterland and the region, local and family run tourism, locally designed architecture, sustainable use of local resources (be it materials like salt or traditional knowledge). Yet, in the implementation we again stumble upon the aforementioned laws concerning private property, free market rights, building materials standards and environmental policies, etc. Thus, adaptation and consensus are needed, but how can we reach it in practice? Some answers might arise through the international exchange of experiences and good practices.

Daniel Thérond

**The Council of Europe conventions in the
field of cultural heritage and landscape:
trends and prospects**

2.1

The programme of this meeting proposes a vast overview of national and international heritage policies and legislation. In this context, my aim is to highlight the specific role played since the 1960s by the Council of Europe, which is an intergovernmental organisation with a political, generalist and regional vocation, uniting 47 states, in other words practically all of the countries of Europe.

For many years, the Council of Europe's aim has been to give meaning to the process of European construction, placing particular emphasis on the underlying ethics and values. The Council is now Europe's main reference point on issues relating to the promotion of human rights, democracy and the rule of law, as underlined by the last 3rd Summit of the Heads of State and Government of the Council of Europe in 2005. Obviously, one of the features of the Council of Europe's work is that its approach to the heritage concept is based on its own areas of expertise, in other words, not that of a professional NGO or an academic institution but that of an international political body seeking answers to wider societal questions. Bearing this in mind, I feel I must make a few preliminary comments.

The heritage concept has undergone many changes since its emergence and its expansion in the 19th century. It has been used by national emancipation movements and, on occasion, exploited to underpin exaggerated notions of identity. It provided material for the founding rhetoric of nation states in the 19th and 20th centuries, particularly through its intangible aspects such as stories and legends, sagas and heroes. What does heritage mean today and what might replace this concept in a constantly evolving society and a Europe that is so radically different from what it was in the 1950s, when cultural co-operation began?

Whatever the context, the concept of heritage represents an intellectual construct created by specific population groups in a given place and time. Representations and interpretations linked to heritage discourse ultimately reflect European society as it constantly evolves, and for this reason, if no other, merits careful attention.

This paper will be divided into two sections. In the first I will call your attention to the origins and content of the legal instruments

established by the Council of Europe. In the second, I will look ahead to the prospects opened up by the Council of Europe's Framework Convention on the Value of Cultural Heritage for Society, opened for signature in Faro (Portugal) in October 2005.

I. 40 years of co-operation – the Council of Europe's achievements in the Heritage field

1. The specific approach of the Council of Europe

In 1954 the European Cultural Convention, which has gradually come to cover the whole continent, stipulated that "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". The Council of Europe has now become the champion of cultural democracy, of maximum access by the citizens to knowledge and lifelong education, and more recently of respect for diversity and intercultural dialogue. In the heritage field the Council has been helping European states to develop institutional and administrative frameworks for sustaining heritage policies to cope with their changing needs. By opening up unexplored new avenues, the Council of Europe has prompted independent work by experts, transformed the developing consensus into international reference texts and helped countries to implement agreed guidelines. The reunification of eastern and western Europe in particular has been followed by requests for assistance from certain regions, leading to the development of institutional and professional "capacity building".

A quick review of the Council of Europe's activities over the last thirty years reveals a logical sequence leading up to the recent Faro Convention. The key dates are 1975, 1985, 1992, 2000 and 2005. The major reference texts corresponding to each of these dates invariably follow the same philosophy:

- the Council's approach is neither academic nor speculative: the aim is to facilitate strategies for the day-to-day work of public authorities and other players;

- the Council's action targets neither the exceptional heritage (thus steering clear of duplicating the world heritage mechanism) nor the introduction of a European label. While the 1972 UNESCO convention underlines the concept of the "outstanding universal value" of certain sites which means they need to be preserved as part of the heritage of humankind, the Council's action has, from the outset, involved a comprehensive approach to the built heritage encompassing urban and rural architecture and the interstitial elements of the heritage fabric in their diversity and vernacular aspects. The aim is rather to develop a holistic view of a living cultural environment and create conditions conducive to the qualitative management of this environment, especially from the regional development angle. The council of Europe approach also differs in this respect from the scientific or technical activities of ICOMOS and from ICCROM's role in passing on know-how;
- the follow-up action to the various heritage and landscape conventions is increasingly important as part of the search for European-level indicators for the sustainable use of each territory's cultural resources, an approach which has not yet been fully implemented by other intergovernmental organisations.

2. The founding reference texts of the Council of Europe - a coherent sequence of initiatives

Granada

Giving effect to the message of the ICOMOS Venice Charter, the Council of Europe developed in the 1970s the principles of the integrated conservation of heritage. Through the European Charter of the Architectural Heritage it alerted governments to the physical and human causes of dilapidation, dereliction, ignorance, specific town planning approaches influenced by economic pressure or urban traffic, land and real estate speculation, and even the damage cause by ill-advised restoration. After 32 years this approach remains strangely topical! Integrated conservation requires legal, administrative, financial, technical, and human resources. It involves a synergy between different

sectors, professions, public authorities and partners, as well as adapting vocational training and breaking down corporatism. The 1985 Granada Convention for the Protection of the Architectural Heritage of Europe enshrined these principles in a European legal instrument and, in keeping with the provisions of the 1972 UNESCO convention, set out the fundamental elements of all heritage policies: identification and inventory, legal protection, sanctions, integrated conservation strategies, information, awareness-raising and training.

While the European Convention on Offences relating to Cultural Property, which was opened for signature in Delphi in June 1985, never actually came into force, and the Council of Europe in fact no longer leads on the problem of the unlawful movement of cultural property, which is catered for by other bodies (Unesco, Unidroit and the EU), or the specific category of underwater heritage, which is also addressed at the global level, the concept of architectural heritage has been extended to several levels with an eye to a more comprehensive approach. The concepts of historic complexes and the cultural environment now figure large in the Council's activities.

Valletta

In this period attention moved from the architectural to the archaeological sector, where major urban and rural infrastructure works were necessitating massive efforts of rescue archaeology and the integration of the archaeological dimension in physical planning processes. This led to the signature of the Valletta Convention for the Protection of the Archaeological Heritage in 1992 updating the original London Convention of 1969. The Valletta Convention, which has been extensively ratified, complemented the more general provisions of the Unesco World Heritage Convention (1972) and updated the Recommendation defining the international principles applicable to archaeological excavations (Unesco, 1956). It also complemented the 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The later Unesco Convention on the Protection of the Underwater Cultural Heritage, of 2001, was by contrast much narrower and more specific in scope than the Valletta Convention.

The aim of Valletta is to protect the archaeological heritage as a source of collective memory and as an instrument for historical and scientific study (art. 1). The parties are therefore required to institute a legal protection system including the maintenance of an inventory and the designation of protected areas (art. 2). They are supposed to systematically establish archaeological reserves and to institute mandatory reporting to competent authorities by finders of chance discoveries of archaeological elements. They must create procedures for the authorisation and supervision of excavations or other activities in such a way as to prevent illicit removal of heritage elements and to ensure that the prospecting work is undertaken in a scientific manner. Two other key points should be mentioned: in line with the integrated conservation principles States are invited to reconcile and combine the respective requirements of archaeology and development planning (art. 5). That means involving archaeologists in the planning process and assuring the allocation of sufficient time and resources for an appropriate scientific study and publication of the findings. Under article 6 of Valletta each party undertakes to take suitable measures to ensure that provision is made in major public or private development schemes for covering, as appropriate from public or private sector resources, the total costs of any related archaeological operations.

Florence

Broadening the Granada and Valletta Convention concept of sites, the European Landscape Convention signed in Florence in 2000 reconfirmed the Council's pioneering role on the living environment, laying down unprecedented guidelines for a qualitative approach to environmental management and a holistic vision of the natural and cultural values and assets of territories. The aims of this text are to "promote landscape protection, management and planning, and to organise European co-operation on landscape issues (art. 3). The landscape is a part of the land "as perceived by local people or visitors, which changes over time under the influence of natural forces and human activities". The convention is not designed for the purpose of protected conservation areas. It applies to the entire territory of the Parties and covers natural, rural, urban and peri-urban areas. "It concerns landscapes that might be considered outstanding as well as everyday or degraded landscapes" (art. 2) and introduces

the concept of "landscape quality objectives" into the protection, management and territorial development. The Parties undertake to identify and assess their own landscapes through field research by professionals working in conjunction with the local people directly concerned. When it comes to visibility, the "landscape award of the Council of Europe" created under article 11 has just been conferred for the first time by the Committee of Ministers, following proposals by the Steering Committee for Heritage and Landscape (CDPATEP). Furthermore, the Florence Convention, together with the heritage conventions, encourages transfrontier co-operation on local and regional level and the implementation of joint landscape programmes (art. 9).

The approach involving the integrated conservation of cultural heritage was also taken up in the Guiding Principles for the Sustainable Spatial Development of the European Continent adopted in 2002 by the Council of Europe Conference of Ministers responsible for regional spatial / regional planning and then by the Committee of Ministers as Recommendation (2002).

At this point we must dispel a misunderstanding about European co-operation in the field of integrated conservation. It is sometimes said that the founding fathers of the 1970s were obsessed with buildings and town planning and paid little attention to intangible heritage. This is somewhat misleading as the very rationale of integrated conservation was based on personal well-being. The cross-sectoral approach of the Faro Convention, which will be discussed below, is clearly inspired by the principles of integrated conservation.

3. Follow up of the COE conventions and the HEREIN network

What about the status of the various conventions: can they be judged a success or not? A conference was held in October 2007 in Vilnius entitled "International heritage conventions and major texts-Current situation and prospects". The first criterion for success of each convention is the number of States that have ratified them. With 40 and 38 ratifications respectively, the conventions on the architectural and archaeological heritage come top of the list, comparable with the Council's human rights convention.

The impact of the conventions in individual countries is dictated as much by the extent to which professionals and the community at large become familiar with them and recognise them as useful tools. The extent of this familiarity at a day-to-day level can be hard to ascertain in the absence of instruments for appraisal and evaluation. There is clearly a continuing need to encourage the sharing of experience at all levels, from national policy-making to local practice. A major issue from the perspective of the Council, is to have a means of observing how the approaches set out in its conventions are being used, interpreted and developed – this, after all, is how any gaps, issues or emerging problems will be identified, and therefore how the Council's future workload will be defined.

The follow-up of the heritage and landscape conventions is under the responsibility of the Steering Committee for Heritage and Landscape (CDPATEP). In this context the main practical working instrument is the HEREIN information system (European Heritage Information Network) set up in 1999 thanks to the co-operation between COE and the European Commission. This unique tool including more than 40 countries offers a database on heritage policies in Europe designed as a follow-up instrument of the conventions and a number of on-line services (please see the information sheet on the follow-up of the conventions).

From 2010 HEREIN will be improved and strengthened. Besides an easier updating system of the database on heritage policy, HEREIN will offer the possibility of undertaking and managing targeted online studies by sharing case-studies dealing with selected topics relating to current priorities in the field of the different conventions. This process will use the results of a pilot study based on the Valletta Convention with a view to extending the database entries as well as to provide the possibility to concentrate on information about specific themes. This work was carried out by a group of experts, in co-operation with EAC and through working visits in Romania, Ireland, Norway, Greece and Belgium.

A series of themes were brought up during the pilot study giving examples of indicators to be used for the setting up of a soft efficient monitoring process:

- private responsibilities for the protection of heritage
- chance discoveries/moveable heritage/portable antiquities
- standards for excavation and other archaeological activities
- archive and storage facilities
- integrating conservation strategies in planning policies
- funding of rescue/preventive archaeology
- post-fieldwork backlog and the dissemination of scientific information

Other themes proposed for future case-study modules included additional measures:

- to further enhance identification, protection, integrated conservation
- to ensure the financing of archaeological research and conservation
- to further prevent the illicit circulation of elements of archaeological heritage
- to further ensure mutual technical and scientific assistance.

During its last plenary session in May 2009 the CDPATEP also launched a similar process for the Granada Convention on the architectural heritage bearing in mind the following issues:

- sustainable development - the sustainable use of resources and the key concept of socially and environmentally responsible architecture
- evolution of the concept of heritage in a globalised society characterised by migrations and exchanges;
- heritage interpretation in multicultural societies – dissemination to the public through, for example, heritage education
- changing function, use and meaning with the widening range of actors involved in identifying a defining heritage.

As regards the follow-up of the European Landscape Convention, an initial compilation of experiences with the aim of promoting landscape quality in countries has already been scheduled on the basis of contributions to the Landscape Prize in operation from 2009. The installation of structured tools for following up the European Landscape Convention started in 2009 with work to set up a database.

Consistency should be maintained among the monitoring tools for the various conventions. Strengthening of the European Heritage Network (HEREIN information system) will be made possible when new software comes online in 2011, facilitating the real-time updating of the database on heritage policies and allowing the input of specific data for all the conventions. It will be associated with the availability of new interactive services (management of targeted “case studies” bringing together a range of countries in the study of priority themes; an updated portal for heritage sites notified by countries; development of a multilingual thesaurus).

The COE “Regional programme for cultural and natural heritage in South-East Europe” constitutes another way to promote the implementation of European conventions. The Integrated Rehabilitation Project Plan and Survey of the Architectural and Archaeological Heritage is a joint initiative of the COE and the European Commission designed to forward the enlargement process in the Balkan countries, encouraging co-operation with European institutions and the adoption of European standards. The “Ljubljana Process” is the new phase of this plan. 26 “Consolidated Projects” have been selected in this context and would serve as a model for continuing publicly and privately-supported dynamic regeneration of heritage in the region (see leaflet).

4. Developments since the 1990s

Certain effects of globalisation have become increasingly clear. A widening gap has emerged between the social, symbolic and collective value of cultural heritage, which is hard to assess or quantify, and its economic dimensions that fall under the laws of the market and the principle of profitability. The focus on heritage “having to earn its living” or, more dynamically, on heritage as a labour-intensive, job-creating factor in local development obviously remains anyway a live issue.

Other aspects of globalisation such as the acceleration of the process of digitisation of cultural assets in the knowledge-based society offer extraordinary benefits in terms of access to heritage by a vast audience and of wider dissemination but also raise a series of challenges in terms of intellectual and real property

and have implications which are not yet fully recognised or fully under control.

Another societal change involves trends in migration, including within individual countries, which are breaking down the supposed traditional links between given regions, communities and cultures. In recent times, we have witnessed both identity-based tensions linked to real or sometimes reinvented heritages and also implicit questioning of the actual nature of the heritage aspirations of mobile population groups who no longer have strong roots. The emergence of multicultural societies, in particular in the major urban centres and, indeed, of intercultural or melting-pot societies, calls for other angles of approach to the heritage concept.

These were all grounds for renewing the debate about the value of heritage for society. Various discussions over the past few years therefore revisited the famous functional typology suggested in a very different Europe by the historian, A. Riegl. It has been proposed more recently that a distinction be made, for instance, between the “intrinsic”, “institutional”, “instrumental” and “economic” value of heritage. In an activity entitled “Heritage and society” the Council of Europe set out to review the concept of heritage, drawing on disciplines other than merely the history of art and architecture. The aim was not artificially to transpose into the European context the role which heritage has played in the process of the political construction of nation states and the way this was represented. Rather, the focus was on the range of possible successive perceptions and interpretations of a particular heritage over space and time. The exercise is therefore like the work on multiperspectivity in history teaching which seeks to facilitate mutual understanding between population groups and prevent conflict.

This was the changing background to the work in 2004 and 2005 by the group of experts which drew up the Framework Convention on the Value of Cultural Heritage for Society which was opened for signature in Faro (October 2005). Concerning the background of the new text may I also refer to a number of key issues brought up by Graham Fairclough in the handbook “Heritage and beyond” to be issued at the end of this year with a view to better explain the origins and context of the Faro Convention.

5. The “New Heritage Frontiers”

Graham Fairclough observed that heritage means not only the cultural properties that we inherit, irrespective of whether we want to keep them, but can also be taken to mean the processes by which we understand, contextualise, perceive, manage, modify, and transform the inherited world. The new objectives of heritage as implied in Faro and Florence conventions take us beyond the physical preservation of parts of the past that to a large extent underpin the Granada and the Valletta conventions. Fairclough underlines two new objectives: “first the management of change throughout the whole environment; second, capitalising on the contribution that cultural heritage makes to high level purposes and the big pictures”.

The traditional approach to heritage can be summarised as being mainly a process wherein experts identify what were regarded as the best buildings and decision-makers then put in mechanism for protection alongside various forms of state funding for conservation. From the 1950s an assumption developed that heritage was only that which could be afforded and that state funding was the only way to protect buildings. It seems in fact that not all heritage needs public subsidy and not all heritage needs designation.

According to Fairclough heritage must also be approached from the angle of place-making and place shaping:

“A constructive, collaborative approach to change is needed within place-making; new development can be designed in such a way that it becomes an expression of place and of heritage just as powerful as the conservation of key monument, and because embedded in the fabric of people’s lives, more socially relevant.”

“ What we choose not to pass on to the future is not a black and white issue ... between the extremes lie a range of ways of passing on the memory, the intangible remains, the outline of a building or the whole of its fabric”..

II. “Heritage and beyond”: what about the benefits of the Council of Europe convention on the value of cultural heritage for society?

The Council of Europe Framework Convention (Faro Convention) takes a different approach from the previous international instruments relating to heritage. It does not challenge the Council of Europe and UNESCO conventions regarding protection and conservation, but supplements them effectively by highlighting the potential which cultural heritage offers for the cohesion of democratic societies and for the adoption of a model of development which respects individuals and the environment in Europe.

1. Clearing up ambiguity regarding the objectives of the convention

As it is usual when new instruments are drawn up, the risk of duplication was in people’s minds. First of all, the Faro Convention is not a text about protective mechanisms, which are already covered in other conventions. Instead, it is an instrument which sets out some strong principles and creates a common think-tank for European countries about the use and value of heritage in the light of globalisation and various hazards resulting from human behaviour.

Following controversy about the legal form which the instrument should take – the question being whether a recommendation with limited legal force or a more formal convention was more appropriate – the solution adopted was that of a framework convention, as had been the case at the Council of Europe for co-operation regarding the protection of national minorities and also transfrontier co-operation. This approach, which is halfway between a mere recommendation and a stronger commitment by states, is particularly well suited to multinational collaboration regarding changing and complex issues involving change management. The text does not create enforceable rights for citizens and cannot become the focus of individual legal disputes. Instead, it links the states which have ratified it in joint efforts to find the ways and means of establishing a democratic culture for people’s living environment.

2. What are the innovative approaches in this text?

Article 1 sets the tone; the *"rights relating to cultural heritage"* are recognised as being inherent in the individuals' right to participate in cultural life within the meaning of the Universal Declaration of Human Rights. Human development and quality of life are also set out as the ultimate goal of the conservation and sustainable use of heritage. The text therefore focuses on individuals, not on objects. Of course, the convention does not grant the rights but offers an opportunity to facilitate the responsible exercise of these rights.

One innovation is to be found in Article 2, which proposes a *"novel, cross-sectoral definition: cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time"*. It should be noted that the Faro Convention is not a duplicate of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, as it does not involve identifying and protecting a presumed intangible category of heritage, usually oral transmission, but rather is a matter of being aware of the significance of the tangible and intangible heritage as a whole for society in a specific, yet changing context.

In this definition there are no real boundaries to heritage which can begin as recently as yesterday and there is even an appearing concept of future heritage as a way to inject quality and legibility into new developments. The word *"resources"* must be emphasized as it carries the implication that heritage exists to be utilised and that there are users who will benefit from the use individually or in communities.

Paragraph b of this article also introduces the concept of *"heritage communities"* consisting of people *"who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations"*. The cultural heritage can be adopted as well as being inherited. Awareness of heritage may be the result not only from *"sovereign"* decisions but also from the aspirations of population groups which are not necessarily linked by a

language, ethnicity or even a common past but are, in any event, bound by a deliberate, shared commitment. The EAC (Europae Archaeologiae Consilium), which is now an active partner of the Council of Europe for monitoring the Valetta Convention, offers an international example here, as do various associations dealing with 20th century architecture or with industrial heritage, not to mention the many associations that are an expression of local democracy in the countries. However, there is an implicit distinction between awareness of a heritage interest by a particular population group and recognition by the relevant authorities of the public interest that could justify legal protection and public funding. Given the risks of possible excesses on the part of some active groups, a safeguard does exist. The text is to be understood in the light of Article 5, under which the public interest is recognised by specific authorities *"in accordance with [the] importance to society"* of the elements concerned. This means that not just anyone can demand public support for whatever they like whenever it suits them.

The concept of heritage communities must be related to a *"shared responsibility for cultural heritage and public participation"*. Section III sets out in much greater detail than other convention texts the principles of shared responsibilities and the arrangements for access and participation. This is a second major plus of the convention, which does not just mention the decentralisation of decision-making but also refers to the effective participation of individuals and heritage communities in the processes of identification, interpretation and conservation.

A democratisation of this kind means facilitating actual or virtual access by as many people as possible to heritage and encouraging public debate. In particular, this involves recognition of the role of voluntary organisations as constructive critics and the need to establish structures facilitating dialogue and effective partnerships (Articles 4, 11 and 12). The relevant provisions should lead to an interesting debate about the respective roles of the public and experts and about changes in the profiles of certain professionals who are required, much more frequently than in the recent past, to act as intermediaries, interpreters and facilitators, without, of course, involving an overall decline in the essential technical expertise and know-how. This is a long-

term undertaking, but one which deserves real effort if we want to encourage awareness of the value of “their” heritage among new generations of voters and taxpayers in the perhaps not too distant future. The convention is also one of the first texts of its level to mention a range of public, private and voluntary partners which are to co-operate to achieve its goals.

A third conceptual innovation lies in the definition for the first time of the “*common heritage of Europe*” (Article 3), which is said to comprise not only all forms of cultural heritage which together constitute a shared source of remembrance, understanding and creativity but also the intangible heritage of ideals, principles and values which underpin the development in Europe of a peaceful and stable society, founded on respect for human rights, democracy and the rule of law. The advantage of this concept can be seen particularly clearly in regions of Europe affected by political changes and movements of borders. Considering all layers of heritage characteristic of a given area as an attractive cultural asset and a development resource for all population groups now living together in the area concerned and for any visitors is an alternative to the possible exploitation of heritage to keep past conflicts alive.

From this point of view, the concept of the common heritage of Europe should be linked with the possible sense of multiple cultural affiliations of all human beings, both individually and collectively. In line with the approach of heritage communities, all individuals have the option of identifying with one or more forms of tangible or intangible heritage, which reflect their past or present, the only conceptual restriction being respect for the fundamental values reflected in particular in the case-law of the European Court of Human Rights. These views are highlighted in the interesting “European Manifesto for Multiple Cultural Affiliation” elaborated by a group of experts of the Council of Europe as a result of the project “Cultural identities, shared values and citizenship”. This text goes beyond the approach related to fixed cultural identities and the discussion of the recognition of minorities. It sets out to show how the feeling of belonging to several traditions at the same time can be reconciled with a European citizenship - now in the making - based on the recognition of different cultures.

3. What do the parties actually sign up to?

Beyond the above-mentioned recognition of the public interest of certain elements of heritage, the parties undertake to “*recognise the value of cultural heritage situated on territories under their jurisdiction, regardless of its origin*”. Some forms of heritage have been “orphaned” as a result of changes in borders, political upheavals or emigration. To create an environment conducive to individuals exercising their rights relating to heritage, the public authorities must both facilitate the universal identification and highlighting of the heritage potential of given areas, and also implement integrated strategies and policies serving the simultaneous goals of cultural diversity and sustainable development. Some of the policies here are as follows.

One category encourages the promotion of “*intercultural dialogue*” via all aspects of heritage education, while respecting the diversity of possible interpretations. The measures should not be restricted to a few exemplary projects but should be implemented in all stages of lifelong education and training. According to article 7 the Parties undertake through public authorities and other competent bodies to encourage reflection on ethics and methods of the heritage presentation and establish processes for conciliation to deal equitably with situations where contradictory values are placed on the same cultural heritage by different communities.

Other articles (8 to 10) cover major issues: the sustainable use of resources and creative activity in a contemporary environment. To sustain cultural heritage the Faro Convention sets out a range of measures such as sustainable management and regular maintenance, the formulation of technical standards suited to heritage, the study and upgrading of traditional materials – bearing in mind now the climate change - and reviews of the skills, qualifications and accreditation of professionals. Article 9a also refers to the respect for the integrity of cultural heritage by ensuring that decisions about change include an understanding of the cultural values involved. Sustainability was at the heart of the ideas that have led to this framework-convention. Interesting contributions in this field are inserted in the COE book “Heritage and beyond”. The English Heritage leaflet “Sustaining the Historic Environment” partly inspired the working group of the

convention. The conservation of a small number of monuments and buildings might fulfil only a small part of the social potential of heritage. However, the management of change in this field is an everlasting and difficult challenge. In growing areas for instance creating connections with the past may work by restoring major historic buildings or simply at the level of layout and patterns. Social sustainability also means creating places where people feel comfortable.

Article 14 also places particular emphasis on the relationship between heritage resources and the information society. To avoid any confusion, the authors of the Faro Convention did not venture into the area of cultural industries as covered by the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Once the Faro Convention enters into force, interesting exchanges will naturally have to take place regarding the use of the potential offered by heritage in the creative process in a manner that does not undermine the preservation of resources. The relationship between heritage, innovation and creative activity is, for instance, the theme chosen in 2009 for the European forum of the European Heritage Days organised on 23 September in Ljubljana jointly by the Council of Europe and the European Commission.

Lastly, Section IV of the Convention pays greater attention than other instruments to its follow up mechanism. It calls for the development of a shared and structured system for disseminating information and exchanging good practices (benchmarking). This monitoring function has already been foreshadowed by the Council of Europe in 2009 with the strengthening of the HEREIN system for monitoring the Granada and Valetta Conventions, which have now been ratified by almost all Council member states. The importance of these tools is all the clearer since the advantage of the Faro Convention is to resituate heritage in the context of change management and a forward-looking strategy. It therefore demands an interactive approach by the European partners so as to improve understanding of constantly changing data. The aim is to work together to determine common criteria and indicators for the sustainable use of the resources that contribute to the cultural pillar of sustainable development. Bearing in mind the "spirit of Faro", the management of resources also sustains ongoing creative

activity which is a further aspect of the convention's philosophy as under this convention heritage is more of a work that is constantly in progress than a completed project.

III. Developing a forward-looking approach to heritage and the quality of citizens' living environments

Viewed as a whole, the information presented above offers a better understanding of the true significance of the Council of Europe's work in this area. What then is its underlying thinking? For heritage to be passed on, it needs to be maintained and hence used, and this in turn calls for sound economic management. Obviously, the aim of integrated conservation is not just to establish cultural and tourist industries seeking short-term profits or to turn Europe into a huge amusement park for visitors from all over the world, particularly Asia's emerging middle classes. The main purpose of heritage is – or at least should be – to serve local inhabitants and to contribute to endogenous development, of which the cultural and tourist industries are only one part. The heritage dimension still needs to be viewed through a this much broader prism of agricultural policies, trade, housing, environmental conservation and development, and many other fields of activity. Choices relating to heritage and landscape management are clearly one aspect of the search for more equitable and democratic arrangements of benefit to society as a whole. While heritage and the quality of our shared environment may seem out of tune with a certain idea of economic liberalism, they may ultimately provide material for other social and economic models.

In the final analysis, heritage and landscape conventions are inseparable from complex considerations about societal issues. This influences the activities of the CDPATEP, which is responsible for all such conventions. The work of the CDPATEP should be put in context, both according to the present position and to trends identifiable over a longer period. In the 2009-2010 timeframe, extended to 2011-2013, we cannot ignore the facts of an economic crisis which many experts regard as structural rather than linked to the present economic climate, and which might result in certain choices regarding development and

social organisation being called into question. For many regions, economic regeneration and the revitalisation of territory will remain or become a major requirement. In the next few years, the emergence of new risks – among them climate change – will also inject greater urgency into the debate on the sustainable use of resources, and also into the search for new forms of development and the general progress of society. Europe will have to face changing challenges. Furthermore, the future cooperation programme should highlight the specific role of the Council of Europe in post-conflict areas through initiatives contributing to the social and economic revitalisation of living communities, as illustrated in the Ljubljana Process and in the field action in Kosovo¹ or Georgia.

The reinforcement of the qualitative and human dimensions of territorial cohesion through the development of cultural heritage and landscape not only contributes to the respect of cultural diversity but to the actual enjoyment of cultural rights of people at local level. In addition this will facilitate the right to participate in cultural life, as defined in the Universal Declaration of Human Rights. A balanced territorial development aims to allow each region to make the most of its territorial capital. The heritages in the widest sense (including knowledge and know-how) and the landscape are the principal components of this potential whether in a local, regional, national or European perspective. Based on the holistic and dynamic approach, which can be found in the texts of the Florence and then Faro Conventions, this involves proposing a culture of development to aid and support countries in devising and adapting cross-disciplinary and inter-sectoral policies taking advantage of the cultural and landscape added value of the territory as a factor in boosting the economy and in the cohesion of peoples. Particular stress should be laid on the potential for creativity and job creation drawing on “territorial intelligence” of the regions. Another line of innovation will focus on the mobilisation of human capital and the revision or devising of methods for joint action between the authorities that are the guarantors of the public benefits of

cultural heritage and the landscape and the various constituents of civil society (firms, scientific research centres, universities, professional circles representative of knowledge and expertise, associations and voluntary movements, etc.).

In general, as regards cultural heritage, the objectives stated above will lead to work on updating the methods of understanding, evaluating and interpreting the heritage resources of territories, considering *inter alia* the choice of criteria for identifying and reconciling the various and sometimes contradictory values attached to the various heritages. This approach could be associated with a study on making decision-makers really aware of the value of the existing potential and the balances that need to be found in order to ensure that resources are not exhausted; the adaptation of principles of sustainable development recently adopted for other areas to the specifics of cultural heritage; seeking new balances between public and institutional competences and the commitment of civil society.

“Implementing Council of Europe standards for culture and cultural heritage” through co-operation in priority regions (South-east Europe, South Caucasus and Black Sea/ Activities in programme V.3.1) act as a laboratory for observing the contributions of heritage to revitalising territories and to cohesion in human communities. It will be a matter of fully exploiting the lessons of the overall experience of regional programmes from the viewpoint of the objectives that the Committee sets itself. The tools for action in support of technical assistance and regional co-operation, which, in recent years, have given rise to active cooperation with the European Commission, will have to survive by renewing themselves and taking into account developments in the challenges addressed by the Council of Europe programme. An external assessment in 2009 will open up prospects for the period 2011-2013 in connection with the medium-term objectives. Until then, the 2009-2010 programme will continue with work aimed at South-east Europe, Georgia and the countries of the Kiev Initiative.

The work that the Council has been carrying out for so many years often goes unrecognised. We need to raise our profile in order to promote our ideas. During the last days in Ljubljana, in connection with the European Heritage Days (EHD), we held

¹ All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with the United Nation's Security Council Resolution 1244 and without prejudice to the status of Kosovo.

a European forum highlighting the links between heritage, innovation and creativity. Next year this EHD forum should be held in Istanbul and focus on the contribution that heritage can make to economic recovery. One sphere in which we need to make advances is in the presence and dissemination in the media of the humanist values and standards we promote

through heritage and high-quality collective living environments. This would be a means of gradually winning over public opinion and, by extension, decision-makers. In the end, it does not really matter if these values are attached to a second or third generation of human rights rather than the first. The main thing is to persevere.

Terje Nypan

**Discovering the inadvertent impact
of EU Directives on cultural heritage**

2.2

1. Effects of European Union legislation on built cultural heritage

The development of EU based legislation threatens the authenticity of cultural heritage by legislation that excludes or complicates the restoration of historic paintings, the replacing of original building stones with stones from the original location, by undertaking certain maintenance works using traditional techniques impossible to practice, by prescribing measures that require the removal of original building components or by demanding industrial certification procedures for traditional building materials, crafts and components that have been in use for centuries. How and why is this happening? Why does the new European cooperation and legislation change the activity field of national cultural heritage administrations? How and by what means, may such legislation be avoided in the future?

1.1 The Working Group on EU Directives and Cultural Heritage

At the end of the 1990s a number of people and institutions became conscious that EU legislation was having effects on their work of safeguarding cultural heritage. The Norwegian cultural heritage administration became acutely aware of this as they were confronted with the Biocide legislation from Brussels. We will come back to this example in one of the cases included.

In 2003 an initiative was formed in co-operation with the EU financed ARRCHIP / ARIADNE project at The Institute of Applied and Theoretical Mechanics; Czech Academy of Science. At the meeting in Prague, it was decided to establish a permanent working group with the task of compiling a list of problematic Directives and seeking to find solutions to this challenge. The main objective of the Working Group for EU Directives and Cultural Heritage became to document and to work towards establishing a permanent observatory function to monitor the legal processes in Brussels. The Working Group documented its findings in the book "European Legislation and Cultural Heritage". It also proposed a clause of special consideration as a legal tool to solve the problem.

In 2008, at the initiative of the European Cultural Heritage Authorities (European Heritage Heads Forum, EHHF), the European Heritage Legal Forum (EHLF)¹ was founded as a step towards an observatory function. The Working Group was subsequently dissolved.

1.2 The European Heritage Legal Forum (EHLF)

In 2008, the European Heritage Legal Forum (EHLF) was founded; as a step towards establishing an observatory (<http://www.ra.no/ehlf>). The EHLF is not an organisation, it is a network of appointed experts from the national competent authorities, who have been given the shared task to follow and scrutinise proposed EU legislation to find if it has negative effects on sustainable cultural heritage management. If a piece of legislation is found to be detrimental, this is reported to the competent national authority to be processed in the political system working with EU legislation. The EHLF members, or others, may seek to influence the wording of the legislation to include exemptions or special considerations for cultural heritage. The EHLF as a body may not operate politically on behalf of their member institution, which is why it has the character of an observatory.



Fig. 2: European Heritage Legal Forum.

1 see www.ra.no/ehlf

1.3 How legislation can restrict conservation, maintenance and rehabilitation works leading to a loss of authenticity

The effect of regulations on the maintenance and restoration of cultural heritage stems from regulations in areas within the competencies of the EU. These regulations are transposed into national regulations without consideration for the fact that they should not apply to cultural (heritage) policies as these are not within the competencies of the EU.

Regulations define the permitted and often we find that the use of traditional materials and techniques are not included therein. In short, the regulations interfere negatively with the safeguarding of authenticity. As such, the regulations negatively influence the value creation chain of cultural heritage as the regulations lead to a loss of historic, traditional or visual authenticity of the heritage.

The general problem concerning the EU legislation is that it is tailored for modern industrial demands. It therefore often, implicitly or explicitly, excludes the use of traditional materials and traditional craft methods. For new modern buildings this



Fig. 3: Traditional building in Romania. Not in accordance with EU building regulations?

legislation is not a problem², for historic buildings it is a threat to authenticity.

If there is one major aspect of heritage that creates attraction, it is the notion of authenticity. The cultural heritage objects are not modern 'Disneyland' creations. The preservation and care for this very authenticity is our responsibility as cultural heritage professionals. In fact I would say the preservation and sustainable management of authenticity is our professional calling and our *'raison d'être'* as public institutions.

The importance of authenticity is outlined in all the conservation policy papers our profession shares. These are UNESCO documents, ICOMOS Charters and the Council of Europe Conventions of Granada, Valetta and Cultural Landscapes³.

In the ICOMOS "*Principles for the Preservation of Historic Timber Structures*"⁴, art. 4 and 10, it is stated that the goal is to make

2 If you wish to build new using only traditional techniques and materials the legislation is a challenge. It is unavoidable to incorporate contemporary solutions according to regulations for water, piping, insulation, etc.

3 Australia ICOMOS Burra Charter 1999, "Principles for the Preservation of Historic Timber Structures" PPHTS, Granada Convention FOR THE PROTECTION OF THE ARCHITECTURAL HERITAGE OF EUROPE, Council of Europe, pts 121, <http://conventions.coe.int/Treaty/en/Treaties/Word/121.doc> Art 10.5 foster, as being essential to the future of the architectural heritage, the application and development of traditional skills and materials. Art. 16 Each Party undertakes to promote training in the various occupations and craft trades involved in the conservation of the architectural heritage. The Venice Charter, The Krakow Charter, <http://www.international.icomos.org/charters/charters.pdf> PPHTS "Principles for the Preservation of Historic Timber Structures", adopted by ICOMOS 1999. <http://www.international.icomos.org/charters/charters.pdf> Australia ICOMOS Burra Charter, 1999 (Burra Charter). <http://www.icomos.org/australia/burra.html> . Art. 4.2 Traditional techniques and materials are preferred for the conservation of significant fabric. NARA Document on Authenticity (2), which was developed in 1994 based in the spirit of the Charter of Venice. (3) from 1964, NARA Document on Authenticity 1994.

4 PPHTS "Principles for the Preservation of Historic Timber Structures", adopted by ICOMOS 1999. <http://www.international.icomos.org/charters/charters.pdf> Art. 4. "Conservation of cultural heritage first and foremost requires regular maintenance." Art. 10. "If traditional techniques are demonstrated to be inadequate the cultural heritage may be consolidated through modern techniques for restoration and construction techniques the efficacy of which has been shown by scientific data and proved by experience."

the end result of interventions “look” as much as the original as possible, by replication of the materials, tools and processes that produced the original.

The European governments have also taken upon themselves the obligation “to adopt integrated conservation policies which (...) foster, as being essential to the future of the architectural heritage, the application and development of traditional skills and materials,⁵ i.e. to promote the use of traditional skills and traditional materials.

This is the background for the challenge created by the EU and subsequently transposed into national legislation. The Working Group found that “... in a number of cases, legislation drawn up by the EU has - unwittingly - had a reverse effect on the safeguarding of Europe’s cultural heritage.”⁶

2. The EU Treaty, EU competencies and cultural heritage

The organs of the EU have only those competencies which have been attributed to them; i.e. the principle of attributed powers. The organs of the EU have been attributed no power over cultural policies, which are the prerogative of the member nations. The EU competencies to regulate culture related questions are therefore questionable. In light of this, it is evident that the EU legislation is not produced to be applied to cultural activities as such.

But, on the other hand, the application of the rules concerning the 4 freedoms and environment has a wide scope. Regulations concerning these areas may therefore have indirect repercussions on the cultural sector.

The difficult question is when cultural heritage relevant legislation or legislation having indirect repercussion on cultural heritage policies is within the policy fields of the EU Treaty and



Fig. 4: Historic windows, contemporary use.

when it is not? Can EU legislation restricting national cultural heritage policies be relevant or applicable to cultural heritage at the national level at all?

The EU treaty has two formulations that are relevant to this question in art. 95 and 151.

Art. 95 Cultural considerations are recognised in the EU Treaty and in the practice of the EU-Court as legitimate reasons for trade restrictive measures in areas not regulated by directives. Article 95 opens for member states to have other rules than those that follow from a directive, where this is necessary to preserve for example national treasures of (amongst others) historic values. This article states the right of member states to have other rules for the cultural heritage area that the rules governing the (policy) areas in which the EU has competencies.

Art. 151 The art. 151.4 of the EU Treaty calls for the general inclusion of cultural aspects in all Community policies. This article gives the EU the right to initiate *supportive* measures to cultural heritage. It does not grant the EU the right to promulgate restricting measures. The difference between supporting measures and restrictive measures has yet to receive a clear cut definition. The article 151.4 underlines the obligation on the EU system to take cultural considerations in all policy matters and therefore underpins the special treatment of cultural heritage in regulations.

Together with the definition of the competencies given to the EU, art. 95 and 151 are important as they set the basis for special

5 CONVENTION FOR THE PROTECTION OF THE ARCHITECTURAL HERITAGE OF EUROPE, Council of Europe, pts 121, <http://conventions.coe.int/Treaty/en/Treaties/Word/121.doc>

6 Working Group on EU Legislation and Cultural heritage. In “European Legislation and Cultural heritage” Ed.: A.M. Ronchi, T.M. Nypan. Delewa editore, Milan 2006, ISBN88-88943-05-6.

considerations or provisions for cultural heritage in any EU directive.

The fact that the Commission Internal Impact Assessment manual (ref. 4.2 Actively influencing legislation) from 2009 includes cultural heritage as a specific assessment criteria underlines this obligation.

The conflict discussed in this paper stems from EU Directives for policy areas that are within the EU competencies; such as international trade competition, personal and public health, safety, and conservation of the natural environment. The conflicts ensuing from the implementation of the EU Directives, on one hand, and sound heritage conservation practice, on the other hand, takes place at *national*, rather than at *EU or international* level.

If there is a lack of understanding the limitations of EU legislation at the national level, problems will ensue from the transposing of EU legislation into national legislation. The EU legislation is, at national level, made to apply for the cultural heritage policy area. National sector ministries *et al* are unaware that such an indiscriminate application of EU regulations oversteps the competencies of the EU. Sometimes we experience that exemptions given for cultural heritage in the EU directives are left out when transposed into the national regulations.

At the Brussels level there has been a (growing) emphasis on cultural policy and safeguarding of cultural heritage in the last 4-5 years. EU Commissioner Jan Figel stated in 2005:

*"a common vision for cultural heritage is an absolute necessity, especially in the light of art. 151-4 of the Treaty, which calls for the general inclusion of cultural aspects in all Community policies".*⁷

Commissioner Mr. Figel also stated that he did not see any point in the EU reviewing or monitoring its activities in light of art.

⁷ December 2005. Commissioner Figel at the Europa Nostra meeting in Brussels. In "European Legislation and Cultural heritage" Ed.: A.M. Ronchi, T.M. Nypan. Delewa editore, Milan 2006, ISBN88-88943-05-6.

151-4. Evidently, that would be up to the member states to do or to demand.

The problems created for cultural heritage by EU legislation were also noted by the European Parliament and in September 2006 the European Parliament stated that it wanted more consideration for cultural heritage in the Commission policies. The Parliament asked the Commission to effectively implement article 151-4, to consider in depth the consequences of legislation on culture and cultural heritage, and to end financing of Community projects that result in the destruction of valuable cultural heritage⁸.

Becoming aware of the challenge the Commission took steps to improve its ability to foresee inadvertent consequences for cultural heritage by including cultural heritage in the revised commission Manual on Impact Assessment (of legislation).

As there is yet no automatic mechanism to ensure special considerations for cultural heritage the challenge of monitoring legislative developments remains. In the Commission's legal work the need for special considerations must be communicated on a case by case basis. Similarly, at the national level there is a need to follow the implementation and to ensure that the necessary special considerations are incorporated into the national regulations, also on a case to case basis.

⁸ [The European Parliament] Calls on the Council to recognise explicitly the contribution made by the cultural heritage to European integration in terms of European identity and citizenship, sustainable economic and social development, intercultural exchanges and cultural diversity; (...). Calls on the Commission, (...) to implement effectively the horizontal clause of Article 151(4) of the EC Treaty (...) considering in depth the implications of the proposed legislation for culture and the cultural heritage. Calls on the Commission and Member States not to provide Community funding for projects which will demonstrably result in the destruction of valuable parts of our cultural heritage. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0355+0+DOC+XML+V0//EN> September 2006; On the European natural, architectural and cultural heritage in rural and island regions. European Parliament resolution on the protection of the European natural, architectural and cultural heritage in rural and island regions (2006/2050(INI)).

3. The effects of EU legislation – Cases

3.1 Case: Restoration of Danson House, UK, using original interior colours

Danson House is a listed Grade I object located 10 miles south-east of London, built in the 1760s by John Boyd, a merchant whose family had made its fortune in the West Indies (sugar & slaves).⁹ In the Music Room he installed expensive mahogany book cases and the walls were decorated in a dark green paint - which would have been very expensive as it contained the pigment verdigris.



Fig. 5: Danson House, 18th century, UK

English Heritage investigated the building and took the decision to conserve any original decorative finishes which survived and recreate original decorations which had been painted over in the intervening centuries. The dark green paint had been painted over in a pale blue colour in 1800. This decision was justified by the fact that the house was 'a museum' - not anyone's home - and the presentation served an educational purpose in attempting to show eighteenth century decoration.

This meant using lead based oil paints. This is possible because in the UK there is a *deregulation* which allows the use of lead white

⁹ Mr. Boyd later went bankrupt when the sugar prices fell. But when he was building the house he had a lot of money to spend and decorated all the main rooms very lavishly.

paint on Grade I and Grade II buildings. The dark translucency, which is the beauty of the completed scheme, could not have been achieved by using modern materials. The finished room is unique.

Finding the verdigris needed to tint paint for the Music Room was not possible and we had to make it ourselves. Copper Acetate was dissolved in an oil/resin mixture and let to dry and then ground to form a pigment which was added to a mixture of chalk and lead white. It was only through trial and error, and following the exact formulation of the original 18th century paint that we gained an insight into 18th century painting practise and taste¹⁰.



Fig. 6: Music Room, Danson House, UK

It is fortunate that in the UK such traditional materials can be used in certain buildings. But, even so, careful consideration must be given to maintenance of decorative finishes which contain toxic material.

¹⁰ Edited text from Chief Conservator, Helen Hughes. Pictures © English Heritage

3.2 Case: EU legislation forbidding the use of traditionally produced wood tar

Traditional wood tar could not be bought or sold under the provisions of the Biocidal Directive¹¹. The Norwegian cultural heritage authorities realised this consequence too late.

The stave churches in Norway and many wooden buildings in Scandinavia or elsewhere are maintained with traditional wood tar. Some buildings are from the middle ages. It is impossible to find a substitute for the protection of the outer surfaces. By not being able to use traditional wood tar, the buildings would lose their authenticity. Further buildings will have an increased rate of decay due to the application of substitute protection materials. A prohibition against the commercial trade of traditional wood tar would have made it impossible to correctly maintain the historic churches shown in the pictures above.

The effects of the directive were subtle in the sense that wood tar production was not forbidden. But it is forbidden to market products that do not comply with the demands for a declaration of content in the directive. An industrial production of wood tar would be able to comply with these demands. But the traditional method of producing wood tar, due to the nature of the production process, cannot satisfy the demands for the product declaration. The traditional wood tar is the type of tar with which these buildings have been treated for centuries and the type of tar professional heritage management demands.

After working to change the directive for years the solution became to scientifically demonstrate that wood tar used as a wood surface treatment does not contain biocide effects. The research project lasted for two years and was co-financed by the heritage authorities of Norway, Sweden and Finland. The research confirmed no biocide effects. Wood tar was removed from the directive's list of active substances in February 2007.

Traditional wood tar may now be sold as surface protection for wood. But to discover such consequences so late makes it



Fig. 7: Heddal stave church, Norway. ©Riksantikvaren



Fig. 8: Kiln for producing traditional wood tar. © NBA, Finland.

almost impossible to rectify them. In this case it was possible to achieve changes, but at a high cost in manpower and funding for research.

¹¹ Biocidal Products 98/8/EC

3.3 Case: Fire protection, EU-Directives and impact on monument authenticity

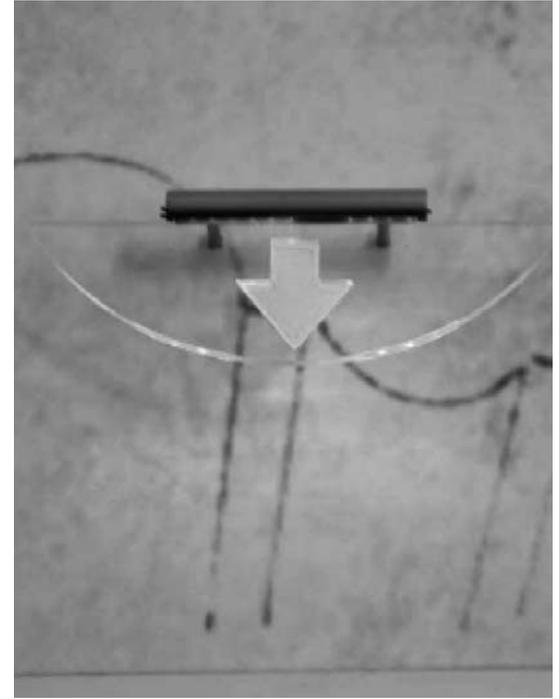


Fig. 9: Purpose designed column and emergency exit signage in Schönbrunn Palace. © Dr. Wolfgang Kippes, Schönbrunn Castle.

In Schönbrunn¹² they were faced with the problem of conforming with the safety regulations applicable to public buildings. The question was, amongst others, if the standardised escape signs should be installed everywhere in the museum. The question was how to protect the monument, keep authenticity and at the same time protect the people within it in case of fire. Does being prepared for disasters through following given mandatory prescriptions always and automatically lead to reduction in authenticity? How may we keep the authentic value of a monument, upgrade fire safety and improve safety aspects for everybody at the same time?

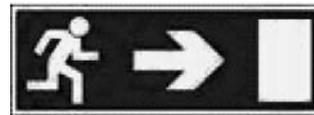


Fig. 10: Emergency exit signs.

The obstacle to achieving the adjusted design consisted in prescriptive standards which specified in detail the signs for escape routes etc. for all buildings.¹³ For Schönbrunn to develop

¹² From the article by W. Kippes, see XII.

¹³ The sign in the illustration has colour, size and design according to ISO 3864 and directive 92/58/EEC O.J. NO. L 245 p.23 26.8.92. Graphic

a different design, more fitting to the historic style of the building and less blatant, was a long and difficult process.

There are solutions for these prima vista contradictory needs. The problems for our cultural heritage and its authentic values occur whenever prescriptive standards are made mandatory. What is good and useful for new buildings and for the entire building industry, usually presents a problem if we wish to keep our heritage. EU-directives are needed, but in order to keep the authenticity of monuments they will have to follow the performance based approach.¹⁴ A European cooperation in the COST 17 group has made major advances in the direction of developing such performance based alternatives. The alternatives are a must when discussing how to avoid prescriptive standards becoming mandatory also for the cultural heritage field. The cultural heritage sector does not need prescriptive standards; we need performance based standards that allow us to find adequate solutions based on the monument itself.

There are some similar challenges in the fire safety regulations as the doors to buildings with public access must open outwards. If other performance based solutions cannot be found, such prescriptive standards mean that almost all doors to such older buildings must be changed.

3.4 Case: Mandatory changing of old windows and the energy efficiency directive

The mandatory changing of windows in historic buildings is based on the Energy Efficiency Directive.¹⁵ To reduce energy consumption the EU implements energy saving measures. At the national level the mandatory changing of older windows with modern windows is prioritised as an efficient and feasible measure to reduce energy consumption.

symbol according to ISO 3864/ISO 6309, ISO 7001 and relevant national standards (Norway).

14 Dr. Wolfgang Kippes, Schönbrunn Castle Director, in "3.1.2 EU-Directives and their impact on authenticity of monuments. In "European Legislation and Cultural heritage" Ed.: A.M. Ronchi, T.M. Nypan. Delewa editore, Milan 2006.

15 Energy Efficiency 93/76/EEC

The NBA¹⁶ comments on this demand by writing:

As a response to Energy Efficiency Directive 93/76/EEC 13.9.1993 and the Energy Performance in Buildings Directive 2002/91/EC, the Finnish Building Code C3 "Decree on thermal insulation in buildings" was renewed at the end of October last year.¹⁷ The target for thermal insulation in new buildings was assessed higher than ever before. Targeted U-values for a heated new building are listed in the following table: outer walls 0.25 W/m²C, roof-plus-ceiling 0.16 W/m²C, floor 0.20 W/m²C, windows and doors 0.14 W/m²C and window in a heated loft 1.5 W/m²C. It may be expected that these U-values will be made a rule in major repairs as well. In practice it means triple glazed windows - or even four glasses- with new aluminium or plastic frames. Outer doors must have a mineral wool filling instead of solid wood. Thermal insulation materials have to be added to walls either internally or externally.¹⁸

The Energy Performance in Buildings 2002/91/EC has an exemption in art. 4 for certain protected buildings. In some countries this is taken into consideration and exemptions have been made at the national level. In other countries no exemptions have been made.

But where exemptions have been made in the national legislation, the exemptions are restrictive and do not include all valuable heritage structures. In France, the Ministry of Culture and Communication requested exemptions for more than only protected buildings. They wished exemptions for protected environments (cultural & natural), the surrounding perimeter of historic monuments, for 'classed' sites, for UNESCO sites, and for buildings protected by regional authorities, for buildings recognised as 20th century heritage, for apartment houses under art L123-1-2 of the urbanism code, and for apartments

16 NBA National Board of Antiquities, Finland. Competent national cultural heritage authority.

17 This was then 2003.

18 Building Regulations and the Conservation of Built Heritage in Finland. Seija Linnanmäki, Conservation officer at National Board of Antiquities. vice president of ICOMOS Finnish National Committee in "European Legislation and Cultural heritage". Ed.: A.M. Ronchi, T.M. Nypan. Delewa editore, Milan 2006.

that have elements that are of historic interest. But the result was a national French regulation that granted exemption only to buildings protected under the Cultural Heritage Act, and only on condition that window changes would modify or change their character in an unacceptable manner.¹⁹

Recent research demonstrates that new windows reduce the energy need of the building, but far less than assumed. Keeping the old windows and improving them with a new inner window, where it does not exist,²⁰ achieves similar energy savings. These figures are the energy savings for the installed new window. But often the new window frame is badly fitted with ensuing energy loss to calculated theoretical energy savings. Further, to replace an old window you need to produce a new window. The energy consumption to produce the new windows is not included in the energy calculation. The energy cost for waste handling of the old windows is not included, nor is the energy needed for future waste handling of the new windows. As the lifespan of a new window is much shorter than of an older window it needs to be replaced 3 times in the life cycle of the old window. The environmental pollution effect of producing a new window is substantial, but is not considered, while it should be considered as “environmental costs” in a total energy and environment equation.

More energy can (often) be saved more immediately by alterations that do not demand taking out the old windows. This is one example where re-use and continued use of material is a better environmental and energy saving option than replacement by new industrially produced substitutes.²¹

19 Décret no 2007-363 du 19 mars 2007 relatif aux études de faisabilité des approvisionnements en énergie, aux caractéristiques thermiques et à la performance énergétique des bâtiments existants et à l’affichage du diagnostic de performance énergétique. Section V, f).

20 Such extra inner winter windows are standard in almost all buildings in Norway from before the 1930-ies. Exceptions to this rule being very old buildings or houses built by the poor.

21 Sverre Fossdal. Windows in existing buildings – maintenance, upgrading or replacement? Windows in existing buildings in a sustainable perspective. Sverre Fossdal. Directorate for Cultural Heritage, Norwegian Building Research Institute. Project report 192 – 1996; Eir Grytli, Inger Andresen, Käthe Hermstad. Vintage houses and energy efficiency measures (Fin gammel aargang) A research based guide. Eir Grytli, Inger Andresen, Käthe Hermstad, Wibeke Knudsen. SINTEF 2004

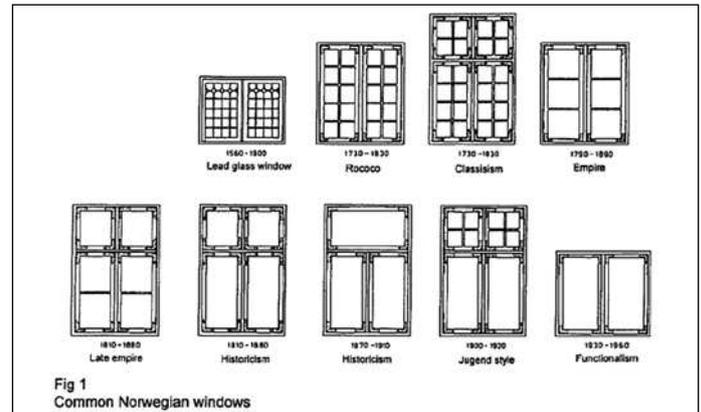


Fig. 11: Common Norwegian windows.

When national regulations demand the replacement of older windows it promotes industrial production. Improving old windows does not promote the production of new windows. If a Clause of Special Consideration for cultural heritage was included in the EU legislation, instead of an exemption for defined buildings, national cultural heritage authorities would have been in a better position to negotiate for alternative performance based solutions to save energy in historic houses.

At the end of 2008 a revised version of the Energy Efficiency Directive contained a clause explicitly forbidding the use of public money (funding) for buildings that did not apply with the energy efficiency regulations after 2014. After 2014 it would become illegal to use public money for the upkeep of listed built heritage like cathedrals, churches, fortifications, castles etc. Another example of the lawmakers not having considered the special case of (built) cultural heritage. This article has subsequently been taken out of the legislation, possibly due to EHLF intervention.

3.5 Case: Vyshegrad castle, public purchasing and certification of building material

In September 2006, the inner left wing suite of 3 rooms was ready to open for the public in the old (reconstructed) Vyshegrad Royal palace (Hungary). The floors had been laid with new dark red tiles. In the innermost room was a square of approx. 1 x 1

m on the floor, which consisted of another type of tiles. These tiles were smaller, of a light mustard colour and clearly not new. These were the remaining usable original tiles that were found during the excavations. The conservator explained that they had wanted to use tiles that looked like the original historic tiles and, if possible, produced in a similar fashion. The conservator had found a producer in Spain who could make such tiles, still using an almost identical production process as used for the original tiles!

The Spanish tiles did not conform to EU rules for building materials and they were not certified. But as the Hungarian Cultural Heritage Act gives priority to historic and visual likeness, and original material, the lack of product certification should not be a problem.

When the purchasing invoice was presented to the Finance authorities who should pay the bill they refused. According to the Finance authorities, they *could* not pay for 'non-authorized' or non-certified building material. Even if the national Cultural Heritage Act permitted such tiles for conservation works, the rules on public purchase made the national heritage legislation impracticable. In this case one regulation impedes on the other. The heritage act is overridden by the EU regulations. This is why the rooms in this wing are now laid with certified red industrial tiles from Italy.

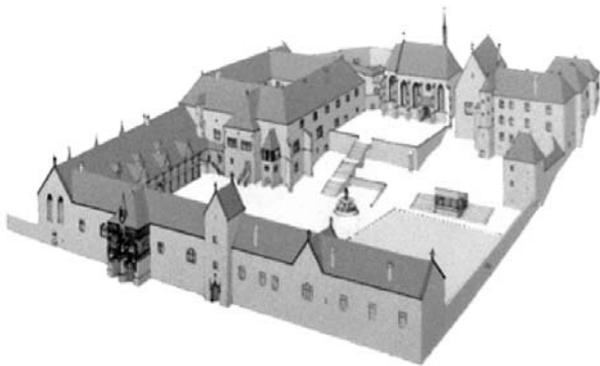


Fig. 12: Vyshegrad palace, poster of 1458-1490 period, at the site.

3.6 Case: Proposed energy demands in building regulations and log buildings

A proposed revision of the building regulation in Norway, would, in the beginning of the 1990s, inadvertently have prohibited building with traditional logging techniques, due to demanded energy performance for the buildings.

The heritage authorities saw this as a major problem as they need skilled craftsmen to work on the protected or historic buildings and therefore depend on traditional crafts being kept alive. The heritage authorities commissioned a research on lifecycle energy consumptions of different building types.

The research results demonstrated that log houses were *not less energy efficient* in a life cycle perspective, than modern houses.²² The proposed regulations were subsequently modified.



Fig. 13: Vyshegrad palace, 2006. © Riksantikvaren, T.Nypan.

²² Sverre Fossdal, Knut Ivar Edvardsen. Energy consumption and environmental impact of buildings. Case study of traditional and modern wooden buildings. Sverre Fossdal, Knut Ivar Edvardsen. Project report 177 – 1995, Riksantikvaren, Directorate for Cultural Heritage, Norwegian Building Research Institute.



Fig. 14: Advertising for contemporary traditional log mountain cabin, 2007.



Fig. 15: Raulandsstua, log building from 1300, Norwegian Folk Museum. One of the oldest buildings of the museum, treated with wood-tar. Foto: Jan Anderssen.



Fig. 16: Advertising for contemporary traditional log house used as secondary country house, 2007.

Now, fifteen years later, traditional log houses are popular and extensively used for secondary country houses. Such construction activity constitutes both an important local economic activity and a pool of employment for the skilled craftsmen needed for works on historic and protected buildings.

3.7 Case: Historic varnishes, lacquers and paints and the VOC directive

When this directive²³ to limit the use of volatile organic compounds (VOC) was nearing completions, the Working Group discovered that the directive presented a major problem for the continued use of many traditional paints, lacquers and varnishes. English Heritage then lobbied for exceptions to the directive and achieved a Clause of Special Consideration, by which the national competent authorities may make exceptions to the directive, when that is necessary to preserve cultural heritage of particular historical and cultural value.²⁴ Therefore, paints and varnishes that contain VOCs may still be used for the restoration and maintenance of buildings which have particular historical and cultural value.

The ensuing procedure in Finland illustrates the process that was necessary at the national level. First, a special order was needed for the implementation of the special clause. To do this the Nature Protection Act needed to be amended to allow the issue of an order. The legal texts were processed in co-operation with the Ministry of the Environment, Department of Nature Conservation and the NBA (National Board of Antiquities), which is the authority responsible for defining the cultural and historical value of buildings in Finland. The order was signed on 20 October 2005 and came into force on 31 October 2005. During the procedure the NBA had to make a statement to the Environment Committee of the Parliament (of Finland) which is responsible for handling matters related to housing, planning, building, environmental protection and nature conservation in Finland.

For the Order the NBA had to define which buildings are of particular historical and cultural value in Finland. These were listed as:

23 Limitation of Volatile Organic Compounds 99/13/EC.

24 Clause of special considerations.



Fig. 17: Left: Helsinki Main Post office. Right: Villa Niemi. Examples of the use of solvent based paints and varnishes used in the 20th century architecture and new building. Without the special clause in the directive continued use of such paints and varnishes would not be possible. Notice the high gloss of the application. Photo: National Board of Antiquities, Finland.

1. Historic buildings protected by town plans
2. Conservation areas protected by town plans
3. Buildings, monuments and sites protected by the
 - a. Building Protection Act 60/1985.
 - b. Church Act 1054/1993.
 - c. Antiquities Act 295/1963.
 - d. Decree on the Protection of State-Owned Buildings 480/1985.
4. Buildings, monuments and sites for which historical and cultural value has been recognised in national, regional or local inventories
5. Monuments and sites submitted to the UNESCO Nature and Cultural Heritage List
6. Buildings subsidised by the National Board of Antiquities or Regional Environment Centres due to their cultural and historical value
7. On a case by case basis, other buildings and monuments being of particular cultural and historical value considered equal to the buildings included in points 1-6.

The order (art. 6, 7) gives the widest possible exemption for the sale and purchase of products which do not meet the requirements of the Directive. The list of buildings being of particular historical and cultural value is the absolutely widest possible definition of the protected buildings in Finland. The NBA considered this important because they wanted the paint manufacturers, most of which come from SMEs, to have the widest possible market.

The fact that a Clause of Special Consideration was included in the EU legislation made it possible for the Finnish national authorities to exploit this possibility to the benefit of the built cultural heritage. Without this clause the national regulations would definitely have been more restrictive.

3.8 Case: Snežnik castle, Slovenia

Snežnik is in its present form a hunting castle. The site was originally a defensive castle, but through the ages the castle was expanded and changed. The present form is from the late 19th century. The castle is in state ownership but used to belong to an Austrian noble family.

The castle is being rehabilitated and restored by the Slovenian Ministry of Culture and the work is supported by EU Structural Funds. The castle is to be a museum. The outbuildings are being rehabilitated to become a restaurant and hotel.

Rehabilitation works have encountered challenges related to EU Directives in the national legislation. These regulations were not in force when the castle was built. The regulations relate to:

1. Demands for security of visitors on the terrace and parapets,
2. Demands for fire safety,
3. Demands for specified minimum carrying capacity of floors.

The demand for visitor security on the terrace and parapets was easy to solve by non-intrusive techniques. The solution



Fig. 18: Snežnik castle seen from the park.

was found by using blocking cross-bars between parapets. The choice of materials was aluminium and the design was modern (see illustration).

The demands of the fire regulations have not yet been entirely met (2008). Some changes could easily be made, such as building a new terrace and stairs descending from an existing exit door at the end of the back tower (see photo). But the demand that doors open outwards remains an unsolved problem. Normally this could be solved by adding an exterior set of glass doors that open outwards. The extra doors would allow the historic doors to be left open when the public is inside. The problem at Snežnik is that there is no room to install such doors in the existing frames. Negotiations between the heritage authority and the agency responsible for fire protection are evidently difficult.

The most problematic regulations are those specified in the new Building Regulations. The new building regulations demand a load bearing capacity of 300 kg/m² in all public buildings. In this castle the floor construction is not able to accommodate the strengthening measures needed to achieve such load bearing capacity.

If such load bearing capacity is to be achieved the whole floor construction would need to be remade and all the historic



Fig. 19: Due to fire regulations, new terrace and steps down from tower gate have been built.



Fig. 20: Non-intrusive steel stoppers at terrace parapet.

floorboards and beams would have to be removed. As often in such cases, the authorities did not know which EU Directive had given the basis for the demands in the national legislation.

The prescriptive standards of the regulations confirm that: *"The problems for our cultural heritage and its authentic values occur whenever **prescriptive standards** are made **mandatory**. What is good and useful for new buildings and for the entire building industry usually presents a problem if we wish to keep our heritage."*



Fig. 21: Renovated and resored floors in Snežnik.

There are other cases where the demanded floor carrying capacity may be met, but not in this building, according to the conservator and the architect. Such measures increase rehabilitation costs and are detrimental to the keeping of the original construction.

3.9 Some assorted examples

The EU is planning to finish the legislation on **Harmonised conditions for the marketing of the construction products** Brussels, 23.5.2008. COM(2008) 311 final 2008/0098 (COD) in 2010. The major problem with this legislation does not lie in the demands for testing traditional materials and products prior to certification. The documentation and certification process can be cumbersome and increases costs when restoring historic buildings, as there are no special provisions for traditional materials.

The real problem lies in the fact that without certification public money cannot be used to fund the purchase of such materials, according to the Public Purchasing directive. This case is analogous to the case mentioned for Vyshegrad castle (3.5 Case: Vyshegrad castle; public purchasing and certification of building material).



Fig. 22: Original roof load bearing construction.

In 2009, when the Commission was working on the recast of the **Energy efficiency in buildings** directive, for a long time the text included an obligation for member states to remove obstacles in their heritage legislation. There was also a general prohibition on public funding for buildings not conforming to minimum requirements after 2014.

Art. 4 par. 3: "Member States shall not provide incentives for the construction or renovation of buildings or parts thereof which do not comply with minimum energy performance requirements achieving the results of the calculation referred to in Article 5(2)."

Without an exception that also embraces this formulation, this clause would prevent public financing for restoration of historic buildings.

As the directive was reworked, EHLF members proposed formulations that lead to the removal of the obligation to remove obstacles in heritage law and clarifying that art. 4-3 did not apply for buildings exempt from art. 1. The question that remains now is to define what is 'officially protected' and how this is defined at national level. Can the EU system limit the national built heritage to only what is protected?

In the directive **Passenger Ship Safety 98/18/EC** there are exemptions (5.1 Some examples of legal texts). The exemptions were interpreted in a particular manner in one national regulation. The administrative interpretation was to demand that all the criteria in the exemption should be satisfied at the same time. The ship should not be propelled by mechanical means, should be wooden and of primitive build, and should be original and individual replicas of, historical passenger ships designed before 1965, built predominantly with the original materials. This is an interesting interpretation, not in line with heritage authorities' interpretation. Heritage authorities see each sub-category listed under art. 2 as an independent and sufficient criterion. This difference of interpretation create "modern" maintenance instructions, always costly and often not applicable to the historic vessels in question.

The Health Conditions on Fishery Products 91/493/EEC requires the use of smooth surfaces when handling fish and fishery products. This creates difficulties for traditional wooden fisheries (in Norway) to continue their production. It requires huge investments to satisfy the standards. Most owners cannot afford this. Small traditional fishery plants, also in World Heritage sites, have been closed down due to this demand. The traditional method of drying stock-fish also became illegal as this fish hangs on wooden poles through the winter. Not much attention has been given to this, possibly because this is traditional food and "... the Commission seeks to ensure that its legislation doesn't stifle small, local, traditional food producers."²⁵ For such products there are special regulations, as it is within the competencies of the EU, "... hinted at by the EC in September when it issued a document that stated, "the suitability of a separate legal framework for products of certain traditions should be assessed."²⁶

The Directive 2002 95/EC, Restriction of Hazardous Substances 96/EC and the **directive on Waste Electrical & Electronic Equipment**, were in one country 'lumped together' into one regulation. This new regulation made it impossible to build and repair traditional (church) organs.²⁷ This combination of the two directives and its unforeseen effect forced the Commission to clarify its position. Commissioner Wahlstrøm denied in 2006 that such interpretation could be made from this EU legislation.

After this possible effect was discovered the Commission consulted with Member States. The question was whether or not the pipe organ fell within the scope of these categories (in the WEEE Directive). The Commission was of the opinion that it did not, and the pipe organ should be regarded to be outside the scope of both the RoHS and the WEEE Directives.

25 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/700&format=HTML&aged=0&language=EN;&guiLanguage=en> Corfu, 13 May 2003. Commissioner Byrne.

26 Can the EU traditional herbal medicines directive be amended? By Shane Starling, 20-Nov-2008. <http://www.nutraingredients.com/Regulation/Can-the-EU-traditional-herbal-medicines-directive-be-amended>

27 Can the EU traditional herbal medicines directive be amended? By Shane Starling, 20-Nov-2008. <http://www.nutraingredients.com/Regulation/Can-the-EU-traditional-herbal-medicines-directive-be-amended>

But the Commission is not empowered to give legal advice and therefore the Commission advised that their announcement of the 27th June 2006 on the pipe organ being outside the scope could not be considered to be a decision. For a *conclusion* to become a *decision*, with full legal status and precedence, the question of the pipe organ must be included in the then forthcoming legal review (mandatory article 17.5 of the Directive) which was planned to take place in 2007/08.

The Purchasing Directive (Directive COM (2003) 503) poses serious and sometimes impossible problems for acquiring materials from a specific geo-location to replace damaged materials in protected monuments, buildings and sites. An example is Versailles castle which had to do a complete and expensive petro-chemical analysis of the used stones of the palace to be sure they would get them from the original quarry when making a public tender for new stones needed for restoration works. This article also mentions other effects of the purchasing regulations, like demands for product certification.

A final example of problems related to implementation in directives at the national level is that national authorities may choose to add other specifications into their national regulations. An electricity company had been given the job of modernising



Fig. 23: Saxon house in conservation area, with meter on the street facade and (inserted) with the final solution of the meter in the courtyard facade. © MET, Transylvania.

the electrical intake of village houses in a conservation area. Reading the national regulations which stated that the meter for electricity etc. use should be located at the outside of the house, the electrical company installed the meters on the street façade of the houses. The company and the contracting public authority insisted that this procedure was due to EU regulations. Only after a massive campaign and the intervention of NGOs did they arrive at the compromise of installing the meter on a facade in the closed courtyard, not visible from the street. This was a heritage conservation area.

3.10 Overview or what to remember

Cultural Heritage policies are not part of the EU Treaty, but Cultural Heritage is funded and supported by the EU. The challenge consists of a number of EU Directives – legal acts – that become incorporated into national legislations and which, to a greater or lesser extent, have a detrimental effect on the sustainable preservation of the European Cultural Heritage. The Commission has no competency to regulate cultural heritage policies. The Commission states that:

*"It is vital that a comprehensive strategy with regard to cultural heritage be adopted by the EU Institutions and Member States and that action benefiting cultural heritage be main-streamed into all relevant EU policy and action areas."*²⁸

The new internal Commission Impact Assessment (IA) procedure for legislation is in force since 2006. From 2009, Cultural Heritage is one explicit impact criterion in the Commission Manual on IA. The majority of the 25 directives studied by the heritage sector from 2003 present a challenge for conservation²⁹ and underpins the necessity for cultural heritage authorities to monitor the legal process.

28 Press release "Culture Counts for Europe", quote from Commissioner J. Figel. Brussels December 7, 2005. <http://www.europanostra.org/>

29 A list of directives has been compiled with an indication of the problems created for conservation. The list shows a wide scope and diversity of the problematic effects. More research into the actual effects and both legal and mitigating measures is needed. See: http://www.riksantikvarnen.no/filestore/Directiveslist_1008.pdf

Legislation at the national level threatens to result in:

- Performance demands only to be solved by intrusive techniques and modern products.
- Problems for the continued use of historic building materials and substances, which are either not allowed and/or made too costly or cumbersome to be applicable.
- Obstructions and difficulties for the use of traditional procedures, techniques and skills; sometimes traditional skills become impossible to apply in practice.
- Obstructions and difficulties for the production and procurement of traditional materials. Purchasing regulations that exclude those traditional materials that do not conform to industrial standards.
- Lengthy and costly specification procedures to procure materials from a specific geographic location which supplied the original materials (due to free competition across Europe).
- Production and marketing regulations that handicap traditional materials, skills etc., and affect their competitiveness adversely compared to their modern industrial substitutes.
- Prescriptive standards that are made mandatory where performance based demands would achieve the same results but with much more room for adjusted solutions. This leads to demanding, for example, the same signposts as in modern buildings. All doors where the public has access must open outwards and forces changing the direction of the doors in almost all historic buildings built before 1890. Demands of changing historic windows where other solutions could have achieved similar or even better results.

There is a long way to go before “*action benefiting cultural heritage be main-streamed into all relevant EU policy and action areas.*”³⁰ What is happening is often the opposite. The problems manifest themselves in a diverse, sometimes indirect and complex fashion. It is therefore necessary to be actively involved in the process in Brussels and at the national level.

³⁰ Press release “Culture Counts for Europe”, cfr. note 28.

4. Legislative developments

There are two main trends that challenge the conservation practises and philosophies. One trend concerns the scope and application of the legislation. The other trend concerns the actual process of producing the content of the legislation, where the mode of participation and influence differs from the national system of which the cultural heritage policies are a part.

4.1 The modern supersedes and eradicates the traditional

The trend is that contemporary industrial and market legislation is made for contemporary modern materials and intended for modern buildings. This is not surprising. But when these regulations are made to globally apply for all existing built structures we see the challenge emerging.

Historic ‘non-industrial’ buildings and production practices become either illegal or, in a milder form, non-standard, cumbersome, bureaucratic, impracticable or costly. In many



Fig. 24: Reconstructed historic vessel SS Göteborg, exemption in directive on safety in passenger ships.

cases non-modern methods become 'de facto' impracticable without being illegal in themselves. We have seen some selected examples of this.

In many cases this legislation makes the use of materials and techniques that are not compatible with the authenticity and structure of historic buildings mandatory. There is also an increasing use of standards as reference points in legislation and regulation. An increasing amount of the national legislation is triggered by the incorporation of EU directives into national law. National cultural heritage acts are superseded by new building regulations, energy regulations, purchasing regulations, etc.

4.2 Actively influencing legislation

The legislative process in Brussels is more open and actively influenced by a number of players than at the national level. The legislative process is a participatory one, but on a voluntary basis. National administrations follow the process in Brussels, as do business and civil organisations. The Commission, the Council, and the Parliament are mandatory participants. The



Fig. 25: St Chapelle, Paris. Use of lead in the glass windows - a prohibited substance.

other players decide to invest time and resources as the issues at hand are of importance to them.

Much is said about this system. Suffice here to say that the cultural heritage community has not yet become one of the players.

There are three main phases where the players can influence the end results of the legislation.

1. First there is the phase of **drafting the EU legislation** and processing it through the different decision-making procedures. At this point contact can be made with the (national) experts working on the drafting of the legislative texts. The experts are mostly satisfied to be reminded of the special considerations needed for cultural heritage and the legal basis for such special treatment in the EU competencies. Of course it is also possible to act at a later stage through established institutional channels as the legislative text is negotiated between the state parties. It is also possible for the cultural heritage community to seek influence over co-decision legislation as it goes through the European parliament. In many countries public administrations are not supposed to intervene with the parliamentarians. But non-governmental organisations are free to seek support from Parliamentarians as they see fit.
2. **Internal Impact Assessment** Since 2006 the EU Commission sends all legislation through an internal impact assessment before releasing it. Since January 2009³¹ one of the impact criteria to assess is cultural heritage. The assessment Manual states that one should assess whether the legislation has an impact on the preservation of cultural heritage? An impact on cultural diversity, an impact on citizens' participation in cultural manifestations or their access to cultural resources? The Commission is actively asking for input from outside during their assessment work, also through public consultations on the internet. The Impact Assessment website is an invitations to stakeholders.³²

31 European Commission IMPACT ASSESSMENT GUIDELINES. 15 January 2009. SEC(2009) 92

32 (http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm)

3. After the EU Legislation is voted, it goes to the competent national authority for **incorporation into national legislation**. Here is the third point in time when the final wording may be influenced, this time at the national level. Working with the subject we have discovered that the national cultural heritage authorities are mostly not included in hearings or reviews in the national administrations prior to incorporation into national legislation. This is a major problem as this leaves the national cultural heritage authorities without influence over the final wording or possible exemptions in the final national legal texts. And subsequently the needs of a sustainable conservation policy are not considered.

4.3 The participation of cultural heritage authorities in legislative processes

The member states of the European Union are responsible for (change in) policies. It is clear that to achieve a better control over the legislation produced in Brussels the heritage community needs to be better informed about the process.

We have also discovered that at the EU level the needs of the national cultural heritage administrations are not taken into consideration in the national political activities in Brussels. This is probably because cultural heritage is not part of the EU Treaty. But the development of the EU and the effects of its legislative work demonstrate that even cultural heritage policies are affected by the EU Commission. Therefore it is necessary that also cultural heritage policies become relevant considerations for the national involvement in the EU processes. Thus, one challenge is to become an active stakeholder at the Brussels level and make cultural heritage just as normal to consider as any other social sector. Also, as of 2009, the effect of the legislation on cultural heritage is specified as part of the impacts assessment procedures.

The regulatory process does not end in Brussels as regulatory measures needs to become part of national law before taking effect. It is also necessary for the cultural heritage authorities to become more focused on, and participate in the legislative process of the different sector Ministries at national level. Cultural heritage authorities need to be involved in all reviews of legislation before it is incorporated into national legislation. At

the national level we have witnessed cases where EU legislation containing exemptions for cultural heritage was transposed into national legislation omitting the given exemptions.

Scrutiny of upcoming legislation becomes even more essential to those cultural heritage authorities that have responsibility for a larger stock of cultural heritage structures than just those which are officially protected. The legal texts from Brussels, if containing considerations for cultural heritage, mostly only use terms such as "officially protected" or "protected".

5. Current legalistic practice

5.1 Some examples of legal texts

The manner in which exemptions or special consideration for cultural heritage is written into certain directives is different in different directives. There is no standard formulation. The manner in which the exemptions are included should also reflect the competencies of the EU in the cultural heritage field and the limitations this imposes on the lawmakers. To what extent the last is the case is debatable. Here are some examples of current practice.

In the Flood Risk Directive³³ Article 1 states:

"The purpose of this Directive is to establish a framework for the assessment and management of flood risks, aiming at the reduction of the adverse consequences for human health, the environment, cultural heritage and economic activity associated with floods in the Community."

Directive 2002/91/EC³⁴ on Energy Performance in Buildings; the exemption in art. 4 reads:

33 Directive of the European Parliament and of the Council on the assessment and management of flood risks, Common Position (EC) No 33/2006 of 23 November 2006.

34 Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings. Official Journal L 001 , 04/01/2003 P. 0065 – 0071. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0065:0065:EN:PDF>

4.3. Member States may decide not to set or apply the requirements referred to in paragraph 1 for the following categories of buildings:

- buildings and monuments officially protected as part of a designated environment or because of their special architectural or historic merit, where compliance with the requirements would unacceptably alter their character or appearance,
- buildings used as places of worship and for religious activities.

In the **Paint Products Directive (2004/42/CE)**,³⁵ amending the directive on the Limitation of Volatile Organic Compounds 99/13/EC, a clause of special considerations (ref. 5.2) has been included.

(11) Member States should be able to grant individual licences for the sale and purchase for specific purposes of products in strictly limited quantities which do not comply with the solvent limit values established by this Directive.

Article 3 Requirements:

3. For the purposes of restoration and maintenance of buildings and vintage vehicles designated by competent authorities as being of particular historical and cultural value, Member States may grant individual licences for the sale and purchase in strictly limited quantities of products which do not meet the VOC limit values laid down in Annex II.

In the **Passenger Ship Safety 98/18/EC directive**³⁶ heritage vessels are targeted in a different manner. In article 2 there is an exemptions clause which reads:

³⁵ Directive 2004/42/CE of the European Parliament and of the Council of 21 April 2004 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain paints and varnishes and vehicle refinishing products and amending Directive 1999/13/EC. Official Journal L 143 , 30/04/2004 P. 0087 – 0096. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0042:EN:HTML> Council Directive 1999/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0013:EN:HTML>

³⁶ COUNCIL DIRECTIVE 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:144:0001:0115:EN:PDF>

Art 2. This Directive does not apply to:

- (a) passenger ships, which are:
- ships not propelled by mechanical means,
 - vessels constructed in material other than steel or equivalent and not covered by the standards concerning High Speed Craft (Resolution MSC 36 (63)) or Dynamically Supported Craft (Resolution A.373 (X)),
 - wooden ships of primitive build,
 - original and individual replicas of historical passenger ships designed before 1965, built predominantly with the original materials.

Finally, in the **Water Directive**³⁷ we find 'openings' for special considerations for the built heritage, but it is not explicit. This possibility for special considerations is found under the clauses treating "legitimate use of the environment", "when no substantial pollution to, or additional deterioration of the water is caused thereby."

5.2 The legal tool - The clause of special considerations

Authorities and policy makers need a legal 'instrument' to use when problematic directives etc. are identified. We believe that the "Clause of Special Considerations" is the most appropriate legal instrument.³⁸

The 'Clause of Special Considerations' transfers the legal authority in a field of EU competency to the "competent national authority" for cultural heritage, when the consequences of the directive impact cultural policies. Or to state it differently; the EU recognises that EU competencies to legislate in specific areas may infringe on the prerogatives of national cultural policy and states that, if such is the case, the competent national

³⁷ EU-Directive 2000/60/EG

³⁸ "For the purposes of restoration and maintenance of buildings /.../ designated by competent authorities as being of particular historical and cultural value, Member States may grant individual licences for the sale and purchase in strictly limited quantities of products which do not meet the VOC limit values laid down in Annex II" [5] Limitation of Volatile Organic Compounds 99/13/EC

authorities (for culture / cultural heritage) may make necessary exemptions from this directive.

The clause is in keeping with the EU obligations according to articles 151-4 and 95 of the Treaty. The clause is in keeping with the subsidiarity principle and recognises that the EU has only those competencies attributed to them.



Fig. 26: Metz, original details in the »Adolf« bar, said to have been frequented by A. Hitler in First World War



Fig. 27: Metz, historic view

As we have seen previously, the texts of the directives are normally not formulated as the clause of special considerations. One exception is the VOC / paint directive. Some legal professionals argue that for the EU to limit the exemptions for cultural heritage to buildings that are "*officially protected*" is to limit the member states freedom to define which cultural heritage is to be considered a "*national treasures of (amongst others) historic value*" (art. 95). Such a limiting definition from the EU is not in accordance with the attributed powers, they argue.

With cultural heritage included in the Commission IA of EU legislation it has now become possible to lobby for necessary changes in the legislation also at this point in the legal procedure. The possibilities to insert the correct legal formulation have improved, but the need to monitor developments remains.

In theory it should be normal to secure the necessary special treatment for cultural heritage at national level, even without such statements on cultural heritage in the EU legislation. But experience has demonstrated that it becomes much easier to get exemptions in the national legislation, if such exemptions are already given in the EU legislation. An exemption for cultural heritage or a 'Clause of Special Consideration' immediately allows for similar exception at national level.

When the EU legislation lacks such special considerations for cultural heritage, exemptions in the national legislation are harder to achieve. Most of the time exemptions are de facto impossible to achieve! Sector bureaucrats will ask why such special considerations were not already incorporated in the EU legal text. Many bureaucrats are unaware of the special position of culture and cultural heritage in the EU Treaty.

6. Summary & Conclusions

The EU has no competencies in regulating the cultural heritage field. The EU legal acts that impact negatively on cultural heritage administration and conservation stem from areas inside EU competencies. The negative impact creates an increasing problem for the maintenance and conservation of cultural heritage following the guidelines outlined in international Treaties, Conventions and Charters.

The cultural heritage sector is not informed about the development and implementation of these legal acts. Therefore, the competent cultural heritage administrations normally discover the detrimental effects too late. This situation can be countered by operating a legal observatory serving and informing all cultural heritage administrations and other players. The cultural heritage sector may, when informed, influence the legal acts in time and on a pro-active basis. The competent national authorities can propose a 'Clause of Special Consideration' for cultural heritage protection to be incorporated in the legal text.

To achieve control over these unintended consequences stemming from legal developments in other fields it is necessary to safeguard Europe's cultural heritage for the future. Conservation and maintenance of cultural heritage is also necessary if the economic and other benefits to society from cultural heritage are to be sustainably harvested. The cultural heritage sector is among the most important European attractors and economic drivers today. Heritage generates millions of jobs and is an essential contributor to the three economic sectors which contribute most to EU GDP, i.e. the Cultural and Creative industries, Real Estate activities, and the Tourism industry. More legal research and clarification is welcomed to highlight the possible legal instruments.

Rob Pickard

**European Heritage Laws and Planning
Regulations: Integration, Regeneration and
Sustainable Development**

2.3

The first real notion of linking heritage protection with territorial planning can be evidenced through the ***International Charter for the Conservation and Restoration of Monuments and Sites*** (ICOMOS, 1964)(the “Venice Charter”) of 1964, which, although emphasising the cultural significance of individual monuments, extended the concept of the historic monument from ‘single architectural works’ to the ‘urban setting in which is found the evidence of a particular civilisation’ (article 1).

Specifically in a European context, and following on from the *Venice Charter* and the formation of the International Council on Monuments and Sites (ICOMOS), the first real consideration of the need to develop an integrated approach to the protection and management of the architectural heritage was through a series of resolutions adopted by the Council of Europe’s Committee of Ministers¹:

- **Resolution (66)19** *on criteria and methods of cataloguing ancient buildings and historic or artistic sites* (adopted 29 March 1966) – which urged member states to take immediate steps to ensure the immediate protection of groups and areas of buildings by various means including the establishment of a machinery to enable protective measures pending the adaptation of existing regional planning legislation to the requirements of the heritage.
- **Resolution (66)20** *on the reviving of monuments* (adopted 29 March 1966) – which considered that monuments could only be effectively protected if appropriate measures were included as an integral part of a general policy on regional planning which centralises and harmonises action to be taken throughout a country. It further considered the need for governments to avoid putting themselves in a position where they would have to accept responsibility for all monuments and identified the need for providing financial incentives for owners to maintain properties and to allow

(suitable) new functions where monument were no longer occupied.

These ideas were further pursued through three resolutions in 1968:

- **Resolution (68)11** *on principles and practice of the active preservation and rehabilitation of groups and areas of buildings of historical or artistic interest* (adopted on 3 May 1968) – which invited the governments of member states to draw the attention of those responsible for town and country planning to the need for providing for permanent liaison between preservationists, town planners and economic planners so that when the need for preserving a group or area of historical or artistic interest was recognised it could be identified as an essential and fundamental consideration in the preparation and implementation of all development plans.
- **Resolution (68)12** *on the active maintenance of monuments, groups and areas of buildings of historical or artistic interest within the context of regional planning* (adopted on 3 May 1968) further called for the complete integration of monuments, groups of buildings and areas of buildings of cultural heritage interest in urban and rural life through a planning process which would recognise their social value and ensure their protection and rehabilitation including the need to stimulate public and private enterprise to contribute to the improvement of monuments and groups or areas of buildings of historical and artistic interest and to actively co-operate in such policies. It referred to the idea of establishing “special plans” and the need for research on different aspects associated with groups of buildings and areas including planning methods to facilitate their integration in urban and regional life.
- **Resolution (68)16** *on the organisation of a conference of ministers most directly responsible for the preservation and rehabilitation of groups and areas of buildings of historical interest* (adopted on 30 May 1968).

¹ The majority of Council of Europe documents referred to in this text (resolutions recommendations, conventions etc) can be found in Council of Europe (2002) *European cultural heritage (Volume I) – Intergovernmental co-operation: collected texts*, Council of Europe Publishing, Strasbourg (see reference list). Additional and subsequent documents of the Council of Europe have been separately referenced in the reference list.

Following this the *First Conference of European Ministers responsible for the Preservation and Rehabilitation of the Cultural Heritage of Monuments and Sites* (held in Brussels, November 1969) made recommendations to governments about

groups and areas of buildings and integrating heritage within contemporary society. The European Ministers recognised the economic and social value and potential of the built heritage and the threats placed on it due to the pressures of “modern life”. A number of recommendations were put forward for governments to consider including the need for protective inventories and action to prevent the deterioration and destruction of this heritage by taking suitable measure such as:

- the integration of heritage buildings within a general policy of town and country planning through co-operation between relevant authorities;
- the allocation of resources for financing preservation and rehabilitation work;
- administrative measures to encourage private owners or users to restore or rehabilitate themselves;
- as well as training and awareness-raising measures.

A Committee of Experts (specialists in heritage, planning, etc) was established to draft a Charter as a preliminary step to developing a Convention. Realising that this work would take a number of years to develop, the Committee of Ministers adopted two resolutions **Resolution (72)20 on interim measures for the protection of the cultural heritage of monuments and sites** and **Resolution (72)21 on the compilation of national inventories of monuments, groups of buildings and sites of historical or artistic interest** (both adopted 30 May 1972). The first of these resolutions recommended that member governments implement *interim measures* to prevent the demolition of monuments, groups of buildings and sites (using the terminology of the World Heritage Convention) of historical or artistic interest and the deterioration of historic towns and picturesque villages. It similarly invited local authorities to adopt interim safeguarding measures for aspects for which they were responsible. The second resolution urged member governments to implement steps to ensure immediate protection of groups and areas of buildings via emergency protective measures pending the adaptation of existing regional planning legislation to the requirements of the cultural built heritage.

The **European Architectural Heritage Year** was subsequently organised in 1975 with the aim of encouraging new protection measures. The **European Charter of the**

Architectural Heritage was adopted during this year as a recommendation of the Committee of Ministers and introduced the concept *integrated heritage conservation*, identifying what would subsequently become a key feature of the **Granada Convention** – that the architectural heritage in its broadest sense should become a major objective of urban and regional planning so that historic towns and neighbourhoods could be revitalised. The Charter was proclaimed as a new way forward through the **Amsterdam Declaration** made at the *Congress on the European Architectural Heritage*. It was quickly followed by **Resolution (76)28 concerning the adaptation of laws and regulations to the requirements of integrated conservation of the architectural heritage** (adopted by the Committee of Ministers on 14 April 1976).

The resolution defined two main objectives for the *integrated conservation* of the architectural heritage:

The conservation of monuments, groups of buildings and sites through measures to safeguard them, steps to ensure the physical preservation of their constituent parts and operations aimed at their restoration and enhancement;

- The integration of these assets into the physical environment of present day society through revitalisation and rehabilitation programmes including by the adaptation of buildings for a social purpose and to the needs of modern life, compatible with their dignity, preserving features of cultural interest and in keeping with the character of their setting.

Three principles of *integrated conservation* were established:

- Integrated conservation of the cultural heritage of monuments is one of the basic constituents of regional town and country planning. Comprehensive policies should be devised for this purpose to serve as a more human basis of planning policy;
- Integrated conservation of a country’s cultural heritage of monuments and sites concerns its citizens first and foremost. A balance should be maintained between man and his traditional environment - assets inherited from the past and on which the quality of the environment largely depends should not be debased;
- Public authorities have a special responsibility at national,

regional and local levels in the integrated conservation of the architectural heritage. They should play a direct part in supporting action by allocating funds for restoration, revitalisation and rehabilitation schemes, encourage private initiatives, take particular measures to ensure the training of practitioners in these operations, harmonise new construction with the old and have particular vigilance in areas where the authenticity of architectural heritage assets could suffer ill-effects such as from large-scale public or private works.

For the implementation of national integrated conservation policies, a review of legislation relating to heritage protection, land-use planning and housing was advocated to allow the co-ordination of the different branches of legislation in order to enable them to be mutually complimentary and compatible. The review was advocated on the basis of four types of measures:

a. Financial measures

This was directed towards the reallocation of budget funds and the provision of financial aid.

Further advice has since been developed concerning financial aspects including **Recommendation No. R(91)6** on measures likely to promote the funding of the conservation of the architectural heritage (adopted by the Committee of Ministers on 11 April 1991) and more recently through Council of Europe guidance (Pickard, 2009).

(These consider examples relating to three principal forms of financial measures: subsidies (grant aid) for individual buildings and historic areas, loans and tax incentives, as well as specific measures to promote sponsorship through donations by individuals and corporate organisations. Other revenue-raising methods are also considered including the use of lotteries, concession agreements, monument annuities and enabling development. Further consideration is given to the role of non-profit and other organisations operating for the benefit of the architectural heritage such as charitable trusts, heritage foundations and limited liability companies, as well as particular types of intervention measures such as social housing improvement programmes in historic areas, renovation leases,

revolving funds and partnership arrangements to support heritage-led regeneration).

b. Administrative measures

This was directed towards increasing the organisational capacity of public authorities through four means. First, by the provision of an appropriate department with administrative, scientific and technical staff to deal with conservation issues, which would act in close co-operation with the department responsible for regional and town planning and with local authorities. Secondly, by the development of integrated conservation programmes and the revision of planning and technical building regulations, promoting rehabilitation rather than demolition and new development and by the control of new development through restrictions on dimensions and materials. Thirdly, by the preparation of protective inventories (provisional lists as a first step) to indicate aspects of the architectural heritage worthy of protection and the provision of protection zones to be entered on plans produced jointly by departments responsible for the protection of the architectural heritage and planning. Lastly, by the planning and implementation of projects by experienced practitioners, technicians and skilled craftsmen and the training of young people in such skills.

c. Social measures

This was directed towards maintaining the social fabric and living conditions of all levels of the population, particularly the less affluent ones, using multidisciplinary teams to make studies of areas and develop solutions likely to be acceptable to local authorities and to the public. Other measures were identified such as subsidised levels of rents for rehabilitated buildings, the avoidance of gentrification and property speculation, and involvement of the public in the preparation of integrated conservation schemes.

d. Awareness-raising measures

This was directed towards ensuring the public could actively take part in the process by the provision of information and education concerning the environment of the built heritage. A role for voluntary organisations was identified – to draw attention to the cultural and social value of the architectural heritage and to induce public authorities to take effective action

(See further: *Declaration on the role of voluntary organisations in the field of cultural heritage 2001*).

Recognising that new skills would be needed to implement the new approach. **Recommendation No. R (80)16** on the specialised training of architects, town planners, civil engineers and landscape designers was adopted by the Committee of Ministers on 15 December 1980. In particular, the appendix to the recommendation identified the need for the training of architects and town planners to include the history of building techniques, rehabilitation including for social purposes, the integration of forms, studies of historical and structural features of the physical and social environment, the urbanistic context – as a guide to architectural composition of human settlement, and historical aspects of buildings and living conditions, amongst other matters.

Moreover, the threat posed to places of architectural character was not just from new development but also through technological progress in building methods, with a consequent impact on traditional craft trades. This being the case, the Committee of Ministers adopted a further recommendation aimed at preventing the decline of craft trades: **Recommendation No. R (81)13** on action in aid of certain declining craft trades in the context of craft activity (adopted 1 July 1981). (See also **Recommendation No. R (86)15** on the promotion of craft trades involved in the conservation of the architectural heritage, adopted 16 October 1986).

The Granada Convention: integrated conservation and the architectural heritage

It was during the Second Conference of European Ministers responsible for the Architectural Heritage held in Granada in 1985 that this new policy of protection and integrated conservation was given impetus by the opening for signature of the **Convention for the Protection of the Architectural Heritage of Europe** with sixteen member states signing the Treaty at this time and Belgium adding its signature shortly afterwards. The Contracting Parties to the convention undertook to implement statutory measures to protect the architectural heritage that would satisfy certain minimum conditions laid down

in the convention (including control of alterations, demolition and of new building) (art. 3, 4, and 5) and ancillary measures to provide financial support and encourage private initiatives for maintenance and restoration (art. 6), promote measures for the general improvement of the environment (art. 7), limit the risks of physical deterioration (art. 8) and provide sanctions against infringements of the law protecting the architectural heritage (art. 9). The signature countries further undertook to maintain inventories (art. 2), adopt conservation policies (art. 10, 11, 12 and 13), and set up machinery for consultation and co-operation in the various stages of the decision-making process, particularly with cultural associations and the public including the fostering of sponsorship and non-profit associations (art. 14).

Article 10 specifically referred to *integrated conservation* policies including:

- to include conservation of protected properties among town and regional planning objectives – both at the time when plans are drawn up and when work is authorised;
- to promote programmes for maintenance and restoration;
- to establish links between the protection of the architectural heritage with cultural and environmental policies as well as planning policies;
- to safeguard buildings through the planning process which, although not individually protected, are of interest in terms of their setting in the urban or rural environment of for quality of life reasons;
- to foster, as essential to the future maintenance of the architectural heritage, the continued existence of traditional craft skills and materials.

In addition, article 11 encouraged the use of protected buildings for the needs of contemporary life and, if appropriate, to allow the adaptation of old buildings to accommodate new uses. Moreover, the integrated process implied the effective co-operation between different administrative departments (conservation, cultural, environmental, planning etc) at all levels.

With a requirement for three ratifications, Denmark, France, Germany and the United Kingdom ratified the Granada Convention in 1987 and it entered into force on 1 December 1987. (NB As at September 2009, the convention had entered

into force in 39 member states - with a further 3 member states signing, but not ratifying, it).

Apart from monuments, groups of buildings and sites (identified in article 1 of the Granada Convention), *integrated conservation* of the architectural heritage should also take account of the surrounding environment. This has been considered **Recommendation No. R (86)11 on urban open space** which identified that open space forms a fundamental part of the urban environment and the historic heritage of a town and recommended, amongst other matters, that open space should be regarded as an essential part of the urban heritage as it is a strong element in the architectural and aesthetic form of a town. Moreover, the recommendation states that "...it plays an important educational role, is ecologically significant, is important for social interaction and in fostering community development and is supportive of economic development objectives and activities..." and, thus, should be reflected in urban planning practice.

Guidance on implementing integrated systems through management plans

To assist member states in reforming legislation on cultural heritage protection with particular reference to the *integrated conservation* approach, the Council of Europe established legislative support task force in 1997 which, subsequently in 2000, produced *Guidance on the development of legislation and administration systems in the field of cultural heritage* (Council of Europe, 2000) (currently in the process of being updated – to be published in 2009/10).

In the context of groups of buildings and historic areas this guidance has advocated the use of conservation management plans in which the area to be safeguarded should be delimited and a system envisaged for monitoring demolition, large-scale work and new construction work and a management scheme to be devised to guide the 'managed change' within an area: a process that is necessary to keep an area alive. The guidance further advocates that a specific management plan should be integrated within a wider framework of policies and plans to ensure that the

protection of the architectural heritage is included as an essential urban and rural planning objective.

The guidance identifies that the management plan can consider several issues including, for example:

- Policies for new development schemes including the circumstances in which development will/will not be permitted, the compatibility of new functions within the area, respect for the historic context in terms of volume, scale, form, materials and quality of design;
- Specific safeguards to protect views, vistas and settings;
- Control/coercive/sanction provisions to safeguard the built fabric and other areas of recognised importance (sites of archaeological importance, historic parks and gardens, the external envelope or façades of group of buildings, etc, including control over demolition or destruction of buildings or sites which make a collective contribution);
- Means of enhancing the appearance and character of the area through the use of design/development briefs for sites that have a negative or neutral impact within an area;
- Other environmental improvements such as the reinstatement of historic street surfaces, sympathetic landscaping and planting (as well as controls over the felling of trees), signs and street furniture, and the removal of obstructive advertising material;
- Traffic management policies to mitigate the effect of pollution and to reduce the physical intrusion of roads and traffic on the architectural heritage (or, at minimum, to limit the growth of new roads);
- The use of a regeneration or rehabilitation strategy including feasibility studies to encourage the maintenance and beneficial economic reuse of historic buildings, the improvement of housing – particularly for social housing, and the encouragement of compatible businesses, etc;
- Action to be taken to preserve single buildings within groups and areas;
- Specific finance arrangements to encourage conservation, restoration and rehabilitation action, environmental improvements and other regenerative or rehabilitation activity - these may include joint venture/partnership arrangements between the public authorities, private organisations and enterprises and non governmental organisations;

- Mechanism for monitoring change on a regular basis through the use of indicators and periodic recording, for example, by photographic surveys or digital scanning.

Moreover, the Council of Europe's *Guidance on urban rehabilitation* (Council of Europe, 2004) provides further advice on the use of management plans to assist in the facilitation of *sustainable local development strategies* in which different sectors concerned may work in an integrated manner to achieve rehabilitation of the urban heritage. The basis of this approach is that old architecture that is worthy of safekeeping is not confined to 'monuments' alone and should not, in principle, be regarded as being of lesser value to new buildings. In this context, reusing old buildings must be considered as a prudent and socially coherent strategy which involves the existing community. Also, rehabilitation must be regarded as far more than restoration, since it encompasses the dynamic processes involved in modernising and enhancing older neighbourhoods in a spirit of *integrated conservation* of the heritage as identified in the *Amsterdam Declaration* and promulgated via the *Granada Convention* (and, in other words, involves a process of 'managed change').

This guidance further defines the process of urban rehabilitation and associated objectives and issues and identifies means of action for urban rehabilitation. Accordingly an urban rehabilitation project for areas or quarters of older architecture should be considered through the establishment of urban policy and be driven by the political commitment of public authorities. This will require public authority involvement in the analysis of areas (heritage values, the housing situation, social climate, urban functions, access, etc.) together with strategic planning (development and protection plans and management or action plans), as well as public authority intervention in the implementation stage (including devising a property management strategy for acquisition, expropriation, pre-emption, leasing and other transaction activity and providing financial incentives to encourage rehabilitation of old buildings and to achieve social objectives). The urban rehabilitation guidance also highlights other necessary actions such as:

- The provision of a technical and multidisciplinary management team or bureau to co-ordinate activities;
- The involvement the local population and community groups to ensure democratic participation in the decision-

making process of the rehabilitation project; and

- The need for both financial resources and legal measures to ensure there is proper coordination between planning and heritage mechanisms including through the production of a rehabilitation or management plan.

The first and third of these points are further considered in the Council of Europe's guidance: *Funding the Architectural Heritage: A guide to policies and examples* (Pickard, 2009).

Other international actions

The Council of Europe initiatives should also be viewed against other international standard setting documents that refer to the need for integrated approaches concerning the architectural heritage.

Following on from the actions of the Council of Europe in 1975 and 1976 the General Conference of UNESCO adopted a recommendation on historic areas: ***Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas*** (adopted 26 November 1976) (UNESCO, 1976). The preamble identified that historic areas provided very tangible evidence of cultural, religious and social activities and that their safeguarding, integration into contemporary society and their revitalisation should be a basic factor in town/territorial planning and land development.

The recommendation further noted the absence, in many cases (in countries), of legislation that was effective and flexible enough concerning the integration between the architectural heritage and planning mechanisms. It set out some *general principles* concerning the safeguarding of historic areas and their surroundings including that they should be considered in their totality as a coherent whole recognising that they remain valid due to the fusion of the different parts of which they are composed and the human activities that take place there as much as the buildings, the spatial organization and the surroundings. The recommendation identified that each member state should draw up national, regional and local policies so that legal, technical, economic and social measures could be taken by national, regional and local authorities with a view to

safeguarding and adapting historic areas to the requirements of modern life.

Further international recognition of the need for an integrated approach for the architectural heritage can be evidenced via the **ICOMOS International Charter for the Conservation of Historic Towns and Urban Areas** (ICOMOS, 1987) (the "Washington Charter") which takes the UNESCO recommendation of 1976 and "various other international instruments" as its starting point. Article 1 of the charter referred to the need for the conservation of historic towns and other historic urban areas to be an integral part of coherent policies of economic and social development and of urban and regional planning. It further referred to the qualities to be preserved including historic character and those elements that express character such as urban patterns of lots and streets, the relationship between buildings and green and open spaces, the appearance of buildings externally and internally, the relationship between a town or area and its surroundings (both natural and man-made) and the functions that the place has acquired over time. It further referred to methods and instruments including the use of conservation plans and the need to address issues such as the improvement of housing, the construction of new buildings, traffic and parking management, etc.

More recently there have also been moves to revisit the UNESCO recommendation of 1976 with a view to developing a new international guideline (proposed to be a recommendation) for the *Conservation of Historic Urban Landscapes* for approval in 2011 (Van Oers, 2007). Initially this proposal was to be considered with particular reference to where development schemes or regeneration projects may pose a threat to the 'outstanding universal value' of sites registered on the World Heritage List, but it has been proposed to broaden the intended standard-setting document to *all* historic areas. The key issues to be considered are:

- "The importance of landscape, as a stratification of previous and current urban dynamics, with an interplay between the natural and the built environment".
- In other words, it has been recognised that by identifying the traditional notions of groups of buildings and historic areas as separate entities within a larger whole this will not

sufficiently protect their characteristics and qualities. The landscape approach of assessing all aspects of the 'cultural environment' in an interrelated manner may be more appropriate when considering the management of change. This concept of the wider 'cultural environment' has also been considered through standard setting documents of the council, of Europe (see below).

- "The role of contemporary architecture, previously considered as 'contextualisation of new buildings' "
- Thus, when designing new buildings in the historic environment it is not just the context that is important but rather whether the area continues to work together as a whole
- "The economic and changing roles of cities, with an emphasis on the non-local processes, such as tourism and urban development, with outside factors of change"
- For example, in the global world many cities wish to bring in inward investment for developments from international sources - which could be detrimental to the character of places. Therefore compromises should be sought because of the uniqueness of the place in order to mitigate the impact on the historic environment.

Widening the concept of integrated conservation

• **The archaeological heritage**

By the 1980s new threats had emerged concerning the impact of large-scale construction projects associated with increasing populations and ever-higher standards of living (motorways, underground railways and high-speed trains, replanning of old town centres, car parks etc.) and due to physical planning schemes (reafforestation, land consolidation etc.). This led to the need to consider the protection of the archaeological heritage in association with other legislation: general legislation on the cultural heritage and legislation on the environment, town and country planning, public works, etc. In other words, as with the architectural heritage, the need for *integrated conservation* systems of protection and management for the archaeological heritage was recognised.

These issues were first addressed by the Council of Europe in **Recommendation No. R (89)5 concerning the protection and enhancement of the archaeological heritage in the context**

of town and country planning operations (adopted by the Committee of Ministers 13 April 1989). The recommendation drew on practice that had evolved over previous years and advocated the completion and bringing up to date of national archaeological inventories which could be communicated by archaeological heritage managers to developers; the creation of scientific and administrative structures capable of handling development projects involving archaeological data; the adoption of legal and administrative measures necessary in order for archaeological data to be taken into account as a matter of course in the town and country planning process; the promotion of new working methods in the context of major development operations including joint working methods and contractual arrangements between archaeologists and developers and resources to enable *preventative or rescue archaeology*; and educational programmes to raise public awareness in the value of the archaeological heritage as a major element of European cultural identity.

Following this, the **ICOMOS Charter for the Protection and Management of the Archaeological Heritage** (ICOMOS, 1990) was prepared by the International Committee for the Management of Archaeological Heritage (ICAHM) and approved by the 9th General Assembly in Lausanne in 1990. Article 2 of the *Lausanne Charter (on integrated protection policies)* identified “policies for the protection of the archaeological heritage should constitute an integral component of policies relating to land use, development and planning, as well as cultural, environment and educational policies”. Article 3 further identified the need for legislation to require developers to arrange and pay for archaeological “impact studies” before development schemes are implemented and to ensure that such development schemes are designed to so that the impact upon the archaeological heritage is minimised.

Bearing in mind that the problems of safeguarding and enhancing the archaeological heritage had changed considerably, the Council of Europe’s Select Committee of Experts on Archaeology and Planning considered that the European Convention on the Protection of the Archaeological Heritage of 1969 should be revised. The Select Committee commenced work on developing a new text, which was examined and approved by the Cultural

Heritage Committee (CC-PAT) in 1991 and designed to be consistent with the *Lausanne Charter*. The subsequent *European Convention on the Protection of the Archaeological Heritage (revised)* was opened for signature in Valletta on 16 January 1992 (the “Valletta Convention”). (NB By September 2009 the revised convention had been brought into force in 37 member states with a further 8 having signed, but not ratified, it).

Article 5 of the *Valletta Convention* specified the need to develop *integrated conservation* systems for the archaeological heritage: “to reconcile and combine the respective requirements of archaeology and development plans” both in planning policies (so that they include well-balanced strategies for protection, conservation and enhancement of sites) and in the various stages of development schemes. The provisions of Article 5 were directed towards providing a systematic consultation between archaeologists, town and regional planners in relation to development plans and proposals, at an early stage to ensure that measures are devised to mitigate the destruction or deterioration of the archaeological heritage (including “environmental impact assessments” of development schemes). Such measures were identified as:

the modification of development plans and the allocation of sufficient time and resources for an appropriate scientific study to be made of the site and for its findings to be published, (see further Article 3 on archaeological research, Article 6 on rescue archaeology and financing research and Article 7 on the collection and dissemination of scientific information), as well as “environmental impact assessments” (when required) of the impact of the development of archaeological sites and settings. Furthermore, in order to deal with the situation when elements of the archaeological heritage have been found in the course of development work, the convention states that provisions should be made for their conservation *in situ* (as far as is feasible).

In order to assist and encourage the consultation process, the European code of good practice entitled “Archaeology and the Urban Project” was prepared by a group of Council of Europe experts (and adopted by the Council of Europe’s Cultural Heritage Committee in March 2000). The code was developed to enhance the protection of the European urban archaeology through facilitating co-operation between planners, archaeologists and

developers. It identifies the roles of public authorities and planners (making reference to various articles of the Valletta Convention), of architects and developers and of archaeologists in this process. The code is not regulatory - it is designed to encourage close and continuous voluntary co-operation between all parties and the provision of advice at an early stage with the aim of balancing the desire to conserve the past and the need to renew for the future. (The code was developed from the experience of the British Archaeologists' & Developers' Liaison Group Code of Practice, published in 1986).

● **Landscape and the cultural environment**

More recently the *integrated conservation* concept has been widened to encompass *landscape* and the notion of the *cultural environment*.

At the European level, the starting point for this development is **Recommendation No. R (95)9** on the *integrated conservation of cultural landscape areas as part of landscape policies* (adopted 11 September 1995). This recognised that the environment is a dynamic system, comprising of cultural and natural elements, the interaction of which is liable to have direct or indirect immediate or long-term effect on living beings, communities and the heritage in general. In recommending that governments should shape their policies on landscape more closely with regional planning, agricultural and forestry policy and the conservation of the cultural and natural heritage, the objective was to give cognisance to the principles of sustainable development through a process of balancing the needs of society, the use of natural resources and the organisation of human activities. The recommendation provided guidelines for the development of landscape policies, in order to respect and enhance European cultural identities, and promoted measures for the conservation and managed evolution of cultural landscape areas.

The first real notion of the "cultural environment" as a concept of heritage in the sphere of the Council of Europe's activities was adumbrated during the *Fourth European Conference of Ministers responsible for the Cultural Heritage* (Helsinki, 30 – 31 May 1996) (Pickard, 2002). In the *Helsinki Declaration on the Political Dimension of Cultural Heritage Conservation in Europe* it was stated that:

"...Access to knowledge and enjoyment of the cultural heritage must be promoted as a factor vital to personal and collective fulfilment. Contact with the cultural heritage allows individuals to locate themselves in their own historical, social and cultural environment. This applies to the cultural heritage in its widest sense, including the cultural landscape, the movable and the intangible heritage, as well as the architectural and archaeological heritage..."

The link between the cultural and natural heritage and regional planning was subsequently developed as a result of the work of the Congress of Local and Regional Authorities of Europe (CLRAE), which led to the opening for signature of the *European Landscape Convention* in Florence on 20 October 2000 (the "Florence Convention"), and through the adoption of the *Guiding Principles for Sustainable Spatial Development of the European Continent* by the European Conference of Ministers responsible for Regional Planning (CEMAT, 2000).

In this context, the *Florence Convention* has provided a suitable framework for co-operation on the environment and the inclusion of cultural and natural heritage assets in sustainable spatial planning mechanisms (as advocated by the "Guiding Principles"). Article 1a defines "Landscape" as an area *"perceived by people, whose character is the result of the action or interaction of natural and /or human factors"*

Moreover, Article 5 of the convention states that each Party undertakes *"to recognise in law as an essential component of people's surroundings, an expression of the diversity of their shared cultural and natural heritage, and a foundation of their unity"* (art. 5 a) and *"to integrate landscape into its regional and town planning policies and in its cultural, environmental, agricultural, social and economic policies, as well as any other policies with possible direct or indirect impact on landscape"* (art. 5 d). (By September 2009 the *Florence Convention* had been brought into force in 30 member states with a further 6 having signed, but not ratified, it). Thus, landscape (recognised by the convention in its broadest sense: covering natural, rural, urban and peri-urban areas) requires consideration in the integrated conservation process and the designation and management of landscapes may necessitate coordination between different

authorities and legislation (cultural heritage, environmental protection, planning, tourism etc.).

The *cultural environment* is further considered in the Council of Europe's *Framework Convention on the Value of Cultural Heritage for Society* (Council of Europe, 2005) (the "Faro Convention"). Article 8 of the convention (entitled "Environment, heritage and quality of life") identifies that the contracting parties should undertake to utilise all heritage aspects of the *cultural environment* by an integrated approach to:

- a. enrich the processes of economic, political, social and cultural development and land-use planning, resorting to cultural heritage impact assessments and adopting mitigation strategies where necessary²;
- b. promote an integrated approach to policies concerning cultural, biological, geological and landscape diversity to achieve a balance between these elements;
- c. reinforce social cohesion by fostering a sense of shared responsibility towards the places in which people live;
- b. promote the objective of quality in contemporary additions to the environment without endangering its cultural values.

(NB By September 2009 the Faro Convention had been ratified by 7 member states with a further 8 having signed it – the convention requires a further 3 ratifications before it comes into force)

Sustainable management of the cultural heritage

Integrated conservation within the sustainable development concept

At the heart of the concept of "sustainable development" is the simple idea of ensuring a better *quality of life* for everyone, now and for future generations. A widely used definition of sustainable development was drawn up by the *World Commission on Environment and Development* in 1987 and subsequently disseminated at the global level during the *United Nations Earth*

² As an example, see management strategies for conservation areas in England (below).

Summit held in Rio de Janeiro in 1992:

"*Development that meets the needs of the present without compromising the ability of future generations to meet their own needs*"

It is recognised that there are three basic pillars of sustainable development:

1. Social cohesion and inclusion
For example, the regeneration, rehabilitation and use of the heritage can create socially inclusive communities by, for example, enhancing the social fabric of communities considered, providing access to the heritage itself and creating attractive places to live and work.
2. Protection and enhancement of the environment (including the cultural heritage)
For example, the condition of our surroundings has a direct impact on the *quality of life* and the conservation and enhancement of the quality and character of the natural and built environment should bring social and economic benefit for local communities.
3. Sustainable economic growth and provision of employment
For example, opportunities for future investment and development can be sensitive to the cultural environment as well as delivering economic objectives and employment opportunities. Moreover, the heritage can be used as a factor in establishing the appeal of a region to attract sustainable tourism and new enterprise and employment.

Moreover, none of these three principles or »pillars« of sustainable development should have precedence over the other two. A policy based on only one of these objectives could not secure efficient, well-balanced and harmonious development. Sustainable approaches also imply the prudent use of resources in order to hand down the *cultural environment* to future generations with all its beauty, authenticity and diversity. But it is not simply about creating very strict protection measures – the ideal for sustainable development must be to inspire a more creative attitude, capable of handing down to future generations a cultural heritage enriched by contemporary work. The sustainability concept is therefore based on the capacity for the cultural and natural heritage to adapt itself to the current

needs and requests (adaptation of structures and functions), without creating long periods of non-activity or obsolescence, and without having actions susceptible of destabilising its environment (Council of Europe, 2000; Pickard, 2000b; Pickard, 2000c)

In this sense, the conservation of heritage can no longer be considered on its own, as (cultural) an objective in itself. It now defines itself as an essential tool for making concrete the global objective of sustainable development of society, at the economic, social and environmental level. **This new approach of integrated conservation of cultural heritage within the sustainable development concept is a highly important evolution. It implies a new behaviour in the drafting and practical applications of laws and policies** (Council of Europe 2000, Council of Europe, 2004; Pickard, 2000b).

The need to develop a sustainable framework for integrated conservation policies has been advocated by two further key documents at the European level concerning spatial planning. First, in the European Spatial Development Perspective (ESDP) (European Commission, 1999) which was directed at the *balanced and sustainable development of the territory of the European Union* (European Commission, 1999) and, secondly, the *Guiding Principles for the Sustainable Spatial Development of the European Continent* (CEMAT, 2000), which followed similar lines but had a wider remit.

In looking at policy aims and options for the territory of the EU the ESDP referred to the need for “wise management” of both the cultural and natural heritage. It recognised that the heritage is under constant threat and whilst strict protection measures are sometimes justified, it advocated a management approach by integrating protection and management of endangered areas into spatial development strategies for larger areas. Moreover, in recognition of broader values that the European heritage provides in terms of expression of identity of world-wide importance, as a factor for enriching quality of life, in terms of its role in social and spatial balancing and economically (particularly through the quality of life of places and their role in the location decisions of companies and through tourism), it called for a creative and sustainable

approach to reverse neglect, damage and destruction so that the cultural heritage can be passed onto future generations.

It specifically referred to relevance of the *Granada Convention* by which countries have committed to an approach that ensures the protection and maintenance of the architectural heritage, but which at the same time must take into consideration the requirements of a modern society. Furthermore the ESDP referred to the fact that the cultural heritage is subject to many different risk factors (such as environmental pollution, real estate speculation, infrastructure projects which are out of scale with their environment or ill-considered adaptations to mass tourism). It identified a number of policy options including

- the development of integrated strategies for the protection of cultural heritage which is endangered or decaying, including the development of instruments for assessing risk factors and for managing critical situations.
- the maintenance and creative redesign of urban ensembles worthy of protection.
- the promotion of contemporary buildings with high architectural quality.
- increasing greater awareness of the contribution of urban and spatial development policy to the cultural heritage of future generations.

The extent of the archaeological heritage is often unknown and in such circumstances may remain unprotected. The threat posed due to, by example, new transnational and transregional infrastructure routes and associated development in the European continent, necessitates the organisation of liaison by respective sectoral authorities and cross-border co-operation. The *Guiding Principles for Sustainable Spatial Development of the European Continent* identified a similar approach to the assessment of risk. By example, in relation to the impetus given to local and regional economies to invest in major new infrastructure transport routes, it identified that such projects should not be undertaken without assessing their direct and indirect territorial impact including by spatial and environmental assessment and to ensure co-ordination regionally, nationally and across borders to allow for recording prior to works commencing, to allow for monitoring or for controlling the works, to make assessments on the impact of such development, or

to anticipate the possibilities to change proposed routes where potentially significant heritage assets are likely to be damaged.

Environmental assessment and the cultural heritage

The relevance of spatial and environmental assessment in the planning process in relation to the cultural heritage can be considered through two directives of the European Union:

- Environmental Impact Assessment (EIA) was first enshrined in European Law in 1985 (Directive 85/337/EEC), with the most recent updating Directive dating from 1997: Directive 97/11/EC. This Directive requires the preliminary assessment of the possible effects of certain public and private projects on the environment, including cultural heritage.
- The Strategic Environmental Assessment (SEA), Directive 2001/42/EC of 2001 addresses higher levels of public sector decision-making, from strategic programmes to operational plans such as those used for urban and spatial planning. It recommends that assessments are carried out at the different levels within the hierarchy of plans and programmes adopted by particular countries.

While the EIA procedure was designed to consider the impacts of individual planned projects, the SEA procedure considers the overall sustainability of planning processes. As the ESDP stated, spatial development strategies which incorporate an integrated conservation approach can help reduce the growing pressures on the cultural heritage, and therefore a strategic environmental assessment of proposed plan policies should lead to better and more informed management and integration of the cultural heritage.

The European Commission (2004) has funded research to develop *Guidance for the environmental assessment of the impact of certain plans, programmes or projects upon the heritage value of historical areas, in order to contribute to their long-term sustainability (Sustainable Development Of Urban Historical Areas Through An Active Integration Within European Towns - SUIT)* which has examined the opportunity to protect urban cultural heritage by using EIA and SEA. The SUIT guidance advocated proactive conservation of cultural heritage, and the development of valuable features within their

economic and social context and whilst the SUIT report has not been adopted per se, the research provides useful information concerning the use of EIA/SEA when considering impacts on the cultural heritage.

The consideration of cultural heritage is explicit within the current EU Directives for EIA and SEA. However, as a result of comparative analysis of the EIA/SEA regulations in the EU the SUIT guidance has highlighted that there is great variation in the way in which cultural heritage is accounted for between EU Member States (and sometimes different approaches to the consideration of cultural heritage between regions or competent authorities within individual countries).

The SUIT report further found that the assessment of cultural heritage within urban areas tends to be confined to the assessment of the built heritage, often limited to designated buildings and legally protected areas and that the less tangible aspects of cultural heritage or cultural environment, such as urban landscape features, cultural identity and community cohesion are rarely addressed. The report further concluded that the majority of Member States are unhappy with the level of consideration that is given to cultural heritage issues in the environmental assessment procedures, although the situation may well have improved since 2001 when the SEA Directive was issued³ (e.g. the planning system in the United Kingdom has been completely reviewed and updated since legislation in 2004 which introduced a regional form of spatial planning (RSS) and local development frameworks (LDF) and made sustainable development a statutory requirement for the planning system⁴).

A further research study of countries in South East Europe has identified that environmental assessment procedures have generally been adopted, mainly in relation to projects and some have introduced them in relation to plans, but in both cases the main focus of such systems seems to be the impact on the natural environment with little consideration of cultural heritage

3 The European Commission Impact Assessment Guidelines of 15 January 2009 - SEC(2009) 92 – is a relatively new key tool to ensure that Commission initiatives and EU legislation are prepared on the basis of transparent, comprehensive and balanced evidence – including in relation to impact on the cultural heritage.

4 See note 13. Similar actions have occurred in France – See note 7.

(with a lack of awareness by environmental assessment experts that cultural heritage is an aspect on the environment in this context) (Council of Europe, 2008a).

The Faro Convention: cultural heritage as a resource for sustainable development

The preamble to the *Faro Convention* also emphasises the need to recognise the value and the potential of the cultural heritage as a resource for sustainable development and quality of life in a constantly evolving society and article 5 of the convention makes particular reference to the need to develop appropriate heritage laws and policies which:

- Recognise the public interest associated with elements of the cultural heritage in accordance with their importance to society;
- Enhance the value of the cultural heritage through its identification, study, interpretation, protection, conservation and presentation;
- Ensure that every person has the right to benefit from the cultural heritage and to contribute towards its enrichment;
- Foster an economic and social climate which supports participation in cultural heritage activities;
- Promote cultural heritage protection as a central factor in the mutually supporting objectives of sustainable development, cultural diversity and contemporary creativity;
- Recognise the value of cultural heritage situated on territories under the jurisdiction of the relevant contracting member state, regardless of its origin;

Enable the formulation of integrated strategies to facilitate the implementation of the provisions of the Faro Convention.

The sustainable approach specifically implies working towards a better co-ordination of the various sectoral policies influencing heritage, such as environment, urbanism and spatial planning, and urban renovation, public works, regional policy, social policy, tourism or economics. In order to optimize the results stemming from this multidisciplinary and multisectoral »horizontal co-ordination«, the public decision-makers will have to ensure a »vertical co-ordination«

of their policies. This multisectoral approach is further highlighted through the articles of the Faro Convention

Article 7, on *Cultural heritage and dialogue*, considers the debate concerning the valorisation of the cultural heritage including the respect for the diversity of interpretations and values it holds for different communities of people.

Article 8, on *Environment, heritage and quality of life*, (as referred to above), looks at the role of the cultural heritage in the environment as a resource for territorial cohesion and inclusion and for improving the quality of life.

Article 9 refers to the *Sustainable use of the heritage*. In particular, the need to maintain the links between knowledge and traditional skills and the use of traditional materials to sustain the cultural heritage and sustain employment in this sphere, respecting the integrity and values of the cultural heritage when decisions about change are made and the need to promote principles of *sustainable management* and encouraging maintenance.

Article 10 refers to the question of *Economic activity* and refers to the importance of raising awareness of the cultural heritage of a region/place on the part of all actors to understand the economic potential of the heritage, including assessment of the condition of the cultural heritage and its potential for beneficial use and *sustainable economic development*.

Article 11 refers to the *Organisation of public responsibilities for cultural heritage*. In this respect integration between different levels of public authorities and different policy sectors are important as well as the creation of partnerships between public, private and voluntary/non-governmental sectors in management and financial strategies for the cultural heritage (public authorities should not have to assume all cultural heritage responsibilities but will have an important role in leading partnership initiatives).

The adaptation of legal and institutional mechanisms to the new principles of integrated conservation and sustainable development only makes up one part of the conservation policy.

Their efficiency presupposes the participation of the society to which they are applied.

Article 12 identifies the need to ensure *access to the cultural heritage and democratic participation*. Part of the process of seeking sustainable ways of managing the heritage is by ensuring there is public/community involvement, including by voluntary groups, in the process of cultural heritage evaluation and decision-making concerning the use of the cultural heritage (see examples in relation to France and England below). Efforts are also needed to ensure that certain groups (the young, socially and economically disadvantaged people) are involved and gain access to the process. Access to “opportunities” should also result from the enhancement of the heritage (especially in terms of employment opportunity or housing). Moreover, promoting a sense of place and identity can be a means to help build stronger and sustainable communities (Pickard, 2008c).

Background to the introduction of the integrated conservation approach in different countries

The development of the integrated conservation approach can be traced back to examples in particular countries. Notably links between heritage protection in a wider context and urban and regional planning had been conceived in France through the *secteur sauvegardé* (from 1962) linked to the planning system through a preservation and enhancement plan (*plan de sauvegarde et de mise en valeur* - PSMV), in the UK through *conservation areas* designated by local planning authorities (from 1967- see further explanation of the UK system below) and through the updating of heritage legislation in the states of Germany in the 1970s.

Following the *Granada Convention* these mechanisms have been further developed in these and other countries, and the integrated approach has been reframed in some countries in the context of sustainable development.

Some examples:

Germany

Following the *Granada Convention* coming into force in 1987 this approach was continued through the updating of law in the new states of the reunified Germany, by example through the *Denkmalpflegeplan* mechanism found in the section 3 of the 1992 Thuringian Law on the Protection of Historical Monuments (containing an inventory and analysis of the planning area from a heritage perspective, data on monuments and ensembles and conservation objectives).

Germany provides a good example of financial programmes to secure the future of historic towns. A number of federal grant-aided building programmes have been initiated in the context of town renewal and which have particular reference to historic towns and centres and have recognized the importance of urban conservation. The “urban redevelopment” programme (*Städtebauförderungsgesetz*) commenced in the 1970s in West Germany and was resourced equally from the federal, state and municipal levels of government. After reunification (1991) this was extended to the eastern states but, more significantly, a similar programme was initiated in the east but with a particular emphasis on the urban heritage conservation (*Städtebaulicher Denkmalschutz*).

This programme was established by the Federal Ministry of Transport, Building and Housing (Bundesministerium für Verkehr, Bau und Wohnungswesen) on the basis that funding would be split 40%/40%/20% between the federal/state/city governments. Normally heritage conservation issues are managed at state level, but this programme was initiated by the federal government on the basis of preserving historic centres as “ensembles” (including buildings and public spaces not classified as individual monuments) with the primary goal of sustainable development of inner cities through restoration, maintenance of historic buildings including the rehabilitation of vacant buildings for housing (including social housing) or commerce and integrated urban renewal.

In the period 1991 – 1997 nearly 5000 buildings in 123 towns had been conserved and approximately 7000 residential, commercial,

public and church buildings renovated (including modernisation of services), and many public open spaces enhance and roads improved (Behr, 2000). The programme levered considerable private investment and brought considerable employment through the construction industry, services and tourism etc and generally boosted trade. The programme was later extended to western states and between 1991 and 2007 the federal government had invested 1.6 billion € (Fan, 2008).

Denmark

As part of its commitment to the *Granada Convention*, Denmark introduced the **S**urvey of **A**rchitectural **V**alues in the **E**nvironment (SAVE) system in 1990 as a means of evaluating buildings in the environment by mapping developed structures (townscapes) and identifying and registering individual buildings in municipal Preservation "Atlases" (since 2002 known as "Cultural Environment Atlases" to include landscapes as well as historic towns) (Tønnesen, 1995). The consolidated 1997 Danish law concerning listed buildings widened the scope of protection to allow *buildings worthy of protection* to be given a form of protection through urban plans and specific local preservation plans using the SAVE system (which generally considers buildings built before 1940, but some municipalities set the limit at 1960). The atlas provides information which can be borne in mind when drawing up preservation and renewal projects and in many municipalities the mapped developed structures are identified in municipal comprehensive plans and their safeguarding can become part of the planning policy – the structures are also taken into consideration when new roads are being built or when the redesign of public spaces and streets is planned.

Each individual building is assessed in five ways: architectural value, cultural-historic value (social functions) and evidence of evolution of craftsmanship or technology, environmental value (harmony with the environment), originality (externally and possibility for rehabilitation) and technical condition (state of repair). From these different forms of assessment an overall *preservation value* is defined on a scale of 1 to 9, with only those buildings (which were originally built as houses) assessed with a preservation value of 1 to 5 qualifying for loans and financial subsidies for improvement works.

By 2004 25% of Denmark's municipalities had produced their own atlas (the majority of which relate to historic towns). In addition the SAVE system has been utilised in other countries through an international version of SAVE (InterSAVE), for example, in Lithuania, Estonia and Russia. It is an interesting system for integrating the wider built heritage, but is not actually part of the planning process – it just assists it. There are some suggestions towards a sustainable approach by the fact that local consultative groups are established to ensure an element of local democratic influence on the values associated with mapping of developed structures and registration of individual buildings (NBA, 2004).

Other countries in brief

The Walloon Region of Belgium reformed its legislation on monuments and sites in the early 1990s and then incorporated it into the Walloon Spatial and Town Planning and Heritage Code in 1999. The integrated process is not just in the context of linking heritage to planning policy, but also through a single-track authorisation procedure rather than two separate heritage and planning permissions. The recent Heritage Protection Review in the UK has also advocated this type of approach and the use of management agreements for managing complex heritage assets.

Other countries have also reviewed their legislation and policy based on the *Granada Convention*. In Ireland a new National Inventory of Architectural Heritage was established in 1990 and placed on a statutory footing in 1999 and a new comprehensive system for the protection of the architectural heritage through the planning code was introduced in 2000.

While other western European countries have also adopted the principles laid down in the convention in relation to inventory systems, statutory protection measures, integrated conservation, funding, and sanctions (etc) it is the countries of the east where most recent work to adopt these principles has taken place.

The Council of Europe has provided support through a number of actions including through a pilot project in Telč which has examined the French system of integrated plans used in

secteurs sauvegardés (the PSMV) for historic centres in the Czech Republic.

More significantly, the Council of Europe's Legislative Support Task Force has given advice to many countries on the reform of legislation and policy for the architectural heritage based on the principles of the *Granada Convention* and, in particular, in relation to the need for an integrated and sustainable approach (see for example *Guidance on Urban Rehabilitation*), encouraging these countries to use their architectural heritage as a living environment through rehabilitation and beneficial use rather than as a museum.

This new approach has become evident in laws in countries such as Latvia, Georgia and the "former Yugoslav Republic of Macedonia" where the 2005 law (On Protection of Cultural Heritage) states in article 69 that "for the purpose of creating the economic and societal conditions for the preservation, revival and functional use of the immovable heritage, its protection is one of the essential goals of spatial and urban planning".

Similarly the new Cultural Heritage Law adopted by the Assembly of Kosovo in 2006 draws directly on the integrated approaches of the *Granada, Valletta and Florence Conventions*. It adopts similar definitions of the architectural heritage (art. 1 of the *Granada Convention*: monuments, groups of buildings and sites) which few other countries do – the exception being the Walloon Region of Belgium, and makes specific references the Law on Spatial Planning in connection with the architectural and archaeological heritage and cultural landscapes in order to be able to develop an integrated system. (However, implementation is another matter – the practical and sustainable operation of an integrated conservation approach will need reorganisation of administrative and institutional systems and training) (Pickard, 2008a).

A more detailed assessment of mechanisms can be given in the case of France and England:

France: Secteurs sauvegardés, ZPPAUPs and other planning tools

Widening the scope of heritage protection

In France the focus of conservation efforts has gradually progressed from individual monuments to urban areas and landscapes (Herein, 2009).

From the Historic Monuments Act of 1913, which provided for the protection of monuments, an Act of 1930 was designed to identify and protect natural monuments and "sites" the conservation of which, from an artistic, historical, scientific, legendary or scenic point of view is of general interest. Such sites protected under this law could be subject to special regulations to preserve the architectural landscape (e.g. controls over works of construction, demolition, alterations to buildings and felling of trees)⁵.

Building on the act of 1913, an Act of 1943 systematically extended protective measures for monuments to their surroundings (the setting of a monument within a 500 metre radius and within sight of the monument is protected) to take a wider view of heritage conservation. This enabled the preservation of a monument to be linked to the management of the entire area. All work, of whatever nature (particularly new construction work or demolition work), in this context was required to have the approval of the *Architecte des Bâtiments de France* (ABF) (in effect, the "official architect" or "official heritage inspector"). However, in the post-war period with the rapid modernization of towns this case-by-case system of control proved to be insufficient⁶.

5 The registration of such sites is not common now as ZPPAUPs are now regarded as being more favourable – see later).

6 Although the Act of 2000 on 'urban solidarity and renewal' (*la Loi n° 2000-1208 du 13 décembre 2000 relative à la solidarité et au renouvellement urbains*) introduced the possibility of varying the size of the perimeter around historic monuments in such a way as to designate groups of buildings and spaces that contribute to the environment with a view to preserving their character and enhancing their quality. This action is initiated by the ABF and introduced jointly with the relative commune following a public inquiry on the perimeter and changes to the local planning document e.g. PLU – see following note).

From the 1960s the trend of widening controls led to the adoption of a more comprehensive approach entailing the protection of entire sites, including groups of buildings and public areas, delimited by a legal instrument.

The *Inventaire général des monuments et des richesses artistiques de la France*, (a general topographical inventory of all categories pre-1940 buildings), has increasingly served as starting point for new protection decisions (for *secteurs sauvegardés* since 1962 and for ZPPAUPs more recently). Studies conducted by specialist freelance architects/town-planners have formed the basis for making preparations for implementing these protection procedures and providing the documentation on historical and development aspects needed for future management activities.

Secteurs sauvegardés

An Act of 1962 (*Loi Malraux*) provided for the establishment of *secteurs sauvegardés* (conservation areas), principally for towns and cities with historic centres in decline. This idea was a reaction to the sweeping renovation projects of the time, which consisted of post war rebuilding and “cleaning up” historic centres with the, then, preference for modernisation. Typical examples are the Marais district in Paris characterised by *hôtel particuliers* (grand town houses) from the 18th century and the city of Troyes characterised by timber-framed buildings from the 16th century. There are now 100 *secteurs sauvegardés* (as of end June 2009).

The 1962 legislation had a dual purpose: it afforded protection to groups of buildings and regulated by town planning in order to avoid the mistakes made in post-war rebuilding by providing statutory and financial mechanisms for the conservation, restoration and enhancement of built heritage. According to article L.313-1 of the *Code de l’urbanisme* (Town Planning Code) a *secteur sauvegardé* is defined as an area “historic or aesthetic in nature or in which the whole or a part of a group of buildings deserves to be conserved, restored or enhanced”. It is a means of protecting and enhancing old parts of towns and cities. The procedure for doing this is set down in articles L.313-1 to L.313-3 and R.313-1 to R. 313-23 of the Town

Planning Code and amended by Decree No. 2007- 452 of 25 March 2007.

Secteurs sauvegardés are created and their boundaries defined by a decree of the Prefect (state official) for the particular *Département* (administrative area) on the request or by agreement of the municipal council or councils concerned or authority responsible for local planning in consultation with the *Commission nationale des secteurs sauvegardés* (National Conservation Areas Commission). This commission is composed of a chairperson from the Deputies or Senators (national politicians) and representatives from the ministries responsible for architecture, heritage, planning, housing, local government, sites, trade, tourism, as well as from the national housing improvement agency ANAH.

This decree provides for the establishment of a “Preservation and Enhancement Plan” (*Plan de sauvegarde et de mise en valeur - PSMV*), a town-planning plan document (a master plan) which provides for the management of the “conservation area” and, with effect from its date of publication, supersedes the Land Use Plan and any other town-planning documents in the area concerned (where applicable, i.e. when such a plan has been adopted). (Types of local land use plans include the *Plan d’occupation des sols* – POS, created in 1967, and the more recent form, *Plan local d’urbanisme* – PLU, created in 2000). A specialist architect/urban planner is commissioned to carry out the studies for the preparation of the PSMV including the elements that require protection and issues to be subject of special regulations.

The resulting PSMV includes a presentation, regulations as well as graphical information and may include management guidelines relating to particular areas or quarters with graphical information.

The *presentation* includes

- a diagnostic preview of the area;
- an analysis of the condition of the environment;
- an explanation of the choices made in preparing the PSMV and its compatibility with project management and sustainable development criteria (*project d’aménagement*

et de développement durable – PADD)⁷ in any adopted local plan;

- an evaluation of the impact of the guidelines of the PSMV and an explanation as to how the plan takes account of preservation and enhancement of the environment, and;
- a memorandum of changes (in cases where the PSMV is to be amended).

The *regulation and its graphics*

- define the architectural conditions that are to be preserved and enhanced in relation to buildings and the urban setting (including open spaces) – which includes rules regarding the materials to be used
- identifies which buildings or parts of buildings are subject to special controls (with strict controls over all works undertaken, e.g. conservation, demolition, reconstruction, etc)

The *management guidelines*

- identify proposed actions and planning operations for historic centres (for example, revitalising activities, the improvement of housing and actions to find appropriate new functions)

The different stages of developing the plan are subject to the approval of a local commission for the protected area (*Commission locale du Secteur Sauvegardé*), which includes representation from local experts. Once the view of this local commission and the views of the national commission are made known, a draft of the PSMV is published. After a public inquiry and the observations of the national commission are made, the PSMV is approved by ministerial order (or, if all opinions are not favourable, the PSMV may be approved by the State Council [*Council d'Etat*]).

⁷ According to article 12 of the Planning and Habitat Act of 2003 (*la loi no. 2003-590 du 2 juillet 2003 Urbanisme et Habitat*) the structure of local plans (PLU) in France have had to be amended to include a PADD document by which a municipality introduces sustainable development via a “communal project” which involves communal debate – this is similar to the “sustainability appraisal” in the UK planning system introduced following the adoption of the regulations to comply with the SEA Directive. The PLU must be compatible with the “coherent territorial plan” at the supra-communal level (*Les schémas de cohérence territoriale –SCOT*) which aims at achieving sustainable development of the territory by ensuring a better balance between the development and protection of urban, rural and natural areas.

After the publication of the order or decree which creates a *secteur sauvegardé* all work of whatever nature, inside or outside of buildings, within the conservation area has to be submitted to the *Architecte des Bâtiments de France* (ABF) for approval. When the PSMV comes into force, the rules replace those of any other planning documents and the decisions of the ABF are made according to the plan instructions.

Thus the main purpose of PSMV is to conserve, restore and enhance groups of buildings of *outstanding* historical or architectural interest. It constitutes a set of special rules applicable in a given area. The preparation of a PSMV involves a detailed analysis of what currently exists in the area in order to identify and enhance its potential. The constitution of the urban environment is regarded as fundamental for assessing what must be passed onto future generations. The progress in preserving and regenerating the area including revitalising functions is monitored and is now firmly embedded in the process of sustainable development, particularly as there is extensive local consultation.

The main problem with the creation of *secteurs sauvegardés* and the preparation of the PSMV is that the procedure is very long and complex (see examples of Bayonne and Troyes below) and therefore very expensive. This is perhaps why only a 100 off these conservation areas have been created since the Act of 1962. Moreover, in the first designations, a significant amount of money was invested in very expensive restoration work to key buildings in such areas (see examples of Troyes and Marais) where as today public investment is more likely to given to buildings of local importance where works will both safeguard architectural qualities but allow for the adaptation and improvement of buildings, particularly for housing.

A highly interventionist, restoration-based approach was adopted in many of the early *secteurs sauvegardés* but this has now changed for various reasons including cost (being very expensive) and the need to adopt a more sustainable approach bearing in mind community needs (many of the early designations often led to the displacement of existing inhabitants) (Delafons, 1997).

ZPPAUPs

The decentralisation Act of 1983 (law no. 83-88) transferred responsibility for town planning to local and regional authorities, which in turn led to the introduction of contractual instrument for heritage conservation and management between the state and the local authorities (under articles 70 - 72) known as a *zone de protection du patrimoine architectural et urbain* (ZPPAU). An Act of 1993 (law no.93-24) broadened the concept by extending the protection regime to include 'landscape' (article 6) with the resultant *zones de protection du patrimoine architectural, urbain et paysager* (ZPPAUPs) (architectural, urban and landscape heritage protection zones).

The ZPPAUP provides a good example of the co-operative approach of integrating heritage conservation into spatial planning policies as advocated by the *Granada Convention*. Moreover, it fits with the new approach of sustainable development particularly since the law of 25 June 1999 for the orientation of planning and sustainable development of the territory in France (*Loi d'orientation pour l'aménagement et le développement du territoire*), the law of 12 July which reinforced co-operation between local authorities (*Loi relative au renforcement et à la simplification de la coopération intercommunale*), the law of 13 December 2000 on urban solidarity and renewal⁸ and the law of 2 July 2003 on planning and habitat⁹.

The purpose of the ZPPAUPs is to enable the *protection and management* of the urban and rural heritage, of built areas and landscapes, on a contractual basis, allocating the responsibilities between the state and local authority(s). The system of establishing a ZPPAUP requires an objective study of an area which should result in a statement comprising:

Firstly, a general presentation – outlining the reasons for its creation, the objectives to be pursued and describes the special historic, geographical, urban, architectural or landscape features within the zone.

Secondly, it sets out the regulations and recommendations concerning proposals to make changes in the area - which

should be in harmony with the general or particular qualities of the area (a set of rules concern architectural appearance, materials, the setting of buildings, their volumes, height, planting of trees, design of commercial signs etc (no advertising hoardings are allowed in designated zones) and other guidelines provide details on conservation/restoration methods, planning issues and the treatment of specific sectors in a zone where appropriate).

Thirdly, there is a graphic document to outline one or more perimeters of the zone.

Once the ZPPAUP is approved (by order of the Prefect), after a public inquiry, it is given legal standing as an easement appended to the local plan (PLU), in this sense it differs from the separate PSMV associated with a *secteur sauvegardé*. The preliminary study is less precise than that of the PSMV and the regulations for the ZPPAUP are less detailed as compared to a *secteur sauvegardé* (depending on the place). Should the commune not have a PLU, the creation of the ZPPAUP can create the opportunity to draw up a communal land use plan which can lead to the establishment of a PLU.

The ZPPAUP document is a local planning tool negotiated between the ABF and the Commune and when a zone is designated in areas where there are a larger number of historic monuments it reduces the need for case-by-case review of applications as it can suspend and replace the 500 metre or other defined perimeter). Moreover, the document becomes the reference for coherent management of all heritage aspects in the zone including transformations to buildings and public spaces. All planning applications concerning new building, demolition of existing buildings, land clearance or alterations to the (external) appearance of buildings within the zone require special authorisation. The authorisation is given by the Mayor of the Commune after the ABF has approved the planned change as being in accordance with the regulations and spirit of the ZPPAUP document. A permanent architectural consultant can be employed to provide advice to ensure the proper management of the zone.

The ZPPAUP also becomes a reference point for various initiatives which can include grant aid and tax incentives (see below). A

⁸ See note 6.

⁹ See note 7.

planning procedure known as the “perimeter for real estate restoration” can be established with the aim of rehabilitating buildings in disrepair and buildings within this perimeter can benefit from tax incentives. This is a tool for urban regeneration which can be included within a larger strategy for revitalizing whole quarters where the work has been declared to be of public interest and is given special authorisation by the Prefect (and the work is carried out according to the prescriptions set out in the ZPPAUP and has the prior approval of the ABF). While the initiative for such programmes often comes from the local authority, it can be from a public development body, a semi-public development company specially entrusted with the operation by contract or by concession, a social housing organisation authorised to carry out building development, or from a group of owners who possess a complete building and who are associated within an urban real estate company.

The ZPPAUP form of protective/management measure is increasingly being used (instead of designating *secteurs sauvegardés*) following an initial trial period. ZPPAUPs have already been adopted in some 583 municipalities (as at 3 October 2008), with a further 25 to 30 new ZPPAUP’s being created each year.

They generally cover generally villages or small towns but a ZPPAUP may accompany a *secteur sauvegardé* to assist in conserving neighbourhoods of more recent construction beyond the historic city centre (e.g. Troyes) and may also serve as a preliminary step for implementing a *secteur sauvegardé*. A ZPPAUP can also be created as a component part of policies that set up regional nature parks to protect and promote the combined aspects of the cultural and natural heritage. The heritage features of an historic monument’s surroundings may also be stipulated by establishing a ZPPAUP, instead of applying the 500 metres rule or what area applies for the surrounding of historic monuments following the urban solidarity and renewal law of 2000 (Féroult, 2000; Féroult 2005).

Financial aspects of protected areas

Under a budget administered by the *service départemental de l’architecture et du patrimoine* of the Ministry of Culture and Communication, managed funds have been provided for studies and work in connection with the policy and enhancement of *secteurs sauvegardés*, ZPPAUPs and the surroundings of historic monuments. On the recommendation of the ABF work to improve regenerate and improve urban public spaces in the environment (including street and pavement surfaces) can receive grant-aid from the regional directorate of cultural affairs (*direction régionale des affaires culturelles* - DRAC).

As state funding for conservation is at a much lower level in *secteurs sauvegardés* and ZPPAUPs compared to individual monuments, building owners must generally cover the cost themselves.

However, there are income tax incentives provided in relation to rented residential property situated in a *secteur sauvegardé* or ZPPAUP. Tax incentives have been designed to promote collective property restructuring schemes to provide housing in these designated areas. Owners may deduct loan interest and expenditure incurred for maintenance, repair and improvement works (as is defined under the ordinary rules for these protected areas) as well as other approved costs¹⁰ from rental income derived from residential property. Any resulting deficit for property tax purposes may be deducted from the landlord’s total taxable income so long as the owner has leased the restored property, unfurnished, as a tenant’s main residence.

Since 1995, eligibility for tax relief has been restricted to:

- Restoration work in a *secteur sauvegardé* where a conservation and enhancement plan (PSMV) has been published or approved;

¹⁰ Approved costs as deductible expenses can include any necessary conversion work to residential property where such work has been approved by the ABF. Demolition work may also be tax deductible when it is a compulsory part of the competent authorities’ planning permission and when it is specified in a PSMV or in a declaration that the restoration work is of public interest. Where demolition makes it necessary to re-roof existing buildings or rebuild their external walls, this work also is tax-deductible. However, new building, rebuilding and extensions are not deductible.

- Restoration work in an established *secteur sauvegardé* prior to publication of a PSMV, or in a designated ZPPAUP provided that the restoration work is carried out within an established “perimeter for real estate restoration” and has been declared to be of public interest.

For some time there had been no maximum limit applicable, however the Finance Act of 2009 has capped work deductible up to 140,000 € for housing in *secteurs sauvegardés* and in relation to 75% of costs for ZPPAUP with a limit of 100,000 €. The length of tenancy was required to be at least six years, but this new legislation has now extended the required term to be nine years.

To be eligible for tax relief, projects may be carried out by:

- Private landlords including individual owners, consortiums of owners or an investment company;
- Public authorities including government planning bodies, semi-public companies contracted or licensed to run a project, or low-cost housing associations authorized to carry out restoration work;
- Non-profit associations set up to carry out housing improvements or restorations.

The Finance Act of 2009 has also expanded the tax relief system to property used for business use in order to facilitate works to buildings designated for commercial use. This extension of the tax relief system is particularly aimed at maintaining local shops in historic city centres at ground floor level (and is not designed for banks and other agencies).

Many municipalities have also provided grant-aid subsidies for façades restoration work on buildings located in their historic districts which can also gain support from the state and regional authorities.

The rehabilitation of residential property in old parts of towns (“ancient centres”), whether protected (e.g. in a *secteur sauvegardé* or a ZPPAUP) or not, is also supported in “planned housing improvement operations” (*Operations Programmées d’Amélioration de l’Habitat* - OPAH). This is the most significant funding mechanism for protected areas at present – a scheme

which, since it started in 1977, had by 2000 resulted in 3,000 such OPAHs and the rehabilitation of over 600,000 dwellings (mostly in old quarters and historic districts). An OPAH is a contract entered into for three or more years between the state, the National Housing Improvement Agency (*Agence Nationale pour l’Amélioration de l’Habitat* - ANAH) and a local authority (municipality) or group of local authorities. ANAH is the main body for grant provision, whose role is to subsidise work undertaken by private landlords for housing improvement and particularly for respecting the architectural qualities of buildings, but the OPAHs can also gain support from the state, the region and the municipality through other financing schemes (Longuet and Vincent, 2001).

Examples of secteurs sauvegardés/ZPPAUPs/ OPAHs

i) Marais, Paris

One of the first PSMV’s was for the *secteur sauvegardé* for the *Marais* district of Paris (in the 3rd and 4th *arrondissement*), covering an area of 126 hectares, which had been designated in 1965. In the 19th century this area became an artisan quarter in which the former town houses of the rich were converted into workshops and apartments with warehouses created in the courtyard areas. By the end of the Second World War the area had fallen into disrepair and surveys completed by 1960 identified that many of the properties lacked modern services. The original plan for the *secteur sauvegardé* considered a restoration approach akin to that of Voillet-le-Duc which was directed at restoring the area to the plan that dated from 1739, restoring the key historic building from the mid 1700s (internally and externally), opening up spaces between buildings and recreating the gardens with the aim of restoring and reusing approximately three hundred grand town houses (known as *hôtel particuliers*) as embassies, head offices of large companies, museums and central and local government offices. However, the Marais scheme was modified and it was decided not to move the majority of residents in the areas to Paris’s suburbs particularly following problems which had occurred in the Avignon *secteur sauvegardé* (riots had occurred due to the forced re-housing of its population to other parts of the city).

Moreover, it would have been difficult to find new uses for all of the *hôtel particuliers* (Rodwell, 2007).

A number of these buildings were significantly restored for use as government offices (such as the *Hôtel de Sully* c. 1625 – which had been divided up as apartments and is now the headquarters of the *Caisse National des Monuments Historiques de France*, the Office for Historic Monuments and Sites) (Fig. 1) or museums (Jodidio, 2000).

However, it is more significant to state that the Marais quarter has been revived in a sustainable manner through rehabilitation action with boutiques and specialist shops (Fig. 2), restaurants, galleries, and apartments (Fig. 3).

The buildings of the *Place des Vosges* dating from 1605 – 12 (Fig. 4) have been rehabilitated with art galleries and shops under the ground level arcades (Fig. 5) and upper floor houses and apartments, and the central square itself was replanted and laid out.

ii) Bayonne

The protection of the old town of Bayonne was originally assured by being the only “site” (derived from the Act of 1930) that had been inscribed on the supplementary inventory of historic monuments (the “Grand Bayonne”) and by the rules applying to the perimeter of historic monuments.

The *secteur sauvegardé* for Bayonne was created on 5 May 1975 and was finally approved on 24 April 2007, covering an area of approximately 80 hectares. A first version of a protection plan was devised between 1975 and 1985. However this proposal did not sufficiently deal with existing housing problems and the municipality requested that the plan should be revised by the State. A new plan was commenced in 1991 and most of the work for this was achieved by 1998, however, it was considered that the plan did not cover all important aspects of the local heritage, in particular the site of former historic military buildings, and the work on finalising the plan had to be continued.

The PSMV was finally approved on 21 May 2007 following a public inquiry held between 23 October 2006 to 24 November 2006 and two periods of development. (Members of the public were invited to record their observations on the register opened for this purpose or to meet officials at defined points in time as part of the inquiry process). *The PSMV went through a form of SEA before approval - this was the first environmental assessment of a PSMV in France - as is now required by article R. 123-2 of the Town Planning Code and the Act of 2000 on ‘urban solidarity and renewal’* (IDE Environment, 2009).

This provides a good example of the lengthy period (and therefore high cost) involved in the designation of *secteurs sauvegardés* and preparation of its preservation and enhancement plan (PSMV). However, the long duration of the plan did not penalise the protection and revitalisation of the old centre. Between 1979 and 2001 it has been reported that nearly 2,100 housing units to rent were restored and rehabilitated, 90 new housing units to rent were constructed and 77 units were acquired and rehabilitated as social housing.

The two periods 1975 – 1989 and 1990 – 2001 correspond to the i) creation of the protected area and first version of the plan and ii) the second version of the plan. In the first period the situation for investment was not so good. The number of residential accommodation units rehabilitated was only 743, of which 682 had aid from ANAH and 61 from a social housing organisation. During the second period the number of units realised was 1457, of which 994 had assistance from ANAH (via an OPAH) and 16 had assistance from social housing organisations, the rest were either newly constructed or rehabilitated without financial aid. (86% of the financial assistance to housing was via grant aid from ANAH and 12% from the municipality – with the remainder from other sources) (Melissinos, Seraphin, and Pandhi, 2006).

Other work proposed in the *secteur sauvegardé* included the following:

1. Proposals for the re-composition of *Les Grandes Emprises de Château Neuf* (a 17th century complex of military buildings - barracks, ropeworks, hospital, etc.) which had been occupied by the army since the French Revolution: The site was acquired by the municipality in 1990 and



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Fig. 1: Hôtel de Sully c. 1625 – now occupied by Caisse Nationale des Monuments Historiques de France (Marais, Paris)

Fig. 2: Renewed traditional shop front designs (Marais, Paris)

Fig. 3: Rehabilitated apartments upper floors above shops (Marais, Paris)

Fig. 4: Place des Vosges (1605 – 12)

Fig. 5: Art galleries and shops under the ground level arcades (Place des Vosges, Marais, Paris)

the plan considered different proposals for the conversion of the site and the rehabilitation of the military historic buildings including the possibility of creating 450 residential apartments, a commercial shopping centre, offices, etc, but is now mainly used as administration offices by the municipality (Fig. 6).

2. Public Spaces:

Management of public spaces including the return of traditional stone paving, conservation of features of quality e.g. quay walls, discrete lighting for the benefit of monuments, conservation of street surfaces and street layouts dating from the 19th century (Fig. 7).

3. Business support and information:

A key aspect of the revitalisation of the area was considered to be in relation to the provision of support for businesses (which commenced from 1982), particularly in the field of conservation work (e.g. in relation to conserving and restoring the architectural heritage such as the treatment of facades by cleaning or painting). Support was given for establishing workshops and conservation enterprises and for training support in conservation skills and information to assist this process (and therefore helping to sustain such skills).

4. Creation of a "boutique" for heritage and housing:

This opened in 1997 in the heart of the *secteur sauvegardé* to give information and assistance on the town, its architecture and the evolution of town planning (especially 16th – 19th century) and to explain techniques of work, for example, for cleaning or painting facades and the restoration process. The boutique remains open in 2009 and has been operated by officials of the municipal town planning service to provide assistance on the process of obtaining authorisation for works and the regulations applicable in the *secteur sauvegardé*, as well as providing information on grant aid finance available to assist the completion of works.

The *regulatory* part of the PSMV set up specific rules for demolition work, alterations and other particular works to existing buildings and regarding the construction of new buildings- which were

required to respect the context of the environment (Fig. 8).

Under article L.123 -1 of the Town Planning Code, there must be an analysis of urban functions with regard to economy and demographics and economic development needs, management of spaces, the environment, social cohesion, transport and services. The *presentation report* for the PSMV identified that there had been a 47% decrease in the population of the centre of Bayonne between 1962 and 1990 (from 9,500 inhabitants to 5,100 in this period). It also looked at the number of owner-occupied property, the vacancy levels of residential apartments for renting, the number of rooms in rented property, and the provision of basic facilities such as WCs in residential accommodation (which rose from 60.7% in 1962 to 94.9% by 1999).

The *presentation report* was published in 2006 and reveals that the creation of the *secteur sauvegardé* and the PSMV and financial assistance mechanisms actually resulted in an increase in the population over the whole period and that the economy benefited from 7 million € expenditure on the rehabilitation of housing for renting (Fig. 9). The PSMV helped to conserve and strengthen the balance of the economic and commercial activities and encouraged the creation of middle to large size enterprises in central Bayonne, particularly new retail functions in the ground floor level of buildings.

The PSMV also assisted in improving accessibility and circulation, particularly for pedestrian (and cyclist) accessibility, with a reduction in the number of cars using the centre (through pedestrianisation of several streets in the historic core, the provision of a *Navette* circulating free bus service and the provision of a number of car-parks on the edge of the historic centre including one sited under part of the *Château Neuf* historic military complex).



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Fig. 6: Part of the Châteaux Neuf complex (Bayonne)

Fig. 7: Safeguarding of architectural features - traditional shutters (Bayonne)

Fig. 8: Approved designs for new shop fronts (Bayonne)

Fig. 9: Restoration of façade and housing rehabilitation (Bayonne)

Fig. 10: Maison du Boulanger (Troyes secteur sauvegardé)

Fig. 11: Hotel du Mauroy (Troyes secteur sauvegardé)

iii) Troyes

The perimeter of a *secteur sauvegardé* covering 22 hectares in Troyes was first defined on 21 September 1964, only two years after the loi Malraux had introduced the mechanism (4 August 1962). It was subsequently extended in 1968 (29 hectares) and in 1975 (to 53 hectares). It was one of the first municipalities to request the formulation of a PSMV, which was subsequently approved and published 19 May 2003, establishing the rules of architectural restoration, urban planning and development for the area. The protected area was extended again when the plan was developed, now amounting to 180 hectares (Bailey, 2002).

Initially financial support was provided for intensive restoration works to key buildings of importance such as the Maison du Boulanger (1963 – 1964) (Fig. 10), the Hotel du Mauroy (including conversion to a museum) (1970 – 1974) (Fig. 11) and the Hôtel du Mortier d'Or (1980 – 1981).

Detailed scientific investigations led to a treatment on a case-by-case basis on such key buildings – for example the Hôtel du Lion Noir which was returned to its original internal plan and had colour re-introduced to its façade. However, this typical expensive approach first used in *secteurs sauvegardés* was changed in favour of more sustainable works for the upgrading of housing for general use with State financial assistance being directed through OPAHs.

In parallel to the PSMV, a third OPAH initiative was launched within the *secteur sauvegardé* principally to financially assist landlords with residential property in the protected area that wish to rehabilitate their property (Ville de Troyes, 2009). The primary objective of the OPAH, which commenced in 2004 lasting initially until 2009, and recently extended to 2010, is to solve the problem of vacant dwellings with unhealthy conditions and to rehabilitate them (Fig. 12, 13, 14). Approximately 700 residential units have been subject to the OPAH. A second objective of the OPAH is to enhance the built heritage of Troyes. (Two previous OPAHs had been operated between 1993 – 1996 and 1998 – 2002).

Financial assistance is provided to landlords of tenanted residential property through the tax incentives offered by the *secteur sauvegardé* according to the requirements set out in the PSMV by which the cost of eligible works can be deducted from global income for tax purposes.

The OPAH provides grant aid for two types of residential property owner: First where the owner of lets the property or the property is unoccupied. In this case ANAH provide grant aid for upgrading the accommodation at 20%, 35% or 50% depending on the type of tenant, with the highest rate applicable where the property is to be let to tenants on low income, and the municipality of Troyes provide grant aid of between 10% to 40% specifically relating to the restoration of timber-framed, coated and brick facades, walls or roofs visible from the public domain. Secondly, in the case of owner-occupied residential property grant aid is provided by ANAH for upgrading works at 20% subject to a ceiling of 11,000 € or 35% subject to a ceiling of 13,000 € for owners with a low income and by the municipality of Troyes (10% to 40% specifically relating to the restoration of facades or roofs visible from the public domain or accessible to the public) and complementary aid is given to the pension of retired owners.

In 2002 the municipality decided to extend its protective measures by commencing studies for a ZPPAUP, to cover areas of the industrial and textile heritage. Thus Troyes provides a useful example where a ZPPAUP has been designated for areas adjoining the perimeter of the *secteur sauvegardé*. The ZPPAUP was established in 2005 and comprises six quarters surrounding designated *secteur sauvegardé* and relates to areas developed to the industrial development period 1850 – 1950. The interior of each of the quarters is organised in architectural sectors – those areas principally in residential use (traditional or recent), specific housing developments (bourgeois houses of character, other houses developed by the patrons of industry and large social housing complexes), industrial sites (still in use for industry, converted to new uses or disused), landscape/green areas and other urban facilities (Ville de Troyes, 2005; Humbert, 2002)).



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Fig. 12, 13, 14: 16th century buildings restored and rehabilitated through the Troyes OPAH

Fig. 15: Résidence "La bonneterie" – proposed conversion to 70 apartments 55m² – 258 m² to be developed by a private sector consortium (Troyes ZPPAUP)

Fig. 16: Social Housing – former Industrial textile buildings developed by Delostal Brothers in 1921, which terminated use in 1953, now converted to social housing (Troyes ZPPAUP).

Fig. 17: New office uses – former industrial textile buildings converted to offices (Troyes ZPPAUP).

The ZPPAUP for Troyes sets out to rehabilitate and enhance buildings, manage the area and control the development of new constructions in line with the existing urban fabric through constraints created jointly between the Ville de Troyes, the State (regional directorate of cultural affairs - *direction régionale des affaires culturelles* - DRAC) and the ABF set out in the local plan for Troyes (PLU). The regulations for the evolution of the six quarters include requirements for new buildings to respect existing building lines and spaces, controls over new openings in façades of industrial buildings, the restitution of original facades and the design of extensions to existing buildings.

By example, many of the former textile buildings in the *Quartier Rothier-Courtalon* have been or will be converted to housing for sale (Fig. 15), social housing (Fig. 16) and offices (Fig. 17), and traditional housing with architectural quality has been safeguarded (Fig. 18):

iv) Belleville (Paris)

An example of an OPAH programme operated in an area of heritage quality but not officially protected can be given in the case of Belleville, an older housing district of Paris, which was set up in 1998. A private project office (or *pacte*) was selected by the municipality to run the scheme (in this case, the *Pacte de Paris*) with a project team comprising a variety of professional expertise – architecture, urban planning, project management and housing – as well as technical and secretarial staff. The project office, in the heart of the district, acted as an information office for the OPAH and co-ordination bureau for the scheme, giving advice on works to rented or owner-occupied property, undertaking research and co-ordinating applications for financial aid from state, regional and municipal sources.

The Belleville district was originally designated as a comprehensive development zone by the Paris municipality – authorising state intervention to undertake or commission the demolition and redevelopment of the area. However, as a result of resistance by residents and landlords in Belleville, this was abandoned in 1995. Belleville OPAH began in 1998, including incentives for both owner-occupiers and landlords, with a life span of six years.

The project was developed by *Pacte de Paris* on the basis that cleared sites in public ownership within the OPAH boundary should be redeveloped for social housing and existing buildings could be improved. There were at least 86 properties within the OPAH boundary containing a total of 2,330 rented apartments, most of which were in need of improvement (Fig. 19; Fig. 20) The Belleville OPAH boundary coincided with a state-designated area in which the municipality and the state would work to improve social and economic conditions.

The five objectives of the OPAH programme in Belleville were:

- to improve living conditions by new heating, water, sanitation and electrical services;
- to improve energy conservation, particularly through double glazing and insulation;
- to resolve problems of unsanitary and unhealthy conditions in buildings, including the health hazard from lead in paint;
- to encourage lower rents with the renovation lease mechanism whereby ANAH gave financial help to landlords for improving their property (if the owner agreed to let apartments at low rents for at least 10 years and not to sell or live in the apartments during that period);
- to make architectural improvements: reinstating traditional windows and other façade features, work on staircases, providing fire escapes, improving basements and creating larger apartments by amalgamating smaller ones.

The *Pacte de Paris* co-ordinated the provision of financial subsidies (provided by ANAH and the municipality) to assist landlords in improving housing standards, with different levels of financial aid being provided depending on the rent level to be set. The *Pacte de Paris* was able to enforce appropriate changes where alterations made by landlords did not respect architectural character and withhold financial aid until the work had been done more sensitively. If necessary, the *Pacte de Paris* was also able to organise low-interest loans within the OPAH (through specific social funds). Where beneficiaries of financial assistance experienced cash-flow problems, the municipality could offer pre-financing. Funds were also available to cover necessary works where owners were found to be in debt (*Pacte de Paris*, 2000; Pickard, 2009).



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Fig. 18: Bourgeois Houses - built by Delostat brothers for the managers of their factories (Troyes ZPPAUP).

Fig. 19: Bellville, Paris – properties identified for action.

Fig. 20: Bellville, Paris – rehabilitated housing.

Fig. 21: 2 - 8 Grey Street at risk through disrepair and vacancy for over 20 years.

Fig. 22: 2 - 8 Grey Street now rehabilitated through conversion to a hotel.

England: conservation areas, integrated conservation and sustainable development

England also provides a good example for the integrated approach and another early example of area-based protection. There have also been significant changes to the planning system to incorporate the sustainable development approach through changes to legislation and policy in recent years. Furthermore, the heritage protection system has been undergoing a process of review in recent years, which should result in new legislation and policy initiatives soon.

Development of the 'conservation area' integrated approach

A new approach to conservation of the built heritage was taken by the government in the 1960s when responsibilities for conservation issues and planning were then brought together under one Ministry. While the French systems of the protective zone around historic monuments, sites and the new concept of *secteurs sauvegardés* were examined, it was concluded that the threat to old town centres in France was more due to do decay, whereas in England it concerned the impact of new development.

While legislation had existed concerning "listed buildings" from the 1940s (and ancient monuments from the 19th century), an area-based protection system came into force much later. The first legal consideration of giving protection to areas can be traced back to a legal decision from 1964 when a court determined that a building might be of special architectural or historic interest by way of its setting as one of a group of buildings. Legislation for areas was actually introduced through the Civic Amenities Act 1967, which provided for the designation of "Conservation Areas". Section 1 of the 1967 Act stated that "Every local planning authority shall from time to time determine which parts of their areas...are areas of special architectural or historic interest the character and appearance of which it is desirable to preserve or enhance and shall designate such areas". The special character of such areas does not come from the quality of the buildings alone – other factors are important such as materials, the historic layout of roads, spaces, green areas and other aspects of the "historic

environment" – as now defined through *character appraisals* (see below).

In 2005 it was recorded that there were at least 9,347 designated conservation areas in England, a far greater number than was originally envisaged. They cover a wide range of areas and although many conservation areas cover the centres of historic towns and cities, they can also be designated to cover 18th, 19th and even 20th century suburbs, rural villages, model housing estates, country houses set in designed landscape parks, as well as historic transport links and their environs such as stretches of canal and railways.

Within a conservation area the local planning authority has additional controls over the demolition of any building not individually listed (there is a presumption in favour of retaining buildings which make a positive contribution to the character or appearance of the conservation area and greater scrutiny of how new developments would impact on the area), minor alterations to buildings which normally have permitted development rights not requiring permission through what known as an Article 4 Direction¹¹(for example, alteration of a chimney, addition of a porch or some other matter affecting the external appearance of a house), and regarding the felling or cutting (lopping) of trees which can make an important contribution to the character of the local environment.

The mechanisms for protecting and managing conservation areas remain similar to their original concept but have been updated through more recent legislation and policy.

Management of conservation areas

A duty is place on local planning authorities to formulate and publish proposals for the preservation and enhancement of conservation areas and to consult the local community about these proposals¹².

11 Under Articles 4(1) and 4(2) of the Town and Country Planning (General Permitted Development) Order 1995

12 Section 71 of the Planning (Listed Buildings and Conservation Areas) Act 1990



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Fig. 23 and Fig. 24: New shop fronts in traditional or sympathetic design resulting from published design guidance and grant aid.

Fig. 25: Former Main Post Office - now converted to offices and apartments.

Fig. 26: Conversion of vacant upper floors to social housing apartments in the centre of the city - part of the "LOTS" initiative (living-over-the-shop).

Fig. 27: Environmental improvements have included the removal of buildings that detracted from the area - the office block engulfing the historic building (now rehabilitated) has been demolished.

Fig. 28: The pedestrian environment in the public realm has also been enhanced.



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In fact the planning system has undergone significant change in recent years, which has impacted on the designation and management of conservation areas¹³. In addition, new legislation and policy has been proposed for the historic environment¹⁴.

English Heritage¹⁵, the government's agency and advisor on the historic environment in England, has also produced guidance to identify good practice in relation to the management of conservation areas by local planning authorities (McPherson, 2005a and 2005b). A number of essential issues have been identified:

1. To include policies in the portfolio of "local development documents" contained in the LDF local planning mechanism for safeguarding the character or appearance of conservation areas and their settings. These include:
 - i) The *Core Strategy* (the new form of spatial plan) which should indicate how the broad strategy for conservation

13 The Planning and Compulsory Purchase Act 2004 introduced new forms of statutory planning documents at regional level (Regional Spatial Strategy – RSS) and local level (Local Development Framework – LDF, which comprise various Development Plan Documents – DPDs, including a "Core Strategy" and "Action Area Plans"). These DPDs with the policies in the RSS form the statutory development plan for a local authority area. Section 39 of the 2004 Act made a new requirement for the planning system: to exercise functions of the development plan with the objective of contributing to the achievement of sustainable development. In addition, the LDF may include Supplementary Planning Documents – SPDs, which provide more detail of and /or guidance on policies and proposals. These do not have development plan status but must be subject to a "statement of community involvement" required from the local planning authority under section 18 of the 2004 Act (to set out how the community will be involved in the preparation and review development documents and development control decisions). The RSS and LDF (DPD and SPD elements) must be subject to a "sustainability appraisal", which incorporates the requirements of the SEA Directive, (Great Britain, Office of the Deputy Prime Minister, 2005).

14 A Draft Heritage Protection Bill was published in April 2008 (but has been delayed) which envisages widening the special interest for conservation areas to include special archaeological and artistic interest as well as special architectural and historic interest and it is proposed to make it a requirement that new development within a conservation area should actually benefit the area to be acceptable (in terms of the impact on its character and appearance) rather than merely avoiding causing harm to that special interest. In addition, new Planning Policy Statement 5: Planning for the Historic Environment was issued in March 2010 to replace planning policy guidance (PPG) on the archaeology and development (PPG16) from 1990 and the historic environment (PPG 15) from 1994.

15 Officially known as the Historic Buildings and Monuments Commission for England.

is integrated with other policies and how it will be locally applied in terms of building local sustainable communities and places. It should identify which conservation objectives are key priorities and how they are interrelated with other objectives, for example, a heritage-led regeneration strategy could form a key part of a community strategy.

- ii) An *Action Area Plan* can be used where significant change or conservation is needed. This may be in an area where there is a radical regeneration programme and measures are needed to protect aspects of the historic environment which are sensitive to change – it may include particular measures for controlling new development or for setting out a strategy for heritage-led regeneration.
- iii) *Supplementary Planning Documents* can give more detailed policy guidance on, for example, development control matters in conservation areas including design quality of new buildings, on important views and vistas, demolition and alterations or extensions to historic buildings.

The core strategy could identify that *character appraisals* and *management strategies* will be developed and formally adopted, and support any relevant policies in supplementary planning guidance, as way of ensuring that the authority's duty to preserve and enhance conservation areas will be fulfilled.

2. To involve the local community in appraisal of areas and in the development of policy for the designation and management of conservation areas. This would involve providing information (via the internet, leaflets, guidance, etc.) and seeking views both by directly consulting organisations (town and parish councils, "conservation area advisory committees" [usually made up of a cross-section of community interests and nominations from national bodies], local amenity societies, environmental groups, residents' associations, local business organisations, etc.) and members of the public via the local authority's website.
3. To designate areas which are of 'special architectural or historic interest'. 'Special interest' is for the local planning authority to determine, but the views of the local community may be important in this context. English Heritage now expects character appraisals to be undertaken for all conservation areas. This helps to provide a clear definition

of an area's special interest and can provide a clear basis for a management strategy.

4. To undertake character appraisals, for which English Heritage has issued separate detailed guidance. The suggested framework for a conservation area appraisal includes the following:

- i) An *introduction* – to explain the background to the study and to describe the general identity and character of the conservation area
- ii) The *planning policy context* – including a brief explanation of what a conservation area is, the implications of designation and the local authority's duties.
- iii) A definition or summary of the *special interest*.
- iv) A *detailed assessment of the special interest* with reference to:
Location and Setting:-
 - a. A factual description of the location of the area and its regional context
 - b. General character of the conservation area (urban, suburban, rural, etc.) and its existing plan form
 - c. Landscape setting (topography, setting and relationship to the wider landscape and any historic landscape if relevant)
Historic Development and Archaeology:-
 - d. The origins and historic development of the area (features shown on map, preferably with GIS)
 - e. Archaeological remains including any protected "scheduled ancient monuments"
Spatial Analysis:-
 - f. The character and interrelationship of spaces within the area (including the importance of open/public spaces)
 - g. Key views and vistas (landmark buildings, views in and out of the area, etc.)
Character Analysis:-
 - h. Definition of character areas or zones (which can be defined through a process of "historic landscape characterisation", or reflect predominant historic character in architectural styles, periods, or types of land use activity, etc.)
 - i. Prevailing or former uses/activities and their influence on plan form and buildings

- j. Qualities of buildings (both individually protected "listed buildings" and unlisted which make a contribution to the character of the area)
 - k. Local design details and their significance (for example, characteristic shop front designs)
 - l. Prevalent and traditional materials used in buildings, walls and ground surfaces (the "public realm")
 - m. Where there is a wide range of historic structures or industrial heritage areas – an audit of heritage assets
 - n. The contribution made to the character of the area by green spaces and its biodiversity value
 - o. Negative factors (the extent of intrusion or damage which detracts from the special character of the area)
 - p. The existence of neutral areas (where there may be potential for enhancement)
 - q. The general condition of the area in terms of both *economic vitality* and *physical condition* of buildings, other heritage assets and public realm (any buildings *at risk* to be recorded – and more recently national register of "heritage *at risk*" has been developed to include conservation areas *at risk* (English Heritage, 2009).
 - r. Identification of *problems, pressures* and the *capacity for change*
- v) Community Involvement ("in the final analysis, heritage is what people value!")
 - vi) Boundary of conservation area (reassessment if appropriate)
 - vii) Identification of the need for local generic guidance
 - viii) Summary of issues (overview of problems and pressures)
 - ix) Useful information/contact details
 - x) Management proposals (which should form part of the character appraisal based on the issues highlighted in point 5 below)
5. To set out proposals for the future management of the area (on the basis of the character appraisal). Components of the management strategy can include:
- i) Policy guidance (linked to the LDF) for example on design issues, new development, repairs, alterations and extensions to historic buildings (whether individually protected or not) and the need for 'historic environment impact assessment' (an issue which was raised in article 8 a) of the Faro

- convention) to safeguard the character and appearance of the area. This should be set out a Supplementary Planning Document (subject to a sustainability appraisal incorporating the requirements of the SEA Directive)
- ii) Discussion of the resources needed to sustain the historic environment in the area
 - iii) Procedures to ensure decision-making is based on established policies and guidance
 - iv) A mechanism for monitoring change on a regular basis
 - v) An enforcement strategy to deal with any unauthorised developments
 - vi) Proposals to secure repair action and beneficial uses to buildings at risk
 - vii) Proposals for urban design and enhancement of the “public realm”
 - viii) Proposals for developing an economic development and regeneration strategy for the area including financial aid
 - ix) A strategy for the protection and management of trees and green spaces

Moreover, the guidance makes specific reference to conservation areas as the focus for regeneration activity and this is where financial support schemes for conservation areas are focussed (see below).

More recent planning statements have identified the important role of the historic environment, in its widest sense, as a key ingredient in sustainable development and therefore an important element in “ensuring a better quality of life for everyone, now and for the future”¹⁶. Indeed the UK approach is now stressing the wider approach of the historic environment (akin to the notion of the ‘cultural environment’) by the use of Historic Environment Records as an important evidence base for plan making both for the regional planning approach (RSS) and the local planning approach (LDF). Historic Environment Records (HERs) are a recent development (all local authorities have access to one of 82 HERs covering England, which are information services provided through databases linked to GIS

¹⁶ Planning Policy Statement 1: *Delivering Sustainable Development* (paragraph 3) (2005) and Planning Policy Statement 5: *Planning and the Historic Environment* (policy HE2.3) (2010).

that provide access to comprehensive resources relating to the historic environment of a defined geographical area). This information resource can be used for sustainability appraisals, assessing character, identifying opportunities that the historic environment may bring, ensuring that the historic environment is not diminished by ill-informed development, and can be used to help identify where heritage assets are at risk and in need of planning or regeneration proposals (Great Britain, Department for Communities and Local Government and Department for Culture, Media and Sport, 2009).

Financial aspects of conservation areas

Apart from grant aid to individually listed buildings (mainly supporting grade I and II* listed buildings – approximately the best of 6% of listed buildings) funding support mechanisms for the historic environment have centred on designated conservation areas since the early 1990s with particular reference to the idea of heritage-led regeneration (Pickard, 2009).

Conservation Area Partnership Schemes (CAPS), operated between 1994 - 2001, introduced the idea of heritage-led regeneration by tackling economic, social and physical urban problems in parallel through the formation of strategic partnerships (combining the aims and financial resources of organisations such as regional development agencies, specific regeneration budgets and European Union finance programmes) (English Heritage, Town Centres Ltd and London School of Economics, 1999).

Heritage Economic Regeneration Schemes (HERS) were introduced in 1999, essentially replacing the CAPS, and funding assistance was provided in a number of bidding rounds until 2002 (although some schemes continued to run to 2006) specifically for historic areas with economic and social problems. Similar to CAPS, HERS were administered by local authorities that put forward bids on an annual basis for English Heritage funds to manage a scheme in their locality. Bids for HERS had to be coordinated through an area-based strategy encompassing five key objectives (English Heritage, 2002).

In 2004 English Heritage replaced the HERs programme with a new scheme called “Partnership Schemes in Conservation

Areas” (English Heritage, 2004). This area-based funding programme builds on the HERS concept and as with HERS are for schemes of funding up to £100,000 per annum. The Partnership Scheme approach is slightly different with a greater emphasis on sustainable development. The aim is “to secure a sustainable future for the historic environment” by ensuring that funding is directed to five key areas:

Repairing historic buildings and bringing them back into use

- Investing in the social and economic regeneration of England’s urban and rural communities including the creation of safe and sustainable communities
- Ensuring work realised is sympathetic to the historic importance and character of an area
- Completing works to an appropriate standard and ensuring that subsequent regular maintenance will be carried out
- Ensuring that the work achieved is sustained by the local planning authority’s policies and actions for the area

The national priorities for Partnership Scheme grant funding include projects where significant elements of the historic environment are at risk, and/or projects where there is a lack of alternative funding (and there may also regional priorities to consider). Eligible projects must be based within a designated conservation area and must be able to attract partnership funding from the local authority and possibly other funding partners and involve a range of work to a number of buildings, structures or spaces within a defined area. Projects must also target at least 60% of the partnership funding towards building repairs and require property owners to contribute financially towards grant funded works to their property.

The Partnership Schemes can provide grant aid assistance for the same type of work considered by HERS (major repairs to historic buildings, authentic reinstatement, public realm works) and can cover management and administration costs (for example, to support a project officer). A scheme cannot be used to finance demolition work, conversions and alterations, modernisation, the provision of building services, or work eligible under other funding schemes.

An application for a Partnership Scheme first involves a “preliminary application” including a map of the conservation area

showing the extent of proposed scheme, photographs showing the scale of problems, a conservation area appraisal, a vacancy survey, a condition survey, a ‘Buildings at Risk’ register and the indices of deprivation for the area and its employment rates. A detailed application must provide details of the conservation area including a description of the special architectural and historic of the area, the problems faced by the area and the suggested programme of works, and an analysis of the conservation area in terms of its economic base, service and retailing activity, business confidence, tourism potential, housing and social mix, identity and coherence, and opportunities for building on the area’s strengths. The application must also explain why funding is needed, what planning policies have been adopted to support and sustain local economic activity and indicate the aims of the scheme including public benefits in relation to access and interpretation, social inclusion, regeneration, training and skills, sustainability and partnership funding.

The approval of a scheme makes a further requirement to provide feedback on progress made towards an agreed delivery plan on an annual basis. Without this funding allocations cannot be confirmed for subsequent years of the scheme.

The Heritage Lottery Fund (HLF) launched the Townscape Heritage Initiative (THI) in 1998 and projects throughout the United Kingdom have been eligible for assistance. Similar to HERS and Partnership Schemes, the THI schemes have been directed towards the problems of an historic area in parallel with economic regeneration, sustainability and raising the vitality and confidence of the community. The annual budget for THI is £10 million for the period 2008 to 2013 (Heritage Lottery Fund, 2008).

The eligibility of areas depends on an assessment of both heritage and economic needs. The forms of partnership that are eligible to apply for a THI scheme include organisations such as local authorities, regeneration companies, non-profit organisations and community groups. The partnership form a ‘common fund’ incorporating funding from the HLF in addition to other public or private funding sources. The HLF have contributed to a ‘common fund’ of each THI. Heritage Lottery funds directed to THI regeneration schemes supported the

repair of sensitive historic buildings and their environs rather than to the area regeneration budget as a whole. The amount of funding provided by the HLF has ranged from 20% - 50% of costs (up to 75% in exceptional cases). THI funding assistance covers:

- Repair of the structure and external envelope of historic buildings and structures. Maintenance costs are not covered and internal repairs are only eligible to ensure structural stability or allow public access. The HLF stipulate that grant levels to support eligible repair work should reflect the difference between the cost of repairs and the resulting financial value added to a property.
- Authentic reinstatement of architectural features to historic buildings and their settings, provided the fabric is in sound repair, or will be repaired as part of the project. The HLF will not support conjectural restoration work or other works to remove previous alterations of architectural or historic interest;
- Bringing vacant floor space in historic buildings back into economic use, including unused upper floors over shops. Support will normally be given to cover the difference between the cost of conversion (and repair) and the value when converted. (This has continued a previous funding scheme entitled LOTS: Living over the Shop);
- Removing visual degradation by filling gap sites in established frontages with buildings of appropriate use and demonstrating a high standard of contextual design, using natural materials indigenous to the area. Where economic conditions for the area indicate that appropriate quality can only be achieved via subsidy, the difference between the cost of developing such an infill site and its end value may be eligible for financial support;
- Repair and authentic reinstatement of elements lost from urban green spaces, historic surfaces and other 'public realm' townscape features defining historic spaces. Conjectural restoration of lost features, replacement of street furniture and modern layouts will not be funded. The level of support is decided with reference to the cost difference between repair to normal standards and the conservation option.

• Further financial support can be given for staffing costs and overheads to run a THI scheme (for example, project officers,

consultants and marketing). In addition, the *common fund* of the THI can support complimentary activities, e.g. the creation of a town trail, training initiatives to improve conservation skill, research of the area or other work related to the long-term management of the area. Furthermore, if an application for a THI scheme is initially accepted then 75% of costs up to £25,000 for developing the project may be offered by the HLF.

Proposals for THI funding are judged on the historic merits of a scheme, the conservation and public benefits, the need for public sector investment to solve major problems, technical quality, financial viability and organisational strength. A specific "conservation area management plan" is required for THI schemes, which all members of the partnership must formally adopt to ensure that the conservation benefits of the THI do not disappear when the scheme finishes. The plan should be put into practice for a period of at least 10 years following the end of the scheme (and cover issues such as the heritage values in the area, threats and problems, planning measures, design standards, community involvement, etc.).

Generally areas already supported by other schemes such as HERS/Partnership Schemes via English Heritage are given a low priority. However, the funding for THI's is at a higher starting point. Applications for a THI grant contribution towards the common fund from the HLF is for schemes of between £500,000 and £2 million.

The levels of grant aid to be offered to individuals and organisations for different categories of work through the common fund can vary - the advice is that each THI scheme set grant aid levels to achieved the desired effect and be based on the principle that public benefits should outweigh private gain. This is usually achieved by setting grant aid at fixed percentages of the cost of specific work

Both the English Heritage HERS/Partnership Schemes and THI schemes have been concentrated in designated historic areas (conservation areas) suffering from economic and social decline. These programmes have been directed towards regeneration through using the built heritage as a factor for improvement of areas and communities. Through this they have enabled the repair and rehabilitation of buildings for housing and commercial

uses, as well as cultural purposes. Moreover, the funding has sometimes been used to provide social housing.

Example: The Grainger Town Project: Heritage-led Regeneration and Sustaining the historic city centre of Newcastle upon Tyne, England

Grainger Town, the name given to the historic core of the northern city of Newcastle upon Tyne, covers approximately 36 hectares and occupies much Newcastle's *Central Conservation Area*. The area was significantly developed by the 'speculative developer' Richard Grainger and others between 1835 and 1842, including a planned commercial centre within the city's medieval street pattern which produced a series of elegant and unique streets. The area also contains some older and significant historic buildings.

The importance of this area is recognized by the fact that 244 out of approximately 640 buildings (i.e. 38%) are "listed buildings":

individually protected for their special architectural or historic interest. Moreover, there a higher than average number of the highest quality listed buildings (30% are Graded I and II* compared to the national average of 6% in these categories).

By the late 1980s and early 1990s Grainger Town was in a state of urban decline as a result of economic transition, employment changes with the decline of traditional industries, social and community issues, poor environmental quality and physical obsolescence. The initial demise of Grainger Town began in the early 1970s with the migration north of the city's core retail (shopping) area. Further disruption occurred in the 1980s due to a large numbers of businesses drifting out to suburban locations and by the regeneration of Newcastle's river quayside to the south during the late 1980s and 1990s with the assistance of substantial public investment from a government created regeneration agency. The developments along Newcastle's Quayside also absorbed much of the demand for growth of leisure amenities such as restaurants, cafes and bars. The combination of these issues resulted in high vacancy rates within the buildings of Grainger Town (especially in the upper floors) and poor building conditions.

In 1992 Newcastle City Council, English Heritage and the then central government Department of the Environment jointly commissioned a study of the area. It was found that the area suffered from a lack of economic confidence, under use of buildings, fabric decay and other environment-related problems including traffic congestion and environmental erosion caused by traffic. The study set out a conservation-based strategy, which was essentially a planning framework for the area, although it did propose a regeneration strategy that could be developed in partnership with the private sector.

In a subsequent detailed survey of the condition and vacancy of buildings in the area it was found that there was a high number of listed buildings at risk in terms of disrepair or vacancy (47% against the national average of 7%) (Fig. 21; Fig 22) and a considerable number in a marginal condition and vulnerable to becoming "at risk" (29% against the national average of 14%).

A Conservation Areas Partnership Scheme (CAPS) was established in Grainger Town in 1994, covering an area of 36 hectares of the city centre (this was one of 15 pilot CAPS partnership funding schemes in the country operated jointly by local councils and English Heritage). The creation of CAPS ensured that the area's conservation budget rose to nearly £500,000 (previously the conservation budget for the whole city had been a mere £60,000 per annum). In the same year, a small three-year Single Regeneration Budget (SRB) regeneration funding scheme provided by English Partnerships (a national regeneration agency) also started, which provided grant aid for converting the upper floors of listed properties for residential use (known as "Living Over the Shop" [LOTS]).

However, as time progressed the area suffered further problems despite some successes in rehabilitating buildings with grant aid being offered for up to 80% of costs. The number of people in employment in the Grainger Town area fell by nearly 5,000 between 1992 and 1997 and there was also a decrease in businesses (approx. 200 less businesses) and residents in the area. The city council and English Heritage along with English Partnerships agreed that the area could no longer be left to take care of itself and was in need for a comprehensive regeneration

strategy but in a way that would secure the past (i.e. the heritage qualities of the area) while securing its long-term future (in other words a sustainable approach).

In 1996 consultants EDAW were commissioned to produce a regeneration strategy for Grainger Town and to prepare a bid for government funding. A detailed analysis of the area's problems was immediately undertaken. Grainger Town represented a complex urban system, which would have to be tackled in a "holistic" way. They produced a vision statement to reflect the aspirations for Grainger Town in 2006 – to be a dynamic and competitive location with a high quality environment that would play a major role in the regional economy, becoming a distinctive place with a safe and attractive location in which to work, live and visit (EDAW, 1996).

The project was developed through a six-year regeneration scheme (1997 – 2003), which aimed at securing £120 million in regeneration funding from public and private sectors (at a ratio of 1:2 - £40m to £80m). Public sector funding came mainly from five separate agencies. The city council and English Heritage provided conservation-related funding totalling over £4 million which was mainly directed through two partnership funding schemes, first through the CAPS scheme and secondly through a subsequent Heritage Economic Regeneration Scheme (HERS). These funds were used to provide grant aid of 60 – 80% of costs to private owners or occupiers of decayed historic or vacant buildings to repair them and to improve shop-fronts to a traditional appearance (Fig 23; Fig 24) and for secondment of staff to the project team.

The other public support (which included money from the European Union, the national regeneration agency English Partnerships and a Learning and Skills Council) provided general regeneration funds, some of which were incidentally used for conservation purposes, and included financial support to develop vocational training initiatives and encourage local business, to assist private owners of partially occupied historic buildings to refurbish their vacant upper floors into new residential apartments or develop new business uses, and to allow infrastructure improvements for improving the environment of the area (such as pedestrianisation schemes to improve the "public realm") .

The investment sought to strengthen and develop Grainger Town as a mixed use historic urban quarter based on seven inter-related 'regeneration themes'

- Business Development and Enterprise – to encourage the development of existing companies, generate new entrepreneurial activity and broaden the area's economic base;
- Commercial Development – to secure investment and economic activity in a range of uses, including office, retail, leisure and culture, leading to the repair and re-use of historic buildings and the redevelopment of key sites;
- Access to Opportunity – to improve training and employment opportunities for the long-term unemployed in adjoining inner city wards;
- Housing – to increase the residential population through the provision of a wide range of affordable housing for rent and sale;
- Quality of Environment – to improve the quality of the environment and public spaces to enhance Grainger Town's competitiveness as an area in which to work, live and visit;
- Arts, Culture and Tourism – to promote Grainger Town as a centre for arts, culture and tourism;
- Management, Marketing and Promotion – to improve the overall management and marketing of the area.

Although 'conservation' was not directly mentioned as an activity, due to the area's high heritage value and because the project was originally conceived in an attempt to conserve Grainger Town, the practice of integrated conservation was deemed to be of relevance to each of the seven regeneration themes.

By the end of the project time-scale (2003) the forecasted private sector investment of £80 million had been substantially exceeded (£145 million). Altogether, a total of 121 buildings of historical importance had been improved and brought back into use, 51 in excess of the target set by the government. Over 80,000 sq. m. of new or improved floor space had been developed or provided through the rehabilitation of buildings (Fig. 25). A number of initiatives helped create a total of 286 new businesses, well above the target of 199, and over 1500 jobs were created. In terms of commercial property the project

had an overall positive effect on the office, retail and leisure property sectors enabling a large proportion of vacant sites and buildings of historical importance to be brought back into use, thus significantly aiding the conservation-led regeneration of the area.

A significant amount of work had been created for local workers in the construction industry and new training opportunities had increased local skills. The residential population had been increased through the provision of a wide range of affordable housing (Fig. 26) for rent and for sale by the creation of 289 dwelling units. Improvements and enhancement of the quality of the environment within the area had helped to increase developer, investor and consumer confidence in the area (Fig. 27; Fig. 28). A range of public art installations and cultural events/festivals had enhanced public spaces and helped to promote the revitalisation of Grainger Town. Marketing and promotion activities had increased the public's awareness of the value of the area's built heritage.

The Grainger Town Project provides a good exemplar for the idea that heritage conservation can be an effective catalyst for social and economic sustainable development. The achievements have transformed the physical, economic and demographic state of the Grainger Town area. It has allowed a good solution to the urban problem in terms of enhancing local distinctiveness, developing a more "liveable" city, assisting local entrepreneurs, fostering community cohesion and contributing to sustainable development (Pickard, 2008c).

In this respect the project is a good exemplar for the principles established in the Faro *Framework Convention on the Value of Cultural Heritage for Society* (Council of Europe, 2005). Section II of the Convention deals with the "Contribution of cultural heritage to society and human development" through four articles:

Article 7: *Cultural heritage and dialogue* – the project ensured that different elements of the community were consulted and involved in the decision-making process.

Article 8: *Environment, heritage and quality of life* – the project has improved the environment and improved quality of life through rehabilitating buildings and creating

a sense of place.

Article 9: *Sustainable use of the heritage* – the project sustained knowledge of traditional skills and the use of traditional materials, respected the integrity and values of built heritage, promoted the principles of sustainable management and encouraged maintenance, conservation and other work.

Article 10: *Cultural heritage and economic activity* – the project provided information and technical assistance and increased awareness for all actors so that they could understand the economic potential of the heritage and establish the appeal of the area for inhabitants, tourists and new enterprises thereby sustaining economic activity but without jeopardising the character and interests of the cultural built heritage.

Moreover, the project meets the criteria of Section III of the Convention which deals with "Shared responsibility for cultural heritage and public participation" (see Article 11: *Organisation of public responsibilities for cultural heritage* / Article 12: *Access to the cultural heritage and democratic participation*). Apart from representation on the Grainger Town management board, the wider community was consulted at all stages of the project's development and there was co-operation between different public authorities, the private sector, the public and other groups in a rational of shared governance (Pickard, 2008c).

The success of the Grainger Town Project is now viewed as a demonstration of best practice having gained national and international recognition through the winning of various prestigious awards. In 2002 a conference hosted in Grainger Town resulted in the creation of a European network - INHERIT - based around the concept of investing in heritage to regenerate Europe's historic cities which has subsequently identified examples of good practice in a guide to sustainable heritage-led regeneration (EAHTR, 2007).

Conclusions

The *Granada Convention* and the process of *integrated conservation* are still relevant today. Some of the articles and the explanatory report could be updated in order to make reference to the issue of *sustainable development* (including adaptive reuse/beneficial use/community benefit/value etc) and also to re-emphasise community and voluntary involvement in decisions concerning the architectural heritage. Also, some of the terminology is a little outdated – greater reference needs to be given to historic zones, areas, and landscapes including the townscapes/cultural landscapes and indeed the notion of the *cultural (or historic) environment* - the instead of groups of buildings and sites. Connections should be made to the other heritage conventions (Faro, Florence, Valetta etc) and other relevant issues (e.g. the need for the strategic environmental assessment of plans and programmes) and other relevant documents (e.g. the Guiding Principles for the Sustainable Spatial Development of the European Continent and the European Spatial Development Perspective).

Some countries have updated legislation and policy and others are contemplating this. In the UK sustainable development (and community involvement) has become a statutory requirement of the planning system since 2004 and because heritage and planning are integrated this impacts on the architectural heritage, and indeed the wider historic environment (for which new legislation is anticipated). A similar approach can be seen in France. Other countries are starting to adopt this

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approach, for example, the cultural heritage law for the FYR of Macedonia of 2005 makes specific "the harmonization of the public interest for the protection of the cultural heritage with one for sustainable economic and social development" (Pickard, 2008a).

Detailed analysis is required before formulation of a robust heritage management methodology that includes a sustainable development framework. Sustainable historic environments should aim to improve quality of life, maintain local identity, diversity (social cohesion) and vitality (economic consideration) and minimise the depletion of non-renewable resources (through rehabilitating buildings for beneficial use and enhancing the environment). Financial assistance should aim to utilise the historic environment as a factor for local development so that social, economic and environmental considerations can be considered together through suitable management strategies and regeneration or rehabilitation programmes. There is a need to develop a collective responsibility for heritage assets through empowering community action and involvement. It is necessary to provide a robust policy framework for integrating conservation objectives with the aims of sustainable development more generally. This should aim to define the capacity by which the historic or cultural environment can permit the change. The challenge here is that of translating such general principles into operation so that they can guide sustainable heritage management practice in meaningful ways at the range of spatial scales and in a variety of historic environments (Pickard and de Thyse, 2001).

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Kerstin Odendahl

**Global conventions for the protection
of cultural heritage**

2.4

1. Introduction

“The cultural heritage of a people includes the works of its artists, architects, musicians, writers and scientists and also the work of anonymous artists, expressions of the people’s spirituality, and the body of values which give meaning to life. It includes both tangible and intangible works through which the creativity of that people finds expression: language, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries. Every people therefore, has a right and a duty to defend and preserve its cultural heritage, since societies recognize themselves through the values in which they find a source of creative inspiration.”¹

This definition of cultural heritage was provided for by the Mexico City Declaration of 1982. It shows that cultural heritage is regarded as one of the main fundamentals of national and regional identity. Therefore, cultural heritage is traditionally protected by domestic legislation. About 100 years ago, however, the first international conventions for the protection of cultural heritage were signed. It was the birth of a new field of international law, the so-called *cultural heritage law*. Its development has been remarkable, especially within the last 10 years. Between 1999 and 2009 the number of global conventions on cultural heritage tripled. The protection of cultural heritage provided by public international law extended considerably.

The purpose of this paper is to give an overview over all *global* international conventions aiming at the protection of cultural heritage from destruction, decay or disappearance. Most of them were elaborated under the auspices of UNESCO. Conventions on the prevention of illegal removal and on the restitution of cultural property will not be presented since other papers in this book deal with this specific topic. All regional conventions, especially those of the Council of Europe, will be left aside as well. Regulations and directives of the European Union will not be treated neither. Not the regional, but the global legal system of protection is the topic of this paper.

1 Mexico City Declaration on Cultural Policies. World Conference on Cultural Policies, Mexico City, 26 July – 6 August 1982, para. 23 and 24.

2. Historical and Systematic Overview

Cultural heritage might be tangible or intangible. *Tangible cultural heritage* is also called “cultural property”. It consists of all movable or immovable objects which were created or shaped by man and which have a historical, artistic, scientific, architectural, archaeological or other kind of cultural value.² They are objects embodying culture. Sites, buildings, monuments, sculptures, paintings or works of art, for example, constitute tangible cultural heritage. *Intangible cultural heritage* consists of all expressions of human creativity that form part of the culture of a people. Traditions, rites, beliefs, language, or dances are only some of many examples to be mentioned. Both forms of cultural heritage are protected by global conventions. The degree of protection, however, varies considerably depending on the area of international law in question.

The first legal instruments for the protection of cultural heritage developed in the *law of armed conflict*. For centuries, the destruction and the removal of cultural property belonging to the enemy had formed part of the customs of war. It was not until the elaboration of the Hague Conventions of 1899/1907³ that the first rules on the protection of cultural property against deliberate destruction developed. They were so weak and so imprecisely formulated, however, that they did not prevent the devastating, disastrous destruction of cultural property during the two World Wars. It became clear that a specific protection system was needed. As a consequence, the international community began to work on elaborating a new treaty. The outcome was the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed in The Hague

2 Abbreviated version of the definition developed by Odendahl, Kerstin (2005) *Kulturgüterschutz*, Tübingen: Mohr Siebeck, p. 387.

3 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 29 July 1899); 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); Convention (IX) concerning Bombardment by Naval Forces in Time of War (The Hague, 18 October 1907). The text of all of these conventions is, inter alia, reprinted in Roberts, Adam and Guelff, Richard (eds.) (1989) *Documents on the Laws of War*, Second Edition, Oxford: Clarendon Press.

on 14 May 1954 (Hague Convention of 1954).⁴ It was the first global treaty dealing specifically with the protection of cultural property, and thus constitutes a milestone in the development of cultural heritage law.

Nevertheless, the convention still had some weaknesses. The States Parties tried to solve them by developing a protocol, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, signed on 26 March 1999 (Second Hague Protocol of 1999).⁵ However, since many powerful States had not signed or not ratified the Hague Convention of 1954 nor its protocols, a second, parallel system of international protection of cultural property developed. In 1977, the four Geneva Conventions of 1949⁶ were supplemented by two protocols improving and specifying the protection of victims of international armed conflicts (Additional Geneva Protocol I)⁷ and non-international armed conflicts (Additional Geneva Protocol II)⁸ respectively. Both protocols contain one article dealing with the protection of cultural objects and places of worship.⁹ Since almost all States

4 249 U.N.T.S. 240.

5 38 ILM 769 (1999). For more details about the Second Protocol see Desch, Thomas (1999), The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Yearbook of International Humanitarian Law 2, pp. 63 – 90. The first protocol to the Hague Convention was signed in 1954 (Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 U.N.T.S. 358). It deals with the restitution of illegally removed cultural property. However, since the illegal removal and the restitution of cultural property is not the topic of this paper, the first protocol is not presented in detail.

6 Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, 12 August 1949, 75 U.N.T.S. 31; Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea, 12 August 1949, 75 U.N.T.S. 85; Geneva Convention relative to the treatment of prisoners of war, 12 August 1949, 75 U.N.T.S. 135; Geneva Convention relative to the protection of civilian persons in time of war, 12 August 1949, 75 U.N.T.S. 287.

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 12 August 1977, 1125 U.N.T.S. 3.

8 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 12 August 1977, 1125 U.N.T.S. 609.

9 Art. 53 Additional Geneva Protocol I; Art. 16 Additional Geneva Protocol II.

not parties to the Hague Convention and its protocols are at least parties to the Geneva Conventions and their two protocols, the basic rules on the protection of cultural property in times of armed conflict have a universal scope of application.

The protection of cultural heritage in times of armed conflict is the oldest and the most developed branch of cultural heritage law. The rules of the Hague Convention of 1954 and its Second Protocol of 1999 are very specific, quite detailed and even enforceable due to the establishment of a criminal responsibility in case of a serious violation of the most important duties. Moreover, the basic rules of the Hague Convention have become binding for almost all States of the world due to their integration into the two Additional Geneva Protocols. It is to be noted, however, that the protection in times of armed conflict only refers to tangible cultural heritage. In the event of an armed conflict, intangible cultural heritage is not protected by a specific international convention.

The protection of cultural heritage in *times of peace* developed later. One of the main reasons might be that, in times of peace, the preservation of cultural heritage lying within a State's territory is usually conceived as being part of the internal affairs of that State. The situation in times of peace is different than the one in times of armed conflict. In the latter case it is mainly the cultural heritage of another State that has to be protected; in the first case it is the cultural heritage of the State in question. The global convention which changed this pure national perception of cultural heritage was the Convention for the Protection of the World Cultural and Natural Heritage, signed on 16 November 1972 (World Heritage Convention of 1972).¹⁰ Its aim is to protect those cultural sites and monuments whose importance exceed the regional or national dimension and which are of "outstanding universal value". The World Heritage Convention constitutes the best known and the most successful treaty developed under the auspices of UNESCO.

For decades the World Heritage Convention was the only global treaty dealing with the protection of cultural heritage in times of peace. At the beginning of the 21st century, however, a new era

10 11 ILM 1358 (1972).

started. UNESCO began to develop a series of treaties covering many other facets of cultural heritage protection. The first one was the Convention on the Protection of the Underwater Cultural Heritage, signed on 6 November 2001 (Underwater Heritage Convention of 2001).¹¹ Its aim is to preserve cultural objects underneath the Sea. Despite the use of the term “heritage” in their respective names, however, both conventions solely protect tangible cultural heritage, i.e. cultural property, and not intangible cultural heritage.

The second treaty elaborated at the beginning of the 21st century by UNESCO was the Convention for the Safeguarding of the Intangible Cultural Heritage, signed on 17 October 2003 (Intangible Heritage Convention of 2003).¹² It marked the enlargement of the scope of the international protection system: For the first time in history a global convention focused on the safeguarding of the intangible elements of cultural heritage. Two years later, another UNESCO treaty, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, was signed 20 October 2005 (Convention on Cultural Diversity of 2005).¹³ It does not deal with the protection of intangible cultural heritage directly. Nevertheless, it constitutes an important supplement to the Intangible Heritage Convention of 2003.

The protection in times of peace is, therefore, wider than the protection in times of armed conflict. It refers to both tangible and intangible cultural heritage. But the obligations laid down in the four treaties are not as strict and detailed as the rules for the protection of cultural property in the event of an armed conflict. The conception of cultural heritage being mainly an internal affair of the States thus continues to characterise the protection in times of peace.

Summing up, the system of global conventions developed for the protection of cultural heritage may be presented as follows:

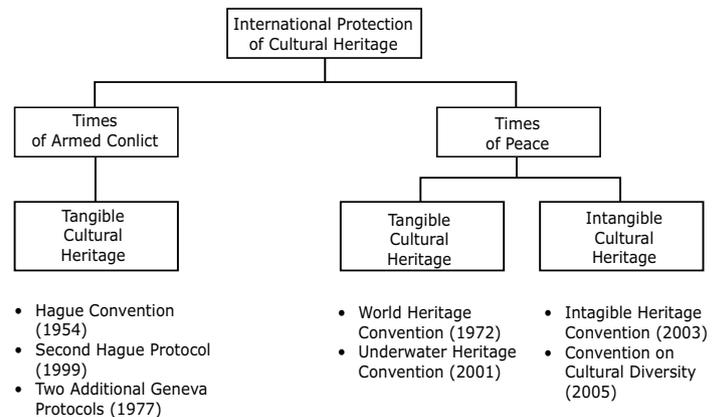


Fig. 1: Scheme representing the system of global conventions for the protection of cultural heritage.

3. Protection of cultural heritage in times of armed conflict

The protection of cultural heritage in times of armed conflict is restricted to the protection of tangible heritage, i.e. of cultural property. Sites or monuments of cultural value are in constant danger of being destroyed or damaged during armed conflicts. The reasons are manifold. The site or building may, for example, be used or perceived as being used for military purposes. In such cases it constitutes a military target. Another reason is the “incidental” or collateral damage of cultural property. It occurs when sites, monuments or museums are located next to military targets that are being attacked. A third reason, which plays a predominant role in ethnical or civil wars, is the targeted attack of cultural sites of the enemy in order to destroy main elements of his cultural identity.¹⁴ But no matter for what reason cultural property is being destroyed or damaged – it is always the people, their identity, and their memory which are the real target.

11 41 ILM 40 (2002).

12 2368 U.N.T.S. 3.

13 45 ILM 269 (2006).

14 The destruction of the bridge of Mostar or of the city of Dubrovnik are only two of many examples for such targeted destruction of cultural property. The emotional pain caused by such destructions is immense. See, for example, Drakulić, Slavenka (1993) Falling Down. The New Republic 13 December 1993, p. 14 f.

Two parallel conventional systems for the protection of cultural property in times of armed conflict exist: the Hague system (Hague Convention of 1954 and its Second Protocol of 1999) and the Geneva system (the two Additional Geneva Protocols of 1977). The first one is much more elaborated and detailed than the second one.

3.1. The Hague Convention of 1954 and its Second Protocol of 1999

The protection provided for by the Hague Convention of 1954 (entry into force on 7 August 1956) and its Second Protocol of 1999 (entry into force on 9 March 2004) is based on a double approach consisting of "safeguarding" and "respect".

3.1.1. Safeguarding

Safeguarding takes place before an armed conflict arises, i.e. in times of peace. According to Art. 3 of the Hague Convention of 1954, the States Parties have to safeguard the cultural property situated within their own territory against the foreseeable effects of an armed conflict. Cultural property situated within the territory of other States does, therefore, not fall under the scope of this measure of protection.

The measures to be taken by the States to safeguard their own cultural property are not specified in the convention; the States can thus opt for the ones they consider appropriate. The Second Protocol, however, contains detailed provisions on the necessary *preparatory measures*. Safeguarding "shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property."¹⁵

Another measure of safeguarding is the *distinctive marking* of cultural property under protection in order to facilitate its



Fig. 2: Emblem »blue shield« designating a cultural property under »general« protection.

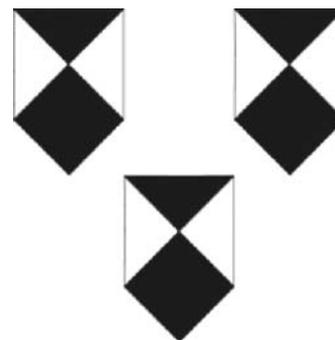


Fig. 3: Emblem »three blue shields« designating a cultural property under »special« protection.

recognition in case of an armed conflict.¹⁶ The emblem to be employed is the so-called blue shield consisting of a "royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle".¹⁷ It may be used alone for cultural property under "general" protection, for the persons responsible for the duties of control, for the personnel engaged in the protection of cultural property and for their identity cards.¹⁸

The blue shield has to be repeated three times in a triangular formation (one shield below) for immovable cultural property under "special" protection, for the transport and for improvised refuges of movable cultural property.¹⁹

¹⁶ Art. 6, 16 and 17 Hague Convention of 1954.

¹⁷ Art. 16 para. 1 Hague Convention of 1954.

¹⁸ Art. 17 para. 2 Hague Convention of 1954.

¹⁹ Art. 17 para. 1 Hague Convention of 1954.

¹⁵ Art. 5 Second Protocol of 1999.

Finally, the States have the duty to *prepare their military personnel* for the protection of cultural property. This preparation mainly consists of introducing specific provisions into the military regulations or instructions and of fostering in the military personnel a spirit of respect for the culture and cultural property of all peoples. Furthermore, the States have to plan or establish services or specialist personnel whose purpose is to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it.²⁰

3.1.2. Respect

The duty to respect cultural property arises at the moment that an armed conflict starts. It refers both to cultural property situated within the own territory as well as to cultural property situated within the territory of other States. According to Art. 4 of the Hague Convention of 1954, the States Parties have to refrain from any act of hostility directed against cultural property. Furthermore, they are obliged not to use cultural property and its immediate surroundings in a way which might make it a military target and thus expose it to destruction or damage. There are, however, three different levels of protection. The level depends on the cultural value of the object in question. The higher its cultural value is, the more difficult it becomes to waive the obligations of respect.

Objects may be placed under "*general*" protection²¹ if they constitute "movable or immovable property of *great importance* to the cultural heritage of every people".²² Monuments, archaeological sites, groups of buildings, works of art, manuscripts, books, scientific collections, buildings such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, movable cultural property, are examples mentioned in the

Hague Convention of 1954.²³ Cultural property under "general" protection may be attacked or used for military purposes in case of an imperative military necessity.²⁴ This waiver of obligations in case of an imperative military necessity was the main point of criticism put forward by commentators of the Hague Convention of 1954.²⁵ The Second Protocol of 1999 tried to solve this problem by specifying more precisely the conditions under which an imperative military necessity may be invoked.²⁶

"*Special*" protection may only be granted to a limited number of refuges intended to shelter movable cultural property, to a limited number of centres containing monuments and to other immovable cultural property of *very great importance*.²⁷ Yet, they may only be placed under "special" protection if they are situated at an adequate distance from any large industrial centre or from any important military objective (like aerodromes, broadcasting stations, railway stations or main lines of communication), and if they are not used for military purposes.²⁸ Such cultural property has to be entered in the "International Register of Cultural Property under Special Protection"²⁹ and is then granted immunity.³⁰ This immunity, however, is not absolute. It may be withdrawn, especially in case of an unavoidable military necessity.³¹

Both categories of protection were established by the Hague Convention of 1954. Both refer to cultural property that is of great or of very great importance to the respective State.³²

20 Art. 7 Hague Convention of 1954.

21 The term „general“ is neither used in the Hague Convention of 1954 nor in the Second Protocol of 1999. The formulation employed there is "cultural property not under special protection". In this paper, however, the word "general" is used in order to better distinguish it from "special" and "enhanced" protection.

22 Art. 1 (a) Hague Convention of 1954.

23 Art. 1 (a) – (c) Hague Convention of 1954.

24 Art. 4 para. 2 Hague Convention of 1954.

25 See, for example, Nahlik, Stanislaw E. (1967) La protection internationale des biens culturels en cas de conflit armé, Recueil des Cours de l'Académie de droit international 120, p. 65 (132); Hladík, Jan (1999) The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the notion of military necessity, Revue Internationale de la Croix Rouge, Vol. 81, No. 835, pp. 621 ff.

26 Art. 6 – 8 Second Protocol of 1999.

27 Art. 8 para. 1 Hague Convention of 1954. "Special" protection might also be granted to transports exclusively engaged in the transfer of cultural property, whether within a territory or to another territory, see Art. 12 ff. Hague Convention of 1954.

28 Art. 8 para. 1 (a) – (b) Hague Convention of 1954.

29 Art. 8 para. 6 Hague Convention of 1954.

30 Art. 9 Hague Convention of 1954.

31 Art. 11 para. 2 Hague Convention of 1954.

32 See Merryman, John Henry (1986) Two Ways of Thinking about Cul-

The cultural property protected is, therefore, such of national value.³³ The Second Protocol of 1999 established a third level of protection especially designed for cultural property of universal value. According to its Art. 10 an "enhanced" protection might be granted by an Intergovernmental Committee³⁴ in a special procedure³⁵ to movable or immovable cultural property of the *greatest importance for humanity*. In order to be placed under "enhanced" protection, however, the cultural property has to be protected, in times of peace already, by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection. Furthermore, it may not be used for military purposes or to shield military sites. Cultural property under "enhanced" protection is granted immunity.³⁶ This immunity is much stronger than the one granted to cultural property under "special" protection. Even though the immunity might be lost, suspended or cancelled, the conditions to be met are so strict³⁷ that the immunity of cultural property under "enhanced" protection is almost absolute. No grade of military necessity automatically waives the obligation to respect such cultural property. Surprisingly, however, this new category of protection has not been combined with a distinctive marking.³⁸

The double approach of the Hague system may, therefore, be presented as follows:

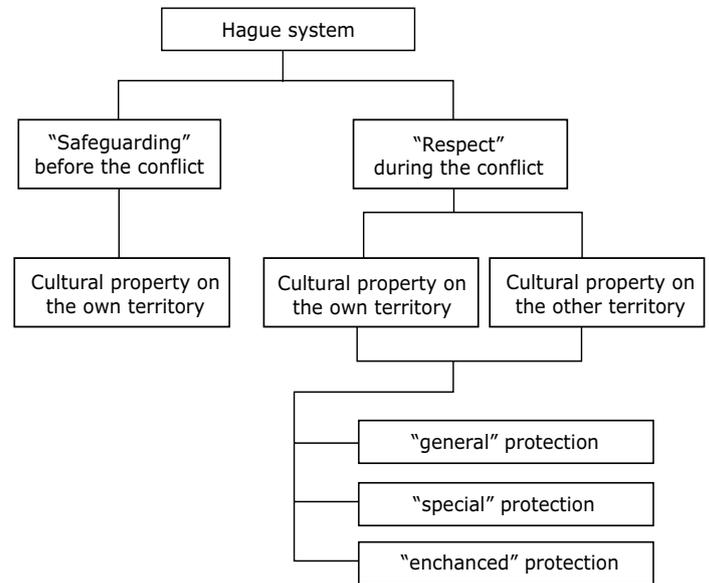


Fig. 4: Scheme representing the double approach of the Hague system.

Two further facts are worth mentioning. Firstly, the scope of application of the Hague Convention of 1954 and the Second Protocol of 1999 is wide. Most rules are applicable both for international³⁹ and for non-international⁴⁰ armed conflicts. Furthermore, there are not only rules for times of peace and for times of hostilities, but also special obligations arising in times of occupation of a foreign territory.⁴¹ Secondly, serious violations of the most important obligations lead to a criminal responsibility.⁴² Thus, an enforcement mechanism is existent.

tural Property. 80 American Journal of International Law, p. 831 (837); Toman, Jiří (1996) The Protection of Cultural Property in the Event of Armed Conflict, Aldershot, p. 50; O'Keefe, Roger (1999) The Meaning of "Cultural Property" under the 1954 Hague Convention, 46 Netherlands International Law Review, p. 26 (28 ff.).

33 See O'Keefe, Roger (2006) The Protection of Cultural Property in Armed Conflict, Cambridge: Cambridge University Press, p. 210.

34 Committee for the Protection of Cultural Property in the Event of Armed Conflict, see Art. 24 ff. Second Protocol of 1999.

35 Art. 11 Second Protocol of 1999.

36 Art. 12 Second Protocol of 1999.

37 Art. 13 and 14 Second Protocol of 1999. For further explanations see Mainetti, Vittorio (2004) De nouvelles perspectives pour la protection des biens culturels en cas de conflit armé. Revue Internationale de la Croix Rouge, Vol. 86, No. 854, p. 337 (353 ff.)

38 For further details see Odendahl, Kerstin (2007) Zur Kennzeichnung von Kulturgut unter verstärktem Schutz nach dem Zweiten Protokoll (1999) zum Haager Abkommen von 1954, KGS-Forum 11/2007, pp. 58 ff.

39 Art. 18 Hague Convention of 1954; Art. 3 para. 1 Second Protocol of 1999.

40 Art. 19 Hague Convention of 1954; Art. 3 para. 1, 22 para. 1 Second Protocol of 1999.

41 Art. 5, 18 para. 2 Hague Convention of 1954; Art. 9 Second Protocol of 1999.

42 Art. 28 Hague Convention of 1954; Art. 15 ff. Second Protocol of 1999.

3.2. The two Geneva Additional Protocols of 1977

The two Geneva Additional Protocols of 1977, which entered into force on 7 December 1978, supplement the obligations laid down in the Hague system. Their content is by far not as detailed; but due to their almost worldwide applicability they guarantee that the basic rules on the protection of cultural property have a universal scope.

The Protocols refer to international (Protocol I) and to non-international (Protocol II) armed conflicts. Both treaties contain a more or less identical provision. Art. 53 of the Geneva Additional Protocol I reads as follows:

"Art 53. Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (b) to use such objects in support of the military effort;
- (c) to make such objects the object of reprisals."

Art. 16 of the Geneva Additional Protocol II has got almost the same wording. There are only two passages missing: the words "of other relevant international instruments" and the last prohibition, i.e. not to make such objects the object of reprisals. The reason is simple. Both missing passages are applicable in case of an armed conflict of an international character, while Protocol II refers to non-international conflicts only.

The obligations laid down in the two Geneva Additional Protocols correspond widely to the "respect" to be granted to cultural property under "general" protection as provided for in the Hague system. Both aim at protecting cultural property of

national cultural value.⁴³ And both the Hague system and the Geneva Additional Protocol I apply to times of occupation of a foreign territory as well.⁴⁴ But whereas the Hague Convention of 1954 solely protects cultural property of "great" national importance⁴⁵ the two Geneva Additional Protocols of 1977 do not contain such a restriction. Therefore, the group of cultural property protected by the Geneva system is larger.

4. Protection of cultural heritage in times of peace

The protection of cultural heritage in times of peace differs considerably from the protection in times of armed conflict. On the one hand, the obligations of States are less developed; the liberty of the sovereign State concerning the preservation of its own cultural heritage still remains the basic legal principle. On the other hand, protection is granted both to tangible and to intangible heritage. They are protected by two global conventions each: Tangible cultural heritage falls under the scope of the World Heritage Convention of 1972 and of the Underwater Heritage Convention of 2001. Intangible cultural heritage is protected by the Intangible Heritage Convention of 2003 and the Convention on Cultural Diversity of 2005.

4.1. The World Heritage Convention of 1972

The World Heritage Convention of 1972, which entered into force on 17 December 1975, protects cultural and natural heritage. Only the first one is of interest for this paper. According to the convention, cultural heritage consists of three groups of objects:

43 Wenger, Claude F. (1986) Article 53, para. 2063 ff. in Sandoz, Yves, Swinarski, Christophe and Zimmermann, Bruno (eds.) *Commentaire des Protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949, Protocole I*, Geneva; Toman, Jiří (1989) *La protection des biens culturels en cas de conflit armé non international*, p. 311 (333 f.) in Haller, Walter, Kölz, Alfred, Müller, Georg and Thürer, Daniel (eds.), *Festschrift für Dietrich Schindler zum 65. Geburtstag*, Basel, Frankfurt a.M.

44 Art. 1 para. 3 Geneva Additional Protocol I together with the common Art. 2 para. 1 and 2 of the four Geneva Conventions of 1949.

45 Art. 1 (a) Hague Convention of 1954.

monuments,⁴⁶ groups of buildings⁴⁷ and sites.⁴⁸ Therefore, even though it is not explicitly mentioned, the convention only protects *immovable* cultural property.⁴⁹ Movable objects, like paintings or works of art, do not fall under its scope. Immovable cultural property must be of “*outstanding universal value*” in order to be protected.⁵⁰ Objects of national or regional cultural value thus remain under the sole jurisdiction of the State on whose territory they are located. The international community does not interfere in the way States preserve such cultural property.

An immovable object becomes a “World Cultural Heritage” at the moment it is inscribed in the *World Heritage List* by the World Heritage Committee. The procedure⁵¹ is largely influenced by the States Parties. It is them who start the process by submitting inventories of cultural property situated in their territory which according to their opinion meets the criteria of being of outstanding universal value. The World Heritage Committee, an intergovernmental body meeting once a year, decides whether the requirements are fulfilled and the property is to be included on the World Heritage List. The conditions to be

46 They are further described as “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”, see Art. 1 para. 2 World Heritage Convention of 1972.

47 They are further described as “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”, see Art. 1 para. 3 World Heritage Convention of 1972.

48 They are further described as “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”, see Art. 1 para. 4 World Heritage Convention of 1972.

49 See, *inter alia*, Kahn, Philippe (1996) *Protection du patrimoine artistique immobilier: La liste du patrimoine mondial de l’UNESCO* in Briat, Martine and Freedberg, Judith A. (eds.) *Legal Aspects of International Trade in Art Law*, Volume V in the series: *International Sales of Works of Art*, The Hague, Boston, London, pp. 231 – 239.

50 See Art. 1 para. 2 – 4 World Heritage Convention of 1972.

51 The procedure is laid down in Art. 11 World Heritage Convention of 1972 and in para. 120 ff. of the Operational Guidelines of 2008 that have been adopted by the World Heritage Committee according to Art. 10 para. 1 World Heritage Convention of 1972. The Operational Guidelines may be downloaded at <http://whc.unesco.org/en/guidelines>.

met by an immovable object in order to be qualified as being of outstanding universal value are not circumscribed in the World Heritage Convention of 1972. Instead, it is the World Heritage Committee which defines the criteria.⁵² They have been developed by the Committee over time and are now to be found, in a very detailed manner, in the Operational Guidelines.⁵³ In 2009, there were 890 properties inscribed in the World Heritage List. 689 form part of the World Cultural Heritage, 176 constitute World Natural Heritage, and 25 were classified as mixed properties. They are situated in the territories of 148 out of 186 States Parties.⁵⁴

The inscription of an immovable object in the World Heritage List leads to the establishment of certain rights and obligations of the States Parties. Most of them concern the *State on whose territory the property is situated*. The duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the World Cultural Heritage belongs primarily to that State.⁵⁵ Measures recommended to this end by the convention are, for example, the integration of the protection of the World Cultural Heritage into comprehensive planning programmes, the establishment of special services for its protection, conservation and presentation, the development of scientific and technical studies and research to make the State capable of counteracting the dangers that threaten the property, or the development of centres for training in the protection, conservation and presentation of cultural heritage.⁵⁶ But the State in question is given some rights as well. The most important one is the right to ask for international assistance in case that the State should not be able to guarantee the preservation of the property of its own resources.⁵⁷ The international assistance may be either financial, artistic, scientific or technical. It is provided by the World Heritage Fund⁵⁸ or by the World

52 Art. 11 para. 5 World Heritage Convention of 1972.

53 See para. 49 – 53 and 79 – 119 of the Operational Guidelines of 2008.

54 The World Heritage List is to be found at <http://whc.unesco.org/en/list>.

55 Art. 4 World Heritage Convention of 1972.

56 Art. 5 World Heritage Convention of 1972.

57 Art. 4 (last sentence) World Heritage Convention of 1972.

58 Art. 15 ff. World Heritage Convention of 1972.

Heritage Committee on the basis of a request by the State.⁵⁹ Furthermore, the State may use the World Heritage Emblem in order to identify the properties that are inscribed in the World Heritage List.⁶⁰ The emblem looks as follows:

The *other States Parties* recognize that the international community as a whole has to co-operate to protect properties inscribed in the list. Therefore, they have the obligation to give



Fig. 5: Emblem of the World Heritage.

their help in the identification, protection, conservation and presentation of the World Cultural Heritage if the States on whose territory it is situated so request. Furthermore, they have to refrain from any deliberate measures which might damage directly or indirectly cultural property of outstanding universal value situated on foreign territories.⁶¹

If a State requests assistance for the preservation of a World Heritage, or if major operations are necessary to conserve the property, the World Heritage Committee inscribes the object into the *List of World Heritage in Danger*. The list is meant to include only property that is threatened by serious and specific dangers. The convention mentions, for example, the threat of disappearance caused by large-scale public or private projects or rapid urban or tourist development projects, the outbreak or the threat of an armed conflict, or any kind of natural disasters.⁶² The criteria and the procedure for inscribing properties on the

list are laid down in the Operational Guidelines.⁶³ In 2009, 31 properties were inscribed in the List of World Heritage in Danger, 16 of which formed part of the World Cultural Heritage.⁶⁴

4.2. The Underwater Heritage Convention of 2001

In 2001, a new UNESCO convention aiming at ensuring the protection of underwater cultural heritage was signed.⁶⁵ It entered into force on 2 January 2009. The term “underwater cultural heritage” is defined⁶⁶ as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years”. Examples mentioned are “sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and objects of prehistoric character.” The convention thus refers to both movable and immovable tangible heritage. Even though its name seems to indicate that it applies to all cultural property laying under any kind of water, its provisions only refer to cultural property *underneath the Sea*.

The convention itself is rather short and sets out only basic principles. The detailed practical rules for the treatment and protection of underwater cultural heritage are to be found in an annex named “Rules concerning activities directed at underwater cultural heritage”. When the different articles of the convention refer to the “Rules” to be applied, they mean the annex. The obligations of the States Parties vary according to the different *maritime zones*. The (Fig. 6) picture⁶⁷ shows the maritime zones

59 Para. 177 – 198 of the Operational Guidelines of 2008.

64 The List of the World Heritage List in Danger may be downloaded at <http://whc.unesco.org/en/danger>.

65 For further information about the convention see Carducci, Guido (2002) *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, *American Journal of International Law* Vol. 96, No. 2, pp. 419 – 434. For the legal situation before the entering into force of the convention see Blake, Janet (1996) *The Protection of the Underwater Cultural Heritage*, 45 *The International and Comparative Law Quarterly*, pp. 819 – 843.

66 Art. 1 para. 1 Underwater Heritage Convention of 2001.

67 Source: <http://www.dfo-mpo.gc.ca/oceans/canadasoceans-oceans-duncanada/images/maritime-eng.jpg>.

59 Art. 19 ff. World Heritage Convention of 1972.

60 Para. 258 ff. of the Operational Guidelines of 2008.

61 Art. 6 World Heritage Convention of 1972.

62 Art. 11 para. 4 World Heritage Convention of 1972.

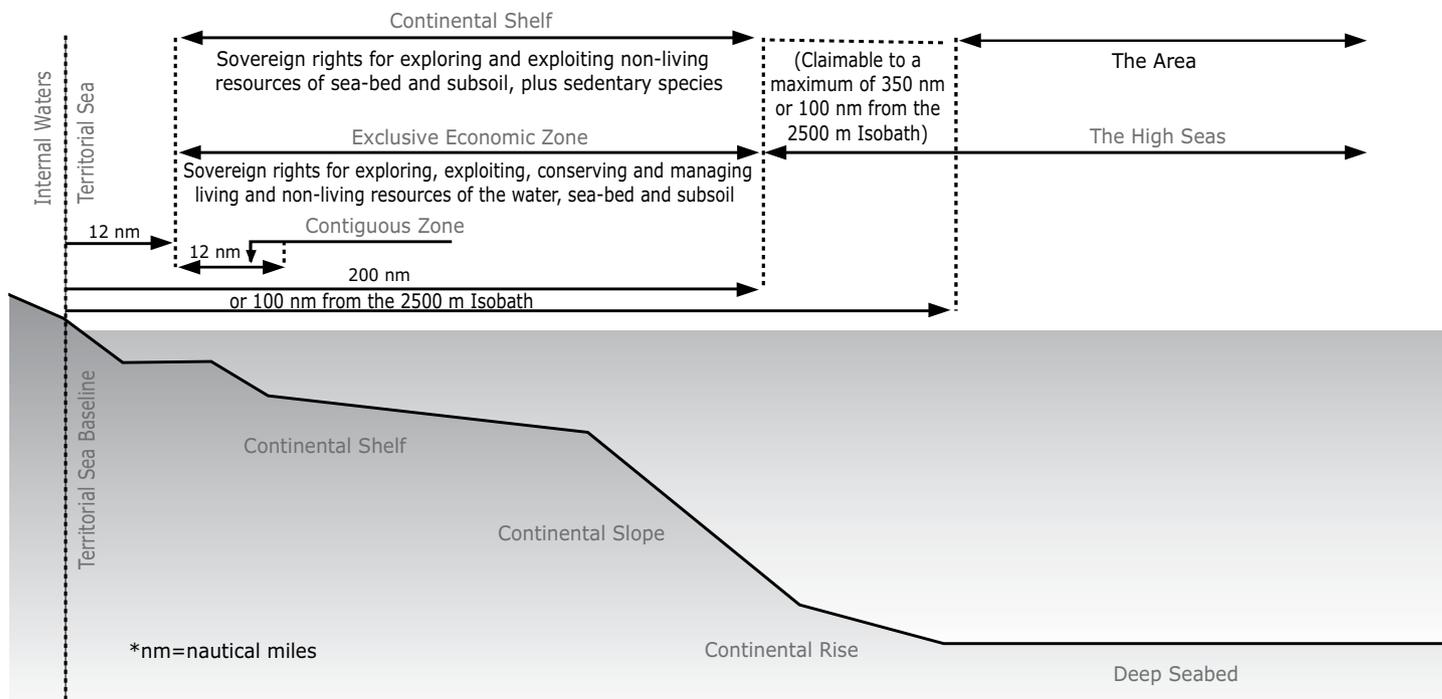


Fig. 6: Scheme of the jurisdiction zones in the sea.

and their respective length:

In their *internal waters* and in their *territorial sea*⁶⁸ States Parties have, in exercise of their sovereignty, the exclusive right to regulate and authorize activities directed at underwater cultural heritage. But they shall require that the Rules be applied to the underwater activities in these maritime zones. The same jurisdiction to prescribe is given to the States Parties within their *contiguous zone*.⁶⁹ Furthermore, in case that States discover vessels and aircraft within their internal waters and their territorial sea they should inform the flag State and, if applicable, other States with a verifiable link to the vessels or the aircraft, in order to cooperate with them on the best methods of protection.

68 Art. 7 Underwater Heritage Convention of 2001.

69 Art. 8 Underwater Heritage Convention of 2001.

In the *exclusive economic zone* and on the *continental shelf*⁷⁰ all States Parties have a responsibility to protect underwater cultural heritage. Accordingly, all activities directed at underwater cultural heritage located in these zones have to be reported to the coastal State which then notifies the UNESCO Director-General of such discoveries or activities. The Director-General informs all States Parties in order to allow them to declare their interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration may only be made by States which have a verifiable link, especially a cultural, historical or archaeological link, to the objects concerned. The coastal State, generally acting as the "Coordinating State", has the right to prohibit or authorize any activity directed at underwater cultural heritage. It may take all practicable measures, and/or issue any necessary authorizations

70 Art. 9 and 10 Underwater Heritage Convention of 2001.

to prevent any immediate danger to the objects in question. It shall implement measures of protection which have been agreed by the consulting States and issue all necessary authorizations for such agreed measures in conformity with the Rules. In all his activities the Coordinating State shall act on behalf of the States Parties as a whole and not in its own interest.

In the *Area*,⁷¹ i.e. in the deep sea bed not falling under the sovereignty of any State, the obligations of the States Parties are almost identical. The main difference is that there is no coastal State which plays a predominant role. Therefore, all reports about activities directed at underwater cultural heritage have to be made to the UNESCO Director-General who will appoint one of the States having declared an interest on the protection of the objects to act as the Coordinating State.

Important to mention is the possibility of the States Parties to enlarge or to reduce the *territorial scope of application* of the convention. On the one hand, they may declare that the Rules shall apply their inland waters not of a maritime character, i.e. to lakes and rivers for example, as well.⁷² On the other hand, they may declare that the convention shall not be applicable to specific parts of their territory, internal waters or territorial sea.⁷³

4.3. The Intangible Heritage Convention of 2003

For many years, the international community focused on the protection of tangible cultural heritage only. It was not until the 1990's that the increasing awareness about the consequences of globalization lead to a new approach. The fear about the development of a *global mass culture* based on the American and/or Western style of living raised the question whether the preservation of regional and local traditions, values, knowledge, folklore and all other forms of living practices and cultural expressions was not at least as important as the protection of buildings, sites and works of art. Many UNESCO recommendations were adopted and a series of expert meetings

held which finally lead to the adoption of the UNESCO Intangible Heritage Convention in 2003.⁷⁴ It entered into force on 20 April 2006.

The purposes of the convention are to safeguard the intangible cultural heritage, to ensure its respect, to raise awareness at the local, national and international levels of its importance, and to provide for international cooperation and assistance.⁷⁵ The definition of the term *intangible cultural heritage*⁷⁶ comprises "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." Examples mentioned in the convention are oral traditions and expressions, performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe, as well as traditional craftsmanship.⁷⁷ The convention, however, does not protect all forms of intangible heritage. It solely protects intangible cultural heritage which is compatible with human rights, as well as with the requirements of mutual respect and sustainable development.⁷⁸

The convention employs the word "*safeguarding*" instead of using the word "protection". Safeguarding is defined as "measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage." Therefore, the purpose of the treaty is not

71 Art. 11 and 12 Underwater Heritage Convention of 2001.

72 Art. 28 Underwater Heritage Convention of 2001.

73 Art. 29 Underwater Heritage Convention of 2001.

74 For the historical background see Kurin, Richard (2004) Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: a critical appraisal, museum, vol. 56, no. 1 – 2, pp. 66 (76 ff.).

75 Art. 1 Intangible Heritage Convention of 2003.

76 Art. 2 para. 1 Intangible Heritage Convention of 2003.

77 Art. 2 para. 2 Intangible Heritage Convention of 2003.

78 Art. 2 para. 1 Intangible Heritage Convention of 2003.

to freeze the intangible heritage or to keep it as a museum object, but to preserve it and, at the same time, to allow for its development.

Two types of obligations are established.⁷⁹ The first one refers to the safeguarding at the *national level*.⁸⁰ Each State Party shall identify and define the various elements of the intangible cultural heritage present in its territory, and draw up inventories to this end. The intangible cultural heritage thus identified has to be safeguarded by, inter alia, integrating it into planning programmes, establishing special institutions, fostering scientific, technical and artistic studies, as well as research methodologies, and adopting appropriate legal, technical, administrative and financial measures to ensure the accessibility, the documentation and the transmission of the intangible cultural heritage to future generations. Education, awareness-raising and capacity-building are other measures to be adopted. Communities, groups and individuals that create, maintain and transmit the heritage have to be integrated in all activities to the widest possible extent.

The obligations of safeguarding at the *international level*⁸¹ resemble those of the World Heritage Convention of 1972. An Intergovernmental Committee establishes, keeps up to date and publishes a "Representative List of the Intangible Cultural Heritage of Humanity" upon the proposal of States Parties. The first elements to be inscribed in the list in 2008 were the 90 elements proclaimed "Masterpieces of the Oral and Intangible Heritage of Humanity" by the respective UNESCO programme,⁸² which expired when the Intangible Heritage Convention entered into force.⁸³ In 2009, there were already 166 elements

included in the list. Furthermore, intangible cultural heritage in danger may be inscribed by the Committee in the "List of Intangible Cultural Heritage in Need of Urgent Safeguarding". It comprises 12 elements at the moment.⁸⁴ The States Parties undertake to cooperate at the bilateral, sub-regional, regional and international levels in order to safeguard intangible cultural heritage. The international assistance may consist of studies, the provision of experts and practitioners, the training of staff, the elaboration of standard-setting, the creation and operation of infrastructures, the supply of equipment and know-how, or other forms of financial and technical assistance, including the granting of loans and donations. Finally, an "Intangible Cultural Heritage Fund" is established which is used to support States Parties in their efforts of safeguarding.

4.4. The Convention on Cultural Diversity of 2005

The latest UNESCO convention dealing with the protection of cultural heritage – at least in an indirect way – is the Convention on Cultural Diversity of 2005⁸⁵ which entered into force on 18 March 2007. Its full name, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, already indicates that the treaty does not deal with cultural diversity as such but solely with the diversity of cultural expressions. The cultural expressions falling under its scope are essentially those resulting from cultural activities, goods and services. They have a hybrid character, since they are not only of cultural but also of commercial value. The convention is mainly a trade and not a cultural treaty. One of its key objectives is to "reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory".⁸⁶ The convention may thus be characterised as a treaty allowing the practice of "*cultural protectionism*" in

79 For more details on the content of the convention see Przyborowska-Klimczak, Anna (2005) The International Protection of the Intangible Cultural Heritage, 27 Polish Yearbook of International Law, pp. 59 - 71 and Odendahl, Kerstin (2005) Die Bewahrung des immateriellen Kulturerbes als neues Thema des Völkerrechts, in Schweizerische Zeitschrift für Internationales und Europäisches Recht, pp. 445 - 457.

80 Art. 11 ff. Intangible Heritage Convention of 2003.

81 Art. 16 ff. Intangible Heritage Convention of 2003.

82 Art. 31 para. 1 Intangible Heritage Convention of 2003. With the help of the programme UNESCO had set up a list of 90 Masterpieces of the Oral and Intangible Heritage of Humanity in 2001, 2003 and 2005.

83 Art. 31 para. 3 Intangible Heritage Convention of 2003.

84 Both lists are to be found in the internet, see <http://www.unesco.org/culture/ich/en/lists/>.

85 For further details see Brunner, Christopher M. (2006) Culture, Sovereignty, and Hollywood: UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the Future Trade in Cultural Products, electronic copy available at <http://ssrn.com/abstract=936734>.

86 Art. 1 letter (h) Convention on Cultural Diversity of 2005.

order to prevent the destruction of domestic cultural industries by strong foreign, especially western influences.

Consequently, the convention mainly establishes *rights*, and not obligations of States Parties. The general rule is that the States have a sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions within their respective territory.⁸⁷ The measures that may be adopted by the States Parties include⁸⁸ strengthening opportunities for domestic cultural activities, goods and services concerning their creation, production, dissemination, distribution and enjoyment, including provisions relating to the language; providing public financial assistance; establishing and supporting public institutions; or nurturing and supporting national artists. Furthermore, States Parties may declare that certain cultural expressions on their respective territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding so that further protective measures have to be taken.⁸⁹

Even though the Convention on Cultural Diversity of 2005 does not constitute a genuine cultural, but essentially a trade treaty, it nevertheless has an important impact on the protection of intangible cultural heritage. Diversity is one of the main features of culture, and the diversity of cultural expressions forms an essential part of a rich intangible cultural heritage. "Cultural protectionism" in trade matters may help to save many forms of cultural expressions from extinction or impair. Furthermore, the convention sets forth – for the first time in a legally binding document – that the "protection, promotion and maintenance of cultural diversity are an *essential requirement for sustainable development* for the benefit of present and future generations."⁹⁰ Sustainable development thus includes the protection of cultural diversity. This principle may develop into a key provision in the future.

5. Conclusion

Cultural heritage law has undergone an amazing development, especially in the last decade. The protection of cultural heritage is no longer regarded as an internal affair of a State falling under its sole sovereignty and responsibility. Rather, cultural heritage is meanwhile classified as "cultural heritage of all mankind",⁹¹ "heritage of all the nations of the world",⁹² "cultural heritage of humanity",⁹³ or "common heritage of humanity".⁹⁴ States have a responsibility towards humanity as a whole to protect cultural heritage located within their own territory. At the same time, the international community has the duty to assist the respective States in their efforts of preservation and promotion.

The legal system of protection, however, is not comprehensive yet. There are still some shortcomings. Only a few of them shall be mentioned: Movable objects (like the painting of Mona Lisa) cannot become a World Cultural Heritage; cultural diversity is only protected due to its commercial value but not as such; in times of armed conflict intangible cultural heritage is left without protection. While acknowledging and welcoming the progress that has been made, it is clear that lot of work still lays ahead.

87 Art. 5 para. 1 Convention on Cultural Diversity of 2005.

88 Art. 6 Convention on Cultural Diversity of 2005.

89 Art. 8 Convention on Cultural Diversity of 2005.

90 Art. 2 para. 6 Convention on Cultural Diversity of 2005.

91 Preamble of the Hague Convention of 1954.

92 Preamble of the World Heritage Convention of 1972.

93 Preamble of the Underwater Heritage Convention of 2001 and of the Intangible Heritage Convention of 2003.

94 Preamble of the Convention on Cultural Diversity of 2005.

Marc-André Renold, Marie Cornu

**New developments
in the restitution of cultural property:
Alternative means of dispute resolution**

2.5

Summary

Alternative methods of dispute resolution are an important resource in matters of cultural heritage in addressing the return, restitution¹ and repatriation of cultural property. The purpose of this article is to analyse the situations in which such methods might be preferred to the classical judicial means and to examine the problems that might arise.

The article is in two parts. The first part describes the actors as well as the current methods used for the restitution and return of cultural property. The second part explores the types of property that lend themselves to alternative dispute resolution techniques and lists the – often original – substantive solutions that have been used in practice.

Alternative methods of dispute resolution enable account to be taken of non-legal factors, which might be emotional considerations or a sense of “moral obligation”, and this can help the parties find a path to consensus.

The circumstances in which the issue of restitution of cultural property arises vary considerably. The various causes of dispossession may be trafficking (theft or unauthorized export), wartime plunder, or appropriation or trades between dealers in times of colonization or occupation. The handing back of property to the original possessor or owner is known variously as restitution, return or repatriation. Although there is not always a clear distinction in the texts² between these terminological variations, it is clear that the various forms of dispossession are treated differently in law, with some covered by private law instruments and others by public law.³

1 The present contribution was published in French (Clunet), No. 2/2009 (April-May-June 2009), pp 493-533 and in English in the International Journal of Cultural Property No. 1/2010, pages 1 to 31. The authors wish to thank UNESCO for its kind help for the translation in English and the International Journal of Cultural Property for its authorization to reproduce the English version.

2 For example, Council Directive 93/7/EEC of 15 March 1993 (Official Journal L 074 27.3.1993 p. 74) is called the European Directive on the return of cultural objects unlawfully removed from the territory of a Member State, but deals only with the return to the State of origin.

3 For a comparative study of the various forms of recourse, see the joint research study Cornu, *Protection de la propriété culturelle*. The study describes the systems of China, France, the United Kingdom and Switzerland.

The term *restitution* is currently mostly used for property pillaged in times of war or for stolen property. According to W. Kowalski, it always denotes an unlawful situation.⁴ The term *return* is preferred for property displaced for the benefit of the colonial power and restored to its country of origin, and also for cases of unlawful export. In the context of colonization, the issue of unlawfulness does not arise if the dispossession was in compliance with the national and international laws in force at the time. In such cases, the handing back of property tends to be based on the need to return irreplaceable cultural heritage to those who created it.⁵ With unlawful exports, the property is returned to the State of origin without the question of ownership arising.⁶ In both these situations, return depends more on the notion of territory, while restitution in the technical sense presupposes that there is an identified recipient. As far as *repatriation* is concerned, this refers to a specific form of restitution whose destination can vary: either to the country where the cultural property belongs or to the ethnic group that owns it. The term is most often used in the context of claims by indigenous peoples.

Subject to that, points of convergence can be seen where there are no legal means of claiming restitution, either because of the passage of time or because there has been no unlawful act. It can also happen that, once outside a State's territory, there may be limits to the protection afforded to a disputed item of property under public law, even where international conventions apply, as these are sometimes unenforceable. Nigeria's claim to the Nok statuettes based on the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, signed in Paris in 1970⁷ was rejected by the French courts simply because that Convention,

4 On terminological issues, see the following two works by Kowalski, “Types of Claims”, No. 228; also Kowalski, “Restitution of Works of Art”, p.17.

5 According to the Director-General of UNESCO, in a plea made in 1978 for Member States of the Organization to conclude agreements to return such property.

6 The Directive on the return of cultural objects, cited above, thus provides for their return, leaving the question of ownership to be settled by the legislation of the State of origin.

7 UNESCO Convention of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

ratified by France in 1997, was not directly applicable and no implementing legislation had been enacted.⁸

Besides the differences observed in the way the law treats restitution, the search for alternative forms of resolution of the various types of dispossession reveals some common features. The aim of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Unlawful Appropriation, established by UNESCO in 1978, is to seek “ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin”.⁹ Its scope is therefore extremely wide, covering thefts as well as removals during colonization.¹⁰

More often than not, “voluntary” restitution occurs in situations where there do not appear to be any available legal means of convincing or compelling a party to make restitution. Thus, when France agreed to enter into negotiations with Nigeria on the subject of the Sokoto and Nok statuettes unlawfully exported from Nigeria and acquired by the French State in 1999, it did so as a gesture of goodwill,¹¹ and the agreement that was reached acknowledges Nigeria’s ownership of the objects, which remain on deposit with the Quai Branly Museum for 25 years, renewable by joint agreement.¹² The lack of legal recourse is one of the working hypotheses here, but not the only one: this paper will also address techniques for avoiding formal legal proceedings. Alternative means of settling conflicts of interest in the ownership

8 The Federal Republic of Nigeria v. Alain de Montbrison, Paris Court of Appeal, judgment of 5 April 2004, upheld by the Court of Cassation, judgment of 20 September 2006, J.-M. Schmitt, *Journal des Arts*, No. 256, 30 March-12 April 2007, p. 27.

9 Article 4, paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Unlawful Appropriation of 28 November 1978.

10 For a recent overview of thinking on restitution, Prott, *Witnesses to History*.

11 This refers to the expression “à bien plaire”, used in Switzerland to describe fulfilment of a natural obligation.

12 See the press release issued by the French Ministry of Culture on 13 February 2002. From this point of view, the term “restitution” should be used somewhat reservedly, as it merely changes the legal characterization of the situation, not the facts themselves. The objects remain in France, but are now there simply on loan.

of cultural property, which coexist with the traditional tools (such as bilateral or multilateral treaties), take many forms: unilateral decisions, or agreements that may involve various forms of intermediary (namely mediation, conciliation or arbitration). In the last few decades, these consensual arrangements have become increasingly popular, both in terms of form and substance, in line with changing sensitivities regarding the restitution of cultural property. The idea that there is a moral duty to make restitution of, or pay compensation for, highly valuable or significant cultural heritage items is strongly gaining ground, especially when the dispossession dates back to a period of colonial domination. Furthermore, demands of communities are increasing, and the collective rights of indigenous peoples are more and more being recognized. As rightly stated by Krzysztof Pomian, “what lies behind the renewed interest in cultural property restitution over the past decades is merely an attempt to compensate for the past, which touches on outstanding historical issues, such as European colonization, the Second World War, and discrimination against indigenous peoples”.¹³ Indigenous heritage claims and the resurgence of the issue of looting have somewhat revived the process of restitution,¹⁴ resulting in the appearance of complex arrangements. It may prove useful to explore the various remedies both as to the practices and methods they use (I) and the substantive solutions they offer (II).

13 Pomian, *Memory and Universality*.

14 The issue of looting has grown in importance in the last decade following the adoption of principles at the Washington Conference on 3 December 1998 (see www.lootedartcommission.com/Washington-principles). The text is reproduced in numerous commentaries. See, e.g. Palmer, *Museums*, especially p 278. Many other declarations, resolutions and other texts have subsequently been adopted by international organizations, be they institutions such as UNESCO or the Council of Europe, professional bodies such as the International Council of Museums (ICOM) and the American Association of Museums (AAM), or States adopting legislation on the matter.

I. New developments in practices and methods

Following the UNESCO General Conference held in Paris in 1978,¹⁵ the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Unlawful Appropriation was established¹⁶ and immediately began work on seeking inter-State solutions in specific cases of restitution or return.¹⁷ More recently, it was suggested that the Committee's terms of reference be extended to offer mediation and conciliation to the Member States.¹⁸

Other organizations, such as ICOM,¹⁹ the ILA²⁰ and the Institut de Droit International have become involved in issues of return or restitution by formulating recommendations or resolutions. Mention should also be made of the work done under the auspices of the United Nations, particularly the Declaration on the Rights of Indigenous Peoples²¹. The proliferation of forums in which issues of restitution are discussed has undoubtedly encouraged the development of practices and methods in this field. Changes in the institutional context affect not only the dynamics of claims and the capacity of the claimants, but also the terms on which returns or restitution can be arranged.

A. The protagonists

The restitution of cultural property has always been primarily an affair of State, and of disputes between States,²² with

¹⁵ Set up by 20 C4/Resolution 7.6/5, Records of the General Conference, 20th session, Paris, 24 October – 28 November 1978, p. 97.

¹⁶ See footnote 9 above for Statute.

¹⁷ The Committee's work is covered in detail in its information kit "Promote the return or the restitution of cultural property: Committee – Fund – UNESCO Conventions", which can be found on the UNESCO website: <http://unesdoc.unesco.org/images/0013/001394/139407eb.pdf>.

¹⁸ Working document for discussion on a strategy to facilitate the restitution of stolen or unlawfully exported cultural property, Thirteenth Session, UNESCO, Paris, 7-10 February 2005, CLT-2005/CONF.202/4.

¹⁹ The International Council of Museums is an international non-governmental organization of museums and museum professionals for the protection of heritage and collections.

²⁰ The International Law Association has a committee on matters relating to the protection of cultural heritage.

²¹ As to this, see below.

²² See, as to this, Perrot, *De la restitution*.

each protagonist claiming sovereignty or ownership over cultural property of major significance. It is essentially from this angle that the issue is addressed in the 1970 UNESCO Convention²³, as in the European Directive on the restitution of cultural property adopted in 1993 to provide a framework for the return of unlawfully exported national treasures.²⁴ A new development has been the emergence of other actors entitled to claim ownership of certain assets: States are not always the only parties. The question now is whether the new actors have standing to make claims based on their own heritage interests.

1. The actors are many and varied

Two features may be distinguished in the involvement of new actors in restitution claims. First, in addition to States, there are now other public and private law entities, regional or territorial government authorities and even museums. Second and more specifically, many claims are now being made by indigenous communities demanding the return of their heritage in the collective interest.

a. Multiple holders and claimants

Many cases of restitution of cultural property involve entities other than States. Museums, for instance, are behind many restitutions, as borne out by numerous examples given in the journal *Museum* and the active role played by the International Council of Museums (ICOM). Indeed, the ICOM Code of Ethics contains a number of recommendations that encourage the return of such property.²⁵ Some national professional organizations have also adopted ethical rules on the subject.²⁶ Recent examples of restitution of cultural property by museums include the restitution agreements concluded between several

²³ UNESCO Convention on the Means of Prohibiting and Preventing the Unlawful Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970.

²⁴ Council Directive 93/7/EEC of 15 March 1993, cited above.

²⁵ The ICOM Code of Ethics for Museums can be found on the organization's website: www.icom.org.

²⁶ In particular the American Association of Museums (AAM).

museums in the United States of America and the Italian State in 2006 and 2007.²⁷

The consolidation of the cultural competences of actors other than nation-States have further widened the circle of holders or claimants in a position to lay claim to heritage on which their identity rests. This is demonstrated by the example of the final settlement of a dispute between the two Swiss Cantons of Saint-Gall and Zurich, over items of public cultural property that had been in Zurich's possession since 1712. One of the points in the 2006 mediation agreement was recognition of the importance of the manuscripts to the canton's identity.²⁸ Another case involves two French local districts (communes) both claiming paintings depicting Saint Guilhaume that had been dispersed during the Revolution and later recovered and redistributed, in disregard of the original possessor. One Commune thus finds itself in possession of a painting that not only used to hang in the monastery of Gellone in the neighbouring town of Saint-Guilhem-le-Désert but also depicts the main episodes in the life of its founding father. Here too, the link between heritage claims and identity-based attachment is evident.²⁹ The town of Saint-Guilhem-le-Désert has been attempting to recover the paintings since the mid-19th century, arguing that its ownership is well known. Its claims have been repeatedly reactivated, so far unsuccessfully.

Finally, voluntary restitution may also be made by private individuals, art dealers and collectors in possession of important cultural property stolen from public collections. The altarpiece of Vêtheuil, an item of religious heritage stolen from a church, was later given back to France by the holder, a professional antique dealer. He had originally put the object up for sale but, with strong encouragement from his profession, eventually decided simply to make restitution.³⁰ In the other case, a bronze Roman hand

held by a collector in Basel was spontaneously handed back to the Turkish authorities.³¹ In both cases, the emblematic nature of the objects and the fact that they formed part of the national heritage may have influenced the decision. With the Turkish hand, another factor may have played a part. Switzerland and Turkey are negotiating an agreement on the import and return of cultural property as part of measures to combat trafficking, which might encourage such initiatives where no binding obligation exists. However, this does not always happen.³²

b. Indigenous peoples: new subjects of collective rights

The rights of indigenous peoples, long ignored by international law, were enshrined for the first time in the Indigenous and Tribal Populations Convention (ILO Convention No. 107 of 1957),³³ which was amended in 1989 and renamed the Indigenous and Tribal Peoples Convention (No. 169).³⁴ Both Conventions focus on non-discrimination and the self-determination of territorial rights.³⁵ Concern about culture, which was not mentioned in the first version of the Convention, is expressed in the 1989 text, although it is approached from a particular perspective.³⁶ In a section entitled "Land", governments undertake to "respect the special importance for the cultures and spiritual values" of this bond with the land.³⁷

for €170,000. See *Le Monde*, 11/12 November 2007.

31 The object was included in the Interpol database of stolen works of art. See the press release of the Swiss Federal Office of Culture, dated 9 October 2007: <http://www.news.admin.ch/message/index.html?lang=fr&msgid=15062>.

32 For example, Mr Silvio Berlusconi holds a 17th-century clock, stolen from the Château de Bouges in France, which belongs to the French National Historical Monuments and Sites Commission, a unique object he refuses to hand back, claiming good faith. See N. Herzberg, "Au musée des oeuvres volées", *Le Monde*, 2 August 2008.

33 Indigenous and Tribal Populations Convention (No. 107), entered into force on 2 June 1959.

34 Indigenous and Tribal Peoples Convention (No. 169), entered into force on 5 September 1991.

35 On the recognition of indigenous peoples as subjects of international law and the emergence of a law distinct from minorities law, see Rouland, *Le droit des minorités*; p.348 and p.391.

36 References to the notion of cultural rights became common as from the 1980s (see N. Rouland, *Le droit de minorités*, p. 461).

37 The 1957 Convention refers only to the legitimacy of the communities' individual or collective ownership rights over these lands and the possible limits thereto.

27 See, for example, the agreement between the Metropolitan Museum of Art of New York and Italy, dated 21 February 2006, annexed hereto.

28 Agreement dated 27 April 2006 between the Canton of Saint-Gall and the Canton of Zurich, with the Swiss Confederation as mediator. For the content of this agreement, see below in chapter "Negotiated processes", p.126..

29 On this case, see the following two articles by Jérôme Carrière in the newspaper *Le midi libre*, "L'église de Vendémian veut garder ses tableaux" (29 July 2005, p.6) and "Le tableau restauré revient à l'abbaye de Gellone" (24 July 2005).

30 The dealer had purchased the piece for €33,000 and intended to sell it

These rights now more generally include cultural and intellectual property rights, as clearly stated in the resolution adopted by the United Nations General Assembly on 13 September 2007.³⁸ The initial premise is to be found in the 1993 Mataatua Declaration adopted at the International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples³⁹ and the 1994 Draft Declaration on the Rights of Indigenous Peoples.⁴⁰ These concerns, initially enshrined in texts on the protection of basic rights, then took on a life of their own to inform cultural property law. They appear in the texts and other documents produced by UNESCO, UNIDROIT and the Council of Europe.

The 1970 Convention thus provides, still in fairly vague terms, that a State's cultural heritage includes "cultural property created by the individual or collective genius of nationals of the State concerned".⁴¹ References to the rights of communities are spelt out more clearly in the new generation of cultural conventions such as the Convention for the Safeguarding of the Intangible Cultural Heritage⁴² and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.⁴³ These two instruments are nonetheless silent on the restitution of tangible heritage, unlike the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which specifically refers to "a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use"⁴⁴ and also to their return if the export "significantly impairs" its interest.⁴⁵

38 United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, Resolution A/RES/61/295.

39 First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, Whakatana, 12 to 18 June 1993, Aotearoa, New Zealand.

40 Draft Declaration on the Rights of Indigenous Peoples of 1994, E/CN.4/SUB.2/1994/2/Add.1(1994).

41 Article 4(a) of the 1970 UNESCO Convention, cited above.

42 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003.

43 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005.

44 Article 3, paragraph 8, of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995.

45 *Ibid.*, Article 5, paragraph 3(d).

The indigenous people-heritage nexus, a notion in which various sources intersect,⁴⁶ has given rise to a new concept as found in the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, namely the heritage community, which denotes the multiple nature of ownership of cultural heritage. The community consists of "people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations".⁴⁷

Indigenous peoples are the new subjects of rights and of some domestic laws. Several States have adopted texts that recognize the rights of their indigenous communities; the United States of America, especially, has passed a famous Act establishing the right of Native Americans to repatriate a number of cultural objects and, in particular, the right to recover sacred objects and human remains, and requiring museums to make an inventory of them (NAGPRA).⁴⁸ Although the title of the Act refers to graves and their contents, the scope of application of the instrument seems to cover sacred objects in general.⁴⁹

On the basis of these texts, indigenous peoples may autonomously exercise rights over their heritage. This raises the question of the nature and intensity of those rights, which vary from one instrument to another, and the determination of what cultural property is covered. There are two distinct sets of prerogatives, both linked to the recognition of a form of moral right.⁵⁰ Under the United Nations resolution, indigenous

46 Human rights and cultural heritage law.

47 Article 2 (b) of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society of 27 October 2005. Although indigenous communities are not explicitly mentioned, they are clearly included in the definition. Failure to mention indigenous peoples specifically and the emphasis laid on the heritage issue may have been intended to reassure States that were less open-minded about community demands.

48 Native American Graves Protection and Repatriation Act, adopted in November 1990.

49 See, as to the system overall, Baptiste Cornillier, Master's degree dissertation on cultural heritage law, Faculté Jean Monnet, Sceaux, Université Paris XI, 2008; Stephen Kinzer, Homecoming for the totem poles, *The UNESCO Courier*, April 2001, http://www.unesco.org/courier/2001_04/uk/doss23.htm.

50 The "moral right to the recovery of vital tokens of cultural identity, removed in the context of colonialism" is mentioned in a UNESCO text as an argument for countries demanding restitution, UNESCO, Paris, 20

peoples are empowered to control the use of cultural property and to “manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies”, which implies access to the objects that support those practices.⁵¹ The text thus introduces an original mechanism in establishing a right of usage, but restitution is not obligatory in this case.⁵² This possibility is mentioned in Article 11, which requires States to grant “redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken”, irrespective of whether the dispossession was lawful or not.⁵³ Respect for these rights may logically be secured through exchanges and negotiation, as alternatives to restitution. The solution is more radical with regard to human remains, as the text imposes a right of repatriation, formulated in more rigorous terms.⁵⁴

Of course the binding force of this instrument and the extent of the State’s duty to return items are open to debate as it is merely a resolution. The attention given to this new generation of collective cultural rights nonetheless strengthens their legitimacy, even in legal systems under which rights may not form the basis of an action for restitution, and likewise encourages voluntary arrangements. It is as if a moral obligation of restitution was gradually being established.

There are several possible explanations for the recent developments in claims for restitution, and in the terms on which it is granted. Above all, new sovereignties are emerging and becoming established, in which heritage values are being constituted or reconstituted in a search for identity that then

triggers the process of restitution. This is the constitutive function of heritage, and it is here that new developments are occurring. However, possessors also sometimes wish to make restitution of property for ethical or political reasons. The case of the Maori head in the Museum of Rouen is particularly illustrative of the changing sensitivity in the way such issues are approached. The head, which had become part of the Museum’s collections during the trade boom of the late 19th century, had been donated by a collector. The City of Rouen, which owned the collections, has decided to return the head. It is interesting to read the record of the debate on the matter in the Municipal Council: “in making this restitution, the City of Rouen intends to perform an ethical act. This symbolic act is an expression of due respect for the beliefs of a people who refuse to allow their culture and identity to die. This head is moreover sacred in the eyes of Maori tribes and will therefore return to its land of origin for burial in accordance with ancestral rites.”⁵⁵ As explained below, this decision was then challenged successfully in the French courts by the French Ministry of Culture.⁵⁶

It could also be said that, in general and despite some resistance, heritage claims are obviously strengthened by the protection of basic rights,⁵⁷ as is clearly apparent from recent texts on cultural heritage that have initiated changes in the way it is protected. Until recently, these texts laid greater emphasis on the preservation of objects or places, but they now concentrate increasingly on the rights of people and communities in such matters.

September 1985, CLT-85/WS/41.

51 Article 1, paragraph 1, of the United Nations Declaration on the Rights of Indigenous Peoples (Resolution A/RES/61/295).

52 Contrary to the provisions of the 1994 Draft Declaration on the Rights of Indigenous Peoples, Article 12 of which concludes by referring to “the right to the restitution of cultural, intellectual, religious and spiritual property...”.

53 The text states that the property may have been taken “without their free, prior and informed consent or in violation of their laws, traditions and customs”.

54 Article 12, paragraph 1, in fine, of the United Nations Declaration on the Rights of Indigenous Peoples (Resolution A/RES/61/295).

55 Municipal Council, City of Rouen, session of 19 October 2007

56 See below in chapter “(a) Restitution”, p. 133..

57 The dispute over the return of human remains to an Aborigine community in Tasmania by the British Natural History Museum was apparently resolved only when the Aborigines invoked their human rights. The dispute had been ongoing for a very long period and was resolved in 2007 through mediation (see Julia May, British Museum Hands over Aboriginal Remains, *The Age*, 28 April 2007). See, on this case, **Prott**, *Witnesses to History*, p. 401.

2. The capacity of entities to initiate the process of restitution

The growing numbers of actors involved in these processes of return or restitution raises the question of the capacity to give back or receive. Who has the duty to make restitution and to whom can a displaced object be returned? There is no one single answer.

In terms of the possessors, the power to dispose of the property generally lies with the owner. The statutes of some museums grant them complete freedom to make restitution. Under the agreements concluded between the Italian Government and the Metropolitan Museum of Art in New York or the Museum of Fine Arts in Boston, these institutions have themselves contracted with the Italian State. Another case in point is the Australian Museum, whose statutes afford it considerable freedom to manage its collections, thereby enabling it to effect restitutions without being obliged to request authorization and to sign contracts with other museums directly without having to go through diplomatic channels.⁵⁸ As this facilitates the restitution process, it is tempting to regard it as a good solution. However, is it always good for curators to decide whether or not items should be returned?

When the objects in question are designated as belonging to the national heritage, there is more at stake than the power of an owner over an object, even a public owner. Collective heritage entails a different form of ownership that affects freedom to dispose freely of such property. Transfer of ownership may require official authorization, and is sometimes simply prohibited. The solution is derived from several sources: public property law or, in some cases, a special law of cultural property. Prohibition on disposal weighs as a major factor. The "prohibition on disposal" objection is often invoked in response to a claim for restitution⁵⁹, and its meaning can vary.

58 For an example of a restitution on the Museum's initiative, see Specht, "The Australian Museum", p. 30.

59 The rule of inalienability was advanced in the objection raised by the museum, with the support of the British Government, in response to a request from Zambia concerning the Broken Hill skull. See Mulongo, "Retour et restitution".

In the English system the rules on the inalienability of public property differ according to the property and the collections in question. Crown property may not be alienated, the system being similar to the concept of the public domain (*domanialité publique*) in French law. Outside this restricted circle, the rule of inalienability can also be derived from museum statutes. National museums are individually governed by laws that impose the principle of inalienability in respect of collections that they hold on behalf of the nation. "De-accessioning" is prohibited, save in exceptional cases. National museums may dispose of, donate or sell the objects in their collections if one of the following conditions is fulfilled: where they have a duplicate or the object is a document printed after 1850 of which the museum has a photocopy; the object has become inappropriate for the collection and may be sold without detriment to the interests of researchers or the public; or the object has become unfit due to deterioration, for instance.⁶⁰ The British Museum,⁶¹ the Tate Gallery⁶² and the National Gallery are all national museums.⁶³ The statutes of other museums may also impose the inalienability of collections but, unlike national museums, this is optional rather than obligatory.

Conversely, there is nothing to prevent museums (even national museums) from agreeing to a long-term loan. This solution was adopted in the case of the Benvenuto Missal (a 12th-century manuscript)⁶⁴ and has also been considered in relation to the Elgin Marbles. It would be for the Board of Trustees of the

60 On the inability to dispose of museum collections in the United Kingdom, see Vigneron, *Rapport national – Grande-Bretagne*, p. 281. The author states that these criteria are general and apply to all national museums. However, the provisions relating to each museum must be consulted in order to ascertain the exact extent of the directors' powers.

61 British Museum Act, 1963.

62 National Gallery and Tate Gallery Act, 1954 (repealed on 1 September 1992).

63 Ibid.

64 It was considered that this manuscript, looted during the Second World War and acquired by the British Library in good faith, should be given back to the Italian monastery of Benvenuto (decision of the Spoilation Advisory Panel in 2005). As restitution was not possible, it was handed over in the form of a long-term loan.

British Museum to make such a decision, without government interference.⁶⁵

In other cases, special laws may override the prohibition on disposal. Under Article 47 of the 2004 Human Tissue Act, nine national museums have been authorized to “transfer from their collection any human remains which they reasonably believe to be remains of a person who died less than one thousand years before the day on which this section comes into force if it appears to them to be appropriate to do so for any reason”, provided that the requesting party provides proof of a continuous link.⁶⁶

The inalienability of collections has been used as an argument in several cases in which French museums are or have been involved. These include human remains (Saartjie Baartman – the Hottentot Venus – and also a Maori head) and sovereign archives.⁶⁷ It was argued that the objects belonged to the public domain and were therefore inalienable. The argument can, however, be overridden, as in many systems. Inalienability of the public domain is not a constitutional principle. The inalienability rule has to do with the public utility of the item, a special determination usually the result of a court decision, and binding even on the Head of State, who may not dispose freely of such property as a gift to another State, for instance. It may, however, be challenged, if necessary, by a public authority. The scope of the public domain, an operational regime that protects the public interest,⁶⁸ is relative, especially when the inclusion of an object is unjustified, per se or in the light of other interests. The reversibility of the designated status of public property is a rule common to many States. This reasoning could have been used in the case of the Hottentot Venus. The object could have

been de-accessioned pursuant to an administrative decision. Owing to the strong feelings aroused by the restitution, a law was adopted that carried the weight of legal authority.⁶⁹ In some cases, however, prohibition on disposal is absolute. Items in French collections that may not be de-accessioned include objects donated or bequeathed – which reassures benefactors – and public property acquired by public bodies other than the State with State assistance in the form of public financial support.⁷⁰ Such irreversibility is open to serious question when the objects involved are part of another heritage. Nevertheless, it precludes any hope of restitution under the law as it stands.

Under Swiss law, property forming part of the government-owned heritage is not explicitly stated to be inalienable. However, it seems that the principle of inalienability could apply to cultural property belonging to the government-owned heritage and, more specifically, to cultural property listed in the Federal inventory of the Confederation (Article 3 of the Federal Act on the International Transfer of Cultural Property (LTBC of 20 June 2003)).⁷¹ As in the French system, government-owned heritage in Switzerland is based on the notion of classification. As a result, objects that are no longer classified as being of public use, or those of disputed importance (the criterion for inclusion in the Federal inventory) may be de-classified under the same procedure as is used for their classification.⁷²

As to the status of cultural property included in the cantonal inventories in accordance with Article 4 of the LTBC, the rules vary as Cantons may declare that certain objects are inalienable and their listing is infeasible. Systems other than those based on inalienability also exist, such as alienation subject to authorization (as in the Canton of Fribourg for protected movable property belonging to legal entities under public or canon law).⁷³

65 See Report on the activities (2002-2003) and the twelfth session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Unlawful Appropriation, UNESCO, 32 C/REP/15, 27 June 2003.

66 Vigneron, Rapport national – Grande-Bretagne, p. 282.

67 On the subject of Korean archives held by the Bibliothèque nationale de France (French National Library) since the late 19th century and the principle of inalienability, see D. Bétard, interview with Jacques Sallois, former director of the Museums of France, “Les collections ne sont pas une monnaie d’échange”, *Journal des Arts*, No. 269, 16-29 November 2007, p. 17.

68 Gaudemet, *Traité de droit administratif*, p.32.

69 On the issue of restitution techniques, see below.

70 Article L 451-7 of the French Heritage Code. This is precisely what prevented the restitution of the Maori head by the City of Rouen, which owned the collections as a “Musée de France”. The head had been donated to the museum at the end of the 19th century.

71 Gabus/ Renold, *Commentaire LTBC* ad art. 3 LTBC, N 7 ss.

72 Ibid. ad art. 3 N 14 ss.

73 Article 19 of the cantonal law of Fribourg of 7 November 1991 on the protection of cultural property.

Provision for free disposal by the owner does not always work to the advantage of the restitution process, as individual owners may oppose it, and the public authority or the State is powerless to force their hand. Some commentators foresee difficulties arising regarding the "ownership of objects, collections, or documents located in museums belonging to federal states or provinces having the final decision in the field of education and culture"⁷⁴ or when such property is held by foundations or private individuals. A State that wishes to return property will not always be able to overcome the owners' opposition. This may be the case, for instance, with property listed in the inventories of the Swiss Cantons, over which the Confederation has no right, or property listed in the inventories of the German Länder.⁷⁵

The parallel issue of capacity to receive property also arises. In responding to claims by indigenous peoples or other communities, can restitution be made directly to the claimants? A claim to ownership should not present problems when the holder of the right can be recognized as a natural or legal person in private or public law. A commune, region or museum is entitled to recover possession of an object once its ownership has been established. The issue is more complex when the claimant is a community. There is still no legal recognition of collective ownership. In practice, such claims and restitutions are usually made through the State.⁷⁶ The Hottentot Venus, ancestor of the Khoisan community, was returned to the State of South Africa after the South African Ambassador made an official request to

France on 26 October 2000.⁷⁷ The City of Rouen took steps to return the Maori head to the State of New Zealand.⁷⁸ Vaimaca Peru, a cacique from the Charruas ethnic group of Uruguay, could not be handed back because the Uruguayan Government did not make an official request to France.⁷⁹ By contrast, in 2006 Sweden returned a totem that had been displayed at the National Museum of Ethnography in Stockholm, the first object to be returned directly to a Canadian indigenous group.⁸⁰

B. The techniques used

The traditional tools of inter-State relations are still used for the restitution of cultural property. Historically, the end of armed conflicts has often heralded the restitution of cultural property as required by peace treaties.⁸¹ One example is the agreement concluded by the French Republic and the Federal Republic of Germany on the transfer of material, objects and documents to form a museum collection for the Allied Museum in Berlin.⁸² In more recent times, Italy and Libya agreed to the restitution by the former to the latter of many objects removed during the colonial period.⁸³ Other techniques are used alongside these older procedures, sometimes in novel ways. Restitution is either unilateral (based on laws or administrative rulings) or bilateral (negotiated with or without mediation or referred to arbitration).

74 Ganslmayr, "Return and restitution", p. 13.

75 See Ganslmayr, "Return and restitution", p. 13. The author adds that it is precisely in these cases that alternative solutions such as loans or exchanges can prove useful.

76 The issue arises in similar terms in litigation. In the Ortiz case (Attorney-General of New Zealand v. Ortiz and others, House of Lords, 1983, 2 ALL ER 93), the request was made by the State of New Zealand rather than the Maori tribe concerned to avoid difficulty in determining the ownership or interest of one or other community with regard to the item. As to this, and more generally on the issue of claims for restitution made by entities other than the State, see the commentary by Muir Watt, "La revendication internationale", p. 20. In that case the problem did not arise, but the author describes more delicate situations, such as when the cultural object itself has a certain personification in the country of origin and is presented as requesting its own restitution through a spokesperson.

77 See footnote 67 above.

78 See paragraph above in chapter "The capacity of entities", p. 122..
79 See written question No. 05640 from Mr Philippe Richert who, given the evident lack of scientific interest, asked why the museum was opposed to the restitution, Official Journal, Senate, 13 February 2003, p. 520 and reply from the Ministry of Youth, National Education and Research, Official Journal, Senate, 22 May 2003, p. 1695, stating that restitution was possible.

80 Restitution of the Hasila G'psgolox totem pole by Sweden to Canada (see below).

81 On the history of restitutions between States during the 19th and 20th centuries, see the above-cited works of Perrot, *De la restitution*.

82 Signed in Bonn on 5 July 1995, decree No. 95-989 of 28 August 1995, Official Journal no. 205, 3 Sept. 1995, p. 13083.

83 The December 2000 agreements are analysed in the procedure relating to the restitution of the Venus of Cyrene to Libya by the Italian authorities, ruling by the regional administrative tribunal of Latium of 28 February 2007, upheld by the Council of State on 8 April 2008.

1. Adoption of special laws or unilateral decisions

A law was passed to regulate the exchange of works between France and Spain in 1941⁸⁴ and again, in 1956, for the restitution of a set of Japanese items by the Guimet Museum. According to the single article of that law, the French Minister of National Education was authorized to surrender to the Japanese Government, on a permanent and inalienable basis, approximately 60 objects from Japan (such as pottery, sculptures, bronzes and items made of jade and other precious stones) for the National Museum in Tokyo.⁸⁵

In the case of public property, in most cases there is no need to enact a law to initiate the restitution process. An administrative ruling suffices to secure removal of the objects from collections. Once they are no longer designated as being of public utility, their public domain status and the resulting restrictions on their disposal no longer apply. The objects may therefore be surrendered. The procedure is legally valid but is not always easy to implement, especially when vehemently opposed by the administration and the directors of the collections. The latter mainly fear that a precedent will be set for property considered almost sacrosanct: the nation's heritage. From that standpoint, recourse to a formal legal process makes sense, as it highlights the exceptional nature of restitution. France handed the Hottentot Venus back to South Africa in unprecedented circumstances involving the adoption of a single-article French law⁸⁶ authorizing the restitution. Because of the background to the case (Saartjie Baartman, to use her real name, was taken from South Africa around 1810, died in France in 1816, and her skeleton was displayed in the Musée de l'Homme until 1976),⁸⁷

84 Law of 19 July 1941, Official Journal, 20 July 1941. On the terms of the exchange, see Perrot, *De la restitution*, p. 192.

85 Law No. 56-631 of 29 June 1956 returning excavation objects belonging to the Guimet Museum to the National Museum in Tokyo, by way of exchange.

86 Law No. 2002-323 of 6 March 2002 on the restitution by France of the remains of Saartjie Baartman to South Africa (Official Journal No. 56 of 7 March 2002), Article 1: "From the date of entry into force of this law, the remains of the person known as Saartjie Baartman shall cease to be part of the collections of the public institution that is the national natural history museum. From the same date, the administrative authority has two months to hand them over to the Republic of South Africa".

87 See Fabrice Naudé-Langlois, "Après la Vénus Hottentote, à qui le tour ?" *Le Figaro* newspaper, Friday 22 February 2002.

an exceptional legal solution was the preferred option. Moreover, recourse to legislation took on a special significance here. First, the case concerned human remains, which are not simply a cultural object like any other.⁸⁸ Second, this method relieved the government of the responsibility of taking a decision on restitution. In this case, it provided a way of overcoming its reluctance.⁸⁹ The question now is whether the same solution could be used to extricate France from the embarrassing case of the Maori head, or the Korean manuscripts held by the Bibliothèque Nationale.⁹⁰ There are indeed serious doubts as to whether it is the role of legislation to resolve specific cases. But this method obviates the need to debate the merits of heritage claims and to strike a balance between two competing interests when, as is most often the case, there are admittedly legitimate arguments on both sides.

In some cases, however, only a law can end the deadlock caused by inalienability. The status of British collections has already been mentioned. In view of the de-accessioning criteria and in the absence of any justifying grounds, a law was necessary in order to authorize the removal of human remains from public collections.⁹¹

With regard to unilateral restitution initiatives, the decision taken by the municipality of Geneva in the dispute on the Cazenoves frescoes is an interesting one. This dispute, well known to experts in private international law, concerned a claim to frescoes removed from a chapel in Roussillon and subsequently acquired by the Art and History Museum in Geneva. The claimants lost

88 On the particular status of human remains, see Cornu, *Le corps humain*.

89 This method might be used for the case of the Maori head at the Museum of Rouen. A bill has been put forward to overcome the legal difficulties relating to the restitution of part of the museum's collection (bill to authorize the restitution by France of Maori heads, registered with the Presidency of the Senate on 22 February 2008, consisting of one article based on the law of 6 March 2002, which reads as follows: "From the date of entry into force of this law, the Maori heads held by the Museums of France shall cease to be part of their collections".

90 On the issue of the Korean archives, see International Expert Meeting on the Return of Cultural Property and the Fight against its Illicit Trafficking, meeting in Seoul, 30 September-3 October 2002, Proceedings, Korean National Commission for UNESCO, 2002.

91 See above.

the case in the French courts, on the grounds of lack of territorial jurisdiction (*ratione loci*).⁹² Reluctant to initiate proceedings in the Swiss courts, they decided to negotiate. Initially, the municipality of the City of Geneva, which has responsibility for the Art and History Museum, agreed with the French authorities to grant a long-term loan.⁹³ A few years later, the loan was unilaterally transformed into a donation by a decision of the Administrative Council of 19 March 2003,⁹⁴ which has prompted questions about the legitimacy of the de-accessioning decision by the Administrative Council of the City of Geneva.

It was also by unilateral decision that Italy made restitution of a sculpture that had been de-accessioned from the public domain.⁹⁵ The decision to return the Venus of Cyrene from the museum in Rome to Libya was strongly criticized but has been upheld by the Italian courts on the grounds of the primacy of customary international law.⁹⁶

2. Negotiated processes

Private agreements can be reached after a – sometimes relatively lengthy – process of negotiation between the parties. One interesting example is the negotiation that enabled the Republic of Italy to sign agreements with the Boston Museum of Fine Arts, the Metropolitan Museum of Art of New York and the J. Paul Getty Museum in California. None of the agreements, apart from the one signed with the Metropolitan Museum of Art,⁹⁷ has been published, although the broad terms have obviously been revealed, in particular through press releases.⁹⁸

92 Abegg Foundation and City of Geneva v. Mme Ribes et al., *Revue critique de droit international privé*, 1989, p. 100.

93 Contract signed on 1 July 1997. See also below.

94 Administrative Council Decision of 26 March 2003: "The Council decides to agree to transform the loan into a donation from the City of Geneva to the Commune of Ile-sur-Tet of the two works, which are hereby removed from the inventory of works of art belonging to the Art and History Museums".

95 Italian judges coined a neologism to describe this operation: "sdemanializzazione", which means removal from the public domain.

96 Ruling of the administrative regional court of Latium, dated 28 February 2007, upheld by the Council of State on 8 April 2008.

97 Agreement between the Metropolitan Museum of Art of New York and the Republic of Italy, dated 21 February 2006, annexed hereto.

98 See below in chapter "Restitution accompanied by cultural cooperation measures", p.131.

What is interesting is the bilateral nature of the agreements: the American museums agreed to make restitution of objects of dubious provenance that might have been obtained from illegal excavations, but they did so in exchange for promises made by the Italian authorities entailing a commitment to allow international loans of similar works, some of which are specifically listed in the agreement.

Another type of agreement is one that follows mediation. Mediation is immensely popular at the moment and has been expressly supported by many bodies including ICOM⁹⁹ and the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Unlawful Appropriation.¹⁰⁰ Although it is difficult to ascertain how many successful mediations there have been, primarily because the resulting agreements are often confidential, some are made public, especially when State entities are involved. One noteworthy example is the mediation agreement between the cantons of Saint-Gall and Zurich: the dispute between the two Swiss cantons had existed since the religious wars in the early eighteenth century.¹⁰¹ On the basis of a provision in the Federal Constitution of 1999, the two cantons called on the Confederation to act as mediator, and an agreement was signed in April 2006. Although the ownership of the cultural objects in question (mainly ancient manuscripts) was granted to the Canton of Zurich, several other elements were decided in favour of Saint-Gall, such as the long-term loan (27 years renewable) of the manuscripts and the production of an exact replica of Prince-Abbot Bernhard Muller's cosmographical Globe at the expense of the Canton of Zurich.¹⁰²

99 See, for instance, the statement made in January 2006 by the ICOM President, http://icom.museum/statement_mediation_eng.html and the June 2005 report of the ICOM Legal Affairs and Properties Committee, <http://icom.museum/download/68/doc-eng.doc/2005LEG06-eng.pdf>.

100 See, for example, the Draft Rules of Procedure on Mediation and Conciliation adopted at the last Committee meeting in June 2007, <http://unesdoc.unesco.org/images/0015/001509/150913e.pdf>.

101 The publicly announced agreement is annexed hereto (although the German is the official original). It is also available online: <http://www.newsservice.admin.ch/NSBSubscriber/message/attachments/2568.pdf>.

102 This agreement could encourage others, such as in the dispute between the two French Communes over the paintings of Saint-Guilhem. Several attempts at negotiation have been made. The Commune of Saint-Guilhem-Le-Désert, in particular, has proposed the return of other paintings in exchange for the restitution.

Negotiation can sometimes be used as a way of avoiding formal legal proceedings, as for example with out-of-court settlements, some of which are ratified by a court.¹⁰³

Mediation was, quite unusually, suggested by an English judge to avoid the length and excessive expense of a trial when an Aboriginal community in Tasmania claimed human remains from an English museum. The judge invited each of the parties to appoint a mediator, and the two mediators succeeded in persuading the parties to reach an agreement permitting restitution in exchange for access to specific scientific data.¹⁰⁴

Although the Intergovernmental Committee has mentioned the possibility of conciliation as an alternative method of dispute resolution,¹⁰⁵ this technique does not appear to have been used to date.

3. Arbitral awards

Arbitration is another alternative method used, albeit rarely, in disputes over cultural property.¹⁰⁶ Article 8, paragraph 2, of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects provides that “the parties may agree to submit the dispute (...) to arbitration”. The main example is the arbitration between Ms Maria Altmann and the Republic of Austria: in an award handed down on 15 January 2006, an arbitral tribunal recognized Ms Altmann, sole descendent of Adèle Bloch-Bauer, as the owner of five paintings by Klimt acquired by Adèle Bloch-Bauer and subsequently looted from her husband during the Nazi period in Austria.¹⁰⁷ Much has been written about this dispute, which

103 See below for the case of settlements approved by a court in the United States of America.

104 See below.

105 Article 4-1 of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Unlawful Appropriation and its Draft Rules of Procedure on Mediation and Conciliation.

106 See Byrne-Sutton/ Geisinger-Mariéthoz (Eds), in particular “Arbitration and Mediation in Art-Related Disputes”, p. 115 and “The Permanent Court of Arbitration, Resolution of Cultural Property Disputes”, *Peace Palace Papers*, The Hague, 2004.

107 Maria V. Altmann, Francis Gutmann, Trevor Mantle, George Bentley v. the Republic of Austria, arbitral award of 15 January 2006, <http://bslaw.com/altmann/Klimt/award.pdf>.

began in the courts of the United States of America, culminating in a ruling by the United States Supreme Court that a private individual could bring an action against a foreign State for looting in breach of public international law.¹⁰⁸ It was after that court ruling that the parties agreed to arbitrate. What is less well known is that a second arbitral award was handed down a few months later by the same arbitral tribunal rejecting a claim to a sixth Klimt painting whose ownership history, after purchase by Adèle Bloch-Bauer, had been different from that of the other five.¹⁰⁹

There is, as we have seen, a growth in use of alternative methods for the resolution of disputes over cultural property, involving a variety of actors and procedures. We will now turn our attention to the content and aims of these tools, and the often novel solutions they offer.

II. New substantive developments

As has been seen, the current context of restitution is changing. The question now is whether these new developments also affect the objects of restitution, the way in which contractual relations are formed between claimants and holders. On the first of these, the main idea to emerge is that the items in question are generally sacred or highly symbolic objects. As to the different arrangements made for restitution, experience shows that the instruments used vary considerably.

A. The nature of the property claimed

Our analysis here is based primarily on cultural property forming part of State heritage, these being the items of the highest importance whether they are in public or private hands. Looked at from this standpoint, claims mainly relate to items considered to be inseparable from the country to which they belonged.¹¹⁰

108 Republic of Austria et al. v. Maria V. Altmann, 541 U.S. 677 (2004). <http://www.law.cornell.edu/supct/html/03-13.ZO.html>

109 Maria V. Altmann, Francis Gutmann, Trevor Mantle, George Bentley v. the Republic of Austria, arbitral award of 7 May 2006, <http://bslaw.com/altmann/Zuckerkindl/Decisions/decision.pdf>.

110 Grounds cited in the 1815 treaty that imposed on France one of the first high-profile restitutions, denying France the right to plunder works from other countries. On these periods in the history of restitution, see Perrot, *De la restitution*.

The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Unlawful Appropriation chooses to focus its efforts on objects in this category. Claims may relate to objects with “a fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State” which was lost “as a result of colonial or foreign occupation or as a result of unlawful appropriation”. Their symbolic, sacred or religious value or importance to the State of origin should, in principle, command respect. The difficulty is nonetheless twofold: not only of expressing the original connection but also of identifying it. Does that link take precedence over all others? In reality, the equation is more complex. Relatively speaking, other interests, too, have a claim to legitimacy by virtue of the universal notion of heritage and the dissemination of cultural plurality, or the need to protect the heritage of mankind.¹¹¹ Many museum collections have been established on the basis of this notion. The first, and prior, question to be resolved is whether or not the acquisition was lawful, and what effect this has on the principle of restitution or return.

1. The issue of unlawfulness

In practice, distinctions must be drawn depending on the period when a party took possession. The lawfulness criterion is obviously decisive in the case of objects procured recently, through trafficking, illegal export or theft. In such situations, the law does not always permit restitution, for a variety of reasons such as the territoriality of criminal enforcement and the consolidation of rights by a possessor in good faith. Where no such means of compulsion exist, it is precisely that sense of unlawfulness that prompts States to make voluntary restitution or other arrangements intended to recognize the rights of the country of origin. In recent cases of theft or unlawful export, restitution has been more likely where the property in question

¹¹¹ See the declaration by major museums defending the idea of the universal museum in the face of contemporary movements for restitution: Declaration on the Importance and Value of Universal Museums, 8 December 2002, signed by 19 directors of major museums (see <http://www.eniar.org/news/repat50.html>). On this point and on restitution more generally, see B. Müller, “Faut-il restituer les butins des expéditions coloniales”, *Le Monde Diplomatique*, July 2007, p. 20.

is highly valued by the State. In such cases, not only is the burden of illegality more keenly felt, but also insufficient time has passed to lend legitimacy to any cultural link other than to the country of origin.

As to France’s acquisition of three Nok and Sokoto objects from Nigeria for the Quai Branly Museum, appropriation is not unlawful under French law if the possessor has acted in good faith. Export of those statues was, however, prohibited in Nigeria and they were on the ICOM Red List of stolen objects. It was this twofold consideration – that those objects had been trafficked and that they were of major importance – that led to the signing of an agreement recognizing Nigeria’s ownership while granting a renewable long-term loan (25 years) of the objects to France. The defence of good faith could have been raised to make such an arrangement unnecessary, but it seems that, in the circumstances, a negotiated solution was called for.

Where earlier dispossessions are concerned, the question arises in different terms. If the test used were whether the dispossession was unlawful, any principle of restitution could easily be defeated. In most situations, either it was not unlawful under the law applicable at the time, or any wrongfulness has been purged by time. Besides the fact that it may not always be possible to ascertain and evaluate the circumstances in which a dispossession occurred, it sometimes took place with the consent of the States or communities concerned. This was the case with the nineteenth century trade in Maori heads. Thus, a discussion centred on unlawfulness usually leads nowhere.¹¹²

Should we, now, revisit situations considered as scandalous and reassess their validity in the light of present-day laws or even ethical principles? A number of cases of restitution in France are coloured by this spirit of repentance. The exercise is clearly a difficult one, with the obvious dangers and uncertainties involved in rejudging the past. Admittedly, periods of colonization did result in the displacement of cultural property, and this substantive loss has been harmful to some States. Would it not be preferable, however, to concentrate on the damage done to

¹¹² One example is the debate on the acquisition of the Elgin Marbles, or the pillaging of Korean archives.

dispossessed States, rather than on the “fault”, by focusing on the breaking of the link with the State of origin and its consequences? This is the dominant approach underlying the reference to the vital nature of these tokens of cultural identity¹¹³ and, in the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, to the significant impairment of sacred cultural property of collective importance.¹¹⁴ The question whether the act was lawful or unlawful becomes a secondary issue. This factor might, to a greater or lesser degree, influence the willingness to make restitution. However, it should never be a precondition of restitution, as this would provide a means of avoiding restitution in cases where it had not been established that the operation was unlawful. The United Nations Declaration on the Rights of Indigenous Peoples follows this logic when it acknowledges a right of repatriation for cultural, intellectual, religious and spiritual objects taken with or without the consent of the populations concerned.¹¹⁵

2. The ownership connection

It remains to be determined which property is vital to and inseparable from the countries or communities that produced it, and in what way it is connected with the State considered to have a greater right to possess it. The notion of country of origin or provenance is not always clear-cut. Formally speaking, the country of origin of an object is the country that designates the object as part of its cultural heritage, by distinguishing it in some way, for instance by classifying it as a national treasure or including it in an ad hoc record. This is the definition adopted in Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.¹¹⁶ However, States do not always identify the cultural property that they consider important, hence the difficulty encountered in applying this criterion. In addition, this approach is unworkable when ownership is disputed and several States claim an eminent right to the same object.

113 In 1987, the United Nations recalled the arguments of claimant countries, in particular to “recognize the moral right to the recovery of vital tokens of cultural identity, removed in the context of colonialism”.

114 See especially Article 3, which refers to the idea of significant impairment and the notion of significant cultural importance.

115 Article 11(2) of the resolution adopted by the United Nations General Assembly on 2 October 2007, the United Nations Declaration on the Rights of Indigenous Peoples, cited above.

116 Cited above.

The notion of State of origin can also be defined in terms of the genuine link between a community and a cultural object, rather than merely from a formal standpoint.¹¹⁷ In the resolution of the Institut de Droit International, the country of origin of a work of art “means the country with which the property concerned is most closely linked from the cultural point of view”.¹¹⁸ Here again, though, this classification raises awkward questions: ties of adoption may also be very strong. The prolonged possession, conservation and long-term incorporation of an object as part of a heritage create a sense of ownership. This principle has been recognized in international instruments including the 1970 Convention on the Means of Prohibiting and Preventing the Unlawful Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. The European Court of Human Rights (ECHR) also recently recalled this principle in the *Beyeler* case.¹¹⁹ As Lyndel V. Prott observes, some States may consider important objects originally from other countries with which their population has close cultural ties as forming part of their own heritage.¹²⁰ Which links must therefore be considered to be closer? Those of the original country? The adoptive homeland? Or both (by treating objects as binational)? Although this reasoning must be selective and confined to the most important objects, even in these cases it is not easy to determine the link of ownership. It may be useful to examine some actual examples of restitution. Cultural property returned to its territory of origin or the subject of agreements (exchanges, loans, etc.) tends to come from public collections, archaeological excavations, archives and other cultural items intimately linked to the history of States, or to be sacred items and human remains. The latter two categories are often mentioned in texts relating to the cultural heritage of indigenous peoples.¹²¹ It may be useful to explore in greater depth the nature of their link to one State or another.

117 On the various formal and real approaches, see Armbrüster, “La revendication”, p. 723.

118 Resolution of the *Institut de Droit International*, Basel session, 1991 (see above).

119 *Beyeler v. Italy*, European Court of Human Rights, judgment no. 33202/96 of 5 January 2000.

120 Prott, *Commentaire relatif à la convention Unidroit*, p.46.

121 For examples of restitution, see *Museum* and the 1987 United Nations report.

As far as archives or manuscripts are concerned, some can be considered to be so closely linked to the history of a State or community that they should naturally be held in that State or community. One example is the manuscripts of the Icelandic sagas, medieval documents compiled by a scholar and then bequeathed to the University of Copenhagen in 1730 and returned in 1965 by Denmark to Iceland, which had become a sovereign State in 1918. Another example is the very early map of North America (undoubtedly one of the first) handed back to the United States of America by Germany.¹²² It could also be argued that the Korean archives taken by force at the end of the 19th century by the French fleet in retaliation for the massacre of missionary priests might be returned to their country of origin, as they are genuine sovereign archives, founding documents that are essential to an understanding of present-day Korea.¹²³ The link in this situation is not only cultural but also political and organic.

In practice, it seems to have long been acknowledged that archives must be handed back, not only in the light of their historical value but also and above all because of their sovereign import and their role in the administration of territories.¹²⁴ From this perspective, archives are not in the same category as other cultural property. Their restitution is, however, not always an easy matter, particularly in cases of State succession.¹²⁵

Many sacred or ceremonial objects have also been the subject of restitution, examples being the totem pole returned by Sweden to indigenous peoples in Canada and the Vanuatu drum handed

back to its country of origin by the Australian Museum. Some museum directors think that the United States Act, NAGPRA,¹²⁶ despite being silent on this specific point, requires restitution of fundamental pieces that should never have left their place of origin. This would apply, for example, of totem poles or emblematic objects. By contrast, the American Museum for Natural History has refused to hand back a meteorite, denying any link to the claimant community.¹²⁷ This position is debatable, in that the link of origin is simply the value attributed to an object by a community or collectivity. It might also be open to the objection that the piece is of primordial scientific importance.

Among the objects of sacred or symbolic value, human remains undoubtedly deserve a category of their own, denoting links to the dead and to the earth. In such cases, it is difficult to argue against the formation of a cultural link. Discussions are ongoing, for instance, on requests for the restitution of Maori heads held in several large museum collections. Generalizations about human remains should be avoided, however, not only because they take many forms¹²⁸ but also because their status changes over time. The decision by the Michael C. Carlos Museum of Emory University of Atlanta to return the mummy of Ramses I was motivated less by respect for the dead than by its historical connection and by the desire to return the mummy to its place of origin.¹²⁹ And yet on another level, museums' bone collections have become the subject of scientific and documentary study, designated as "natural biological materials".¹³⁰ Arguably, there is scarcely anything sacred in these fragments that have long ceased to be human. Some claims show, however, that the

122 This map was included on an inventory of cultural property of national importance, items comparable to national treasures within the meaning of Article 30 of the Treaty establishing the European Community.

123 On the issue of the Korean archives, see International Expert Meeting on the Return on Cultural Property and the Fight against its Illicit Trafficking, Proceedings of the Seoul meeting, 30 September - 3 October 2002, Korean National Commission for Unesco, 2002.

124 On the recognition of a specific international custom with regard to archives, see Manlio Frigo, "Les archives et autres biens culturels, quelle spécificité", lecture delivered at the Faculté Jean Monnet, Sceaux, as part of the meeting "Quel avenir pour les archives en Europe? Enjeux juridiques et institutionnels", December 2008 (proceedings to be published). On the distinction in the restitution process based on the administrative function or cultural nature of archives, see Perrot, *De la restitution*, p. 35.

125 On the international restitution of archives, see Ermisse, "L'actualité des contentieux", p. 41 ss. and Kekskeky, "L'histoire des contentieux", p. 51 ss..

126 See above.

127 It was argued that the meteorite was part of the natural landscape, rather than a sacred object. See the presentation by Ian Tattersall at the International Symposium "From anatomic collections to objects of worship: conservation and exhibition of human remains in museums", organized by the Quai Branly Museum on 22 and 23 February 2008 (see website of the Quai Branly Museum).

128 See Marin, *Statut des restes humains*, p. 337.

129 Martha Lufkin, "Retour au pays", *The Art Newspaper*, No. 154, 12/26 September 2002.

130 Ruling of 16 September 2004 setting standards for the identification, inventory, classification and processing of the movable property and scientific documentation taken from archaeological excavations and diagnostics, Official Journal of France, 28 September 2004.

issue is not that simple. In the dispute between the Aboriginal community of Tasmania and the British Natural History Museum concerning human remains claimed by the former, the Museum had intended to conserve the remains in order to take DNA samples as material of scientific interest for future use.¹³¹

The foundational dimension is also extremely relevant for objects found in archaeological excavations, also known as “soil archives”, which are essential not only to an understanding of States and their history but also to their construction and foundations. Given the cultural and political considerations at stake, these are particularly sensitive items.¹³²

Lastly, with regard to elements removed from monuments, the link of origin is clearly strengthened by the natural attachment of the detached part to its original support. It was probably on this basis that the United States court ordered the restitution of the mosaics of the Autocephalous Church,¹³³ as there was no dispute over State ownership in that case, in which an unscrupulous gallery director had acquired the mosaics under dubious conditions. Italy’s restitution of the obelisk to Ethiopia was no doubt similarly motivated to ensure reconstitution of and respect for the natural attachment. The Elgin Marbles case, however, shows how difficult this solution is to implement.

The greatest problem lies in the fact that, in certain cases, both links are legitimate, and it is therefore not easy to rule out one in favour of the other. The idea of dual nationality, of a form of collective cultural ownership of property, is a solution that surely deserves more detailed exploration. Dispute resolution is certainly moving towards the recognition, and therefore reconciliation, of the legitimate interests of both sides. Arguments are no longer couched solely in terms of restitution and dispossession. This new perspective has definitely been

131 Case described by Palmer, UNESCO Conference, Seoul, 26-28 November 2008. On the resulting agreement, see below.

132 See Négri, “Fouilles archéologiques ” p. 325 and more generally Négri, *L’édification*.

133 United States Courts of Appeals, 24 October 1990. *Autocephalous Greek Orthodox Church of Cyprus and Republic of Cyprus v. Goldberg and Feldman Fine Arts Inc.*, and Peg Goldberg, note by Muir Watt (cited above).

influential in the emergence of alternative solutions other than restitution, which are viewed in some quarters as geared more towards rights of enjoyment and use than rights of ownership.

B. Methods of restitution

In current practice, the variety of restitution solutions is impressive. Negotiated agreements offer sometimes complex solutions, and there is also a tendency to “uncouple” ownership from possession. While some solutions focus on restitution or an arrangement based on it, others provide an alternative to restitution subject to certain conditions. Joint solutions are also starting to appear. Furthermore, several specific solutions can be adopted cumulatively in one specific case, as, for example, in the mediation by the Swiss Confederation in the dispute between the cantons of Saint-Gall and Zurich over ancient manuscripts, which resulted in the simultaneous adoption of restitution, the recognition of the special cultural importance of objects that were not handed back, a long-term loan, a donation and the production of a replica of one of the cultural objects in question, all as part of the settlement.

Generally speaking, there seems to be a move towards settlements that are not formally expressed in terms of victory and defeat, but rather acknowledge the existence of legitimate interests on both sides. The stage of recognizing dual nationality or a form of collective ownership has not yet been reached,¹³⁴ but it is clear that reconciliation of interests is becoming the solution increasingly preferred by all concerned.

The following is suggested as an initial categorization of possible solutions:

(a) Restitution (simple restitution or for consideration)

This option appears to be the simplest: the claimant convinces the other party of the need to make restitution of the cultural property in question (where the claim is one of ownership) or return it (in the case of unlawful export). A typical case is the

134 For an original proposal for cultural property management in the form of collective ownership, see the fine thesis by Maget, *Enjeux et évolution*, p. 625.

restitution of the five Klimt paintings ordered by the arbitral tribunal in Austria in the Altmann case.¹³⁵ Another example is the simple restitution of the Maori head by the City of Rouen,¹³⁶ although that decision was subsequently annulled.¹³⁷

Restitution may also be associated with consideration. Thus the Aksum Obelisk was handed back to Ethiopia by Italy, which also bore all the transport, reconstruction and restoration costs.¹³⁸

(b) Conditional restitution

Closely akin to simple restitution, sometimes restitution is subject to conditions, which resembles the case of donations with obligations or conditions attached. One example concerning human remains is the restitution by the British Natural History Museum to an Aboriginal community in Tasmania, pursuant to a 2007 mediation, of the remains of 13 Aborigines on condition that some DNA samples handed back along with the remains of the bodies would not be buried with them but would be preserved for future scientific use that would require the consent of the Aboriginal community.¹³⁹

(c) Restitution accompanied by cultural cooperation measures

Nowadays, restitution can take place in the broader framework of cooperation between the parties involved. One example is the agreement by the Metropolitan Museum of Art in New York to hand back the famous Euphronios Krater, accompanied by a series of cooperation measures between the museum and the Italian authorities. Under the agreement of 21 February

2006, the Italian authorities undertook, in exchange for the restitution, to make available to the museum as from 15 January 2008, "cultural assets of equal beauty and historical and cultural significance to that of the Euphronios Krater" via four-year international loans.¹⁴⁰ The agreement goes on to list in detail the 12 specific objects that were to be lent, with inventory numbers. The Museum furthermore undertook to make other restitutions and the Italian authorities promised other loans, particularly of archaeological objects found during missions financed by the Museum (Article 7). The term of the agreement is long, since it is stated to remain in force for 40 years.¹⁴¹

The agreements signed by Italy with the Boston Museum of Fine Arts (2006),¹⁴² the Getty Institute (2007),¹⁴³ Princeton University (2007)¹⁴⁴ and Cleveland Museum of Art (2008)¹⁴⁵ contained similar provisions.

Quite surprisingly, the agreements contained no choice of law clause. This means that the parties have not explicitly chosen the law applicable to their contractual relations and that this must therefore be determined by interpretation. Given that these are rather sophisticated international agreements, the lack of such a clause may appear unusual. As the Italian State's claims are based on its public law, it is hard to see Italy agreeing to the application to those claims of a law other than its own. The American museums were probably much more in favour of the agreements being governed by the law of the United States of America. The result was therefore a deliberate silence, probably indicating failure to agree on this point.

135 Arbitral award of 15 January 2006 (see above).

136 Deliberation of the Municipal Council of the City of Rouen of 19 October 2007.

137 Judgment of 27 December 2007 of the Administrative Tribunal of Rouen No. 702737 annulling the above-mentioned deliberation, upheld by the Administrative Court of Appeal of Douai, judgment of 24 July 2008, *Actualité juridique - Droit administratif* (AJDA) of 13 October 2008, *Actualité jurisprudentielle*, p. 1896.

138 For further information on the obelisk, see the world heritage section of the UNESCO website, <http://whc.unesco.org/en/news/456/>.

139 M. Bailey, "Natural History Museum Returns Aboriginal Remains", *The Art Newspaper*, London No. 181, 01/06/2007 vol. 8(1), p.1.

140 Article 4(1) of the above-cited agreement.

141 Article 8(1) of the agreement.

142 Press Release of 28 September 2006: Museum of Fine Arts, Boston and Italian Ministry of Culture sign agreement marking new era of cultural exchange (www.mfa.org – press releases).

143 Press release of 25 September 2007: Italian Ministry of Culture and the J. Paul Getty sign agreement in Rome (www.getty.edu/news/press/center/italy_getty_joint_statement_092507.html).

144 Press release of 30 October 2007: Princeton University Art Museum and Italy sign agreement over antiquities (www.princeton.edu).

145 Elisabetta Povoledo, "Pact will relocate artifacts to Italy from Cleveland", *New York Times*, 20 November 2008.

As to disputes that might arise out of the performance of these agreements, all of them provide for International Chamber of Commerce (ICC) arbitration in Paris with three arbitrators. This provision, too, is noteworthy: despite the lack of any direct link between the agreements and international trade, disputes are referred to a centre specialized in the settlement of commercial disputes.¹⁴⁶

It is also of interest that the parties wanted their agreements to be registered by the UNESCO Secretariat, but UNESCO refused, which in our opinion is regrettable. While such refusal might be understandable, probably on the grounds that the agreements had not been concluded between two States, their registration would have been very useful to the international community in allowing dissemination of the general principles of the agreements, though not of their specific content, as they all contain confidentiality clauses. Furthermore, as the first generation of such agreements it would have been desirable for UNESCO to be associated with the example set by them.

(d) Formal recognition of the importance to cultural identity

Where there is no simple or conditional restitution, agreements resulting from negotiation, mediation or arbitration sometimes provide for formal recognition of the objects' importance to the cultural identity of one of the parties. In the mediation by the Swiss Confederation in the dispute between the Cantons of Saint-Gall and Zurich over ancient manuscripts, the objects that were not handed back to Saint-Gall were nonetheless explicitly recognized by Zurich as being of great value to the identity of the Canton of Saint-Gall.¹⁴⁷

Such recognition can be more than merely symbolic: in some cases, the museums that retain the cultural assets in question

nonetheless agree that they may be used for ritual purposes by the community of origin.¹⁴⁸

(e) Loans (long-term, temporary and others)

Long-term loans are a common option in this field. When no simple or conditional restitution is envisaged, the parties quite often agree to the loan of assets whose restitution was requested. Conversely, restitution may be agreed in exchange for a loan to the party from whom they are claimed.

An example of the first situation is the mediation by the Swiss Confederation in the dispute between the Cantons of Saint-Gall and Zurich: Zurich's ownership was recognized but the manuscripts were lent to Saint-Gall by Zurich for a potentially unlimited period.¹⁴⁹

An example of the second type of long-term loan is the February 2002 agreement between France and Nigeria on the Nok and Sokoto statuettes, providing for the recognition of Nigeria's ownership of the objects in exchange for the grant of a renewable 25-year loan to the Quai Branly Museum. Curiously enough, the press release appears to interpret the loan as a form of compensation to France for its good faith, as the objects were made available free of charge.¹⁵⁰

Temporary loans are arranged when simple restitution, even where desirable, cannot be granted for technical reasons. For example, where the United Kingdom Spoliation Advisory Panel recommends that a national museum make restitution of property, such restitution would require an amendment to the law, which could be a lengthy process. As noted above, the

¹⁴⁶ Potential disputes could also have been referred to the Arbitration and Mediation Centre of the World Intellectual Property Organization (WIPO) or the UNESCO Intergovernmental Committee.

¹⁴⁷ Article 2, paragraph 1 of the above-mentioned mediation agreement.

¹⁴⁸ This is the case with the meteorite conserved by the American Museum for Natural History, with which an indigenous tribe concluded an agreement requiring the meteorite to be available for it to hold its ceremonies. For more detail, see Ian Tattersall's submission to the International Symposium "From anatomic collections to objects of worship: conservation and exhibition of human remains in museums", organized by the Quai Branly Museum on 22 and 23 February 2008 (cited above).

¹⁴⁹ Article 4 of the mediation agreement, cited above.

¹⁵⁰ See the press release by the French Ministry of Culture of 13 February 2002.

Benvento Missal, handed back by the British National Library, was such a case.¹⁵¹

With regard to these loans, there is much discussion about the issue of restitution guarantees: restitution proceedings could be brought against the beneficiary of the loan, and the State of origin might be minded to request some form of guarantee to avoid finding itself in such a situation.¹⁵²

(f) Donations

Restitution can also take the form of a donation, sometimes after considerable time. In the dispute over the Roman frescoes of Cazenoves (1984-1988),¹⁵³ the Museum of Art and History of Geneva, whose ownership of the frescoes was not challenged in court, had nonetheless initially agreed to lend the frescoes to their commune of origin in France.¹⁵⁴ The loan was then unilaterally transformed into a donation by the City of Geneva.¹⁵⁵

The party that has ownership of the assets can also make a donation. In the mediation by the Swiss Confederation in the dispute between the Cantons of Saint-Gall and Zurich over ancient manuscripts, Zurich undertook to donate to Saint-Gall a manuscript that was not one of those listed in the latter's claim.

There are even cases of successive donations: in October 2008 an eye from a statue of Amenhotep III was the subject of two almost simultaneous donations. The eye was first donated by a collector/purchaser to the Antikenmuseum in Basel, where it was being held, and was at the same time donated by the museum to the Egyptian State. The eye was thus reunited with the rest of the statue of Amenhotep III, which had been reconstituted by archaeologists.

151 See above.

152 See the Action Plan for the EU Promotion of Museum Collections' Mobility and Loan Standards, Finland, 2006, p. 12.

153 Cited above.

154 Loan contract of 1 July 1997 between the Museum of Art and History of the City of Geneva and the French State, represented by the Heritage Director of the Ministry of Culture.

155 Deliberation of the Municipal Council of 2003.

That said, donation is not always the appropriate solution, as it presupposes that the donor is the rightful owner of the object, which the other party often refuses to acknowledge.

(g) Setting up special ownership regimes (joint ownership, trusts and others)

The imaginative powers of lawyers know no bounds. In legal proceedings concerning a Degas painting, *Landscape with Smokestacks*, looted by the Nazis and subsequently purchased by a United States collector, the parties eventually agreed to the following arrangement: the collector gave half of the painting to the Art Institute of Chicago and the other half to the descendants of the family from which it had been looted, with an option for the museum to purchase the second half of the painting by paying half of the painting's value based on a valuation agreed by both parties. These were the terms of an out-of-court settlement reached by the parties in August 1998.¹⁵⁶

Another remarkable case is that of the Afghan cultural assets held for many years in the Afghanistan Museum-in-Exile in Bubendorf, Switzerland, with a view to safeguarding them and one day making restitution. This was a form of trusteeship that ended on the day UNESCO decided that the property in question could be handed back.¹⁵⁷

Lastly, original solutions have been suggested in this field based on the Anglo-American trust and the *Waqf* in Islamic law.¹⁵⁸

(h) The production of replicas

The making of replicas cannot be deemed as equivalent to restitution. It is, however, a technique that can be used as one element in the resolution of a restitution claim, forming part of arrangements that are sometimes complex.

156 See Palmer, *Museums*, especially pp. 110-111.

157 See, e.g. Maget, *Enjeux et évolution*, p. 577; see also "Guidelines for the Establishment and Conduct of Safe Havens for Cultural Material", International Law Association, Rio de Janeiro Conference (2008), Cultural Heritage Law.

158 Maget, *Enjeux et évolution*, p. 628.

This solution remains little used, despite being regarded as an interesting option in this field. When the Swiss Confederation mediated between the Cantons of Saint-Gall and Zurich, one of the objects in dispute was a magnificent cosmographical globe by the Prince-Abbot Bernhard Müller dating from 1554. The parties agreed that Zurich could keep the original globe, provided that it bore the cost of producing an exact replica to be given to Saint-Gall. The production of the replica was reported in detail by the local press and required considered technical skill, as the original could not under any circumstances be dismantled.¹⁵⁹

Other proposals have been made, some successfully: for example, an artist offered to make a copy of Veronese's *The Wedding Feast at Cana* (the famous original of which is in the Louvre) and install it in the refectory of the monastery on the Venetian island of San Giorgio Maggiore, where the original was located before it was taken by Napoleon.

(i) Withdrawal of the claim for restitution in exchange for financial compensation

This situation is fairly common, particularly when the claimant realizes that the case is a difficult one and is more interested in financial compensation than in the work itself. Several disputes over looted assets have ended in this way, a very recent example being the case of *Mr Schoeps v. the Museum of Modern Art and the Guggenheim Museum* (both in New York) concerning two Picasso paintings that Mr Schoeps claimed had been the subject of forced sales in Germany in 1934 by his ancestor the Berlin banker Paul von Mendelssohn-Bartholdy.¹⁶⁰

(j) Other possible solutions

Lastly, legal experts might devise many other solutions, open-endedness being one of the major advantages of mediation. Three real-life examples are given below. First, where neither the claimant nor the possessor is particularly interested in keeping the item in

question, they might agree to transfer ownership to a third party, such as a museum. Second, States claiming ownership of property belonging to their cultural heritage often decide to simply purchase the object on the market, rather than engaging in lengthy and costly legal proceedings. In such cases, the State may be said to be acquiring the object for the second time. Third, Egypt, in particular, uses the "carrot and stick" technique to bring pressure to bear on States wishing to carry out archaeological excavations on its territory: permits have been granted only to States that have acceded to Egyptian claims.¹⁶¹

Conclusion

A comparative analysis of international practice shows, in our opinion, that there are genuinely new developments in the restitution of cultural property, both in terms of the methods used – alternative means of dispute resolution – and the solutions proposed, with a great variety and diversity of types of restitution. Practice in this field seems to be driven by new ethical principles governing the formation of public and private collections. Cultural property is no longer acquired in the same way now as in the past, as standards and requirements have changed considerably. Interestingly, the new ethical approach seems to be having an influence even in more sensitive cases, where the passage of time and changes in what is perceived as unlawful make it more difficult to find appropriate solutions.

While it is probably premature to speak of the formation of an international custom making some form of return or restitution of cultural property mandatory, we can however observe a practice emerging coupled with a sense of obligation, based on precisely those ethical considerations that come close to the "opinio necessitatis", the condition required for a custom to come into being. In the area of cultural property, as in many others, ethical considerations precede the formation of a rule of law.¹⁶²

¹⁵⁹ There were several articles in the Swiss newspaper *Tages Anzeiger* on the production of the replica globe in 2007 and 2008.

¹⁶⁰ See the decision of the Federal Court of New York of 2 February 2009 ratifying the agreement between the parties. The terms of the agreement remain confidential.

¹⁶¹ Antoinette Maget, *Enjeux et évolution*, p. 549.

¹⁶² On this aspect, see T. Scovazzi, *Diviser, c'est détruire, principes éthiques et règles juridiques applicables au retour des biens culturels*, paper presented to the fifteenth session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Unlawful Appropriation, Paris, 11 - 13 May 2009.

Savin Jogan

**Slovenian legislation in the field
of cultural property protection:
data, developments and some dilemmas**

3.1

I. HISTORICAL BACKGROUND AND BASIS

1. Short survey

Throughout history the Slovenian territory has been strongly connected with the neighbouring countries, also in the field of art and other cultural production and exchange, including the collaboration in these frameworks. This refers especially to the relations with Italy, Germany and Austria, in some periods also with the Czech Republic and in the newest history also with Croatian and other territories of the former Yugoslav State. Endeavours and activities in the mentioned framework were not equally intensive, nor productive in all directions and in all fields of the discussed framework. Even between the relations with the Italian and German-Austrian cultural circle, which were constantly among the strongest ones, considerable differences appeared.

In the Austrian-Hungarian Monarchy, part of which were also the regions of present-day Slovenian territory (Carniola, Styria, Carinthia, Gorizia, Trieste and Istria), the legal regulation of Cultural Property Protection (CPP) began relatively early. The first act in this framework is represented by the decree on the protection of archival objects (manuscripts, correspondence and plans) in 1749. In two later decrees (in 1782) the Court Office protected all coin finds, which were to be sent to the Court Cabinet for coins and antiquities, and objects found in the ground (arms, sculptures, stone reliefs etc.), while in the case of heavy finds (stone inscriptions, statues) the finder was only obliged to inform the mentioned Office. The last act also includes the definition of cultural monuments and illustrates the concern about the Habsburg collections. The decree of 1818 prohibits the export of cultural monuments and objects which "contribute to the respect and splendour of the State". The decision about the importance of such objects had to be taken by the competent authority on the basis of a declaration by the Academy of fine arts or the director of the Regional library. Two decrees in 1828 instated the notification about the planned export of cultural property and the in-building of the ancient stones into the walls of the nearest church, where the priest could be the curator of such objects.

As a result of the later abolition of obligatory offering the acquisition of the cultural objects to the court cabinet, some regional museums were established, among others also in Graz and Ljubljana in the Slovenian regions (1811, 1821); instead of to the court cabinet, the archaeological finds were now sent to the newly established regional institutions and societies.

Irrespective of the mentioned changes in the organisation of CPP, the general concern for cultural monuments forced the Austrian State to be more efficient and competitive with foreign countries, especially Germany and France. In this atmosphere, in December 1850 the emperor issued the decree in which he approved the establishment of the Central Commission (CK) for the investigation and conservation of monument buildings, which became the fundamental body for the CPP; the organisation and tasks of the Commission were appointed by special decree in 1853. Their tasks included the conservation of monuments and museum (immovable) objects, care for inventories of monuments and their surroundings, their classification, conservation, education of the people in these fields, etc. The CK prepared the special declarations concerning the CPP aspects on the occasion of constructing new buildings, the renovation of streets, taking into consideration the proper methods of building and the historical importance of objects.

In the process of decentralisation of the CK activities, the most important participants gradually became the conservators and correspondents in individual countries (regions). Their main tasks were the identification, classification, valorisation and repair of the actual state of the monuments, and preparing proposals for their renovation, etc. Later on, the concept of heritage within CK broadened so to include the specific fields: archival sciences, history of art, archaeology, architecture. The Commission's reorganization in 1873 strengthened the collaboration among the CK and regional governments; in contact with the Commission, the Ministry of education and worship invited citizens, especially teachers and priests, to report all excavations, and appointed district offices to counter the plundering of archaeological sites. On the proposal of the CK the real estate taxes on monument buildings were reduced in 1908, etc.

In its last reorganisation (in 1911) the CK was completely transformed into a Council for monuments and a Monument

office as an administrative agency, giving basic importance to the regional conservators.

Thus, it could be estimated, that despite the fact that in whole the Austrian State did not succeed in creating a uniform, integral legal system of CPP in the discussed period, it gradually developed the network of rules, organizational and other measures, which could in an effective way regulate the most important questions and relations in this field, based on very developed and broad theoretical activities inside the Vienna school of the history of arts (Riegl, Dvořak, etc.).

Although intangible cultural heritage became an actual topic only in the newest period (*Unesco Recommendation on protection of the traditional culture and folklore* 1989, Convention on protection of intangible cultural heritage, 2003) it is interesting to stress the close connection between endeavours for the efficient protection of both aspects of the material and immaterial, intangible heritage already in the mentioned period. The collecting and study of folk poetry as an important part of the intangible cultural heritage reached a high professional level at that time and, on the initiative of the Vienna Society of Music Lovers, the Ljubljana Philharmonic society, started with the systematic gathering of the mentioned heritage in 1819. Later K. Štrekelj, the well-known linguist and folklorist, professor at the Universities of Vienna and Graz, between 1887-1911, collected, with the group of collaborators, more than 13,000 folk songs with melodies (for that time the most comprehensive collection of all Slavic nations) and published them in 14 books. This enabled him in 1905 to be named as chairman of the Slovenian committee inside the all-Austrian campaign of collecting this poetry (*Das Volkslied in Österreich*). Unfortunately, owing to the outbreak of the First World War this campaign was never finished.

Contrary to these very positive influences, some negative ones can also be mentioned in the CPP between the Slovenian and Austrian area in the period after the World War I. Namely, owing to very strict obligations of the peace treaty on returning very valuable assets for Slovenian history and cultural heritage from the Vienna museums, after many delays this has still not been realized. But, this is another story..

2. Reasons why?

There are two main reasons for this historical introduction in the explanation of the contemporary legal system of CPP in Slovenia.

The first represents the fact that all the mentioned Austrian legal solutions and organizational measures in the treated period led to very concrete, practical and efficient solutions and results in the CPP activities in all areas inhabited by Slovenian population, or now included in the Republic of Slovenia, respectively. Some examples are: the theological libraries in Ljubljana, Celovec (Klagenfurt) and Graz are nominated for participating in creating the assessments about the importance of individual cultural objects in case of their export. Following the decree of 1828, the in-building of ancient stones in the walls of town hall was first realized in Ptuj two years later, creating in this way the first open air museum ('sub divo') in our territory. The organizational instructions of the CK with the nomination of conservators in Slovenian regions provided the basis for the development of all CPP activities in the Slovenian territory. Among the first conservators were some very respected and well-known experts in the field of history, archaeology, construction, architecture, archivist activities. Following the CK's instructions, the Episcopal ordinariates in Maribor and Celovec (Klagenfurt) issued a prohibition forbidding the sale of church equipment without the permission of the ordinariate (1893), creating a possibility for the later establishment of three church museums (in Maribor, Krško and Gorica). In this framework regional governments were also very active: the Carinthian regional government ordered, among others, a comprehensive study of the regional art topography for the officials to be more efficient in CPP, and the Carniolan government appealed to local communities to hand over the historic equipment no longer in use to the museums, etc.

The second reason could be seen on the personal side. Namely, France Stelé, an art historian, who began his professional activities as collaborator of the CK in Vienna, was appointed in 1912 as the first regional (*landes*) conservator for Carniola in Ljubljana. With the establishment of the new Yugoslav State, his competences extended to the whole Slovenian territory,

but his influence reached the level of common State. It needs to be mentioned that he contributed to the first decree of the Slovenian government dealing with the export of objects of art (1921). He was also active in preparing the parts of CPP in the State laws on Woods and construction (1929, 1931). Later all his knowledge and rich experience were invested into preparing the draft Yugoslav law on CPP (Problems of cultural monuments protection, 1935), although these endeavours remained without result. The same could be said about the draft order on CPP in the Drava region (Slovenia) in 1939. Additionally, some influences of these directions and activities can also be seen in the later legislative attempts and solutions at the end of World War II and in the following period, especially concerning the organisation of public services in this field.

3. World War II damages

There is no need and not enough space to elaborate more comprehensive descriptions on the state of and damages to cultural property in the Slovenian territory, but it could be probably useful to mention at least the general extent of its destruction and damage in World War II and the long-term consequences.

Owing to air bombardments and military attacks, the heavy destruction of towns and cities (Maribor, Ljubljana etc.) and the majority of villages (mostly owing to revenge after the partisan attacks), many schools, cultural and research institutions were destroyed and damaged. After the Nuremberg bill of indictment the Germans began in 1941, soon after the occupation, with the realisation of their old plan of germanizing the annexed parts of Slovenia. This involved closing the schools and expelling the teachers, destroying books in public libraries and burning them, prohibiting the use of Slovenian in schools and in public, destroying the libraries and cultural institutions. Here could be added that already before the attack in 1941 the Germans briefly prepared lists of archives and objects of cultural property, which would be destroyed as proof of the existence of the Slovenian nation or which ought to be seized to complement some blanks in their own archives, research and cultural institutions.

4. Renewal of cultural property objects

Like in many other European countries, the endeavours for the renewal of cultural property objects were also not among the first priorities in Slovenia. After the removal of the ruins, the reconstruction of schools and cultural institutions was of secondary importance, after the construction of industrial capacities and flats, so it only started in 1947 and 1948. Furthermore, the reconstruction activities in this field were often carried out with cheap and poorly skilled specialists and workers, the latter included volunteers, prisoners and even prisoners of war. In addition, unsuitable equipment and materials were used, which led to additional negative consequences.

5. Nationalization

Perhaps the most important and long-term influence on the status of cultural institutions and property was caused by the broad nationalization of the enterprises and all immovable property in the period 1945–1958. Nationalization changed the whole private, and in some cases also the collective ownership (cooperatives, local communities' ownership) into state ownership without any specific differentiation. The corresponding federal and national laws in this framework dealt with the confiscation of property, agrarian reforms and colonization (1945), nationalization of private economic enterprises (1946), expropriation (1947) and the nationalization of the rental buildings and building-sites (1958). After the last mentioned law, each citizen could as a personal property retain only one bigger or two smaller flats, while all other residence rooms became social property. Later in the 1950s, with the development of the so-called self-management system, slight differences between state and social ownership appeared which did not distinguish the heritage status of a property, but the manner of its management. From the view-point of CPP it is important to stress that in such a state also the use and purpose of heritage essentially changed, especially of the protected buildings. It was no rarity but even the rule that remarkable feudal buildings, monasteries or palaces were used as asylums for aged people or as social residences for poor families, psychiatric hospitals, magazines, etc. So, it was completely impossible to ensure the normal maintenance or even renewal of such property. In

addition, many such buildings were later evacuated, when their tenants moved, and finally abandoned and (self)destroyed. The only systematic law on heritage (cultural and natural) in the period until the end of the nineties (Law on natural and cultural heritage, 1981), in an intention to save (preserve) the cultural heritage, forbade the misappropriation of cultural monuments into social and public ownership and so prevented also the possibilities for new owners or for assuring another, more appropriate use of this property.

6. Relations between CPP and natural heritage protection

The second particularity in the development of heritage legislation in Slovenia in this period is characterized by a very changeable relationship between CPP and natural heritage protection. Namely, in the first post-war period all four laws in this framework (two federal laws and two national laws on cultural monuments and natural curiosities protection, issued in 1945, 1946 and 1948) for both fields and also for the organization of public services were shared and uniform. The same approach is visible in the ensuing state law in 1958. In the following period, the laws split and separated the mentioned fields of heritage protection. But in 1981 a joint law on natural and cultural property was again issued, again without a clear explanation of this fusion of fields (and public services). Finally, in 1994 another reorganization of the state administration took place with a law on organization and spheres of the ministries. So, the fields of cultural heritage and of natural heritage protection (together with the organization of proper services) are once again (for all times?) separated. In the professional sphere at that time and later different views on this matter appeared. Some saw the joint administration of both spheres under one ministry (Ministry of Culture) as a possibility for a more rational and stronger coordination. On the other hand, counterarguments stated that separate competences for each sphere enabled a clearer overview. Some views stressed also the tradition and need to be comparable to other countries, etc. It could be observed that despite the problems in both, the spheres of heritage protection are to a great extent similar, yet the ways and methods of each are rather different and for this reason their separation could be more suitable. In some cases

(cultural landscape, shaped nature, etc.) the collaboration is necessary, but at least in our conditions and traditions it is still weak. How to improve it is still an unanswered question.

7. International regulations and national legislation

Let us have a look also at the influence of international regulations on the national legislation in this field, namely two aspects of the Hague Convention on CPP (HCPP) in the event of armed conflict (1954) and our Law on natural and cultural heritage (1981).

The first aspect refers to the definition of cultural property.

We may observe that the Slovenian law accepts all the essential definitions of the Hague, in terms of cultural property, while it also includes the cultural landscape and objects of garden architecture and shaped nature among substantial fields of cultural property.

The second difference appears in the case of military interventions, elaborated in the Convention, but it is not even mentioned in our law. Similar is the case of property under general and special protection in the case of an armed conflict, etc.

II. THE NEWEST (RECENT) LAWS ON CPP IN SLOVENIA

In the second part of the contribution we deal with some specific solutions in our latest laws in the field of CPP, i.e. the Law on cultural heritage protection (1999) and the current law with the same name from 2008, together with some other laws, referring to this framework, and their comparison.

1. Laws on cultural heritage protection, 1999 and 2008

a) *Cultural function of heritage, definition and basic objectives of CPP.*

After the Law on cultural heritage protection, 1999 (later: Law 1999) the cultural function of heritage shall mean the direct inclusion of heritage in a broader context and social activities, in particular in the fields of education and the transmission

of skills and experience from past periods for the purpose of raising national awareness and consolidating cultural identity. Heritage protection shall mean the conservation of the material and contextual character of objects, groups thereof, properties and sites, and efforts to preserve them whole and intact, and to emphasise and consolidate the importance they have as a constituent part of contemporary life.

The basic content and objectives of heritage protection shall be as follows:

- the maintenance and restoration of heritage, and the prevention of risks;
- the provision of material and other stipulations for the implementation of the cultural function of heritage, irrespective of its use;
- the provision of public access to heritage, and the facilitation of survey and research into heritage;
- the prevention of interventions on heritage which would change its character, context, form and therefore its value;
- responsibility for the promotion and development of the heritage protection system. (Art. 3, 4, 7).

The Law on cultural heritage protection, 2008 (later: Law 2008) appoints the content and objectives of heritage protection, especially through public interest. The level of public interest in heritage protection shall be determined in accordance with the cultural, educational, developmental and symbolic significance of the piece of heritage in question, and its relative uniqueness, to the State, the regions and municipalities.

In the public interest, heritage protection shall comprise, additionally to the existing elements from the 1999 Law:

- ensuring access to heritage and relevant information about heritage open to all, in particular young people, elderly and disabled persons,
- fostering awareness of its values and public presentation of heritage,
- inclusion of knowledge relating to heritage in education and training,
- stimulation of cultural diversity with respect of the diversity of heritage and its interpretations,

- participation of the public in matters relating to protection.

The State, regions (a new entity, but for the moment not yet legally expressed), and municipalities shall respect the public interest of heritage protection by organising and supporting the activities and actions, and shall implement measures on the basis of this Act. In this intent, they shall cooperate with the owners of the heritage, business entities, non-governmental organisations, and civil society. (Art. 2).

b) Establishing of the CPP network.

Both laws appoint the identification and registration of objects and sites of heritage and the listing or other mode of defining the cultural and historical monuments (of national and of local significance) as a way to establish cultural heritage protection, with some differences.

According to the 1999 Law the heritage register shall be deemed as a collection of documents and data kept by the ministry responsible for cultural heritage (Ministry of Culture). The data included into the register shall be publicly accessible, with the exception of the personal data on owners. The purpose of the register is the implementation of the common interest in the field of heritage protection.

An initiative for the entry into the heritage register may be submitted by any natural or legal person and a proposal for entry into the heritage register shall be submitted by the responsible public institution for CPP. The minister shall issue a decision on entry in the register. (Art. 11).

There is a slight difference in this topic in the 2008 Law. The registered heritage according to this act, contrary to the previous Law, is protected only indirectly; registration has no influence on the owner and his rights and duties, it means only the basis for preparing the spatial and other plans and its main purpose is supporting the implementation of heritage protection. In comparison with the previous law, which regulated completely only the registration of immovable heritage, the approach in the present law is broader and also includes the movable heritage and the intangible ('living') heritage in the uniform register. Therefore, the actual register shall comprise three interconnected

parts which include basic data, protection data and presentation data on immovable, movable and living heritage. The basic and protection data on the heritage are similar as in the previous law, while the presentation data shall include additional data to illustrate the heritage in textual and graphic form and in other appropriate media. (Art. 9, 65 – 67).

A cultural monument shall be granted its legal status on the basis of a statutory protection act. Both laws speak about cultural monuments with the status of national and of local significance. The first mentioned status could be granted to the heritage property which represents an exceptional achievement of human creativity, or which is crucial or rare testimony to a specific historical period; the heritage the characteristics of which correspond to being of special interest for local community may be granted the status of a local monument.

The regulations on an initiative for statutory protection and preparing the proposal (dossier) are in both laws similar to regulations on registration. An act on the statutory protection of a national monument shall be adopted by the Government and by the responsible local community for a local monument, respectively.

If the content of the statutory protection acts refers to historic parks and gardens or cultural landscape, measures for protection, with the exception of acts adopted by the Government, shall be set out in agreement between ministries responsible for cultural and for nature conservation.

When heritage, assumed to have the characteristics of a monument, is at risk, the minister or the responsible local community authority shall adopt an act on the temporary statutory protection of a monument.

Aside from the regulation of the status of cultural monuments it is maybe interesting to mention the decree on statutory protection which shall be issued by the competent authority to the owners of a monument on the basis of the act on statutory protection. The decisions shall set out the terms for research, methods of maintenance, authorisation of interventions, legal transactions, physical protection, and methods of management

and use of monuments, public access to monuments and, in particular, public opening hours, other individual restrictions and prohibitions, and measures for the protection of monuments (Law 1999, Art. 13). The purpose of the mentioned provision was not only to clarify the rights and duties of the authorities and the owners of the monument, but above all to give the owners the possibility to influence all important conditions, referring to the protection and management of the protected object. Owing to the additional tasks that such preparation would add to the responsible public service, there were no wider interests and only few such decisions were issued in the meantime. However, instead of elaborating the obstacles or difficulties in this framework, the ministry as the proposer of the present law completely abolished the mentioned provision. In the present law, instead of proposing a solution, the Institute for the Protection of Cultural Heritage is supposed to prepare a proposal for the proclamation and inform the owners of the heritage that is to be proclaimed a monument, providing them with the opportunity to give their opinion. The owners shall be informed by e-mail, or by public announcement if such a manner is more sufficient due to the high number of people concerned. The Institute shall take a position on all such opinions.

Additionally, the latest law defines the case when the same item is proclaimed both as a monument of national significance and as a monument of local significance: the protection regime provided for it and other protection measures under both acts shall not be in opposition. In the event of a conflict of provisions, the provisions of the decree of the monument of national significance shall apply.

The general regulation on the legal status notification of an immovable monument and its impact area in the land register from the previous law was considerably changed. Instead of the obligation of the Ministry or local community authority to propose that a note designating an immovable monument enter in the land register, in the latest Law such notification is obligatory only if it is so provided for by the preservation decree. The entry designating the immovable monument in the land register shall not be made for sites, except in the parts thereof that encompass archaeological sites, or in parts where the note is provided for by the preservation decree. Yet, numerous

examples in our country and in the entire world show us every day that the local authorities and public service in the CPP field are not strong and efficient enough in relation to the financial capital in its endeavours for subduing nearly all of society's values and protected objects and sites for expected profits. With the mentioned change it could be possible to estimate that an important obstacle in this direction has been overcome.

The actual law defines that movable heritage or a collection shall obtain the status of a movable monument through entry in the inventory ledger of the national or authorised museum; other heritage or collections shall become monuments by proclamation; the procedure is similar to that of the proclamation of an immovable monument.

Living (intangible) heritage which is already entered in the register shall be proclaimed a living masterpiece with the *mutatis mutandis* application of regulations, concerning the proclamation of immovable monuments, whereby the provisions on public consultation are carried out through inviting communities, groups and individuals, bearers of the living masterpiece which is the subject of the proclamation procedure, and other interested public. The actual law inside the chapter of establishing heritage protection treats also the next topics: national treasure, heritage protection areas, and archaeological remains.

Meanwhile the procedure and process for returning the illegally removed heritage are regulated in the Law on returning the illegally removed objects of cultural heritage (2003), the 2008 Law appoints only the definition of the national treasure, which is the object of this return.

Compared to the regime of protection, appointed in the statutory protection of *monuments*, in the case of *heritage protection areas* the regime is much milder and is intended especially to prevent destroying or considerably damaging the heritage during interventions in given areas. These areas shall be determined with a view to the integrated conservation of heritage, preventing its destruction and mutilation in the space at the national and local levels. The government shall determine the types of heritage protection areas and protection guidelines,

and lay down more detailed criteria for their determination. Prior to its concrete determination, the Minister shall inform the region or municipality in which the territory of the envisaged heritage protection area lies.

The regulations on archaeological remains in the 1999 Law were pretty short: a person who discovers a heritage element must ensure that this element remains undamaged, and in the site and position it was found in, and must immediately inform the public Institute of their discovery. The public institution must determine the period during which all interventions on the site where the heritage element was discovered shall be prohibited. In the event that the building-grounds extend over an archaeological site, work in this zone shall be permitted only after rescue archaeological research of the zone has been completed. The research shall be provided by the investor as part of the infrastructural equipping of the zone. Individual emergency works may exceptionally be carried out, but only after a permit from the institute for CPP. Rescue archaeological research may only be carried out by authorised institutions, and shall comprise, in particular, rescue excavations, including the preparation of suitable documentation. The use of the site shall be determined on the basis of research into the site. (Law 1999, Art. 58 - 60).

The 2008 law, similarly to the previous one, regulates the ownership of archaeological excavations, but the duties of a finder and proper activities of the competent agencies are regulated with some more detailed data. So, only a person, authorised by the Institute may carry out activities on the site of the find within seven days following the notification, except in case of threat to human health and life, or the archaeological remains.

The authorised person shall establish, within the appointed time limit, whether or not the find is considered heritage. He/she shall have, for the purposes of research, the right to resituate the movable item. If it is established that the find is not heritage, the Institute shall after completed preliminary research, return all taken movable items to the finder. When an authorised person has grounds for believing that archaeological remains are situated at a certain location, the Institute may

define that location as an archaeological site for as long as it takes for preliminary research into any archaeological remains to be carried out. The decision shall specify the area of the site, the nature and extent of the preliminary research required to investigate it. Moreover, it shall be possible to restrict or prohibit any economic or other uses of the site which may endanger archaeological remains. A decision shall remain in force for six months at the longest and would be exceptionally prolonged for a maximum of 60 days; and the minister may upon request from the Institute additionally extend this time limit to a maximum of 90 days. (Art. 26, 27).

c) Concerning the problem and state in the field of *marking the cultural monuments*, it is necessary to mention some data. Following the Hague Convention, it was generally defined for the first time through the Slovenian Law on natural and cultural heritage in 1981. Later, the procedure of marking the monuments was definitely laid down in the *Regulations on the shaping and fixing of the Blue shield emblem for protected cultural monuments (and natural curiosities)* issued in 1985. Due to this very well elaborated, yet rather complicated solution, the rules from this Regulation have not been used often enough. Until the mid-1990s only about 5 % of the 7,110 proclaimed monuments had been marked with the Hague shield. In this framework the situation which occurred in the short (10-day) war in Slovenia must also be mentioned, during the attack of the Yugoslav army (June and July 1991), when it became necessary to find some fast and uncomplicated solutions to mark cultural monuments.

So, instead of the formal distinctive marking, in some cases the distinctive emblem and the wording "cultural property" in five languages (Slovenian, English, German, French and Italian), rather complicated signs were fixed to the walls. Relatively soon after that the situation and views on this matter became unclear. Namely, during the wars in Croatia and Bosnia and Herzegovina (1992-94) in our vicinity (the heavily bombed and shelled town of Karlovac is less than 15 km from the Slovenian-Croatian border), the marked objects even became one of the main targets. Then, a kind of scepticism appeared also in our country, that such marking may represent an exaggerated or even directly damaging activity in contemporary armed

conflicts. Also owing to such thinking, the process of marking cultural objects in our country slowly diminished.

Our two discussed laws dealt with the problem of marking very shortly: Immovable monuments shall be clearly designated (marked) with emblems (Law 1999, Art. 18). Immovable monuments shall be marked with a goal of improving public access. The marking shall be executed when it is not in conflict with the benefits of protection and other public interests. The marking shall also be executed as a form of protection in the event of an armed conflict on the basis of international treaties to which the Republic of Slovenia is a signatory (Law 2008, Art. 58).

Let us add some specific and general dilemmas and views concerning this framework.

Concerning the possible negative influence of marking cultural heritage objects and sites with distinctive emblems in the event of the latest armed conflict, it is possible to ascertain that the distinctive markings - beside a protective - also have an affirmative and promotional meaning and importance. In addition, in the era of the information society every side in an armed conflict could know at least the basic data of the most important objects of cultural heritage on the adversary's side even without special public markings. So, the dilemma of marking or not marking monuments could be completely artificial. The marking of cultural objects is important and useful for protection in general, in all circumstances. The real problem are the groundwork and the rules on which the armed conflicts are managed and if there are efficient possibilities for the international community to enforce the following of rules of IHL on both sides, not only in the framework of CPP.

The second question refers to the relation between 'civil' marking and taking this fact into consideration on the other, 'military' side. Namely, if the objects marked with the blue shield emblem are not simultaneously drawn into military maps, this situation would be without practical importance in any true armed conflict and also during peace time military exercises. The same holds true for specific education on the cultural heritage and the culture of other nations.

d) *Interventions in cultural heritage*

One of the main activities of the public service is ensuring a uniform system of protection for immovable heritage in the case of construction of new and the reconstruction of existing residential and other objects, together with the implementation of entire works, which may permanently, temporarily or occasionally affect the protection regime, conservation and maintenance of heritage. This is realized through suitable cultural protection acts, which shall consist of cultural protection terms (conditions) and cultural protection approvals.

Cultural protection conditions shall determine the requirements that must be met by the project documentation set out by the regulations which govern the construction of facilities with respect to the construction of new, the reconstruction of existing facilities, and by the documentation required for the implementation of other planned interventions. Cultural protection terms and approvals shall be issued by the institute for CPP (Art. 44 – 47). In the new law (2008) the rules about protection approval for works is given in a more general way.

So, the protection approval shall be obtained in respect of the works on a monument and in its impact area, if such obligation is provided for by the preservation decree, concerning works on registered immovable heritage and research on the heritage in question. A novelty is the provision that through protection conditions, the Institute may render the obtaining of protection approval conditional upon the acceptance of an obligation to carry out preliminary researches or to prepare a conservation plan. The conservation plan shall be necessary in all occasions when works on the structural elements of a monument are involved (Art. 28 - 30). The protection approval for research and removal shall be issued by the competent minister.

Searching for archaeological remains and the use of metal detectors and other technical means for such purposes shall only be allowed with the prior permission of the Institute, on the condition that such work is conducted by a person with the technical competence to carry out archaeological researches. An authorised person conducting research shall, upon conclusion of the works or at least annually, provide the Institute with a complete report on the course and results of his research (Art. 32, 33, 52).

e) *Export and import of movable heritage and monuments*

The permanent export of monuments shall be prohibited. The minister may, however, exceptionally permit such export of a monument if this involves the exchange of museum material. The minister shall issue licences for the temporary exportation of monuments and for the export of heritage objects.

The import of heritage objects shall be permitted. If the country of origin stipulates an export licence, this licence must be produced upon import (Law 1999, Art. 31, 32).

The 2008 law treats the export of heritage together with its transfer: the permanent transfer or export of national treasures shall be prohibited or shall be permitted only in the case of the exchange of museum, archive, or library material. Exceptionally, the permanent transfer or export of some national treasures may be permitted when the movable object is not of such cultural value for the Republic of Slovenia that its permanent removal or export would represent the impoverishment of national treasures.

A temporary transfer or export of national treasures shall be permitted for one year at the longest from the date of their crossing the state border, with the possibility of an extension to up to five years. But in the case of a risk of a permit being misused, the Ministry may temporarily revoke the authorisation for transfer or export. The transfer or export of movable heritage referred to in the Annex of Regulation 3911/92/EEG shall be subject to the authorisation issued by the Minister.

Heritage may be introduced or imported into the Republic of Slovenia. If the state of origin prescribes a permit for export or transfer, such a permit shall be presented upon the introduction or import of the heritage in question. (Art. 46, 47).

f) *Heritage trades operations*

After the 1999 law the traders or legal persons who deal with heritage must keep a record of sales and other operations in relation to heritage. The record must contain data on the origin of heritage objects, the description and sale price of objects, and data on the buyer. The trader must inform the buyer that restrictions may apply to the export of the object. (Art. 36). In

addition, this law for the supervision of the export and removal from the territory of the state, import into and trade operations in movable heritage, stipulates that the minister shall specify the categorisation of heritage objects, which shall be published in the Official Gazette of the Republic of Slovenia (Art. 37).

The 2008 law in addition introduced the registry of traders kept by the Ministry. The registry is kept with the aim of acquiring precise data on the trade in heritage, so as to prevent unauthorised trade therein. When the trader is a legal entity, its name, registration number and registered office shall be entered into the registry of traders; when a trader is a natural person, the following personal information is entered: personal name, unique personal identification number, and place of residence. When trading in national treasure, the trader shall check the treasure's origin (Art. 45).

g) The question of *origin of the movable heritage* is very often joined with the heritage trade operations. So, the 1999 law in its Art. 39 demands that when acquiring museum material, museums must check this material. The same provision is included in the 2008 law with one very important addition: the museum shall notify the inspector competent for heritage of any suspicion that the heritage in question is of illegal origin (Art. 89).

h) *Status, rights and duties of owners of cultural property objects*

Both laws very carefully deal with the status, rights and duties of owners and holders of cultural property objects and sites.

In the first one it is ordered that no person may trade with heritage or monuments in such a way as to threaten their cultural significance. The use of monuments in specific ways or for individual purposes which may threaten the existence or affect the integrity of a monument shall be prohibited. Also the use of the image or name of a heritage monument or a collection without the owner's consent is prohibited. Owners must protect and conserve their monuments at their expense, enable the research of and access to their monuments in accordance with their purpose and in accordance with the protection regime specified, and consistently consider the cultural functions of the monuments when using them.

On the other side, owners of heritage shall have the right to free explanations, advice and instructions from the appropriate public service, the right to compensation if the protection regime results in a deterioration conditions for the commercial exploitation of their monuments and if these cannot be compensated for by other activities within the protection regime, in addition to investments from public funds if the maintenance of or interventions on monuments for the purpose of their protection or restoration incur extraordinary costs which exceed the monument's commercial benefit or the normal costs of maintenance (Law 1999, Art. 48 – 53).

The 2008 law includes similar, but partly more elaborated provisions, when referring to the general responsibility and duties of owners and holders of heritage and monuments. In this framework it is important to stress some new included provisions:

- in cases of emergency, when there is a direct danger of damage or destruction to the heritage, the competent organisation shall be liable to provide the owner or possessor with immediate technical assistance within three days following the submission of the written request at the latest.
- the owner or possessor of national treasures shall be obliged to meet the minimum requirements for their storage. The national or an authorised museum shall check the suitability of storage conditions for national treasures, provide their owners or possessors with instructions and advice for protecting such treasures, and provide for their conservation. The owner or possessor shall ensure the safe transportation of national treasures. Such transportation shall be carried out only by a national or authorised museum, or by a person who meets the relevant conditions on the basis of laws governing the transportation of remittances.

When carrying out field excavations the owner or possessor of immovable heritage shall, with the aim of protecting archaeological remains, allow access to an authorised person of the Institute to unfenced land, upon prior notification to the owner or possessor, as well as to fenced land and into all facilities except private dwellings, with no respect to whether archaeological finds have been discovered or not. The owner or

possessor of the monument shall allow the authorised person to document and research the monument, but he/she shall have a right to compensation for the damages caused by the activities mentioned above (Art. 4, 5, 36 – 41, 52, 55, 56).

Finally, one general principle about the extent of restriction of owners' rights in this framework also needs to be stressed: the ownership or other rights *in rem* to heritage shall be restricted to the minimal possible extent necessary for protection. The state, regions, municipalities, and other protection bodies shall select those measures which, when achieving the same effects, are the least restrictive for the owners and actual possessors of the heritage (Law 2008, Art. 5). This could be compared with a similar rule in the previous law (1999), referring to the decision on statutory protection (Art. 13), which regulates the measures of protection in such an act, and may restrict the ownership right to a monument only to the extent necessary for implementing protection.

i) *Ownership and misappropriation of cultural heritage (monuments)*

The 1999 Law regulated the questions in this framework in a very short but relatively concise way: an object assumed to be an element of heritage which is discovered on the surface of the earth, underneath the surface of the earth or under water shall be the property of the state (Art. 58).

The state and the local community on whose territory a monument is located shall have a pre-emptive right to the monument. Owners of monuments must, within 60 days, notify the authorities entitled to a pre-emptive right referred to in the preceding paragraph of their intended sale, and of the terms and stipulations of the sale. A contract of sale concluded in contravention to the previous regulation shall be deemed to be null and void. (Art. 63, 64).

The newest law (2008) elaborated these questions in a much more extensive and partly different manner:

- The ownership of heritage objects found or discovered on the surface of the earth, underneath the surface of the earth etc. is fixed similarly as in the previous law, but is limited to archaeological finds or archaeological remains. (Art. 6/1)

- A monument owned by the state, region or municipality, which is an archaeological find or archaeological site or is protected on the basis of special regulations or international treaties to which the Republic of Slovenia is a signatory, shall not be misappropriated.

Other monuments owned by the state, region or municipality may exceptionally be misappropriated only if this provides for their improved conservation and public accessibility, and if such use accords with protecting the significance of the monument.

Decisions on the misappropriation of monuments of national significance shall be adopted by the government upon the proposal of the competent minister, and any decision on the removal of monuments of local significance shall be adopted by the competent authority of the region or municipality which proclaimed the monument (Art. 6/3, 4, 5).

The law very specifically regulates the ownership of the heritage managed by the state and other registered museums, which shall be determined on the basis of the following criteria:

- The heritage shall be owned by the person who is entered as owner in the inventory ledger of the museum;
- When the owner is not entered in the inventory ledger of the museum as the owner of the heritage, the heritage shall be owned by the person who has financed the purchase which resulted in the heritage's becoming managed by the museum. When there are more financers, the heritage shall be the subject of joint ownership by the financers in ideal shares proportionate to their contributions;
- In other cases, the heritage shall be owned by the founder of the museum, except for archaeological remains which are owned by the state on the basis of this Act (Art. 88).

The provisions on the pre-emptive right of the state and the local community and about void of contracts in contravention to this right are similar to the 1999 law with two additions: this right is now extended also to the real estate in the impact area of an immovable monument of national significance, while the transfer of this right to a third person is also now possible, if this person offers an improvement in conservation and public access,

and ensures a use compatible with the social significance of the monument (Art. 62).

Completely new is the regulation on resources acquired through the sale of heritage or monuments owned by the state, region or municipality; they may be allocated only for purposes of conservation, maintenance, revitalisation or the purchase of heritage or monument (Art. 6/7).

Very important is also a new article about heritage without owners, when the owner is unknown or could not be found, or if heritage remains without an owner. In all these situations the ownership passes to the state (Art. 7).

In this framework both laws also dealt with the question of expropriation (Law 1999, Art. 54 – 57; Law 2008, Art. 63). In the first case, the court may authorise expropriation of an immovable monument at the proposal of the state or a local community, if this involves public interest which cannot be achieved otherwise for the purpose of conserving a monument at risk, or for the purpose of including a monument in the restoration process and adopting it to a new use within an urban or landscape complex. The 2008 law is more general: expropriation shall be permissible if the monument and its protected values are endangered or their conservation is not possible in any other way, or if the accessibility of the monument pursuant to the preservation decree may not be ensured in any other way. The encroachment on ownership rights shall be proportionate to the public interest which caused the expropriation.

j) *The public service*

The public service in the CPP field, after the 1999 law comprises the following general tasks:

- the recording of heritage and the provision of data to be entered into the heritage register;
- the preparation of dossiers for statutory protection acts and the preparation of approvals for administrative procedures;
- integration of the heritage protection system in the event of an armed conflict, and integration into the system of protection against natural and other disasters;
- the implementation of research projects using methods

which are potentially destructive for heritage;

- monitoring of maintenance, interventions, use and legal transactions related to heritage;
- monitoring of the management of heritage owned by the state or by local communities;
- the preparation of guidelines in the field of heritage within procedures for adopting spatial planning acts;
- the preparation of restoration and conservation programmes;
- the issuing of instructions to owners of monuments and owners of heritage, etc.

It consists of the following institutions:

- For the purpose of providing public service in the field of the protection of immovable heritage and its constituent movable heritage, the state shall set up a public Institute for the protection of cultural heritage whose organisational units shall cover the entire territory of the Republic of Slovenia.
- For the purpose of providing public service in the field of the protection of movable heritage, the state shall set up national museums, and in conjunction with local communities shall determine a network of regional and municipal museums, which shall cover all types of movable heritage in the entire territory of the Republic of Slovenia

The protection of bibliographical heritage and documentary / archival records as a part of cultural heritage/monuments is in accordance with special acts organized in separate public services (Art. 6, 19 –26).

The new law gives a much more elaborated and detailed picture in this framework. According to this law similar tasks as in the previous law shall be carried out by the Institute for the protection of the (immovable) cultural heritage, national or authorised museums, providers of local public services for heritage protection, and heritage managers. The supervision of the public service for protection shall be conducted by the Ministry.

Within the Institute a conservation centre acts, which *inter alia* performs the following tasks: providing for the development

of the conservation-restoration profession and its direction, managing and carrying out preliminary research on monuments, preparing conservation plans for monuments owned by the state, carrying out research projects in the field of protection upon the order of the Ministry, providing documentation for conservation-restoration activities, etc. The Institute shall, within the Conservation centre, carry out individual tasks in the field of preventive archaeology as the national public service.

The national public museum service consists of national museums and of authorised museums, carrying out the tasks of protecting movable and intangible (living) heritage of wider interest. The local public service for the protection of heritage shall encompass the protection of heritage of local significance, financing museums and other entities promoting the protection of heritage, and the management of sites of local significance. Regions and municipalities may establish their own organisations for the performance of protection tasks. Protection organisations shall not interfere with such powers held by the state bodies in the field of protection. The public service for protection may engage people, appropriately educated or qualified to act as volunteers. Upon conclusion of the volunteer work, the provider of public service shall issue a certificate of the work experience obtained, or qualifications, unless they are otherwise provided for by law.

A very new and unusual solution in broadening the public service represents a solution, referring to a natural or legal person who owns a large number of immovable or movable monuments, such as a church or other religious community, an institution in the field of education, or a company, which may internally organise an activity of keeping a record, storing, researching, and publicly representing the heritage. The government shall sign a contract with such persons in order to lay down the requirements for executing such activity, and regulate other matters by the application of *mutatis mutandis* of the provisions of this Act which apply to the public service of protection, professional titles, the authorisations referred to in this Act, for authorised museums, and for carrying out specialised protection activities (Art. 81 – 107).

The definition of non-governmental organisations acting in the field of cultural heritage in the public interest is also new. The

same status under the same conditions may be obtained by a church or other religious community if it has its own legal representative (Art. 107).

k) The *supervision and inspection* of the implementation of the provisions of these laws, of the general and special acts issued on the basis thereof, and of other regulations and acts applying to heritage protection after both laws shall be exercised by the inspectorate responsible for cultural heritage via its inspectors. If this involves acts applying to the historic parks and gardens or cultural landscape, inspection and supervision shall also be exercised by the inspectorate responsible for nature conservation.

In addition to the authorisations arising from the regulations which govern inspection and supervision, inspectors shall have the following authorisations:

- examine heritage properties and objects, books and documents relating to legal transactions, interventions on heritage, and the protected surroundings of monuments;
- supervise the legal aspects of the operations of the public institutions for heritage protection, and the operation of other persons implementing heritage protection activity;
- demand written explanations and statements from responsible persons of the entities involved in relation to supervision;
- examine and demand access to documentation relating to statutory protections of monuments, the issuing of administrative decisions to owners of monuments, the export of heritage, and heritage market.

Inspection and supervision shall, in addition to general comprise these special measures: restoration to a former condition or the enhancement of the current condition, setting the deadline by which the restoration to the former condition or the enhancement of the current condition must be completed, notifying the inspector responsible for construction, who in turn must immediately issue a decision for the determined irregularities to be eliminated by a deadline set by him, or for further construction or implementation of other interventions to be halted, in the event that an inspector ascertains that there is an immediate danger of damage to a monument, he shall set the deadline by which this danger must be eliminated, or adopt

measures for eliminating the damage done or for adequately reducing the damage, the prohibition of incorrect handling or use of a monument, etc.(Law 1999, Art. 65 – 74).

The Law 2008 separated the supervision in this frame. So, the supervision of the public service for protection shall be conducted by the Ministry which could order the provider to eliminate the deficiencies or irregularities, and fix a time limit for the implementation of such actions or even dismissing the managing or administrative body of the provider of the public service, or for the expiration of the statutory authorisation of that body.

The supervision of the implementation of the provisions of this Act and the regulations issued on the basis thereof shall be carried out by an inspector competent for heritage and in individual cases also the customs authorities. The authorisations and methods of work are similar as in the previous law. Concerning the customs authorities, the law among others appoints that if the competent organisation determines that the goods under retention are heritage, which, under the provisions of this Act, are required to have an export or import permit, the customs authority shall reject the submission of the goods to the selected authorised customs use. (Art. 82, 109 – 120).

l) The *penal provisions* in both laws only include financial penalties (Law 1999, Art. 76 – 79; Law 2008, Art. 125 – 129).

m) Besides the solutions on topics, included simultaneously in both treated laws, the actual one separately deals with the following:

- damages for devaluation (Art. 41): the developer of unauthorised works shall be liable to pay damages for devaluation of the heritage concerned. The damages for the devaluation of heritage shall be determined with regard to the significance and value of the devalued heritage, where its value is at least equal to the costs of re-establishing it to its former condition;
- promoting the mobility of collections (for exhibitions abroad if the guarantee is not assumed by the organiser, lending foreign documents for exhibitions, etc.) by the State budget (Art. 43);

- management of monuments, with a special manager and based on a management plan which is obligatory for all monuments which are protected on the basis of international treaties to which the Republic of Slovenia is a signatory, as well as all protected sites (Art. 59, 60);
- heritage protection in development plans including, *inter alia*, a heritage protection strategy which shall, on the basis of the estimation of a threat being posed to the heritage and its development opportunities, determine the objectives, directions and measures for the integrated conservation of heritage which is the subject of public interest; the guidelines for determining the acts on heritage protection areas and preservation decrees together with proposals of zoning conditions for protecting the property inside an individual location (Art. 73 – 78).

2. Denationalisation

We already discussed the impact of nationalisation in the first post-war period on the state of cultural heritage management. A set of laws in the treated period tried to change this state: the laws on nationalisation (1991), on transformation of enterprises (1992), on changing the ownership of immovables in social property (1997) and on changing the ownership of cultural monuments in social property (1999). Although all of them are referred to in the general conditions for CPP, the heritage property is affected more by the laws on nationalisation and changing the ownership of cultural monuments in social property.

The former determines that movable property is returned to legitimate persons only if it represents an object of cultural, historical or natural heritage; if such objects are included in museological and other public collections. Immovable property could not be returned if it serves state activities or activities in the field of medical, educational or cultural activities or if these activities would be seriously affected with the return of such property. The law on changing the ownership of cultural monuments fixed the state ownership of such objects and its equipment; the previous holders shall hand over the objects to the state in nine months and the refund of the money invested in individual objects shall also be regulated in the treaty on their delivery.

Contrary to the mentioned rules, the procedures are in many cases prolonged for many years, and even now there are some open questions about the final state in this framework.

3. Public libraries

The Law on librarianship (2001) stipulates some library materials (books, manuscripts etc. before 1800 and archival issues, defined legally as an obligatory copy) as cultural monuments; every (public) library which possess such books and other materials, states individually, following the professional instructions of the National and university library, which of them represent a monument and includes it in the list of monuments. This act otherwise does not regulate the procedure of defining and including the monuments in the list, not even the criteria about the heritage in this field.

4. Archives

The laws on archivistics (Law on archives and archival materials, 1997 and Law on the protection of documentarian and archival materials, 2006) similarly speaks only about cultural (and historical) monuments in this field (archival materials received this status with their inclusion in the public archive, after selection among the documentarian materials), not mentioning separately the status of cultural heritage.

5. Obligatory copy of publications

The Law on the obligatory copy of publications (2006) has been in preparation for more than three decades: the problem was the number of obligatory copies for sending to the authorized libraries, especially for smaller publishers. The final solution in this act determines four copies (two among them with the character of archival copies with a special regime of maintenance) for the National library in Ljubljana and the University library in Maribor (in the case of publications financed by public funds the number of copies is 16). But the initial purpose remains unchanged in the whole post-war period: the preservation of all publications (including the audio and video records in different bearers) published in Slovenia or in Slovenian.

6. The Law on returning illegally removed objects of cultural heritage

The Law on returning illegally removed objects of cultural heritage (2003) represents the harmonisation of Slovenian legislation with the Council Directive 93/7/EEC of 15 March 1993 (see detailed survey in a later chapter).

7. National defence and CPP

The responsibility of military authorities for the protection of cultural heritage in the event of armed conflict and for the implementation of the entire field of international humanitarian law (IHL) is generally determined in the Defence Act (1994) and in the Rules of service in the Slovenian Army (1996). The law contains the general rule whereby all forms of military and civil defence must to be in compliance with the principles of international law (Art. 4).

Practically, during their training members of armed forces are generally acquainted with the principles and rules of IHL, including the CPP provisions. Moreover, familiarisation with the cultural heritage issues is included in homeland lectures for soldiers and all these efforts contribute to the respect for the culture and the cultural heritage of other nations. Special courses for candidates to be sent on international peace missions (soldiers and CIMIC participants) very briefly discuss the international instruments and also the experiences of recent missions in this field.

Compared to the rules on military measures, CPP officers have not yet been designated in the Slovenian Army, instead, this part of the IHL rules is included in duties of legal advisers (the professional line of legal advisers was established in December 2004).

In April 2008 a working group for preparing a draft *Manual for the respect and realisation of IHL provisions in the Slovenian Army* was also established. In the field of Cultural Property it is taking into consideration not only all the newest international instruments, but also numerous newest military manuals from other countries.

8. Protection from natural and other disasters.

The threat of natural and other disasters appears very frequently in the Slovenian territory and thus also the threat to cultural (and also natural) heritage, their demolition and damages. Relatively powerful earthquakes in the recent period (1972, 1976, 1998, 2004) seem to be unusual, but data shows that the territory of our state mostly belongs to comparatively active earthquake zones with possible earthquakes to the magnitude of 6.8 (after the Mercalli's or Medvedev-Sponheuer-Karnik's scale), where the destructions of objects appears between magnitudes 5 and 6. Until now there were 95 stronger earthquakes registered in the Slovenian territory. Owing to extensive and unsuitable interventions in the natural environment floods are increasing so that it is possible to speculate that in future these disasters will imperil more than one third of the population. The number of fires is also increasing, recently from 1,200 to 2,600 yearly. Considerable damages in cultural heritage appeared in some of the recent disasters: in three consecutive disasters in the Soča valley (1976, 1998, 2004) three settlements were destroyed and another 11 seriously damaged, together with some religious and secular monuments. In catastrophic floods in 2007 the historical center of the town Železniki was demolished, and the partisan hospital Bolnica Franja, included in the Register of European cultural heritage, completely destroyed.

Legislation in the field of preventing and protection from disasters (Law on protection from natural and other disasters, 1994 and Law on protection from fires, 1993) includes separately also the protection of cultural heritage. The legal protection in this field consists of preparing and performing measures for mitigating the danger, together with preventing and mitigating the destructive consequences to the heritage. The preparations and measures are realised by the owners and users of this property, the public service for CPP, the state and local communities, together with the civil defence organizations. The National program for the protection from natural and other disasters (2002) has foreseen elaborated plans for 60 sites and 1421 units of the most important cultural heritage in the country. But in the later more detailed national plans for protection and rescue in the cases of natural and other disasters, heritage is only mentioned, but the preparation and protection in this field are not completely and systematically

elaborated. Special tasks in this direction are otherwise intended to be implemented by the public service and institutions in the CPP, but these endeavours are not visible or controlled enough.

9. Criminal legislation

Concerning the cultural property, the Penal Code (1994, amended in 1999 and 2004, and the actual code from 2008) deals with some criminal acts perpetrated in times of peace:

- damaging or destroying an object of special cultural or historical significance (Art. 219)
- taking an object of special cultural or historical significance abroad without a licence from the competent authority (following also the provisions of the Convention on the Means of Prohibiting and Prevention of Illicit Import, Export and Transfer of Cultural Property (1970)), or importing such object contrary to international law (Art. 218).

The Code defines as criminal also the aggravated forms of the following criminal acts (referring to objects of special cultural or historical significance):

- grand larceny (Art. 205),
- arson of a cultural object (Art. 222),
- disowning of the trusted object (Art. 208),
- concealing a stolen or illegally acquired cultural object (Art. 217).

Following the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) in our Penal Code (1994, amended in 2004) two articles are included:

- on destroying cultural and historical monuments (and natural curiosities), institutions and buildings devoted to science and art, contrary to the rules of international law;
- on the abuse of international distinctive signs (Red cross, blue shield etc) (Art. 102).

The basis for both provisions could also be found in the Convention of World Heritage (1972), which obliges the signatory states to never intentionally harm the cultural heritage of exceptional significance located in the territory of another signatory state (Art. 6/3).

The obligations of the state parties, included in the Second protocol to the Hague convention (1999) were also considered in the Codes and amendments, but not completely. So, among the criminal acts the use of cultural property under enhanced protection or its immediate surroundings in support of military action and the extensive destruction of the protected cultural property are included, but not yet the act of making cultural property, protected under the Convention and the Protocol, the object of attack and acts of vandalism directed against cultural property (Art. 102).

This survey shows that Slovenia has considered nearly all important international instruments on the CPP in the framework of responsibility and sanctions: especially the otherwise pretty general rules in the Hague Convention and the more detailed ones in its Second Protocol (with maybe one exception: criminalisation of the exposal of cultural objects in a position to be attacked in military combat). The corresponding rules from the Statute of the International Criminal Court (Art. 8/2.b ix, d iv) are to be taken into account equally.

III. SLOVENIAN LEGISLATION AND THE EU RULES (DIRECTIVES, DECREES) IN THE FIELD OF CPP

EU rules and the Slovenian legislation in the CPP relate in some specific aspects: the export/import of cultural heritage, joined with the status and definition of national treasures, identification and registration of European cultural and historical monuments, and only partly, on the impact assessment of public works on cultural heritage. The extra stress is given to the harmonisation of Slovenian legislation with the EU principles and rules.

a) The EU law system is connected with the CPP especially in the field of removal and introduction (*iznos in vnos*) of objects of cultural heritage within and outside boundaries of member-states. Like the transport of any other goods among the member-states, the transport of cultural objects in the EU framework is also free, meanwhile, Art. 30 of the Treaty of foundation of European communities enables the states to fix the exceptions for cultural goods included among national treasures.

Firstly, speaking generally, not only the CPP but the whole sector of culture is subject to the principle of subsidiarity, considering the laws and regulations in this field as a national prerogative.

- So, the *Council Directive on the return of cultural objects unlawfully removed from the territory of a member-state (93/7/EEC of 15 March 1993)* defines the cultural object depending on its inclusion among national treasures, forming an integral part of public collections or belonging to the categories listed in the Annex to the Directive (including the age and the value of protected objects in ECU). The Directive also regulates the return of unlawfully removed cultural objects and the procedure in this framework. The member-states shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within nine months of its adoption; these acts shall contain a reference to the Directive. The States also shall forthwith inform the EU Commission on their issue.
- The Annex to this Directive, the *Directive 96/100/EC* of the European Parliament and of the Council (17 February 1997) completes the list of cultural objects given in the Annex by adding water-colour, gouache, and pastel pictures, and mosaics.

Secondly, the transport of cultural objects, which are not included in the term of national treasures or they do not belong to public collections, is free inside the EU, but it does not mean that the member-states resign the regulation of the export of these goods across the EU frontiers into foreign states. Since the control over this export is no longer located on the frontiers of individual member-states but in the starting points to non-EU countries, the EU authorities are arranging the uniform control of this export, in the form of *regulations*.

- In this framework, the *Council Regulation (EEC) No 3911/92* of 9 December 1992 is among others defining the obligation of issuing export licences, valid in the whole EU territory by individual member-states, the appointment of a common Commission for this export, the list of authorities empowered to issue the licences, the administrative cooperation in this field, etc. The cultural goods for which the Regulation manages export is included in a special Annex to the Regulation, similar to the Annex enclosed to the Directive 7/93.

- The *Commission Regulation (EEC) No 752/93* of 30 March 1993 determines the rules of executing Regulation No 3911/92, especially the form of export licences, the use of licences, the enclosures to and the time of validity of a licence.
- The *Council Regulation (EC) No 2469/96* of 16 December 1996 amends the 1992 Regulation taking into consideration the Directive 96/100/EC (adding the water-colour, gouache, pastel pictures and mosaics to the list of protected cultural objects).
- *Commission Regulation (EC) No 1526/98* of 16 July 1998 lays down the provisions for the implementation of Regulation No 3911/92 by introducing, besides the standard one, also the model of a specific open or general open licence for the export of cultural objects (for repeated temporary export by a particular person or organisation or for temporary export of cultural goods that form part of a permanent collections of a museum or other institution).
- *Regulation (EC) No. 974/2001* of 14 May 2001 defines the transformation of the value of individual cultural objects from ecus into euros (in the countries within the euro zone) and to national currency (in other member-states), respectively, and the change of nomination "zero" to a real price of individual objects (in the case of archeological objects, separated parts of monuments, incunabula and archives).
- *Council Regulation (EC) No. 806/2003* of 14 April 2003 determines only the organisational change, namely, the establishment of a special committee for the export of cultural objects to assist the EU Commission.
- *Commission Regulation (EC) No 656/2004* of 7 April 2004 replaces the text of Annex I to the basic Regulation (1992) with the changed one.
- Finally, the *Council Regulation (EC) No 116/2009* of 18 December 2008 cancels the basic Regulation (1992) and codifies it, respectively. Changes appear in the definition of export licences, limitations to the number of custom offices, administrative collaboration and the definition of sanctions (penalties) for violating the provisions of the actual Regulation. An Annex to the Regulation is also compiled.

b) The short survey of the already accepted national rules and measures indicates that all important solutions and provisions

from the mentioned European Directives are timely and correctly included and elaborated in the newest acts.

Firstly, these endeavours were systematically present in the long-lasting process of rapprochement and integration into the European Union (including the *Acquis Communautaire*), completed in May 2004. Already in the 1997 *Europe agreement* on the association between the EU and the Republic of Slovenia (amended later in 1999, 2000 and 2001), the framework for the regulation of authorized restrictions was mentioned, so that it shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on, among others, same grounds as the protection of national treasures of artistic, historic or archaeological value (Art. 36). The concrete solutions and regulations are included in the plans of legislation activities and are briefly elaborated in the negotiations in this field.

In this framework Slovenia issued the following solutions and acts:

- In the *Law on CPP 1999* there are included provisions on central authority for the co-ordination of the return of objects of cultural heritage (Ministry of Culture), the deadline for submitting requests for the return of these objects, the payment of compensation to the possessor of unlawfully removed objects in good faith, together with the obligation of the competent ministry to issue the regulations on specifying the categorisation of cultural heritage objects for supervision of the export and removal from the territory of the state.
- The *Regulations on the categorisation of cultural heritage objects* (J.O. RS 73/2000) appoints the groups of objects of cultural heritage, following the Annex to the basic EU Directive (1993), but without the financial thresholds to certain categories. Included are also the conditions for national treasures. This act includes also the additional items of cultural property, included in the EU Directive 96/100/EC (1997): water-colours, gouaches and pastels, together with mosaics in any material.
- The systematic and comprehensive solution in the treated framework is represented by the *Law on returning illegally*

removed objects of cultural heritage (J.O. RS 123/2003). With the Directive 1992 directly mentioned as a source, the law defines and elaborates the following topics:

- The Ministry of Culture is appointed as the central authority to carry out the tasks provided in the Directive.
- Similarly as in previous Regulations, the cultural objects are categorized and the objects consisting the national treasures fixed.
- The procedure for searching, testing and returning the heritage objects, together with the role of the courts is elaborated briefly and in detail.

The newest *Regulation* in this field (J.O. RS 34/2004), similarly to Regulation 2000, elaborates the procedure of returning objects of cultural heritage, with one additional element. This quickly prepared Act, which came into force in the last days prior to Slovenia's entry into EU (1 May 2004) together with the already mentioned *Law on returning illegally removed objects of cultural heritage*, concerns the financial thresholds applicable to certain categories of heritage objects.

The new *Law 2008* also deals with some aspects of the discussed issue:

- The national treasures are defined anew, but in an already established manner;
- The permanent transfer (removal) or export of cultural objects from the Annex to the EU Directive 1993 is forbidden, while the permanent transfer (removal) or export of cultural objects listed in the national treasures is allowed only in the case of exchange of museum, librarian and archival materials;
- The Ministry of Culture shall coordinate the recovery of national treasures which have been unlawfully removed from the Republic of Slovenia, and the recovery of movable heritage from other member-states;
- A deadline for submitting requests for heritage recovery and a payment of damages to a bona fide possessor are regulated similarly as in previous acts;
- The recovery of unlawfully removed movable heritage from EU member states to the Republic of Slovenia and *vice versa* is the subject of a special act (already mentioned *Law on returning*, 2003).

The relation between EU regulations and national provisions is different than in the case directives: national acts. In this framework, every EU regulation shall be binding in its entirety and directly applicable in all member states. Such comprehension derives also from the regulation in the Constitution of the Republic of Slovenia (Art. 3a) on the transfer of execution of some sovereign rights to international organisations. So, the competences of EU and of the member states are divided and could not be doubled or contradicted, but the member states could supplement or extend these regulations. Namely, in the Regulation 1992 there are two additional tasks: beside informing the EU Commission of the measures taken pursuant to the regulation, each member state shall determine the penalties to be applied for violation of the provisions of the regulation (in both cases without determining the time-limits for these tasks).

Observing the practice in Slovenia in this framework we can mention the following:

- The *Law on returning illegally removed objects of cultural heritage (2003)* obliges the Ministry of Culture to prepare a report on the execution of this law for Government discussion every three years (Art. 18);
- Both laws for CPP (1999, 2008) include penalties for the attempt to export cultural goods without a licence, while the export in itself is regulated – as we have already seen – in the Penal Code.

c) The set of EU directives on the impact assessment of public and private projects on the environment only partly refers to cultural property. Cultural landscape and sites or properties of horticultural and park design have a substantial impact, while also many other protected cultural sites (archaeological sites and layers, settlement monuments with their surroundings, historical sites, etc.) are very often affected at least indirectly.

The *Directive on the impact assessment of public and private projects on the environment (85/337/EEC)* of 1985 determines that before the execution of some projects (building and other installation works and projects, exploiting mineral sources, etc.), it is necessary to prepare a special assessment about the environmental impact. Among the different topics, which shall be included in these activities, the material property

and the cultural heritage are also directly included. Within the proposed procedure the appointment of the interested public, the manner of informing, and of consulting the public, etc are included. The member state shall issue the necessary measures to perform this act.

The *amended Council Directive (97/11/EC)* obliges the member state to define, describe and assess each case individually. In the Annex I the works and projects which should be included in the environmental impact assessment are elaborated in detail: building airports, railways and motorways. Meanwhile, the Annex III to this Directive also includes the assessment of those, which could affect the nature reserves, parks and sites, together with the sites, important for history, culture and archaeology.

The *Directive 2001/42/EC* on this topic has prepared the procedure of impact assessment introducing also a special act – the environmental report. Particular attention must be paid to works and projects which strongly affect architectural and archaeological heritage, landscape and mutual relations of these factors.

It is difficult to give a comprehensive picture about the situation in this framework in our country because the main and decisive factors are on the sides of environment, nature protection, construction and building activities, etc. However, the following section tries to present this aspect in the field of CPP.

The first Law on CPP (1999) determines that in preparing the draft site plans of infrastructural facilities of national importance, the municipal spatial plans and other urban planning projects the heritage protection schemes shall constitute an obligatory element.

Moreover, in the construction of production facilities and the implementation of other works which may permanently, temporarily or occasionally affect the regime of protection, suitable administrative acts about the conservation and maintenance of immovable cultural heritage shall be issued: cultural protection conditions and cultural protection approvals. The first act shall determine the requirements that must be met by the project documentation set out by the regulations

which govern the construction of facilities with respect to the construction, reconstruction and by the documentation required for the implementation of planned interventions. Legal or natural persons, which have been issued cultural protection terms shall be obliged to obtain a cultural protection approval prior to the issuing of a permit for construction or prior to the registration of the commencement of works. The approval shall confirm that the project or the documentation for the implementation of works required are prepared in compliance with the issued cultural protection terms. If not, the responsible authority shall reject the issuing of an approval. All three acts - protection schemes, cultural protection terms and approvals shall be issued by the institute (agency) for the CPP (Art. 43 – 47).

The *Law 2008* regulates these issues in a similar way, but in a narrower field, this is in cases of restoration of a cultural monument or any other interventions to a monument and its surroundings, not for works and projects affecting other types of cultural heritage.

So, in the application for obtaining cultural protection conditions, the purpose of the works shall be indicated, and the project documentation required to obtain the cultural protection conditions, shall be added in accordance with the laws governing construction shall be attached. With the protection conditions, the Institute shall lay down the requirements, which are to be met by the project, as well as the requirements with regard to the technical competence of the contractors of specialised works.

Through the protection conditions, the Institute may render the obtaining of protection approval conditional upon the acceptance of an obligation to carry out preliminary researches or to prepare a conservation plan. The cultural protection approval for reconstruction is issued as a project approval in accordance with provisions, valid for regulating the building activities (Art. 28, 29).

Compared with the approaches and procedure from the discussed EU Directives a slightly less elaborated and sophisticated solutions appear in our case, nevertheless they generally work.

d) Initiative on the European Heritage Emblem
In 2006, after the initial discussions, the EU authorities shaped

the formal initiative on the European Heritage Emblem activities. The ideas and proposals developed so that in December 2008 the EU Council issued the Conclusions on introduction of the 'European Heritage Emblem' in the EU. The Council called for the Commission to prepare an elaborated proposal and draft on the introduction of this emblem.

Already in the preparation phase, on January 25 2007, at its meeting in Madrid the steering committee confirmed the European importance and the right to special marking with the European Heritage Emblem for some proposed monuments and sites in the member states. Among these also three monuments in Slovenia are listed: the church from the First World War on Javorca near Tolmin, the Partisan hospital Bolnica Franja in Novaki and Plečnik's cemetery Žale in Ljubljana.

IV. SOME PRACTICAL OBSERVATIONS

1. We already tried to elaborate some aspects concerning the relation between the regulation of cultural and natural heritage, and more specifically the mechanisms for collaboration and solving the common problems in this framework. A short assessment of the implementation of both legislations in these fields shows that the practical problems are being solved still very slowly and not always satisfactorily.

For instance, in cases of sites proclaimed as cultural and natural heritage (monuments and curiosities) simultaneously, still very often the practical activities of inspectorates and other agencies are different and even opposite, e.g. the cases of the stud stables in Lipica, Ljubljana hill, etc. In the first case, owing to the different approaches of the inspectorates of culture and that of environment and spatial regulation, some problems connected with the enlargement of the golf course in the protected area have remained opened for some years. In the second case, again due to the differences between both inspectorates, two modest cottages on a protected hill (a medieval cultural and historical monument and natural curiosity) were replaced with a group of twelve modern luxury apartments.

Numerous examples show the weak coordination between the public services in both fields. The 1999 law, for instance,

determined that if the inspector for cultural heritage ascertains that an intervention on heritage has been carried out, which is contrary to the cultural protection approval or without such approval, he must immediately notify the inspector responsible for construction, who in turn must immediately issue a decision for the determined irregularities to be eliminated until a deadline set by him, or for the further construction or implementation of other interventions to be halted. In practice we could see numerous examples where the latter did nothing or just postponed taking measures, in accordance with his previous own agenda.

2. An interesting and promising form of collaboration in the field of CPP represents the Varded coordination group (the name derives from the Slovenian words for protection of heritage, *varstvo dediščine*) established in March 2008 by the empowered representatives of four state authorities (Ministry of culture and Ministry of justice, the General State Prosecutor, the General Director of the Police and the General Director of the Customs Administration). Among the most important tasks of this group are: the assistance in the harmonization of the national legislation with European instruments in this field, the state survey and shaping a system for the effective protection of cultural property objects and collections, mutual assistance in banning and investigation of illegal acts, support in completing a network of databases about criminal acts and their offenders in this framework, etc.

3. Collaboration between the Ministry of Culture and the Administration for the protection and rescue (Civil Defence) had also previously been very successful in preparing common exercises (for instance the rescue of cultural heritage items in individual museums in case of floods or earthquakes), in defining detailed plans for the rescue of cultural property in cultural institutions, in writing common programs for the education of particular professionals in these fields, etc. In 2003 both organizations prepared a widely noticed international conference on fire security in cultural property buildings, dealing with the cases of destroying fires in York, Hampton Court, Turin etc., together with comprehensive information on EU endeavours in preventing damages in this field (Committee COST 17). However, a general estimate shows that the extent and intensity of these activities are slowly diminishing.

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Andrej Gaspari

**Purchase, compensation or reward?
Abolition scheme for the illegally excavated
artifacts between law and practice
(experience from the Republic of Slovenia)**

3.2

Introduction

Illegal acquisition of archaeological finds is one of the most burning issues regarding protecting and preserving world cultural heritage. This is indicated by the fact that trade in stolen antiquities and works of art is the most profitable criminal activity, immediately after prostitution, drugs, arms and animal species. Virtually every state faces site looting archaeological sites, which also includes the heritage in international waters of oceans and seas, only partially protected by the law. In Slovenia, this phenomenon started in the 1970s and reached its peak in the first half of the 1990s. The still pressing problem partly coincides with availability of equipment needed for researching ground layers and aquatorium. It also reflects the profiteering mentality, in Slovenia also caused by the new socio-economic environment and by examples of sensationalistic media reporting about finds of »treasures« and their market value.

In field, unauthorized searchers are, as a rule, always one step in front of state institutions. The consequence of their actions is selective removal of objects from their primary contexts, causing the loss of archaeological expressiveness of the finds, reducing them to merely aesthetic objects. In addition, they are usually available only to the privileged while their long term destiny remains uncertain. The same applies to the relatively easily accessible archaeological material from riverbeds and from lake and sea bottom. Due to the specific character of such sites and the good conditions for the preservation of materials, such archaeological material often includes the most attractive and scientifically important specimens. Not even the cases when objects so obtained end in museums can abate the irreparable damage caused by lack of recognition, inadequate documentation or even ignoring contexts and relations between the finds.

To prevent and restrict illegal interventions into the archaeological heritage and also to control the export, import, trade and storing archaeological finds as a part of the national wealth which is subject by law to the public interest of heritage protection, the Slovene legislation follows the obligation of cultural heritage protection defined by the constitution with the aim of ensuring the widest possible accessibility to expert and general public, deriving also from implementation of the ratified international

conventions and directives of the European Union. The new Cultural Heritage Protection Law, in force since March 2008, thus maintains the basic concepts of protection from previous legislations and introduces possibilities for closer cooperation with individuals and associations of amateurs and collectors, acting in the public interest. A transitional provision allowed the legalization of possessing archaeological finds originating from the territory of the Republic of Slovenia, in private storage.

Legal aspects of the ownership of archaeological finds in the Republic of Slovenia, procedures at their discovery and research authorization

The issue of ownership

After July 31, 1945, when the Cultural monuments and natural sites of special interest of the Democratic Federal Yugoslavia protection law (Official Gazette of the DFY, no. 54/45) entered into force, archaeological finds or movable objects of cultural-historical significance, discovered either on the surface, below the surface or in the water, were in all legal regulations, applicable to the Republic of Slovenia, exempt from the provisions of the valid property law regulations concerning the acquisition of the right of ownership for things found, as well as treasure finds and were defined as state (between 1959 and 1999 social) property regardless if the objects were raised or not. The criteria for differentiating between archaeological finds and "ordinary" things are merely the circumstance (archaeological context) of their discovery and their cultural, historical and/or scientific significance.

The obligation of reporting finds

Illegal activities affecting archaeological remains and especially searching for archaeological items and removing them have always been sanctioned and defined as a violation or a criminal offence. After 1999, acts include a provision that whoever discovers heritage must ensure it remains undamaged as well as in the place and in the position it was discovered while the find must be immediately reported to a competent institution.

Even before the introduction of such diction, a provision of the property law legal code concerning the responsibility of a finder entailed a duty to notify the then competent institution and deliver the object into keeping to a public (state) museum.

Authorizations and conditions for searching for archaeological remains

The minister's authorization is required for archaeological excavations or investigations, including those using metal detectors and equipment that causes intervention into the original site context. Only persons professionally qualified for executing archaeological investigations can look for, investigate and remove archaeological remains. They must be authorized and act under the supervision of a competent institution. According to the regulations on procedures for the issue of authorization to conduct archaeological investigation (1999), persons with a university degree in archaeology and five years of work experience are professionally qualified to conduct archaeological investigations. The law also specifies sellers are obliged to inform metal detector buyers that it is forbidden to use them in order to obtain archaeological remains.

Within the limits of the law, any searching that ends with excavation or raising an object outside authorized archaeological investigations is therefore impossible. In the light of the obligation to preserve sites *in situ* and the set minimal excavation standards, projects relying on the exclusive use of metal detector as an identification tool for non-endangered sites, seem long surpassed, for their consequence is not only selective removal of material and damaged contexts, but also ignoring the remains from pre-metal periods and places of activity with no metal objects.

Practice

Illegal removal and selling finds

Despite the clear legislative provisions, for more than thirty years we have been facing increased illegal searching for archaeological finds using metal detectors or diving, a process that started in the second half of the 1970s. The then very

limited phenomena were conditioned by the relatively difficult access to detectors, which were used principally by the military and the police. There were also the psychological factors of the then still strict control of the repressive bodies over the movement of persons as well as self-protective behavior of the population and the still present denunciation.

Also, by the end of the 1970s, diving technique was more or less a matter of state bodies and public authorities, while sport or recreational diving was subject to relatively strict control, being an activity hidden from the eyes of security authorities and the public. Therefore it is no surprise that searching for archaeological finds, collecting and/or selling them was a relatively limited phenomenon in the time of the socialist Yugoslavia.

Collecting material remains from the First and Second World Wars, tolerated by the then legislation, as well as some rare archaeological collections in private keeping were normally the result of activities of well-intentioned enthusiasts in their local environment. The collections, composed mostly of incidental finds, were created over a longer period of time and have mostly been published, while competent services kept records of them.

Attractive locations and archaeological sites in the Adriatic Sea drew undesired attention already in the early 1960s, when the monument preservation services faced raiding sites with amphorae and other remains of cargo, ship equipment and weapons. In addition to foreign looters, occasionally caught at the sites or on the borders, the practice of raising archaeological finds spread among local divers as well, even among the members of the military and the police. Not seldom, amphorae were nearly official gifts from superiors as well as decoration of offices, while amphorae at home are almost a trademark of a whole generation of divers. Organized sale of amphorae out of the country was especially intensive in the 1980s.

In the 1970s, first discoveries were made in the inland waters, which – a fact the public is well aware of – due to the excellent conditions for preserving the majority of materials and due to the very nature of the sites usually contain movable objects of

the greatest quality. The private initiative could not be curbed even by the relatively fast response from the public bodies, which created several groups and established cooperation with amateur divers. Some of the latter continued diving outside institutionalized frames. Taking finds out of the country was also detected, most of those finds being from the Ljubljanica river.

Changes in the political and economic circumstances at the end of the 1980s and in the first decade of the independent state of Slovenia were reflected in the rise of the private initiative as a consequence of loosening control and partial decline of the reputation of repressive bodies as well as the rise of profiteering mentality in the frame of non-critical accepting the free market principles. During the transition period in the 1990s, giving priority to the private before public interest and easily accessible metal detectors allowed illegal destruction of archaeological sites to the extent that had never been seen before.

Searchers using detectors are active in virtually every Slovene region except for the flatland parts of Prekmurje where the reason for their absence is that there are almost no sites easily recognizable in the topography. In the past, the hardest blow was dealt particularly to the elevated locations in the western and central Slovenia, in Styria and Lower Carniola and partially also to the previously known sites in the flatlands. The most common targets of searches are hillforts with remains from the Bronze and Iron Age and from the period of the Roman conquest, Late Roman settlements and fortifications as well as medieval castles. There have also been known such destructions of burial grounds and ritual places. Aside from the already mentioned collecting finds from rivers and lakes, special damage is inflicted by uncontrolled digging at the sites in underground caves and abysses and in the mountains. No less worrying is the trend of acquisition and selling of military equipment from the battlefields of both World Wars and also remains of modern vessels and aircrafts.

According to rough estimates, a good decade ago, when such activities reached their peak, some 100 people were more or less actively occupied with illegal searching for archaeological finds and their acquisition. The most problematic are the methodic,

routine searchers, who can easily recognize a potential site as well as the importance and market value of the discovered material. Some of them exchange their finds or sell them, although pure money-making is supposedly limited to a smaller number of individuals. Selling archaeological material out of the country is traditionally bound to auction houses in Germany, Switzerland and Austria. It has been proven that among the objects from the Slovene territory, weapons from the Bronze and Iron Age, the Roman period and the Middle Ages were prevalent. An important share of the market of the illegally acquired finds is represented by numismatic finds. Especially interesting for foreign buyers are Celtic and Roman coins, while it is mostly local collectors who are interested in the silver coins from medieval mints on the Slovene territory.

A part of amateur researchers occasionally informs the experts from institutions about their discoveries. Some of them even publish or exhibit the material found. That is supposed to give their activities some sort of legitimacy, yet they mostly see themselves as owners of the discovered material. If they try to justify their activities, then they point out to the indifference of the experts, supposedly reflected by the lack of exhibitions and the allegedly inappropriate preserving of finds, as well as the professionally questionable approach or somehow else disputable attitude of some archaeologists in public services.

The response of experts and repressive bodies

In the transitional period museum and monument preservation services did not find the right answer to this problem. This was undoubtedly partly a consequence of marginalization of the issue from the side of the repressive bodies and judiciary, but also of the lack of uniformity of the experts at estimating the need for its solving. The latter was reflected in shifting responsibility among the institutions concerned and in the inefficiency of initiatives for legislative regulation of the field and the adoption of general policy of promoting awareness and deterrence of possible violators of regulations. In relation to such circumstances it must not come as a surprise that even those court hearings for the criminal offences of theft and damaging objects of special cultural significance that did take place, based on reports made by aware citizens or public servants, usually

ended with dismissal or acquittal. Judgments of conviction from this field can be counted on the fingers of one hand. This is also partly a consequence of suspects claiming to have cooperated with public institutions.

There was a part of creators of archaeological policy in Slovenia, that either out of interest or in the course of their duties came into contact with the searchers and collectors and saw cooperation with amateurs as the only way for effective prevention of the outflow of the material into inaccessible collections in the country or abroad. Discovering new sites was one of the arguments, supposedly supporting such impoverishment of archaeological contexts. However, due to the lack of transparency and the absence of any foundation in law or in rules on the finds handling and procedures, it is not possible to thus claim public interest. Also the constant inflow of attractive finds had its own effect. Such finds are not only expressive exhibits, they also automatically gain response from the wider expert public when published in local or foreign journals and proceedings from international symposiums, and thus influence the position of their publisher in the scientific circles. The silent consensus about the suitability of such cooperation irrespective of its lack of ethics has brought the experts into inferior position and has established a network of legally questionable relationships, that encourage or »force« museums to purchase objects, although that is apparently appeased by the donated, i.e. illegally obtained finds. At the same time, notions »purchase« and »donation«, used in official documents and media until recently, created a belief, even among the general public, that archaeological finds are the property of the finder and the owner of the land, all in accordance with the selective understanding of provisions from the property law legal code concerning treasure finds. Partly responsible for what happened in the past are also higher administrative structures, competent in the area of the movable cultural heritage, and universities. The former would confirm the museums' proposals for purchasing finds and did not clearly demand compliance with the provisions concerning examining the origin of the material; while the latter did not until recently offer information connected with deviant occurrences and preventive actions in the field of archaeology.

Legislative regulation of the archaeological finds in private keeping

Abolition

The substantially changed circumstances concerning movable cultural heritage protection that arose with the accession of Slovenia to the EU, and the consequent elimination of customs and police control at more than a half of the state borders, dictated introduction of stricter measures in the field of recording traffic (trade, export and departure) and arrangement of preserving the national wealth inside the state territory.

In connection with the basic concepts of heritage protection and with the purpose of settling the mentioned activities in everyday practice, the new law established the principle that archaeological finds, that are not in their original contexts yet they originate from sites in the Republic of Slovenia, cannot be a priori counted either as state property or as the property of persons who currently keep them. Identified as the owner is the keeper who provides evidence that a certain find originates from legal transactions (legal trade, inheritance, exchanges between legal owners), or that it is not a result of illegal excavations, incidental finds or other actions. Previous laws did not oblige keepers to provide evidence about the origin of the finds in their keeping, therefore the new law included a transitional rule concerning the transitional arrangement in the form of the so called abolition.

The idea of abolition was that the keepers who, from whatever reason, did not possess a supporting document about the origin of the finds were able to report their finds to a competent institution within one year of the law enforcement and thus legalize their possessions. In case the find was proven to be of special significance during the procedure the keeper was entitled to financial compensation. In such a case, a find can be, on the basis of the agreement between the state and the keeper, placed into a museum collection. The rest of the material remains in their keeping, yet they must meet the conditions regarding the preserving of material and restrict legal transactions with it, as stated in contracts with the possessors. The competent museums will in such cases conduct comprehensive documentation of

finds and prepare inventory ledgers for the collections as well as preservation guidelines.

Implementation

In order to give the widest possible publicity to the public call, the Ministry of Culture organized a wide-ranging media campaign with two press conferences, one at the beginning and one just before the expiry of the prescribed time limit, and with publications in daily newspapers, a television advert, posters and a brochure containing basic information. The latter was available at the state and authorized museums and galleries as well as at the monument protection service establishments. It was also distributed to societies of collectors, numismatics, divers, cavers, to the chambers of fishing, forestry and agriculture etc. – i.e., to the societies of persons who, due to the nature of their activities, come into contact with archaeological finds.

Concerning the solely voluntary decision to report archaeological finds, the campaign informing the keepers was based on the stated forms of public calls, while the public institutes' staff members were encouraged to promote awareness of the positive intentions and effects of the adopted legislation. Primarily, the call was directed to the collectors, private museums owners and other individuals, who have already exhibited or in any other way published the material of known provenance and from whom a positive response was expected.

Response

As expected, the maximum response was recorded in the month before the expiry of the period, which is comparable to the experience of a similar public call organized some years ago by the Ministry of Internal Affairs to report unregistered weapons. The total number of reports on the prescribed forms received by the competent institutions and forwarded to the Ministry of Culture to issue certificates of the initiation of the procedures is 217. The reports include altogether more than 20,000 objects. The largest part of these are collections of weapons and military equipment from the World War I battlefields in the regions of Karst and Posočje. Prior to the new law such finds were not explicitly stated as archaeological finds and their reporting was

not necessary. Yet, in some 50 cases, the reported objects are from older periods. The expectations regarding positive effects of the transition rule were thus fully met, while the readiness of the owners of large archaeological collections of great cultural and scientific significance, that had already been known to the expert public and contain finds from individual sites with basic spatial information, is particularly pleasing.

Yet, as expected, the intention of the law to regulate the marketing of national wealth, in particular archaeological finds, was not favorably met by everyone. The most severe reactions were directed to the nationalization of collections as a supposed goal of the transition rule. On this basis, two constitutional complaints have been made. Even some staff members from the state museums took part in creating the negative atmosphere, being dissatisfied with an interference in the established relationships, and believing that a large part of collectors and searchers will withdraw into anonymity or even sell the finds out of the country.

Even a proposal for an amendment to the law has been lodged. It proposes amendments to the provisions, yet it is based on a misunderstanding of the importance of cultural heritage as a consequence of the priority the proposal gives to the private before the public interest. The petitioners understood that it is possible to gain ownership of archaeological finds no matter where they originate from. This would even further intensify difficulties in preventing illegal searching and removal of finds from archaeological sites for such actions could then not be penalized from the moment the object is removed from its primary position. Putting well-intentioned keepers on the same »ownership level« as those not so well-intentioned would incite demand and sale, not only stimulate collecting, which is in itself not contrary to the intentions of protection, when it takes place within the law and enables public access. There has been a proposal to change the definition of acquisition, explaining the notion merely as acquiring museum material through purchase, donations and similar, while it does not explicitly mention acquiring archaeological finds through legal archaeological investigations. This is also a part of the concept that archaeological finds, although originating from archaeological contexts, are not state property. Something similar could be stated for the

propositions to limit the merchants' obligation to examine the origin of the items they trade to the cases of registered heritage and to not make further steps to find out whether the item being sold was acquired in a legal way. At a first glance, the intent to equalize the status of keepers and owners is helpful, registering archaeological finds and collections, yet it brings, in connection to the other proposed changes of definitions, a legalization of the hitherto existing practice of selling the illegally acquired finds to collectors, merchants and museums that buy finds with no regard to their origin. The proposal also provides pre-emptive right of the competent museums when it comes to private collections, with no regard to their monument status, which is too excessive an intervention into the right to private property. The proposers thus believe their solutions will raise interest for archaeological heritage. Yet this is by no means public interest but merely interest for the heritage as market goods.

Perspective

The offered possibility to legalize finds in private keeping was welcomed and that led to the decision to make another public call. It also gives us bright prospect that introduction of the legally unquestionable cooperation with amateur researchers will be successful. In any case, the until now non-institutionalized practice of the so called trustees, more or less limited to quasi-archaeological topographies made by unauthorized persons, must immediately be upgraded with the introduction of executive acts, that will, in compliance with the provisions of the European Convention for the Protection of the Archaeological Heritage (ratified in 1999), prescribe conditions for eventual cooperation.

In the frame of preventing illegal excavations and raising finds and in accordance with the interministerial commitment to stricter control over the field situation, there is also additional education of police officers about the illegal acquisition of archaeological finds, which has been underway for several years as a result of cooperation between the Culture and Media Inspectorate of the Republic of Slovenia and the General Police Directorate.

It is evident that merely preventive legislation does not provide efficient protection of archaeological sites. That was clearly shown by one of the most rigorous steps of the Slovene monument protection legislation made so far; the limitation of diving in the Ordinance on the designation of the Ljubljana river cultural monument of national importance, with the intent to prevent the uncontrolled removal of material that had lasted for a quarter of a century, and to promote systematic surveys. The inevitable decision to regulate diving and make it possible only with the license from the Ministry of Culture is comparable to the protection regime of some underwater sites in the Adriatic Sea, and also to the physical prevention of access to the protected underground caves or covering the amphora sites. General public usually does not abnegate the need for such actions.

The example of the Ljubljana, an archaeological site that, after its presentation in the international issue of the National Geographic magazine, received attention around the world, which led also to unwanted visits of new searchers, clearly shows, that legislative acts can only achieve their true goal by promoting cultural values in the media and by rising public awareness on the local level. Successful police interventions following reports made by citizens prove that cooperation with associations of hunters and fishermen, with historical and museum clubs as well as with sports associations, is indispensable to the protection of the most endangered sites.

With the new law inclusion of volunteers into the professionally led investigations was upgraded as it introduced the institution of volunteers – people acting in a trust in the public service, whose tasks are: raising public awareness about the heritage, giving information, and informal control over the situation in the field. Societies can also be awarded the status of non-governmental organizations, operating in the field of cultural heritage in the public interest. To promote examples of good practice with the emphasis on education a joint project about archaeological investigations of the World War I battlefields in the Posočje region is being prepared. The aim of the project is the practical application of a methodologically unquestionable approach. Beside the central state institution it would also include local societies and individuals.

The most effective among the positive motivations are undoubtedly appropriate rewards for honest finders who report chance discoveries to competent institutions. A good example of this is set by Croatia with a system of awarding concessions

for guides to the protected underwater sites of interest. The competent ministry in the Republic of Slovenia is currently in the phase of evaluating the adequacy of one such way of motivating people to report finds.

Stefano Della Torre

**Conservation of built cultural heritage,
laws enabling preventive approach:
the case of Italy**

3.3

1. Planned Conservation

Preservation includes an activity which seems much more relevant and influencing than others - restoration. Architectural restoration is the topic of my research.

During the 19th and 20th centuries restoration grew as a discipline with its own deontology, techniques, and debates. Generally speaking, restoration has two purposes: to conserve the object, but also to reveal its hidden values, often going back to states modified in the past, and now judged more desirable. Therefore, restoration, especially when dealing with architectural objects, grew as a problem of choice and design, and it was a task for architects. In recent times as new skills were developed the material conservation issues seemed to take priority. But there is still a gap between conservation theories applied to buildings and to works of art. Statements and principles are more easily followed when referring to moveable objects, while they become more uncertain when referring to the complexity of a building. The preservation of built cultural heritage includes many more phases, tasks and activities, like restoring, maintaining, monitoring, and also planning. It may be easy to define preventive conservation from a conservator's perspective, but it is difficult to understand all the consequences of extending the definition to built environments.

In the last decades, many efforts have been made endeavouring to set up a strategy for transcending the limits and criticalities of traditional restoration. The problem has been felt at various levels: the lack of maintenance as cause of damages, the need for a long-term vision in choosing appropriate solutions for monuments, the need for a coherent strategy in planning, the need for interventions at an environmental scale... Different solutions have been proposed and tested in different countries. The best practices in the Netherlands and in Belgium are well known. They can show a long story of increasing success and consensus (Verpoest, Stulens 2006). The establishment of the Unesco Chair in preventive conservation at Leuven University is a milestone and the starting point for new development at an international level.

It is generally considered that this kind of preservation (based on information management, regular maintenance and control

of environmental factors) is less expensive and more cost efficient. The claims are that 'prevention is better than cure', or 'from cure to care'. The good old metaphor of the restorer as a doctor has been worked out to include preventive medicine. At this point, the question should be why the preventive approach is not customary and spontaneous for owners and technicians. As is well known, it's a matter of behavioural economics, but also of regulations.

In Italy 'planned conservation' (*conservazione programmata*) is the name for an innovative procedure stepping away from restoration as an event to preservation as a long-term process. It tries to include, maybe even merge, a top-down approach (prevention of territorial risks, such as floods, earthquakes, abandonment...) and a bottom-up approach (everyday behaviours of stakeholders; i.e. architects, conservators and users).

The top-down approach requires regulation, consensus, and also public spending for interventions at a territorial level. It is difficult to enforce this approach without the mirror of new bottom-up tendencies towards prevention and care. For this purpose, information and persuasion could be most effective; in other words, the strategy needs to be carefully designed as a set of different tools (regulations, incentives, education, and dissemination of best practices...). Furthermore, actions have to be taken at different levels, and many regulations have to be harmonized. The best solutions cannot be realised without a global strategy.

A lot of research is still needed to better understand why (and how) planned conservation would be the most convenient strategy for built cultural heritage. We need meta-thinking, because perhaps the vision of the architect, of the restorer, of the historian, cannot reach further and cannot encompass the complexity of the problem. We need to think why, and through what means heritage can be relevant for contemporary societies; we are sure it is, but perhaps we are failing to consider some opportunities. For example, economists propose a number of models for endogenous local development, and culture plays different roles in their models. It would be interesting to ask what would happen if some of the outputs of planned conservation were taken into account.

It is possible to gather and discuss the results of some experiences made in Italy over the last ten years. Italy offers a framework law for heritage and landscape, financial incentives, regulations concerning public works, educational programmes... Therefore, Italian experience leads us to focus on the following issues:

- the legal framework of preservation: advances and open questions;
- the links between preservation laws and building rules;
- the financial side of planned conservation;
- the links between planned conservation and local development.

2. Italian legal framework for preservation: advances and open questions

Firstly, some background information is needed. Disregarding for now the many decrees against robbery and exportation of antiquities, the first comprehensive body of rules on preservation is generally acknowledged to have been born in Italy: the edict written by Cardinal Bartolomeo Pacca and promulgated in 1820 in the Papal States. The principles of careful conservation raised by Antonio Canova, the sculptor (Jokihehto 1999, p. 76; Fancelli, Tomaro 2000), inspired the text that was definitely innovative mainly because of its view of an administrative plan system. The 'Pacca edict' represents an important reference frame for the future of preservation laws, not only in Italy.

Italian heritage legislation history is closely related to the history of Italy in the 19th century, i.e. to the formation period of a national state. Until 1861 Italy was fragmented into many little states, each of them having a legal framework to protect its heritage. After unification a mandatory goal became the building of the nation - sharing the same identity, also choosing some monuments as the nation's heritage. Between 1871 and 1902 a series of laws were passed in order to set up an efficient preservation service spread throughout the whole country. At once commissions were formed on a provincial basis, then, after decades of debates about restorations, regional 'technical offices' were established, in which architects with special skills for restoration works were employed, as a matter of fact, a new

type of professional was born in that period, i.e. the preservation specialist.

A framework law was approved in 1902 together with a list of 'national monuments', but already in 1909 the Italian parliament thought it right to review the legal framework. The 'Rosadi-Rava act', promulgated in 1909 (364/1909), introduced a number of new concepts which set the legislative theories that still stand at the base of the laws enforced nowadays (Code 42/2004). For this short discussion, a most relevant topic is the concept of listing (*vincolo*, i.e. restriction); namely, a form of control applied by the state to private properties and their conservation process. As a precondition for listing a single object had to be selected. The restriction had to be very clear in its boundaries, to avoid legal troubles and to respect the interests of landlords; therefore, for example, the proposed extension of protection to gardens and landscapes became very difficult, and was eventually postponed. But the most relevant and enduring consequence is that the law establishes an unmistakable division between protected properties and the rest of the territory. The reason was probably political more than cultural: some opinion leaders were already pushing for a more extended protection. But the society was only ready to accept a protection based on outstanding artistic or national values, and only on this basis was it possible to overcome the defenders of the intangibility of property right. Thus, the whole protection system is based on an initial proclamation of the building as a listed monument, which conveys a sharp difference with the non-listed surrounding.

The 1909 the law consolidated the *soprintendenze* system, a system of local offices in charge of the protection of monuments and fine arts, and so the process of heritage listing slowly began.

One of the main tasks of these offices is controlling of the conservation of listed buildings. This task has always been understood as the control of restorations, i.e. the approval / refusal of transformation projects. The law does not enforce any specific kind of restoration; the officers will decide according to their taste or culture. The task of controlling the compatibility of everyday activities, maintenance, management, or prevention

conditions (risk management) is perhaps present in the spirit of Italian laws, but it has seldom been practiced.

When in 1939 two new laws were promulgated, and then in 1999, when the 'Consolidation act' tried to give unity to the whole matter of Italian protection norms, the basic structure remained that was set in 1909. The same holds for the 'Heritage and landscape preservation code' approved in 2004 (Cammelli 2007); with a distinct turning point - the vision of a preventive approach.

The roots of this change are to be found in the 1970s, when Giovanni Urbani (Rome, 1925-1994) introduced some new issues to the debate in Italy. For clarity's sake, please note that the 2004 'Heritage code' is known as 'Codice Urbani' after the minister Giuliano Urbani; here we are referring to the role of Giovanni Urbani (died ten years prior to the passing of the law) as the herald of a preventive approach in Italy.

Giovanni Urbani entered the ICR (*Instituto Centrale per il Restauro*) School for restorers in 1945. Two years later he took his degree as art historian, with a thesis on Domenico Veneziano (tutor prof. Lionello Venturi). Then he became a restorer, and later a technical officer of the ICR. In 1973 he became the Director of ICR, the position previously held by Cesare Brandi, his most inspiring teacher. In this position Urbani launched two initiatives, perhaps unsuccessful at that moment, but influential in the long term: the 'Pilot plan for the planned conservation of cultural heritage in Umbria' (*Piano pilota per la conservazione programmata dei beni culturali in Umbria*, 1975) and an exhibition on the seismic risk of Italian built heritage (*La protezione del patrimonio culturale dal rischio sismico*, 1983). Some chosen sentences from the introduction to the 'Pilot plan for programmed conservation of heritage in Umbria' will help to understand his vision: "Cultural heritage must not be dealt with separately from the natural environment"... "Cultural heritage is objectively limited"... "The problem of conservation is set at a global level... available techniques can improve the situation only under the aesthetic viewpoint, not under the conservation one" (Urbani 2000). Urbani felt that the preservation problem had to be set in the framework of environmental concerns: then he proposed a 'shift' in the whole matter: "That turnover

of traditional restoration, which up until today has only been theoretically postulated (Brandi) as 'preventive restoration', must now take the concreteness of a technical action" (*Occorre che prenda corpo di azione tecnica quel rovesciamento del restauro tradizionale finora postulato solo in sede teorica (Brandi) come "restauro preventivo"*). To this technique, Urbani wrote, "we give the name of 'planned conservation' " (*A questa tecnica "diamo il nome di conservazione programmata"*). This is a very important point: the transition from restoration to prevention starts in Italy with a very broad understanding of the aim of conservation; this understanding encompasses concepts such as long-term vision time-wise and global vision space-wise.

It will be useful here to remind the reader that the Umbria pilot plan was prepared in 1975, the European Year of Architectural Heritage, when the Council of Europe launched "a new policy of protection and integrated conservation" with the Charter and the Declaration of Amsterdam.

It should also be mentioned that Urbani used the term '*beni culturali*' (quite new in 1970s Italy). The introduction of this term started a still unfinished revolution. It means that heritage is not understood as a selection of masterpieces, but a network of links and relationships. By naming heritage '*beni culturali*' we mean that heritage is seen as a whole with its territory, and is significant just because of this wholeness, while it becomes less interesting when it is treated spot by spot, masterpiece by masterpiece, listed building by listed building (as it usually is). The term '*beni culturali*' had been introduced before (Franceschini Commission, 1964-66), but Urbani's work was crucial for its elaboration and diffusion. A radically different kind of preservation should be developed through this way of thinking about heritage, working according to territorial plans and not by listing single artefacts, or buildings or properties, and then applying restrictions to them, while the spatial framework goes its own way. But we will come back to this topic later.

The Umbria Pilot Plan was expected to give many outputs (research projects, technical standards, field-tests, test-interventions...). The Planned conservation plan had to include the evaluation of the 'status of conservation' of the whole regional heritage, a programme of interventions in pilot sites,

the outputs of field-tests on decay processes. The plan however did not start any activity in the field, also because of political difficulties (for example, a private company was supposed to be the technical partner of the Ministry, but such profitable partnerships were not welcome in 1970s Italy).

In 1976 and 1980 two destructive earthquakes struck northern and southern Italy. Academic research about earthquake-proof buildings and strengthening techniques arose, and within the ICR Urbani carried out research on the seismic vulnerability of Italian monuments. The exhibition '*Protezione del patrimonio monumentale dal rischio sismico*' was ready in 1983, intended to be set up in various peripheral seats of the Ministry. But only two *soprintendenze* (out of 73!) asked to host the exhibition. The attitude was that 'thinking of evil brings bad luck': it has even been mentioned that a *soprintendente* commented on the idea of the exhibition with a very typically Italian and not positive non-verbal sign...

And so Urbani resigned in 1983, twelve years before the scheduled end of his mandate at ICR. But his ideas of preventive conservation and of a territorial approach to risk management had been launched, and in a few years they had to bear results.

The direct follow up of Urbani's legacy was the Risk Map Project. According to the Italian Ministry website, the Risk Map "is a project carried out by the Central Institute for Restoration (Istituto Centrale per il Restauro) with the aim of providing the authorities in charge of safeguarding the national territory and the Central Administration with a technological instrument of support for scientific and administrative work. The project claims to have been conceived from the ideas of Giovanni Urbani, and to gather the methodological contents developed in the 'Pilot Plan for Programmed Conservation of Cultural Assets in Umbria' (1975). The initiative was defined in a subsequent document; in 'Memorabilia' (1987) entitled 'For Risk Map of Cultural Heritage' and the project arrived only in 1990 within the framework of the law 84/90, which provided financial support of 28 milliards for the implementation of the pilot plan and assigning the scientific responsibility to the ICR. The information processes developed with the Geographic Information System of the Risk Map, make

it possible nowadays, to calculate the intensity of the loss risk to which each monumental and historical artistic asset of the Italian cultural heritage is subject and also, give the opportunity to get acquainted with their distribution all over the territory through thematic cartographic representations that can be constantly updated."

Between 1992 and 1996 the ICR (*Istituto Centrale per il Restauro*) started the implementation of the geographic information system, called 'MARIS' (MAppa RISchio, i.e. Risk Map), in order to provide the public administration with information that should be the basis of planning. The main users are the Departments (*Soprintendenze*) of the Ministry for the Assets and Cultural Activities (*Ministero per i Beni e le Attività Culturali*) operating for the safeguarding, conservation and maintenance of the archaeological, architectural, artistic and historic assets present on our territory, which are in the competence of the abovementioned departments.

The Risk Map is a tool for an approach to prevention that is a support to decision-making at a territorial scale, although it risks being only remotely useful. Obviously, it is expensive and requires public funding. It is expensive in terms of time as well: the time needed for gathering detailed data can be so long that it will be difficult to get a comprehensive situation referring to a given moment (a large part of the data will always be outdated). Theoretically, it can be constantly updated, but updating is costly too, and it is still a task for public structures, without involving stakeholders. Moreover, gathered data is always a little rough, because inspections have to be as fast and as cheap as possible. Other risk evaluation systems appear more advanced, for example the evaluation of seismic vulnerability: but the lesson learned from the last earthquake is that even by evaluating the vulnerability of buildings in a very proper way, all that knowledge is necessary, but not sufficient at all, if the data is not shared with stakeholders, and strengthening the structures is not pointed out as a priority.

Nevertheless, the Risk Map Project has been very effective in keeping the debate alive. Alongside the computer system developed by the ICR, some regional authorities developed technical instruments, incentive system and professional profiles

required to make it possible to experiment with new ways of carrying out the preservation of historical buildings, correlating sites within the territorial framework. Thanks to these efforts, the ground for the 2004 Heritage Code was prepared. '*Conservazione programmata*' became a successful brand, although with different understandings. Urbani's followers were joined by people involved in the research supported by the Lombardia Region and by the Centre for Cultural Heritage in Sicily; conservation scientists proved to be very interested in an approach able to give importance to their tools (monitoring, instruments for early detection...); the research on seismic risk found bold endorsement for a general long-term vision, and so on. A planned conservation strategy was outlined, through a radical discussion on maintenance and its presumed innocence, introducing the theme of authenticity and focusing on architectural complexity, keeping in mind very well the lessons learned through preventive conservation in museums. Attention was paid to international best practices (e.g. *Monumentenwacht*). The aim was to surpass the limits of risk map, by implementing a bottom-up process with stakeholder involvement, soft regulations, education and incentives (Della Torre 2009).

Obviously, the new strategy had to face a lot of opposition, even silent. Owners were difficult to convince, as planned conservation entails spending beforehand, and produces knowledge and reports, not work done; most architects (even teachers of restoration), were sure that 'conservation is a matter of project' and seemed to be afraid that any change in the process would diminish the centrality of their role; public officers (*soprintendente*) were to approve or reject projects, not get involved in endorsing prevention measures; even most economists were of the opinion that heritage counts because of tourism, restoration is a cost, new processes increase the restoration costs and give benefits only in the long term, often outside the reach of their models.

Nevertheless, the attempt to define restoration during the preparation of the 'Heritage code' ended up, after much ado, in a definition of conservation as the output of a process of various activities. Article 29 (conservation), states that "conservation is obtained through a coherent, organized and programmed activity of study, prevention, maintenance and restoration".

Therefore, not only restoration deserves a definition, but each of the activities, now constituting a set of tools, different according to their aims and procedures, but working together for the same purpose. So the activities themselves are given meaningful definitions. Prevention means "the set of activities useful to limit the situations of risk concerning cultural property in its context"; the reference is to advanced techniques of risk management, looking at territorial dangers, like earthquakes, flooding, landslides, as well as at dangers due to human factors, like abandonment or tourism pressure. This definition directly recalls Giovanni Urbani's legacy.

Maintenance means "the set of activities and interventions oriented to the control of the conditions of a cultural property and to the permanency of its integrity, functional efficiency and identity". For the first time the word 'maintenance' (*manutenzione*) occurs in an Italian preservation law. It's worth emphasising that this definition is quite unusual if compared to English terms used at the international level, where 'maintenance' mainly means repairs, and does not include control, so that control activities can be conceived separately from it. But the Italian definition follows a long debate about authenticity and the risks of ill-planned repairs; therefore, inspections and repairs are joined together in an activity, which aims to be complex and carried out by qualified people (Della Torre, Gasparoli 2007).

Last but not least, restoration means "the direct intervention on a cultural property through a set of operations oriented towards material integrity and to recover the property itself, to the protection and transmission to future of its cultural values. In the case of historic buildings located in zones declared subject to seismic risk, restoration includes structural enhancement." The definition, derived from the one in the 1999 'Consolidation act', is very cautious, revealing a tendency toward conservative restoration, but what really counts here is the overall scheme: restoration can't be a single event, but functions as a phase in a broader strategy: over time, it must be integrated within different activities, e.g. prevention and maintenance. It is obvious that this new kind of production cycle requires new tools, and in particular careful information management. An article of a law cannot change old attitudes and customs:

the Italian legal definitions are now far more advanced than everyday behaviours. Nevertheless, article 29 entails some very important practical consequences.

First of all, it has political value as the statement of a new direction. Planned conservation is no longer the dream of some scholars, it has been chosen as the main direction by the State.

Secondly, while Italian heritage laws had previously enabled the State to finance restorations, but were not clear about everyday maintenance and preventive measures, the new law explicitly enables the State to finance all conservation activities, including prevention and maintenance (i.e. also control, inspections, monitoring...).

Finally, it provides a reference for all other regulations that directly or indirectly concern cultural heritage, so that a process of harmonization has started, and other laws are being modified in the same direction, i.e. allowing a preventive approach to conservation.

3. Links between preservation laws and building regulations

The real effect of the 'Heritage code' has to be measured by taking into account the synergy with other regulations. It is remarkable that since Roman times there is a tradition in Italy to legislatively regulate any detail of social life and economic activities, so that Italian norms are sometimes difficult to understand, especially for foreigners.

If the statements issued by Italian law-makers about conservation processes are more advanced than general behaviours, the same holds true for other building regulations. Though following EC directives, and thus facing typical problems and impacts (Ronchi, Nypan 2006), all Italian regulations and standards include some kind of special attention paid to listed buildings. In general, the norms are not prescriptive but 'purpose oriented'. Therefore, the impact of new regulations (energy saving, accessibility, safety, comfort...) can be very hard on historical buildings not protected by the declaration, while for listed monuments it's a problem of

culture and sensitivity. Very often the designer or the controller tends to apply the norms unthinkingly, ignoring the openness of the regulations towards compatible solutions.

Given such a framework, it is obvious that a change in attitude toward preventive conservation, as the Heritage Code has initiated, will not be easily implemented. It will require accuracy in harmonizing all the regulations, but also dissemination and education.

The 2004 'Heritage Code' followed the period of ten years or more in which Italian governments were committed to carrying out a reform of public works. The aim was mainly to end corruption, but the output was a huge body of detailed regulations and norms, substantially affecting any kind of intervention undertaken by a public body or institution using public money; therefore, according to the Italian legislation, the restoration of buildings owned by public bodies is virtually all listed. Two new documents were introduced as mandatory in 1999 for public works concerning listed buildings, namely a 'maintenance plan' and a 'scientific report'.

A 'maintenance plan' (*piano di manutenzione*) has been introduced primarily for new constructions to avoid projects developed without anticipating management problems and maintenance costs. But as it was made mandatory for all interventions, it became part of restoration projects as well. This highlighted some issues that until then appeared self-evident in designing the restoration interventions : e.g. the concerns for microclimate, for compatibility, for durability... Now these contents are given the structure of a 'maintenance plan', divided into three documents: the 'technical manual', which is a kind of archive of information about the building and its elements; the 'maintenance programme', by which maintenance activities are scheduled; and the 'user manual', containing instructions for everyday use, cleaning and keeping. Clearly this kind of structure encourages an idea of maintenance that includes controls and informative feedback. According to Italian regulations the maintenance plan has to be set up in the framework of the project, and has to be updated after the works.

A 'scientific report' (*consuntivo scientifico*) literally means that "at the end of the work a final technical-scientific report

is produced by the construction manager (*direttore dei lavori*) as the ultimate phase of the knowledge process and of the restoration, and as a premise for any future programme of intervention, including the clearest expression of the cultural and scientific results obtained, the graphic and photographic documentation of the state of the artefact before, during and after the intervention; as well as the output of all the researches and analyses carried out and the open problems for future interventions. The report is to be filed by the owner, and a copy is submitted to the competent ministerial office". (Dpr 554/99, art. 221)

These procedures are not fully implemented yet: in spite of the duty of producing 'maintenance plans', maintenance works are still regulated as little as possible, with occasional repairs being done without any planning and without any information feedback. In other words, there is a lack of consistency in building regulations, and the 'Heritage Code' follows an idea of maintenance, which is not (not yet, at least) shared in administrative regulations.

On the other hand, there are no guidelines about the 'Scientific report' (not yet, at least), whose format can span from a few sheets of paper to an enormous information system. Another odd fact is that this report is (should be) mandatory for projects financed from public funds, as if the goal were to oversee the spending of public funds, and not the treatment of heritage objects.

Accordingly, we developed a proposal for the Lombardy Regional Government to merge the 'maintenance plan' and 'scientific report' into just one document, i.e. an information system, which would be updated to support inspection and maintenance activities (Della Torre 2003). This way, it would be possible to transform mandatory bureaucratic duties into a tool for innovation. Furthermore, it is already possible to foresee the development and implementation of integrated, multilevel and multiuser systems, enabling new forms of control and management of historic properties (Della Torre - Petrarola 2007).

4. The financial side of planned conservation

Regulations could also affect the owners' attitude towards conservation. As Nigel Dann concludes after a serious field test, "owners see little apparent benefit from preventive maintenance, tending to react to a problem rather than seeking to prevent it from occurring in the first place" (Dann 2004, 14). Some owners are willing to pay for the brilliant result of a restoration, and they feel that after restoration a quiet period (no technician at the door, no problem) will follow. Others pay more attention to spending, taking keen interest in regular preventive maintenance as it promises to reduce spending, but they soon realize that it requires spending beforehand, while savings will only be visible after some years. Furthermore, the best way to increase the long-term efficiency of a maintenance system is to invest in 'soft' activities (inspection, monitoring, recording), which seem unproductive at first. It's a problem of behavioural economics, as well as a problem of vision and awareness. Even the owners who consider the historical significance of their property are mostly led astray by the common idea that only appearance is relevant for cultural recognition, not material authenticity. This leads them to avoid preventive actions or even regular maintenance, and to delay interventions until the moment when a full restoration is necessary; restoration will thus imply some loss and replacement, but they don't consider this a loss of authenticity or a disadvantage.

Within this cultural framework it is possible to detect more than a signal of change in opinions and values: leading authors changed their ideas, people will follow. As for financial reasons, something could change if incentives and tax reductions were oriented to encourage regular preventive maintenance instead of heavy restoration.

The task of the legal framework is to offer incentives (or tax reductions) for maintenance, instead of large-scale interventions. Some experiences of well designed incentive systems exist, and are proven to work: for example we can quote the experiences of the Flemish provinces in Belgium, where through time incentives given for maintenance works substituted those for full restoration. Thanks to the definition of conservation as a process in Italy public funding for prevention and maintenance is now

possible, although it is not customary yet. A corpus of ideas and norms about development and management has been compiled as well. With this legislative tool, it is now possible to remind the promoters of both, restoration projects or establishing of museums, that such actions require a long-term vision. These are two corners of the same innovation process: considering conservation and fruition as a long-term process, also including planning and the implementation of continuous care instead of single-minded short-term interventions.

However, this policy will never be easy, because regulations affecting taxes and economy have many reasons and interests to satisfy. For example, if the purpose is to increase the amount of money spent in the building sector, to encourage industry, the first impulse will be to push owners towards major interventions: that's why VAT rates are often set in a way that makes heavy transformations more convenient than minimal intervention. Recently, the Italian government proposed to manage rights for the same purpose, offering owners the right to increase house volumes beyond fixed parameters, just to have them invest in the building sector, with the aim of giving a positive boost to economy. These measures, however, are strictly pertaining to an economic situation, and one has to doubt in their long-term effectiveness. The strength and the competitiveness of an economic sector have to do with the readiness to match innovation, to sustain quality, and to improve performance. If everybody agrees that the main challenge of today and tomorrow is sustainability, governments should take actions orienting owners, industries and enterprises towards new behaviours. Keeping jobs during a global crisis can be a primary target for today, but what counts for tomorrow is improving skills and disseminating awareness. No doubt 'planned conservation' stays in the mainstream of sustainability; furthermore, financial figures prove the effectiveness of a conservation policy both in terms of investments and created jobs.

At the moment, Italy is very far from conceiving heritage as a key sector for the development of sustainable economic policies. Politicians still seem to be working only with simple programmes of increasing visitors by offering simpler messages. A lot of work has to be done to develop the potential already contained in the 'Heritage Code', and to make it evident to decision makers.

5. Planned conservation and local development

A preventive approach focuses necessarily on the links between the protected object and its context. Managing risks is a matter of controlling changes which occur in the context and/or in the relationships between the object and the context. That's why it is necessary to work out new tools, and it will not be enough to set up preventive conservation activities out of the framework of a large scale vision. So we are back to the basic problem: which kind of recognition, what kind of protection system.

All the innovative norms introduced lately in the name of 'Planned conservation' apply only to listed objects or properties; not to the whole, precious fabric of Italian territory. A wider definition of heritage is given, but the legal basis is still a declaration of something clearly cut out of context. The buildings' contexts are landscapes, and this should be encouraging, as there is a long tradition of landscape protection studies. Moreover, the Italian 2004 Heritage Code pretends to be innovative just because it considers landscape at the same level as cultural heritage.

Unfortunately, landscape protection is a very hard problem to manage, and even to understand. The European Landscape Convention adopted in Florence in 2000 sets an often underestimated agenda, which requires strong commitment to understand what we are looking for. Sometimes landscape protection is simply contemplative and is unable to keep together a sustainable approach with an aesthetic one. In his *The Invisible Cities*, Italo Calvino seems to describe this with striking precision: "*There are three hypotheses about the inhabitants of Baucis: that they hate the earth; that they respect it so much they avoid all contact; that they love it as it was before they existed and with spyglasses and telescopes aimed downward they never tire of examining it, leaf by leaf, stone by stone, ant by ant, contemplating with fascination their own absence.*" It should be clear that heritage protection is not simply to "love it as it was before", but should be a hard challenge of managing change.

Therefore, to find an Italian way towards planning with effective respect for heritage values, it is necessary to search inside

the norms, innovative as well, concerning the enhancement (“*valorizzazione*”) and management of cultural properties. Here, interesting hints about territorial actions are to be found.

Today, a reconsideration of cultural heritage and its strategic role has become quite popular. This fact can be explained by new trends in the market economy, such as production processes of intangibles and competition between global and local dimensions. As it is generally understood that Italy is far behind other western countries in the management of cultural properties, the Heritage Code tried to address some guidelines for public and private properties; the Ministry should have issued valorisation standards (referring to museum management, employee qualification requirements, comprehensive culture-driven local development plans), although until today we only have the first results of the works of a Commission, chaired by Massimo Montella, which have not been published in full detail yet.

Management itself entails a vision oriented to planning, although we can observe a lot of initiatives which, in the name of management, only seek profit, with a very short-term vision. But our interest is not in the management of single properties, but in system enhancement projects, i.e. integrated projects focused on the culture-driven development of a region.

These kinds of projects became more and more widespread in Italy during the past ten years with a better control of the processes of spending money on cultural heritage, e.g. making grants dependent on the quality of restoration or on the prevision of a better management or maintenance system for the future. In Heritage Code a series of articles (111 and following) are devoted to ‘*valorizzazione*’ and management, trying to give a legal framework to a flow of experiences and to a growing market without rules.

The situation, however, is really complex. Some of the problems concern the different powers of the state, of the regions and of local administrations. The Italian constitutional reform, introduced with Constitutional law n. 3/2001, sets the distribution of these powers, modifying article 117 of the Italian Constitution. The state reserves the exclusive right to protect

and safeguard the environment, the ecosystem and cultural heritage. The regions are delegated to hold the functions of land and territory governance and management, the enhancement of cultural and environmental heritage, the promotion and management of cultural heritage and activities. This situation has been acknowledged in the 2004 Heritage Code. Different competences for the state and the regions are specified in the fields of protection, enhancement and cooperation forms are set. In particular, the state has the exclusive power of protection, meant as the exercise of the duties and the discipline of the activities addressed, on the basis of adequate knowledge, to identify the objects and properties constituting cultural heritage and to guarantee preservation and conservation for the purpose of public enjoyment. Regions have the power (not exclusive) for enhancement, which is meant as the exercise of the duties and the discipline of the activities addressed to promote the cultural heritage knowledge and to ensure the best conditions for exploitation and public enjoyment. Enhancement includes, together with promotion and management of cultural activities, also the interventions of heritage conservation. This division of competences, although clear in its political reasons, is nevertheless difficult to carry out in practice. The bulk of the problem is just the question of which kind of recognition is at the basis of the whole system. If we recall the understanding of ‘*beni culturali*’ introduced by the Franceschini Commission, any subdivision between protection and enhancement will result as absurd, as well as any division between protected properties and their territorial frame.

Once again, the need emerges for a preservation system designed not only for protection, but for a sustainable management of change. Maybe legal innovation will not precede better behaviours on this front, but it will follow field-tested best practice. Project systems (in Italian ‘*distretti culturali*’, literally ‘cultural districts’, but with a strong difference from English common meaning) are evolving, and in some of them the purpose of joining together protection, enhancement and economic development is very well designed. Beyond the opportunity of improving financing efficiency by means of specific grant agreements, these projects are really oriented to be the best environment for setting up a set of tools for the implementation of planned conservation: regulations (and deregulation when needed), incentives, rights

management, long-term vision, education and communication, monitoring and steering in order to harvest external benefits... In this context, it is easier to exploit one of the most important potentials of planned conservation; namely, the possibility of giving activities continuity and management, so that it is possible to look into the educational side of a preventive approach (Della Torre, forthcoming). The model we developed takes inspiration from the endogenous development model of 'learning regions', so we call those system projects 'learning-based cultural districts' (Della Torre, Canziani, 2009; Putignano, ed., 2009).

Actually, planned conservation activities require skilled people at every level, both because it applies more sophisticated techniques

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(monitoring, management, ICT...), as well as because it requires a thoughtful attitude also in simple activities, like repairs and inspections. Good maintenance is often pointed out as the way to keep traditional crafts alive. In my opinion, this can be the case when maintenance is carried out properly, and it remains within the conceptual framework of planned and preventive conservation. This, however, relates to a modern approach and thinking, which aims to learn from tradition not falsify it, and to "unlearn" the misunderstandings and false myths.

System projects seem to be, nowadays, the best environment for testing and developing planned conservation policies, which will provide inspiration for legislation in the future.

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Alfredo M. Ronchi

**Cultural Heritage and Legal Aspects in Europe:
eGovernment and ICT impact**

3.4

Foreword

This contribution will complement some of the issues debated on the occasion of the working group meeting held in Piran on September 2009. eGovernment and ICT may help to solve or at least put under control some problems and negative behaviours. We will focus on the different aspects and meanings that the term eGov represents in different contexts. The main part of the contribution provides an overview of the main aspects of eGovernment having a relation with the cultural heritage sector. In addition, it briefly introduces eGovernment issues, problems and goals in the cultural heritage domain.

Introduction

In the internet era, a diffuse need of innovation and better performance affected governments and institutions in general. Citizens and even institutions are looking for a general re-design of the public administration both in the front and back office. In such a renovation process the ICT support turns "government" into "e-government" which means:

"Delivering complete services in public administrations to individuals, businesses and organisations combined with organisational change in order to significantly improve services and democratic processes and strengthen support to public policies; fostering quality and efficiency of information exchange; empowering citizens and public services clients."

This is one of the attempts to define e-government used on the occasion of the World Summit on Information Society (WSIS 2005).

From Government to eGovernment

More generally e-government can contribute significantly to the process of transforming the government towards a leaner, more cost-effective government. It can facilitate communication and improve the coordination of authorities at different tiers of government, within organizations and even at the departmental level. Furthermore, e-government can enhance the speed and efficiency of operations by streamlining processes, lowering costs,

improving research capacities, and improving documentation and record-keeping. This means that governments have to rethink their information flows and processes. Reasonably a similar revolution will involve the entire structure.

"However, the real benefit of e-government lies not in the use of technology per se, but in its application to transformation processes. eGovernment is more than just putting in new computer systems. Rather, e-Government also involves complementary changes to administrative practices and business processes." (National Research Council 2002)

Nevertheless, one of the seeds enabling a similar transformation is the availability of information communication technologies for everyone. In 2000 the UN General Assembly adopted the Millennium Declaration which set out a vision for the future which affirmed that *'... the benefits of new technologies, especially information and communication technologies, are available to all...'*

"As already outlined by the author on the occasion of the Smart Communities Symposium held in Rome in 1997¹, the advent of e-society will, in the current scenario, dramatically increase the gap between the industrialised countries and the developing ones, and even the gaps between the industrialised countries themselves. At that time I called this issue 'the increasing gap'; now we use the term 'the digital divide'. On the one hand, this is a big problem, but on the other, it presents an incredible opportunity".² Thinking positive, let us consider it to provide digital opportunities.

Thus an increasing number of countries started e-government programmes. Some of them simply published on line an "institutional" static web page, others added some services and some took the opportunity to activate an in-depth reform of both the front and back office.

1 Smart Communities Forum: Economic Development in a Global Information Society, September 1997, Sophia-Antipolis, Nice, France and Rome, Italy.

2 This is an excerpt from: Alfredo M. Ronchi, eCulture: cultural content in the digital age, ISBN: 978-3-540-75273-8, Springer 2009

If we consider our specific domain of interest, cultural heritage, the basic benefits and goals due to the implementation of an eGovernment platform may represent a significant contribution to the sector. The question is: which are the guidelines ensuring a proper solution development?

As generally agreed once we have ensured a proactive environment and accessibility for all, in order to achieve the goal, we have to adequately take into account: Who is likely to go online to use government services? What is the typical behaviour of citizens online? What types of barriers and obstacles avert people from going online to use government services? What factors encourage users to feel comfortable with e-Government services? Once a person uses online services, will they return? Will they encourage other people to use the site or not?

The global survey of e-Government created by Professor D. West (<http://insidepolitics.org/>) offers an interesting insight on e-Government implementation: *"Most governments around the world have gone no further than the billboard or partial service-delivery states of e-Government. They have made little progress at portal development, placing services on-line, or incorporating interactive features onto their websites. Not only are they failing to use technology to transform the public sector, their efforts mostly consist of no meaningful change or small steps forward"* (D. West 2005).

A web of relations

Above we considered the terms and definitions, what about the different actors and their main relations? If we consider the potential set of interactions between government and other bodies we can find at least:

- Government to Government (G2G): interactions among different governmental bodies (local/central, ministry/ministry, local/public company, etc);
- Government to Business (G2B): interaction among governmental bodies and business companies;
- Government to Citizens (G2C): interaction between governmental bodies and one or more citizens.

All the above mentioned interactions are often active in the field of Cultural Heritage (e.g. private owner / local government / superintendents / ministry). A recent emerging class of interaction, at global level, is the transnational one (e.g. G2G, G2B, and G2C)³. Simply considering the European Union framework, how can I perform a transaction between Italian and German e-government systems? Such an interaction usually implies setting international standards and extended interoperability. Some European projects are developing transnational government services mainly referring to their own interoperability standards.

Back to the design approach of course the first idea is to offer information and public services online. Due to the new opportunities offered by the technological framework we can provide new additional services.

Toward iServices and iGovernment



If we consider traditional services, we can simply try to implement a major part of the ones offered in the pre-information society era as "e" services thanks to the basic use of networking; the challenge is to turn them into "i" services where "i" stands for intelligent, innovative and inclusive.

One of the common risks is to design the new front office on the basis of the "institutional" point of view. This often means replicating the internal structure of the institution. Such an internal structure is very often "unknown" or "too complex" for the end user. It usually takes some time to reshape "practice" in order to fully benefit from innovation.

In the early phase of internet use large companies and postal services used to transfer messages by email but delivered

³ E.g. stolen artefacts: Owner / local police / Interpol – national/international cataloguing system - etc.

them to the “recipient” in paper format printing and delivering them as regular mail. The same happened to a wide range of services delivered in “half duplex”, i.e. information flow from the institution to the citizen via the internet, the opposite by registered mail or fax. The same happened and still happens in e-government. “Bad ambassadors” are always one of the major concerns in any innovation process. They can significantly delay the implementation of new processes and technologies. All these considerations make us consider that first of all we need a complete re-design of both the front and back office of governmental institutions including the full set of tools and procedures needed (e.g. electronic signature, electronic submission and delivery, etc). This is the starting point for the complete digitisation of public administration, private bodies and citizens. Then we need to ensure full interoperability in G2G interaction. The next step in this direction means online access to: public bids, financial support, e-procurement, information and documents, and more. Last but not least, a citizen-centred design of the platform. We will outline in the following paragraphs why those aspects may influence performance and even the successful implementation of e-government platforms.

In the present transitional phase one of the main problems consists in the bridging of the digital and social divide between digital natives, digital immigrants and “analogue ancestors”. The effective deployment of the digital society must be inclusive. Accessibility issues came to the fore at the end of the 1990s, supported by technological issues related to the potential social role of the internet. If the internet has a “social” role, then, in order to avoid any “divide”, it must be accessible to anyone, anywhere, and at any time. If e-Government tools have to be considered the “default” link between organisations, individual citizens, and the public authorities, providing in this way a better interaction, it must be accessible to everybody, no matter the gender, age, wealth or eventual disability.

If we simply think of elderly people, it is not realistic to think that they will start using eServices. We must probably set up iServices providing a real tangible added value to them. Better and more effective service, less bureaucracy, less physical efforts to be invested in the procedure (no need to get to a specific place, no queues, intelligent help supporting the interaction, etc...).

There is another relevant emerging parameter to be considered in the evaluation of e-government global performances: e-Participation. e-Participation has the potential to establish more transparency in government by allowing citizens to use new channels of influence which reduces barriers to public participation in policy-making.⁴ e-Participation is a compound “object” made by feedback channels (C2G) or live contribution opportunities mixed and boosted by Web 2.0 features and services such as wikis, blogs, Facebook, Youtube, Twitter and more. Some politicians found a new and more direct way to reach their audience thanks to Youtube video-clips or supporting communities on Facebook. In some way this “person to person” consensus building may revolutionize the world of politics establishing a true bottom-up approach. Further proof that the lines between politics and citizens are becoming blurred was the YouTube sponsored Democratic Presidential Debate in the United States, where ordinary citizens had a platform to question candidates on issues that mattered to them. This direct interaction using ICT tools was unprecedented and ushered in an era of direct dialogue between politicians and citizens.

Accordingly with the definitions provided by the UN e-Government Survey 2008:

e-Information - The government website offers information on the list of elected officials, government structure, policies and programmes, points of contact, budget, laws and regulations and other information of public interest. Information is disseminated through a number of online tools such as: community networks, blogs, web forums, text messages (micro democracy), newsgroups and e-mail lists.

e-Consultation - The government website provides the tools necessary for e-consultation. It allows citizens to set the agenda for the debate through e-petitioning. The government ensures that its elected officials have a website to communicate directly with their constituents. It maintains an archive of their discussions and provides feedback to citizens.

4 Hacker, K.L.& van Dijk, J. (ed. 2000) Digital Democracy: Issues of Theory and Practices, London, Sage

e-Decision-making - The government is willing to take into account the e-inputs of citizens into the decision-making process. The government informs its citizens on what decisions have been taken based on the consultation process.

e-Participation and related activities may provide a significant support in the field of Cultural Heritage both at decision-making level and at consultation / information level (e.g. cultural identity preservation, intangible heritage, etc).

There are at least two more points to be considered in designing e-government solutions: the thin border between such services and privacy, and the long term preservation of digital archives. We all know that the increasing use of technologies and in particular ICT improves our "visibility" and the danger of being "tracked"; mobile phones, highway tags, on line transactions, instant messaging and emails are very useful, but reduce our privacy. The second aspect has been underestimated for quite a long time. Digital fragility is one of the major concerns in the digital age.

eGovernment success or failure

There are a number of aspects influencing eGovernment success or failure. Simply to mention a short selection, some of them refer to the cultural aspects, some of them to organisational issues, some of them to the infrastructure and technology in general, and some to the user's habits, literacy, capacity or merely the interaction design. This includes: having a significant population of citizens willing and able to adopt and use online services; and, developing the managerial and technical capability to implement e-Government applications to meet the needs of citizens (Prattipati 2003).

Governments are increasingly looking towards an "e-government-as-a-whole" concept which focuses on the provision of services at the front-end, supported by integration, consolidation and innovation in back-end processes and systems to achieve maximum cost savings and improved service delivery. What do we mean as "whole-of-government"⁵ concept? It is a holistic

⁵ The 'whole-of-government' concept refers to *Connecting government: Whole of Government Responses to Australia's Priority Challenges*. Management Advisory Committee Report 4. 2004. <http://www.apsc.gov.au/mac/connectinggovernment.htm>.

approach to ICT-enabled public sector governance. As stated in the Australian report on Connecting government "public service agencies working across portfolio boundaries to achieve a shared goal and an integrated government response to particular issues." Government agencies and organizations share objectives across organizational boundaries, as opposed to working solely within an organization; this is the main characteristic of the *whole-of-government* approach. Such an innovative approach encompasses the design and delivery of a wide variety of policies, programmes and services that cross organizational boundaries. This means that in mid-term perspective the cultural heritage sector will be included as a part of the whole in the process (from cataloguing to management in a broad sense).

eGovernment services must not replicate the complexity of bureaucracy at end user level (e.g. citizen). The organisation and the complexity of the back office, even if it exists, must be transparent to the end user. The organisational and procedural aspects of governments are surely one of the key points in the implementation of e-government strategies. Nevertheless, the choice to take advantage of e-government is one of the unique opportunities to deeply restructure and re-think the overall governmental organisations in term of bureaucracy and workflow. The long term sedimentation of different procedures, workflow and regulations must probably be re-designed, reaching major efficiency, and incorporating background knowledge and routine controls in the automated procedure. This part of the job may be one of the most difficult, both because of the usual complexity of such procedures, and because of the "re-distribution" of responsibilities and "power". This aspect may be crucial because even "information" is "power". Online services providing timely information on public bids or financial opportunities may conflict with private interests taken for granted.⁶

The re-design of work and information flow will impact both back-office and front-office activities. Back office refers to

⁶ Astegiudiziarie (<http://www.astegiudiziarie.it> by Aste Giudiziarie In-linea Spa) and Infoappalti (<http://www.infoappalti.it> - by Studio NET) are two web based services providing timely information on public bids. Such a service will deliver relevant information to all the citizens interested in taking part in bids without any potential lobbying in information provision.

the internal operations of an organization that support core processes and are not accessible or visible to the general public.⁷ The term front office refers to government as its constituents see it, meaning the information and services provided and the interaction between government and both the citizens and businesses (G2C, G2B). Of course front office activities require some back office activities in order to provide “services”. Back office services may be internal and are production oriented.

A major part of innovation in processes and procedures has faced some friction in the early phase. From the industrial revolution to the information age, the accounting and banking sectors to the engineering sector have perceived innovation in procedures and workflow as something upsetting. For these reasons this aspect has to be carefully considered and approached through a deployment plan. The twin objective of achieving further improvements in service delivery and efficacy in government functioning is bringing about a rethinking of the role of ICT.

Having already considered the “working” infrastructure we now can focus on the technological infrastructure: telecommunication and computer networks. The internet is now, for the most part, the communications medium of choice (in a great many forms) for a large part of the world. Why “great many forms”? Because the way we communicate and the tools we use to do so have all evolved significantly since the internet came into the public domain (1990s); and continue to re-define how we communicate.

On one hand, we have moved from an era of using the internet to send simple text based messages (email) to today where the same email is more a multimedia message and can contain pictures, videos and voice messages, in addition to text. The internet is also being used to make “telephone” calls using voice over the IP (VoIP), for blogs, web portals, instant messaging and social networks are some more different forms of the way in which we have begun to use the internet as a communication medium. On the other hand, we improved and extended the use of mobile phones from pure voice communication devices to multimedia

and interactive service terminals. Mobile phones, both terrestrial and satellite, are playing a significant role in the deployment of innovative services, simply consider the growing “apps” market.

Connectivity as a public good

Knowledge and information are the most important resources available to humanity. Moreover, they have the wonderful qualities of being non-exclusive and non-rivalled (they are not private property and we can consume as much of it as we want to without depriving others), it encourages synergy (more of it and more of us engaged in consuming it usually results in more of it) and these are typical qualities of public goods.

There is a Chinese quote outlining such qualities: “If we share one coin each, at the end we still have one coin; if we share one idea each, at the end we both have two ideas.”

If we agree to consider “connectivity” as a public good, a commodity, how can we ensure it to everybody? Of course we do not believe that connectivity could presently be provided free of charge. We do believe, however, that we can greatly increase people’s access to affordable and viable connectivity services, thereby contributing in time to making the internet a ubiquitous piece of infrastructure just like roads, water and electricity.

Internet World Stats (www.internet-worldstats.com) reports that there are close to 1.5 billion internet users today. comScore (www.com-score.com), an Internet research/analysis organisation, reported in January 2009 that the global internet audience (defined as 15 years of age and older accessing the internet from home and work computers) has surpassed 1 billion users (note that the comScore report excludes internet access from cybercafés, mobile phones, and PDAs, which probably represents the difference in numbers between the two reporting organisations). These numbers are growing rapidly and will continue to do so.

The internet that is taken for granted by so many needs to continue its evolution around the fundamentals upon which it was founded. These fundamentals relate to the concept of user centricity, where the internet user and how they use the internet

⁷ E-Government for Better Government. OECD e-Government Studies. <http://puck.sourceoecd.org/vl=16470954/cl=30/nw=1/rpsv/cgibin/fulltextew.pl?prpsv=/ij/oecdthemes/99980096/v2005n30/s1/p11.idx>.

should be the primary focus of decisions and developments on the internet. The concept of user centricity characterised, perhaps for the first time in computer technology, the birth and early development of the web technology. From the beginning up to, at least 1995, the World Wide Web technology was built based on the request of users directly from users.

Standards and interoperability

Another defining feature of the internet's success has been the open nature of the technical standards, and the innovation this has allowed. The innovation have been key to a large number of new technologies that have evolved out of the internet, and it is important that this continues so that we keep finding new ways to do some of these old things cheaper, better and faster.

In order to provide a comprehensive scenario we take into account different levels of interaction and services; government to government, government for citizens, government for businesses, and more. The interaction between different systems and organisations means interoperability in a broad sense.⁸ What does the term "interoperability" mean?

<interoperability>

ability of a system (such as a weapons system) to work with or use the parts or equipment of another system [Merriam-Webster dictionary]

<interoperability> (computer science)

meaning the ability of the user of one member of a group of disparate systems (all having the same functionality) to work with any of the systems of the group with equal ease ... [Encyclopædia Britannica]

Interoperability is currently one of the most popular buzzwords used in the ICT industry. This focus on interoperability and inter-workability has arisen due to the spread of the internet and the increasing need to get different applications to "talk"

⁸ EU member states have expressed a political will to change public procurement significantly. The Manchester ministerial declaration of 24 November 2005 for example defines that "by 2010 all public administrations across Europe will have the capability of carrying out 100 % of their procurement electronically and at least 50 % of public procurement above the EU public procurement threshold will be carried out electronically." The PEPPOL project is strongly supporting this target. - <http://www.peppol.eu>

to one another. Without a way to exchange information, high-tech systems literally can't communicate with each other, and if they can't communicate, they can't work—interoperate—with each other.⁹

The need to exchange data between different applications has long been a common requirement in several key sectors, such as research, banking, ... and e-Government. Information systems often speak different languages or dialects. This happens not only when the products that need to communicate come from different suppliers, but even among different generations or variants of the same product.

While an interoperability problem might be due to a minor incompatibility, its impact on a system can be dramatic, and the task of getting all the relevant parties to participate in solving the interoperability problem can often turn into a nightmare.

There are therefore compelling reasons (e.g. connected government) to create information technology products that can be guaranteed to interoperate (e.g. digital signature, digital certificates, e-procurement, etc.). This issue is fundamental in order provide a unique access point to personal data services for citizens as it is requested for the one stop services. Different governmental bodies at different levels and eventually public companies will be able to exchange data and provide integrated services to citizens and/or companies.

This can only be achieved if all of these products conform to the same, publicly available standards (e.g. open standards). Of course, we do not only mean technological standards, but standards in the broad sense including semantic aspects and thesauri.

The availability of intercommunication has enabled incredible new scenarios based on information linking and exchange with potential positive effects in the e-Government sector. Interoperability is both the exchange of information and its utilisation. Interoperability will play an interesting role both amongst governmental bodies and at international level (e.g. European Union).

⁹ Alfredo M. Ronchi, eCulture: cultural content in the digital age, ISBN: 978-3-540-75273-8, Springer 2009

eGovernment and cultural heritage

Apart from the comprehensive and inclusive view of eGovernment as a unique platform, it is evident that the use of typical eGovernment instruments in the cultural heritage domain will have a positive impact. Enhanced efficiency, quicker responses, information sharing, and transparency are only a limited number of potential benefits. The implementation of an eGovernment approach with the re-design of the procedures and workflows together with the benefits due to multimedia communication tools will probably simplify and empower the process. Simply think of administrative procedures, now reshaped in on line versions, the immediate availability of a full set of information associated with a specific artefact, or the completely new approach to surveys, the potential close communication between expert panels and on-site surveyors. Public opportunities¹⁰ and administrative processes may be more transparent and effective, the unique opportunity to design and implement efficient procedures in a kind of “pipeline”, ensuring minimal “stops” and scheduled times for each procedural step.

Some potential scenarios are already drawn up, ranging between monument management and fighting illicit artefact trade. Objects unique identifier, microdots, features extraction and invisible markers or trackers are reality nowadays. Long term data repositories may preserve an incredible amount of precious information supporting restorers, curators, researchers. The adoption of unique digital identifiers¹¹ may help in information harvesting and sharing.

Culture and long term perspective

In the last few decades we have witnessed two related processes: the increasingly visible inclusion of electronic devices in our everyday lives, and the rush to digital formats. Institutions, organisations and private companies have recently begun to convert their own archives into digital formats. Moreover,

¹⁰ E.g. access to public funds in order to restore and promote historical buildings.

¹¹ E.g. OKKAM Enabling the Web of Entities - is a Large Scale Integrating Project co-funded by the European Commission - <http://www.okkam.org/>

the general public has also started to convert personal data into digital formats: documents, music, movies, drawings and photos have been converted from their original formats into bit-streams in digital media.

People used to believe (and many still do) that digital formats were the ultimate formats for storing information indefinitely. The idea that texts, images and more general data can be perpetuated by converting them into digital form is popular and widely supported.

As a result, a significant amount of our documents and data relies on digital technology. But is digital technology really suitable for long-term preservation? And are electronic devices, which are required in order to access information stored in digital formats, durable enough to guarantee future access to this information? If not, what can we do to overcome this problem?

The rapid evolution of technology makes the preservation of digital content a challenge. Considering the huge amount of data to be stored, the amount of time permitted to accomplish this task, and the length of time that such information needs to be stored,¹² it is important to address the issue of the long-term conservation of digital information—a problem that has largely been underestimated up to now even at governmental level.

We need to consider two aspects: technological obsolescence and the temporary nature of “permanent” storage systems. Computer systems are aging; the media on which information is stored are disintegrating. Given this issue, what are the long-term implications of relying on current digital technology to preserve our archives?

Society, of course, has always shown a great deal of interest in preserving materials that document issues, concerns, ideas, creativity, art, discourse, and events. Even if we simply focus, for the moment, on basic digital content such as text, we cannot guarantee that textual records stored in digital electronic form will always be accessible.

¹² The time span is mainly related to the national regulations and data/document type (10, 40, 70 years, indefinitely).

Although it may seem odd to discuss digital text in this context, there are some important, although indirect parallels, between the principles described above and those that govern digital text capture. When capturing “digital text” it is commonly understood that we do not sample the original in the same way that we sample audio or images. However, the process of text capture does involve making choices about the level of granularity of the resulting digital representation.

When capturing a twentieth-century printed text, for instance, a range of different “data densities” are possible: a simple transcription of the actual letters and spaces printed on the page; a higher-order transcription, which also represents the nature of textual units such as paragraphs and headings; or an even more dense transcription, which also adds inferential information such as keywords or metrical data.

Other possibilities arise for texts that are structured on different levels of internal granularity. In the case of a mediaeval manuscript, one might create a transcription that captures the graphemes, the individual characters of the text, but does not distinguish between different forms of the same letter (for instance, short and long). Or one might capture these different letter forms, or even distinguish between swashed and unswashed characters. One might also choose to capture variations in spacing between letters, lines of text, and text components, or variations in letter size, or changes in handwriting, or any one of a number of possibly meaningful distinctions.

These distinctions, and the choice of whether or not to capture them, are the equivalent of sampling rates and bit-depth: they govern the amount of information which the digital file records about the analogue source, and the resulting level of nuance that can be obtained when reusing and processing the digital file.

As already outlined, although the loss of data due to the deterioration of storage media is an important consideration, the main issue is that software and hardware technologies rapidly become obsolescent. Storage media are subject to degradation; they are not designed to survive for long periods of time (the kinds of timescales associated with archives and governmental data). Magnetic technology does not guarantee

long-term access to stored information; tapes and disks lose their properties and are sensitive to environmental conditions such as heat, humidity, magnetic fields, static electricity, dust, fire, etc.

In addition, they become obsolete as the devices capable of reading them become outdated and are mothballed. Even though they were once cutting-edge formats, today it is very difficult to obtain equipment that will read a 9600 bpi magnetic tape, an 8 inch floppy disk or even a 5¼ inch one. The same can be said for early RLL or IDE hard disks. Old formats and standards are essentially shelved in favour of newer formats and standards.

This even happens to software standards, because ways of coding information and the quality of the information stored are constantly improving. This situation holds for both electronic records converted from analogue forms (paper, film, video, sound, etc.) and records that were originally created in electronic form (born digital).

For digital content that is derived from an analogue source, the analogue source (provided it is still available) can be digitised again to new and improved standards and formats, so this issue is not a big problem. On the other hand, content that originated in digital form must be preserved based on the original record. Until recently, documents were generally paper or microfilm based. Microfilm technology was popular because of its efficiency, usability, robustness and we now recognise that it is almost hardware-independent. A few decades ago people started to convert microfilm archives into digital archives.

Sometimes the last resort is to keep the data in a safe between one generation and the next. Unfortunately, some digital data cannot be converted to paper or microfilm formats. In this case, technology does not help because it is constantly delivering new generations of digital objects that are different to established ones. How can we revert back from a digital signature to paper format, or do so for a cooperative document created on the fly? How can we easily preserve distributed data related to an “inter-governmental” service? How can we permanently store wikis or blogs?

However, today's data storage methods include digital storage, and more and more organizations are storing more and more of their information digitally. Yet, surprisingly little attention is given to the preservation of digital information over long periods.

The digital and electronic assets that need to be preserved range from high-level and mission-critical information and applications to objects from everyday life. This task of preservation will involve highly skilled ad hoc organisations and citizens, the former saving military or census records and the latter saving their photos, music, and documents.

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Conclusions

We have to adequately take into account the relevant impact that the vision "e-government-as-a-whole" may have on the cultural heritage sector. Does eGovernment represent an opportunity or a threat for this domain? There is not an *a priori* right answer; it is the responsibility of the main actors both on the institutional/public and private side to cooperate in order to shape eGovernment as an opportunity, not a threat. eProcurement platforms may suggest offers that are not in line with historical quality preservation. European directives may unintentionally impact and jeopardize cultural assets. One of the key points in order to avoid such risks is to contribute to the innovation process from the early beginning.

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Kersti Berggren

**To experience institutional capacity-building
in Kosovo as an international expert**

3.5

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.

Hague Convention, 1954

I still clearly remember my first arrival to Kosovo, in August 2001. I looked out through the airplane window and tried to read the landscape I was flying over. I saw a lot of unfinished red brick houses and stacks of corn. What kind of society would I find?

I was driven in to Pristina, a city I found quite surprising, very brutal and modern in its design. When my mission was over and I left six months later, I felt sad and wondered if I would ever come back. I had had the privilege of learning a lot about European history, and I have made a lot of friends. But I did come back, and I have kept coming back to Kosovo over the years.

Working for CHwB

The Swedish foundation Cultural Heritage without Borders (CHwB)¹ was constituted in 1995 as a reaction to the extensive and systematic destruction of cultural monuments in Bosnia-Herzegovina. The founders of CHwB were mostly professionals in the fields of architecture and heritage, which identified an urgent need to create an organisation that could fulfil the aims behind the 1954 Hague Convention.

The main goal of CHwB is to work with safeguarding of cultural heritage devastated by catastrophes, time and negligence, and at the same time contributing to capacity building in accordance with international principles. This means also working to support the development of networks and co-operation between ethnic and religious groups across entity and nationality borders.

CHwB started its mission in Bosnia-Herzegovina in 1996, and from 2001 in Kosovo, when I entered as one of two project leaders. The work in Kosovo was outlined as two parallel types

of projects; the first one offered support to the development of public management (my task); the second dealt with hands-on preservation works.

The mission for CHwB in Kosovo had started with a request from the PISG/MCYS.² Since the end of the war in 1999, Kosovo had been governed by the United Nations Administrative Mission in Kosovo (UNMIK) as a protectorate. In this task UN faced a hitherto unfamiliar challenge as an organisation; handling the civilian administration of a whole nation. UNMIK built a management system that was gradually supposed to take over the running of Kosovo as a democratic entity. The strategy was to staff the administrations with international experts (Co-Heads) parallel with Kosovar professionals. The international experts were expected to, when the situation became more stable, step down in the hierarchy system and hand over the leadership to the Kosovars.

At an early stage the Head of the Heritage Division at Department of Culture (DoC) in Kosovo suggested the placement of an international expert at the Central Institute for Protection of Monuments in Kosovo (IPMK), as part of the parallel staffing technique. UNMIK welcomed the idea and an agreement was reached with CHwB and the Swedish International Development and Co-operation Agency (Sida) to support an heritage expert for six months. My position was regarded as Co-Head at IPMK and as supervisor to the whole network of Institutes for Protection of Monuments (IPMs) in Kosovo.

Paralysed institutes

The foundation of the IPMs goes back to the 1950th. The federal (now national) IPMK institute was established 1954, the other municipal (now regional) institutes were founded by respective municipality in later decades. The Institutes had four major obligations: proclaiming legal documents for listed buildings, keeping archives, handling restoration projects for protected buildings, and monitoring research in the field of heritage. I could see that both the fundamental structure and

¹ For more information about CHwB see www.chwb.org

² Provisional Institutions of Self-Government (PISG)(Ministry of Culture, Youth and Sports (MCYS)

the fundamental obligations resemble those in Sweden, at least as it used to be.

As Co-Head and supervisor I was given two assignments. The first one had to do with the collapse of the Institutes after the war; they had to be made functional again. The second assignment had to do with the urgent need to introduce new ways of thinking to the staff, implementing contemporary international principles regarding conservation and preservation. This included the first attempt to draft a new heritage law. The overall goal set out from CHwB was to raise the status of heritage, and show its decisive role in the economical and social development of Kosovo. The difficulties in making the IPMs go for this goal seemed at the beginning almost overwhelming. The whole institutional system appeared paralysed.

To find out what the situation really was, I carried out a staff assessment. This turned out to show in clear figures the severe consequences of the recent decades of politics towards Kosovo. After Milošević came into power hardly any ethnic Albanian had been recruited to the Institutes. The Albanians already at the institutes lost all leading positions. Kosovo-Albanian academics experienced ten years of discriminatory politics, with no right to be promoted, to be educated or to educate. After the 1998/99 war the institutes were facing a situation where everybody with ethnic Serbian origin had left, and the staff of ethnic Albanian origin were underqualified or inexperienced. Everybody was exhausted after years of armed conflict.

The institutions were supposed to function with an almost non-existing budget at the same time as they were expected to broaden their approach towards conservation and preservation issues and to co-operate with – and educate – other sectors, such as the urban planning departments within the municipalities.

The staff assessment showed that the conditions before and during the war still heavily affected the Institutes in 2001. The staff at hand was clearly split in two halves. One part had often more than twenty years of experience working at an institute, while the other part had started working after the war. This unbalance was worsened by another fact: the old staff had one kind of education and profession, while the newly employed had

another kind of education. There were no guidelines issued from any superior level how the institutes were supposed to work, and with what. They were left to compete with each other, trying to get the best pieces possible from the protected heritage.

There was hardly any sharing of experiences between the different branches of the institutes. The directors met occasionally, called by the national institute. I could also observe during my first mission that the much-needed co-operation between the municipalities and the institutes was severely underdeveloped.

Status quo and vacuum

The thing that surprised me the most during my first six months of assignment in Kosovo was that my Kosovar colleagues did not want any changes of their system. They wanted everything to stay the way it was. Before arriving in Kosovo, I naively presupposed that *change* should be the dominant emotion and desire. But I found the opposite; the staff I met at the Institutes guarded the structure they were used to or had been waiting for to enter for many years. It was not only me that was surprised by this; this I would say puzzled all the international actors that had entered the scene of Kosovo.

The divide between the staff of the Institutes in Kosovo, and the International organisations and NGOs that came to directly or indirectly deal with heritage, was (and probably still is) vast. The international organisations and NGOs (Italians, French, Americans, Swedes and others) were all guided by the latest adopted international principles. They all believed in a system where public institutions co-operate with the private sector. The international organisations and NGOs all came from stabile, well-fare countries, used to a public sector comfortably financed by public money. The international organisations and NGOs had little understanding for the Kosovo institutes fighting for their exclusive right to handle the preservation of protected buildings, especially so-called first category buildings.

The staff assessment also gave a picture how the Institutes had worked. The IPMs had functioned as traditional expertise-oriented institutions with granted influence over legally protected monuments. Their legitimacy was given through their exclusive

right to be interpreter of the law. A decision to list a building was proclaimed without any negotiation with the owner. Consequently no support was given by the public institute to the owner.

It turned out that the absolutely most urgent assignment should have been to guide the Institutes in a democratic development. Firstly, for the institutes to be open and gain the trust of the citizens of Kosovo. Citizens' trust in public institutions is a fundamental part of a democratic society. Secondly, internally the institutes' needed to develop towards being democratic workplaces, as a fundamental part of their capacity building.

Spatial planning and preservation

I left Kosovo in February 2002, when my first mission ended, but returned for a second mission in August the same year. This time I was stationed as an advisor at the Heritage Division in DoC. The focus of the mission shifted from merely preservation of single objects, to spatial planning and integrated conservation in a broader sense. The target groups were heritage professionals and urban planners. A co-operation was initiated between DoC and the Ministry of Environment and Spatial Planning (MES).

A workshop entitled "Integrated Conservation" was held on location in Prishtina and Prizren, supported by UN-Habitat. The financial means to organise the workshop came jointly from DoC and Sida. Invited participants were staff from the Institutes for Protection of Monuments on national and regional level, urban planners, and students of architecture. The most dedicated participants turned out to be the students of architecture. They put their heart and souls in the workshop, and delivered a fantastic result.

Prizren Old Town was chosen as the fieldwork subject, based on the conclusion that this is the only town in Kosovo with a remaining and coherent pre-industrial urban fabric. As a category this heritage is unique and at the same time vulnerable; threatened and degenerated through decades of neglect, sabotage, and a high building activity.

In co-operation with the Ministry of Culture, CHwB started to develop "Preservation and Development plans" (PDP) in 2002

to demonstrate the necessity of using spatial planning as a tool to reach heritage conservation goals. This led in 2006 to a co-operation agreement with UN-Habitat in six municipalities in order to get the integrated conservation thinking into the planning process.

The international presence: lack of co-ordination - missed opportunities

As other countries in a disaster situation, Kosovo was overflooded with international aid-agencies, NGOs and donors. One effect of the absence of a functioning public administration is the lack of co-ordination of external (in this case international) support, both financial and contribution of expertise. It ought to be evident that the international community should be capable of co-ordinating itself. They are not. In the Kosovo case UNMIK and PISG were supposed to take this role, but the organisations were not prepared. The international actors had huge difficulties interacting with each other - they all assumed that their national system was THE universal system and consequently understood by all.

The huge presence of international aid agencies led ironically to severe destruction of vernacular heritage. The financial and material support to the individual families (internal refugees) was focused on building new houses. The site was of course the real estate, where the old traditional stone houses were standing, in a more or less damaged status. The traditional building was often thoughtlessly destroyed and a new was built in its place. Especially in the western part of Kosovo a large number of traditional stone houses ("kullas") were demolished during 2000-2001.

There have been two other international NGOs (apart from CHwB) working specifically with heritage: InterSOS from Italy and Patrimoine sans Frontière from France. InterSOS is a humanitarian organisation, which has done a number of preservation and restorations works in the western part of Kosovo in cooperation with the Rome Conservation Institute. They established themselves by restoring the Bajrakli mosque and the hamman in Peja/Pec 2001. Since then they have been

concentrating on the Patriarchate in Peja/Pec and the Decan Monastery in Decan. In connection with the preservation works, InterSOS have been active with capacity building and reconciliation activities. InterSOS and CHwB have had close contact over the years.

Patrimoine sans Frontière was active directly after the war ended.

Numerous Fact Finding Missions

What I saw when I came to Kosovo was a country destroyed, but not as much by war, as by neglect.

Kosovo heritage can be described as consisting of unique ensembles of orthodox churches and monasteries, and an indigenous Islamic tradition going back more than 600 years, with its own rich architectural heritage - mosques, tekkes, medreses, Islamic libraries, hamams, and bazaars built to support charitable foundations. Besides this monumental heritage there is a rich vernacular heritage and a likewise rich cultural landscape.

The deliberate destruction of built heritage in Kosovo had started systematically before the war. In the beginning of the war in 1999, when NATO had taken the decision to intervene, the paramilitary troops that supported the state of Yugoslavia destroyed as much as they could of Muslim, ottoman and Albanian heritage and Albanian villages. At the end of the war the Kosovo-Albanian side destroyed orthodox heritage and Serbian villages.

Numerous facts finding missions have been sent by UNESCO, Council of Europe (CoE), Europa Nostra, and others after the armed conflict had ceased. But when the international organisations came to Kosovo, they missed the point or they did not want to see the real point of the mutual destruction.

The first mayor survey was done by Andras Riedlmayer and Andrew Herscher from Packard Humanities Institute. Already in October 1999 they mapped damages to cultural and religious heritage - historical architecture, houses of worship, libraries,

archives, and museums. Their conclusion was that no Orthodox sites had suffered serious damage during the war - either from NATO bombs or at the hands of Albanian rebels. After the end of the war, however, the situation with respect to Serbian Orthodox heritage changed for the worse. Many less known churches in rural areas abandoned by the fleeing ethnic Serb minority became easy targets for revenge attacks by returning Albanian villagers.

In 2004, perhaps the most picturesque part of the Prizren historical town, the Serbian part, was destroyed in the so called March riots.

UNESCO has commissioned expert inventories of the built heritage, the first one in 2003; they were deeply engaged after the March 2004 riots and are now responsible for the international grants for the restoration of a number of monuments of Orthodox, Ottoman and vernacular origin. CoE has been leading the Reconstruction Implementation Commission (RIC)³ since 2005 with the task of rebuilding or repairing the damaged Orthodox buildings from the 2004 riot.

According to my opinion, the muslim and ottoman heritage is disproportionately acknowledged by the international society, compared to the interest shown towards the orthodox heritage. The Albanian, muslim and Ottoman heritage in Kosovo is not neglected by the international community, but it is a tendency that it is regarded as secondary.

Making of a new Heritage Law

When UNMIK took over they replaced the Heritage Law from 1989 with the former Law from 1977. The 1989 Law was no doubt discriminatory and ought to be replaced, but replacing it more or less overnight with the 1977 law was no good solution. The institutes, depending on an applicable law, were left in a vacuum. Their main instrument was missing.

The 1977 Heritage Law put in force by UNMIK contained in theory a wide range of possibilities with a far-reaching

3 RIC, see <http://www.rickosovo.org/RIC%20-english/index.htm>

system of delegation, and much of the decisions delegated to the municipalities. The law clearly stated that as long as the decisions (for protection, or what ever measures to be carried out) were taken by public authorities, the work could be done by an organisation outside the institutions or by a legal person. When the 1977 Law was re-introduced these principles were not welcomed by the staff of the institutes. The staff of the institutes were not prepared to share this task. They had so recently gained power and influence over the heritage, which they had been dreaming of for such a long time. External donors were welcomed by the Institutes, but not external partners like NGOs or private consultants.

The CoE has been active in Kosovo since 1999, targeting on legal framework, capacity building, and reform processes connected to public institutions. One of the mayor achievements by the international support, conducted by CoE, was the drafting of the new Heritage Law. The Law was adopted by the Kosovo Parliament in 2006, although it was not complete in many respects. There was a need for a number of sub-laws before the law could be applicable. The sub-laws were drafted through a series of workshops with participation of Kosovo experts led by the CAL group set up by CoE.⁴ I took part in the CAL working group during 2008 and could see a drastic change for the better at the Kosovo- Albanian side, when the work came to critical stages and just had to be carried through.

One step forward - two steps back

A real back-lash for the Kosovo community were the riots in March 2004, when a huge number of Orthodox churches and monasteries were targeted and destroyed by Albanian activists. This revenge turned out to be a very short-sighted effect for the Albanian side; the riots and destruction of heritage gave legitimacy to the international organisations to focus almost completely on the orthodox heritage and the Serbian situation. The international organisations' mistrust towards the Kosovo-

⁴ The Legislative Support Task Force (or "Cellule d'appui législatif" – CAL) was created by CoE in 1997 to meet the increasing need to complement the goals of cultural heritage protection with wider environmental issues in its work in South-east Europe.

Albanian community, in combination with their seemingly deep-rooted understanding of and preference for orthodox heritage, has resulted in a strange situation.

Kosovo is a difficult case. Since the declaration of independence 2008 Kosovo has tried to make a new start under the guidance of the EU. In the heritage field the EU has declared that they are focused on the Ahtisaari plan. The UN Special Envoy for Kosovo's future status, Martti Ahtisaari, concluded that negotiating for Kosovo had been his most difficult task. Never before had he come across communities so unwilling to communicate with each other. The declaration of independence has not made it easier for international organisations as CoE to support Kosovo, as CoE can only act if all its member states agree. And in the Kosovo case this is not the situation, as we all are aware of.

Special Envoy Ahtisaari published his Comprehensive Proposal for the Kosovo Status Settlement in March 2007. Annex V deals with Religious and Cultural Heritage.

According to Annex V Kosovo shall recognize the Serbian Orthodox Church in Kosovo, including monasteries as an integral part of the Serbian Orthodox Church, seated in Belgrade. The churches and monasteries shall furthermore be surrounded by protective zones, and the Kosovo authorities shall have access to sites only with consent from the Church. In all 45 objects are mentioned in the Settlement.

The Historic Centre of Prizren and the village of Velika Hoca/Hoçë e Madhe are considered as two special cases that need protective zones.

The Ahtisaari Settlement writes in detail what shall be permitted or not permitted in the Protective Zones. The Settlement specifies what kind of new activities will absolutely not be permitted, e.g. the exploitation of mineral resources or the building of power plants. Other activities, less harmful, may be permitted, e.g. commercial construction or development. But the buildings cannot be taller than the protected monastery!

It is in a way easy to understand the desires behind these restrictions; the building practice in Kosovo seems to have gone

almost totally out of control of local authorities. On the other hand; the work based on the proposal of protected zones has come to a standstill.

Trust

It is the Kosovo authorities that shall ensure that spatial plans for areas within the Protective Zones are outlined and in conformity

with the restrictions. How does the “international community” expect this to function in reality? I have once discussed this with the EU-representative, and once with a high representative of the CoE. Both representatives were convinced that no trust can be placed in the Albanians or Serbians capability or willingness of working together. This was not, and is not, the belief or the experience I have gained working for CHwB in Kosovo. I believe that the case is difficult, but not hopeless.

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Cover images by Mitja Guštin

Front:

View of Piran, Slovenia

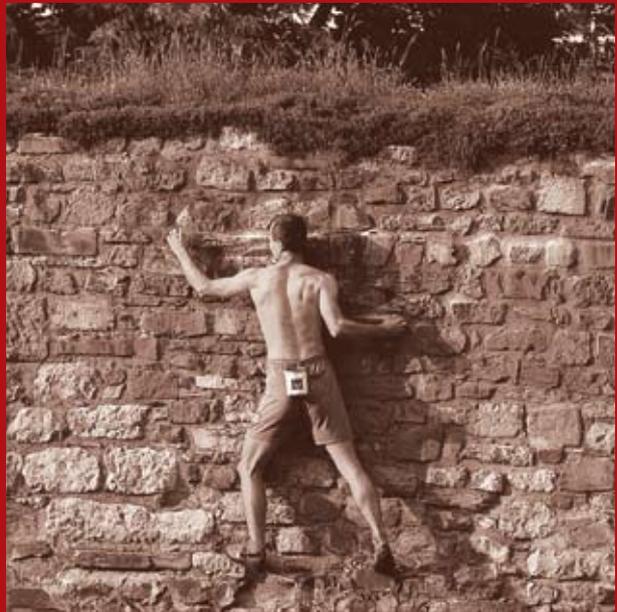
Back:

Restoration of a historic house in Slovenska Bistrica, Slovenia

Heritage in use – climbers training on the Roman walls of Ljubljana, Slovenia

Tradition of the Slovenian countryside

Detail from a welcome cup, end 19th century, Bizeljsko, Slovenia



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