The 1970 UNESCO and the 1995 UNIDROIT Conventions and the 2003 UNESCO Intangible Heritage Convention

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Introduction: The Interconnectedness between the Different Categories of Cultural Heritage

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In general, international conventions concerning the protection or safeguarding of cultural heritage specifically address one particular category of such heritage, without devoting much attention to the implications of the rules they contain for other categories of heritage. To a related extent, such treaties usually consider certain protected elements of cultural heritage exclusively (or almost exclusively) under the perspective on which the treaty concerned focuses, and do not take into proper account the significance that such elements may attain under different perspectives. In some cases the protection or safeguarding needs arising from such different perspectives may even conflict (and be incompatible) with each other. For instance, in a number of cases inscription of cultural properties or sites on the World Heritage List (WHL), under the regime established by the Convention concerning the Protection of the World Cultural and Natural Heritage (WHC), has proven detrimental for the intangible values attached to such properties or sites related to their traditional use by indigenous or other communities.[1] Similarly, protection of a cultural object in the interest of the state of origin under the 1970 Convention[2]—supposing for instance that it is stored in a museum to the benefit

[1] See, as regards indigenous peoples, Stefan Disko and Helen Tugendhat (eds), *World Heritage Sites and Indigenous Peoples' Rights* (IWGIA 2014).

[2] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (opened for signature 14 November 1970, entered into force 24 April 1972) 823 UNTS 231.

of the public at large—may end harmfully for the cultural values it bears for the community which needs such an object for its religious rituals or for other specific cultural purposes. In factual terms, an element of cultural heritage explicates all its functions contextually, all its different profiles of significance being strictly interconnected with each other. Generally, the most pertinent legal instruments—with only a few exceptions[3]—do not properly consider the interconnectedness existing between the multifaceted implications produced by cultural heritage vis-*à*-vis human communities, establishing legal regimes which prioritize the protection of certain values attached to cultural heritage, often in a way that may be prejudicial for the other values attached to such a heritage but that are ignored by the legal instrument concerned. Such a 'fragmented' approach becomes even more evident, in practice, in the framework of the operationalization of the relevant treaties at the level of UNESCO. In fact, the organs established by each of these treaties do not usually devote too much attention to the implications that the implementation of the legal instrument concerned may play with regard to the values protected by other cultural-heritage-related conventions. This is the reason states and other relevant actors, when implementing and applying international treaties related to cultural heritage, should adopt—to the maximum extent possible—an integrated approach to ensure the contextual realization of the purposes of the different instruments, to guarantee that such heritage may produce all the benefits it has the potential to generate for human beings and communities. This integrated approach would be particularly necessary in the context of the implementation and application of the 1970 UNESCO and the 1995 UNIDROIT conventions,[4] on the one hand, and the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH),[5] on the other, in consideration of the important elements of interaction existing between such instruments, as will be described in the next sections of the chapter, after a brief description of the legal regime established by the CSICH. In particular, the idea of 'mutual supportiveness' between the relevant treaties will be developed, based on the assumption that its use may actually allow either to contextually achieve the purposes of the legal instruments concerned or to identify the interest(s) which must be recognized as having priority over the other(s), so as to properly safeguard the fundamental values that are practically influenced by the operation of these treaties, including the human rights of the individuals and/or communities for whom the cultural elements protected or safeguarded by such treaties attain special significance.

The CSICH C50S2

C50P9 The CSICH was adopted by the UNESCO General Conference on 17 October 2003, thirty-one months after the official opening of the work aimed at drafting and adopting its text.[6] Since the very beginning of the work, it was clear that the intention of UNESCO

[3] See the provisions of the UNIDROIT Convention concerning sacred or communally important cultural objects belonging to, and used by, tribal or indigenous communities described later in the chapter.

[4] Convention on Stolen or Illegal Exported Cultural Objects (opened for signature 24 June 1995, entered into force 1 July 1998) 2421 UNTS 457.

[5] Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3.

[6] The first meeting of experts gathered by UNESCO with the purpose of drafting the text of the future convention took place in Grinzane Cavour, Turin (Italy), from 14 to 17 March 2001. The present author was among the experts who participated in that meeting and in the subsequent 'International Meeting of Experts,

was to reproduce for intangible cultural heritage the same (successful) model which had been used for the WHC, despite the fact that the two kinds of heritage are profoundly different especially in terms of the significance they have and social functions they perform for the different 'layers' of human society at global, national and local levels.[7] In fact, while the main purpose of the WHC is to select the cultural and natural properties of 'outstanding universal value' with a view to preserving their integrity in the interest of humanity as a whole, the kind of heritage intended to be safeguarded by the CSICH is especially significant as a fundamental element of the cultural identity of the communities which are creators and/or bearers of elements of intangible cultural heritage, and, *a fortiori*, as a crucial vehicle for the transmission of such an identity to future generations.[8] Such a peculiar significance seems to have been properly captured by the definition of 'intangible cultural heritage' enshrined by Article 2 para 1 of the CSICH, which reads as follows:

C50P10 [t]he 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

C50P11 At the same time, however, the choice of negotiators to opt for a listing system for the safeguarding of the heritage in point similar to the one established by the WHC casts doubts on the adequacy of the safeguarding system built by the CSICH,[9] although the name attributed to the main list established by the latter—that is, *Representative* List of the Intangible Cultural Heritage of Humanity[10]—was exactly chosen with the purpose of purporting that the existence of such a list would not imply any kind of hierarchy between inscribed and non-inscribed elements of the intangible cultural heritage.

Intangible Cultural Heritage: Priority Domains for an International Convention', Rio de Janeiro, Brazil, 22–24 January 2002. He was then a member of the Italian delegation in the rounds of negotiations which took place at the UNESCO Headquarters, in Paris, until October 2003, when the Convention was officially adopted by the General Conference.

[7] See, on this issue, Federico Lenzerini, 'Protecting the Tangible, Safeguarding the Intangible: A Same Conventional Model for Different Needs' in Sabine von Schorlemer and Sylvia Maus (eds), *Climate Change as a Threat to Peace. Impacts on Cultural Heritage and Cultural Diversity* (Peter Lang 2014) 141. During the 2002 expert meeting in Rio de Janeiro, the present author stressed that 'the schema of the 1972 World Heritage Convention might not be the suitable model for Intangible Cultural Heritage (…) a legal approach should perhaps avoid the establishment of a List based on selective criteria of importance. The latter might give rise to arbitrary discrimination among cultures'; see 'International Meeting of Experts, Intangible Cultural Heritage: Priority Domains for an International Convention' (n 6), Final Report, at 8.

[8] See Federico Lenzerini, 'Intangible Cultural Heritage: The Living Culture of Peoples' (2011) 22 *European Journal of International Law* 101, 109–13.

[9] For a critical assessment of the listing system of the CSICH, see Federico Lenzerini, 'Articles 16-17: Listing Intangible Cultural Heritage' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020) 306.

[10] See Art 16 of the CSICH (emphasis added).

C50P12 Another apparent shortcoming of the CSICH is represented by the scarce role attributed to the creators and bearers of the intangible cultural heritage in its safeguarding activities. During the *travaux* leading to the adoption of the Convention, most provisions included in the original draft contemplating an active involvement of communities, groups, and individuals that create, maintain, and transmit elements of intangible cultural heritage in their safeguarding were cut, because of the will of the majority of governments involved in the negotiations to keep full control of the operation of the CSICH. It was only thanks to the strenuous resistance of a few delegations—notably Italy, Hungary, and Belgium—that a general duty of States Parties to 'endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit [intangible] heritage, and to involve them actively in its management', '[w]ithin the framework of [their] safeguarding activities of [such a] heritage', retained its place in the Convention's text, at Article 15. In addition, pursuant to letter (b) of Article 11, States Parties are requested to guarantee 'the participation of communities, groups and relevant non-governmental organizations' in the identification and definition of 'the various elements of the intangible cultural heritage present in [their respective] territor[ies]'. It is nevertheless self-evident that the duties of States Parties towards the creators and bearers of the intangible cultural heritage—as established by the provisions just reproduced—are not particularly *hard*, to say the least. However, this deficiency of the Convention's text has been compensated, at least partially, by the *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage* (Operational Directives), last updated in 2020,[11] which introduce the requirement that an element to be inscribed on the Convention's lists has been nominated 'following the widest possible participation of the community, group or, if applicable, individuals concerned and with their free, prior and informed consent'.[12] This, at least in principle, would allow local communities to retain control of their own intangible cultural heritage—at least as regards the decision of whether or not it should be inscribed on the lists established by the CSICH—although in many cases it remains problematic to ensure that the required consent is genuinely given or that it actually represents all communities and/or persons concerned, not to mention the difficulty of properly defining the meaning of the terms 'community', 'group', and 'individuals'.[13]

C50P13 In sum, considered as a whole, the safeguarding system established by the CSICH is certainly not immune from deficiencies. In addition to the issue concerning the scarce involvement of the creators and bearers of the heritage concerned, one may refer, for instance, to the fact that no real obligations—in the technical sense of the term—exist in the Convention's text, leaving States Parties substantially free to decide the strategies to be put in practice with a view to implementing the Convention, as well as the elements of the intangible cultural heritage present in their respective territories to be safeguarded. At the same time, however, the CSICH has the huge merit of having globalized the awareness of the significance of the immaterial component of cultural heritage, as shown by the very high rate of ratification characterizing the legal instrument in discussion.[14] The safeguarding of the intangible cultural heritage has therefore gained a prominent

[11] The text of the Operational Directives is available at <https://ich.unesco.org/doc/src/2003_Convention_Basic_Texts-_2020_version-EN.pdf> (accessed 22 February 2023).

[12] See paras I.1 e I.2 of the Operational Directives.

[13] See Lenzerini (n 7) 320.

[14] At the time of this writing the CSICH had been ratified by 180 States; see at <https://ich.unesco.org/en/states-parties-00024> (accessed 22 February 2023).

position in the context of international cultural heritage law, equivalent to that occupied by tangible heritage in its different profiles of protection. And, while the two categories of cultural heritage are conceptually distinguished from each other, the operation of the existing conventions respectively dealing with each of them produces practical implications that notably overlap, to the point that, depending on the manner in which they are concretely managed, they may either conflict or be mutually supportive. As a consequence, it is opportune to investigate how the different regimes of protection/safeguarding of cultural heritage—in both its tangible and intangible manifestations (or components)—may be coordinated with each other, so as to avoid that the operation of one of the relevant international treaties, concentrating on a specific aspect of significance of cultural heritage, may factually translate into a prejudice for a different value also attached to cultural heritage which is protected or safeguarded by another treaty. Taking this into account, this chapter concentrates on the relationship of the 1970 UNESCO and the 1995 UNIDROIT Conventions with the CSICH.

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Relationship of the 1970 UNESCO and the 1995 UNIDROIT Conventions with the CSICH: Potential Conflicts . . .

C50P14 It is normally not very easy to establish a mutually supportive relationship between treaties dealing with different subjects, or even with the same subject considered under different perspectives. As noted in the previous section, a treaty usually concentrates on its own purposes and scope and does not devote much attention to the implications that its provisions may determine as regards other matters or profiles related to its own subject-matter which are outside its scope of application. It is true that all the treaties dealt with in this chapter serve to pursue states' national policies in the cultural field, and may therefore be the object of an integrated management at the domestic level which may actually minimize the potential conflicts existing among them. At the same time, however, such an integrated approach is not always adequately carried out, with the consequence that conflicts and clashes between different treaties which prioritize their respective interests are not efficiently prevented, often to the prejudice of the concerns addressed by the other treaty. As noted by the Internal Oversight Services (IOS), while mutual supportiveness at the normative level is essential, in practical terms there are challenges to the coordination and cooperation between the Conventions. Each Convention has its own group of constituencies, which sometimes overlaps and sometimes does not overlap with that of the others, and this can make any concrete cooperation a challenging task. In addition, the way in which programmes and interventions are structured (and budgeted) does not always support inter-conventional cooperation.[15]

C50P15 For instance, let us get back to one of the examples touched on in the previous section and suppose that we have two international treaties concerning the same kind of cultural heritage. The first of these treaties protects the interest of the state of origin of a cultural object to preserve it as part of the national heritage in the interest of all citizens, while the other treaty concerns the safeguarding of the spiritual value the same object may have for a specific community, whose interest would be that of using it for ritual purposes

[15] See IOS, 'Evaluation of UNESCO's Standard-setting Work of the Culture Sector. Part II – 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property', Final Report, Doc IOS/EVS/PI/133 REV 2, April 2014, para 243.

and keep it hidden in a particular place only known to the shamans of the community itself. It is evident that in this case a conflict would exist between the interests pursued by the two treaties at the moment when they would contextually claim to be applied with regard to the above object, leading to a problem whose possible solutions would presuppose that one of the two treaties is given priority over the other, as the interests pursued by the two legal instruments are apparently incompatible with each other. This example has not been chosen by chance. On the contrary, it is used because it represents the typical conflict which may arise in the context of the relationship between the 1970 UNESCO and the 1995 UNIDROIT Conventions, on the one hand, and the CSICH, on the other. Apparently, such treaties deal with different kinds of cultural heritage, the 1970 UNESCO and the 1995 UNIDROIT Conventions concerning the protection of tangible movable heritage, and the CSICH relating to the safeguarding of the immovable manifestations of cultural heritage. Nevertheless, this construction is too simplistic and does not take into account the intangible component attached to most movable tangible objects. The example of the tangible object used by a community for ritual purposes is the classic case of a material cultural good with a marked intangible significance. Separating the two components inherent in cultural objects would be an artificial operation resulting in a mutilation of their multifaceted significance for humanity, and, even if the target of the safeguarding of the intangible cultural heritage are the immaterial elements of cultural heritage, most such elements consist of a complex amalgam of different elements that are inextricably intertwined with each other, and which include tangible components. The drafters of the CSICH were well aware of this reality, as demonstrated by the fact that the concept of the heritage which is the object of safeguarding under the Convention—reproduced in the previous section—includes, in addition to 'practices, representations, expressions, knowledge, skills', that is, immaterial elements, also the (material) 'instruments, objects, artefacts and cultural spaces associated therewith'. It follows that the same cultural goods which are the object of protection of the 1970 UNESCO and the 1995 UNIDROIT Conventions may well be encompassed within the scope of application of the CSICH, with the consequence that the unilateral application to those goods of the regime of any of such conventions, without taking into proper account the exigencies of the other(s), may translate into a mortification of the value protected or safeguarded by the latter.

C50P16 The kind of conflict just exemplified is indeed quite frequent in international and domestic practice, involving in most cases sacred or ceremonial objects—and even human remains—belonging to indigenous peoples. The fact that such objects are included within the notion of 'indigenous peoples' cultural heritage'[16] is beyond question. It is also evident that they are normally included in the concept of 'intangible cultural

[16] Among the many existing definitions of 'indigenous peoples' cultural heritage' (none of which may however be considered as the most authoritative in the framework of international law on indigenous peoples), the one included in the 1995 Principles & Guidelines for the Protection of the Heritage of Indigenous People, UN Doc E/CN.4/Sub.2/1995/26, 21 June 1995, <http://ankn.uaf.edu/IKS/protect.html> (accessed 22 February 2023), is particularly interesting: '[t]he heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry, all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immovable cultural property such

heritage' as defined by the CSICH, because in most cases they are functional to the exercise of spiritual or other cultural practices, which form a distinctive and fundamental component of the cultural identity of the communities concerned. Throughout the past few centuries the practice of appropriation of sacred and ceremonial objects of indigenous peoples, including human remains, has been widespread, and only in relatively recent times has international law become concerned with the claims of repatriation of such heritage advanced by the above peoples and by their supporters.[17] While a right of indigenous peoples to obtain the return of their cultural objects—especially of certain categories of them—can today be considered as consolidated in the context of general international law,[18] the realization of this right in practice is often very complicated, in light of the co-existence of competing interests on the heritage concerned, particularly those claimed by states and private owners. Although the CSICH does not take any explicit position on the issue of the return of cultural objects associated with the intangible cultural heritage to their creators and bearers (which are often indigenous peoples), it is evident that the actual possession by the communities concerned of such objects is an indispensable condition for allowing the Convention to fulfil its purposes. In fact, when a request of repatriation of a cultural object associated to an element of the intangible cultural heritage is presented by a community that is creator and/or bearer of such an element, the fact of whether or not this request is granted is decisive in order to allow the community concerned—as well as the territorial state—to guarantee the necessary safeguarding in favour of the above element consistent with the CSICH. At the same time, however, granting the request of repatriation of a movable cultural good presented by an indigenous (or other traditional) community may potentially collide with competing interests protected by the 1970 UNESCO and the 1995 UNIDROIT Conventions. It is therefore necessary to ascertain whether any methods exist to settle the conflicts which may surface in the context of the relationship of the 1995 UNIDROIT and the 1970 UNESCO Conventions with the CSICH.

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. . . and Possible Methods for Reconciliation

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In the context of international law, a number of techniques exist to prevent or regulate the possible conflicts and other problems arising from the relationship between different treaties,[19] including those discussed in this chapter. These methods will now be analysed,

as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotape, or audiotape' (see paras 11 and 12).

[17] Among the many doctrinal sources concerning repatriation of indigenous peoples' cultural objects, see Karolina Kuprecht, *Indigenous Peoples' Cultural Property Claims. Repatriation and Beyond* (Springer 2014); Federico Lenzerini, 'Cultural Identity, Human Rights and Repatriation of Cultural Heritage of Indigenous Peoples' (2016) 23 *Brown Journal of World Affairs* 127; Federico Lenzerini, 'Reparations for Wrongs against Indigenous Peoples Cultural Heritage' in Alexandra Xanthaki et al (eds), *Indigenous Peoples' Cultural Heritage. Rights, Debates, Challenges* (Brill/Nijhoff 2017) 327; Laura Hottelier, 'Repatriation of Cultural Objects as a Human Right: Challenges relating to the Right to Culture and the Protection of Indigenous Peoples' Cultural Heritage' (UNIDROIT 2020) <https://1995unidroitcap.org/wp-content/uploads/2020/07/200707-Laura-HOTTELIER.pdf> (accessed 22 February 2023).

[18] On this point, see the following section of the chapter.

[19] Generally on this topic, see, among the many pertinent sources, Christopher J Borgen, 'Resolving Treaty Conflicts' (2005) 37 *George Washington International Law Review* 573; 'Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi (Report on Fragmentation),

contextualizing them in the specific situation of the relationship of the 1970 UNESCO and the 1995 UNIDROIT Conventions with the CSICH.

C50P18 First of all, several international treaties contain *conflict clauses* (also defined 'savings clauses' or 'compatibility clauses')—which are clauses 'intended to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty deals'[20]—so as to prevent or resolve conflicts arising from the provisions included in different international agreements. While no clause of such a kind is included in the 1970 Convention, Article 13(1) of the 1995 UNIDROIT Convention establishes that the latter 'does not affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States bound by such instrument'. In the event that this clause could be considered applicable to the relationship of the 1995 UNIDROIT Convention with the CSICH, one might conclude that the rules of the former are in principle (and unless a contrary declaration is made by a state bound by the CSICH) subordinate to the latter. In effect, an objective interpretation of this provision—based on its plain text, especially on the fact that it uses the present tense—seems to show that it does not want to place any temporal preclusion to its application. It follows that it should be considered as actually applying to the relationship of the 1995 UNIDROIT Convention with the CSICH, even if the latter was adopted and entered into force after the former. This is confirmed by the *travaux préparatoires* of the 1995 UNIDROIT Convention. In fact, in the Report on the fourth session of the Committee of Governmental Experts on the International Protection of Cultural Property, taking place from 29 September to 8 October 1993, the following was noted:

C50P19 > The committee (…) considered a proposal which had been submitted at its second session (…) but which had never been the subject of discussion, aimed at safeguarding the application of agreements concluded before the entry into force of the Convention by States Parties concerning the return of cultural objects that had been exported. One representative suggested that the drafting of this article posed problems for the Member States of the European Community in relation to the [pertinent EC] Directive and the Regulation. In effect, the article only spoke of 'agreements already concluded' which did not cover community instruments and referred to agreements concluded before the entry into force of the Convention whereas it was not inconceivable that the Directive would in the future be revised or a new instrument adopted. In the absence of a representative of the EEC Commission the Belgian delegation, acting in the name of the country at present chairing the EEC Council, announced that EC Member States were obliged to enter a reservation on this article until such time as they could submit a new text to the diplomatic conference.[21]

UN Doc A/CN.4/L.682, 13 April 2006, paras 268–71; Ahmad Ali Ghouri, 'Determining Hierarchy Between Conflicting Treaties: Are There Vertical Rules in the Horizontal System?' (2012) 2 *Asian Journal of International Law* 235.

[20] Report of the International Law Commission on the Work of its 18th Session (4 May–19 July 1966), YILC (1966), vol II, 214. On the different kinds of conflict clauses, see Report on Fragmentation (n 19) paras 268–71; Nele Matz-Lück, 'Treaties, Conflict Clauses', Max Planck Encyclopedias of International Law, April 2006 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1466> (accessed 22 February 2023); Seyed-Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Brill 2003).

[21] See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property, Report on the fourth session (Rome, 29 September to 8 October 1993), UNIDROIT 1994, Study LXX – Doc 48, February 1994, para 251.

C50P20 The provision in point was therefore modified, replacing the term 'agreements' with 'instruments' and removing the limitation of its applicability to instruments adopted before the entry into force of the 1995 UNIDROIT Convention.[22] Furthermore, the fact that the article refers to 'provisions on matters governed by this Convention', and not to 'instruments concerning the return of cultural objects', determines the consequence that the provision in point is applicable to the CSICH, because, for the reasons explained above, it undoubtedly contains provisions related to matters governed by the 1995 UNIDROIT Convention. It follows that, in the event of conflicts between provisions of the 1995 UNIDROIT Convention and rules included in the CSICH, the latter should be considered as prevailing over the former.

C50P21 As far as the CSICH is concerned, it also includes a conflict clause in Article 3, whose scope is however limited to prevent that the Convention may alter 'the status or [diminish] the level of protection under the [WHC] of World Heritage properties with which an item of the intangible cultural heritage is directly associated', as well as that it may affect 'the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties'. It hence appears that such a clause is not applicable to the relationship of the CSICH with either the 1970 UNESCO Convention or the 1995 UNIDROIT Convention.

C50P22 Another technique which may be used in order to settle conflicts between international treaties is the principle of *lex specialis* (*lex specialis derogat legi generali; lex posterios generalis non derogat legi priori speciali*).[23] It is a principle based on the assumption that, as regards inter-treaty relations, particular treaties enjoy priority over general treaties.[24] However, as regards the relationship of the 1970 UNESCO and the 1995 UNIDROIT Conventions with the CSICH, this principle appears to be of difficult applicability. In fact, the three conventions all deal with *specific* aspects concerning the protection or safeguarding of cultural heritage, and should therefore all be considered particular treaties. The conflicts arising from the relationship between such conventions are hence to be seen as conflicts 'between different types of special law'.[25] In this case, the solution suggested by the Special Rapporteur of the ILC Martti Koskenniemi would be that the choice of the rule to apply would 'depend on how a case would be qualified in this regard', meaning that the practical solution of a conflict would vary 'depending on which one chooses as the relevant frame of legal interpretation'.[26] Needless to say this solution does not appear satisfactory, especially in the context of the subject-matter of this chapter. In fact, it would presuppose in practice that the choice of whether the legal regime to be applied to a cultural object encompassed within the scope of application of both the 1970 UNESCO Convention and/or the 1995 UNIDROIT Convention, on the one hand, and the CSICH, on the other, would depend on which of those legal frameworks the legal operator would consider more relevant in the instant case. However, provided that the operator concerned belongs to a state which is bound by both legal frameworks, how would it be possible to establish which one is 'more relevant', considering that the situation would *directly*

[22] See UNIDROIT Secretariat, Draft Final Provisions capable of embodiment in the draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, with Explanatory Notes, UNIDROIT 1995, Study LXX – Doc 50, January 1995, at 4.

[23] See Mark E Villiger, Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources (Martinus Nijhoff 1985) 36.

[24] See Report on Fragmentation (n 19) para 85. [25] ibid. [26] ibid.

influence the operation of both legal regimes (positively or negatively, depending on the choice made)? The most reasonable answer to this question, maybe, is that the 1970 UNESCO Convention and the 1995 UNIDROIT Convention are to be considered *more specialis* than the CSICH, because, differently from the latter, they specifically concern the matter of circulation of cultural objects, despite the fact that the CSICH would also be substantially affected by a decision taken in a concrete case relating to the issue in discussion involving an object associated with the intangible cultural heritage.

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It is then possible to rely on the *lex posterior derogat legi priori* rule, according to which 'later law overrides prior law'.[27] In principle this rule would clearly militate in favour of the prevalence of the CSICH over the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, in cases of conflict between them. This prevalence would first of all be grounded on the plain fact that the CSICH is of more recent adoption than the other two treaties in discussion, but could also be based on an additional argument. Specifically—as regards in particular indigenous communities—the primacy of the values and interests attached to the intangible cultural heritage appears to be supported by a rule of customary international law protecting indigenous peoples' cultural identity, according to which 'States are bound to recognize, respect, protect and fulfil indigenous peoples' cultural identity (in all its elements, including cultural heritage) … consistent with the perspectives, needs and expectations of the specific indigenous peoples',[28] in consideration of the fact that effective possession by the communities concerned of their own sacred or ritual objects is often an essential component of their cultural identity. The existence of such a rule, which is of *posterior* formation to the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, and which reflects the contemporary awareness of the international community concerning the significance of intangible cultural heritage (and associated objects) for the survival of indigenous and other communities, cannot be reasonably denied. It is extensively validated in light of the most recent developments in the field of indigenous peoples' rights,[29] and is grounded on a number of arguments, related especially to human rights considerations.[30] Those who deny its existence on the basis

[27] ibid para 58.

[28] See ILA Resolution No 5/2012, available at <https://www.ila-hq.org/index.php/committees> (accessed 22 February 2023), para 6.

[29] See, among others, Ridha Fraoua, Le trafic illicite des biens culturels et leur restitution–analyse des réglementations nationales et internationales, critiques et propositions (Editions Universitaires 1985) 161; John H Merryman, 'Cultural Property Internationalism' (2005) 12 IJCP 11, 13 (stating that '[i]t seems right that objects of ritual/religious importance to living cultures remain with or be returned to the representatives of those cultures'); James AR Nafziger, 'Cultural Heritage Law: The International Regime' in James AR Nafziger and Tullio Scovazzi (eds), *The Cultural Heritage of Mankind* (Martinus Nijhoff 2008) 145, 213 (writing that 'throughout the world, it is no longer a matter of whether to repatriate human remains and significant classes of sacred and other cultural material to indigenous cultures', but rather of 'what', 'when', and 'how'); Catherine Bell and Robert K Paterson, 'International Movement of First Nations Cultural Heritage in Canadian Law' in Catherine Bell and Robert K Paterson (eds), *Protection of First Nations Cultural Heritage. Laws, Policy, and Reform* (UBC Press 2009) 78, 102 (holding that the 'international community may be more willing to support the return of indigenous cultural material removed in colonial or historic times than it is to endorse the return of all cultural material removed in the past'); Lakshman Guruswamy, Jason C Roberts, and Catina Drywater, 'Protecting the Cultural and Natural Heritage: Finding Common Ground' (2013) 34 *Tulsa Law Journal* 713, 734; Dalee Sambo Dorough and Siegfried Wiessner, 'Indigenous Peoples and Cultural Heritage', in Francesco Francioni and Ana F. Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 407, 421–7.

[30] See eg Kristin Ann Mattiske, 'Recognition of Indigenous Heritage in the Modern World: U.S. Legal Protection in Light of International Custom' (2002) 27 *Brooklyn Journal of International Law* 1105, 1106 (holding that the right to self-determination 'encompasses the right of indigenous peoples to repossess, or at least maintain control over, those objects, sites or practices deemed vital to their distinct identity');

of the assumption that relevant 'state practice [would] not [be] sufficiently developed'[31] seem not to properly catch the ontological difference existing between the 'ordinary' rules of customary international law (like the one in discussion) and the rules of *jus cogens*—that is, of absolute character—which states are obliged to respect in all circumstances. The fact that state courts and other authorities sometimes deny repatriation of cultural objects claimed by indigenous or other communities having an intangible connection with them is not at all incompatible with the existence of the rule of customary international law in point, since 'for a rule to be established as customary, the corresponding practice must [not] be in absolute rigorous conformity with the rule'.[32] The crucial point is that the rule in question conflicts with other interests also protected by international law. When rules proclaiming conflicting interests exist, in concrete cases state authorities necessarily need to decide which one prevails over the other(s). Claims of indigenous peoples to repatriation of cultural objects normally conflict with the interest of the requested state to preserve what it considers its own national heritage, with the right of the private owner to retain their property rights over the object, and even with the right of the international community as a whole to enjoy cultural heritage of great importance. Leaving aside the latter interest (which is however noteworthy), while it is safe to assume that the right to private property is also protected by a rule of customary international law,[33] even if one would deny the existence of any such rule corresponding to any of the provisions enshrined in the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, the latter would in principle prevail over the competing rules of customary international law by virtue of the *lex specialis* principle, the effect of which 'treaties generally enjoy priority over custom'.[34] It follows that denial by a state authority of a claim advanced by an indigenous community requesting repatriation of a cultural object of intangible significance, when it is justified by the need to accommodate a competing interest also protected by international law, can in no way be considered as a manifestation of state practice refuting the existence of the rule of customary law sanctioning the need to protect and preserve indigenous peoples' cultural identity.

C50P24 As regards the applicability of the *lex posterior* rule to the relationship between a prior treaty and a customary rule of more recent formation, it is in principle possible that the latter may prevail over the former.[35] However, an abundant degree of caution needs to be used when translating this principle into practice. In particular, the *lex posterior* rule needs to be balanced with the *lex specialis* principle;[36] consistently, 'the *lex posterior* [may] not [be considered as] abrogat[ing] a prior treaty obligation if the speciality of that prior obligation may be taken as indication that the parties did not envisage this outcome'.[37] It is then evident that in concrete cases the relationship between the two principles needs to

Ana F Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press 2006) 301–2; Hottelier (n 17) 11.

[31] See Kuprecht (n 17) 88.

[32] See ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 186.

[33] See John G Sprankling, 'The Global Right to Property' (2014) 52 *Columbia Journal of Transnational Law* 464, 488.

[34] See Report on Fragmentation (n 19) para 85.

[35] See Mark E Villiger, *Customary International Law and Treaties* (Martinus Nijhoff 1985) 216; see also, in general, Nancy Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Oxford University Press 1995).

[36] See Report on Fragmentation (n 19) para 62.

[37] ibid para 114.

be defined by means of interpretation, and 'must be weighed and reconciled in the light of the circumstances of the particular case'.[38]

C50P25 In sum, it appears that the use of the techniques just described only allows for the extrapolation of some theoretical inferences which in practice do not really serve the purpose of providing convincing solutions to the question of how the conflicts between the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, on the one hand, and the CSICH, on the other, should be settled. In this writer's opinion, one should follow the 'farewell to fragmentation'[39] approach and promote more 'positive' methods for reconciling the treaties in discussion. It follows that, as already presupposed a few lines above, the best means through which the interests enshrined by those legal instruments may be coordinated with each other corresponds to the idea of 'systemic' interpretation (or *systemic integration*)—expressed by the customary rule codified by Article 31(3)(C) of the Vienna Convention on the Law of the Treaties (VCLT).[40] On the basis of this principle, in each concrete case the interpreter should weigh and balance the different interests at stake with the view of determining, in light of the specific circumstances of the case, which one should be considered as prevailing over the others (unless, of course, a solution would exist that would contextually satisfy all such interests). Conceived in this manner, the principle of 'systemic interpretation' turns—as purported for instance by Arcari—into 'consistent interpretation', 'i.e. one which upholds a constitutional and hierarchically-oriented … outcome of the conflict between the norms and values at stake'.[41] In fact,

C50P26 > [t]he principle of systemic integration … articulates the legal-institutional environment in view of substantive preferences, distributionary choices and political objectives … Without the principle of 'systemic integration' it would be impossible to give expression to and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or 'regime'.[42]

C50P27 The principle in point obviously presupposes determinations on a case-by-case basis. That said, however, certain general considerations may be formulated which may serve as guidance for the exegetists entrusted with such an intricate hermeneutic operation. In particular, one should take into account the significance of protected values. While nobody denies that both the interest of a state to preserve (what it considers) its own national heritage and the property rights of private owners are worth protecting—not to mention the right of the international community as a whole to enjoy cultural heritage of great importance—when it comes to the right of indigenous and other communities to

[38] See Wilfried Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 403, 407.

[39] See Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015); Anne Peters, 'The refinement of international law: From fragmentation to regime interaction and politicization' (2017) 15 *International Journal of Constitutional Law* 671, 672.

[40] Art 31(3) VCLT states that, in interpreting an international treaty, '[t]here shall be taken into account, together with the context: … (c) any relevant rules of international law applicable in the relations between the parties'. On the principle of 'systemic interpretation' see, among others, Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (2005) 54 *International & Comparative Law Quarterly* 279; Gabriel Orellana Zabalza, *The Principle of Systemic Integration: Towards a Coherent International Legal Order* (Lit Verlag 2012).

[41] See Maurizio Arcari, 'The Creeping Constitutionalization and Fragmentation of International Law: From "Constitutional" to "Consistent" Interpretation' (2013) 33 *Polish Yearbook of International Law* 9, 11.

[42] See Report on Fragmentation (n 19) para 480.

preserve the elements (including tangible objects) associated with their intangible cultural heritage, the inner spiritual connection usually characterizing the relationship between the peoples concerned and their heritage appears to overpower any other consideration. Such an interest my therefore be considered, in general, as 'constitutionally' (ie hierarchically) preponderant over the competing ones. Indeed, when a cultural element is indispensable to keep the cultural identity of a human community alive, depriving the latter of such element may translate into an intolerable offence for the group as a whole and for its members individually considered, involving human rights considerations that, in some cases, may even concern rights of fundamental and absolute character.[43] Of course, the effective existence of such a deep significance in the disputed object must be carefully ascertained in the concrete case, but, when it actually exists, prevalence should be accorded to the right of the community concerned to have the object repatriated. This conclusion is reinforced by the fact that repatriation of the object may be seen as a form of reparation in favour of the community for a wrong suffered,[44] which is essential for the community to recover its harmonious relationship with the universe and preserve its identity and distinctiveness intergenerationally.[45] It follows that the *kind* of cultural object that is claimed to be repatriated may attain special importance in the context of the hermeneutic operation in point. In this respect, while relevant international and domestic practice remains ambivalent with regard to sacred and ceremonial objects generally speaking, it is much more uniform as far as human remains are concerned, as they are considered a *sui generis* category of cultural heritage, due to their quality of being spiritually 'alive' and deeply connected with the collective soul of the community to which they culturally belong, going beyond the 'mere' characterization of cultural objects.[46] The fact that they must be returned to the community concerned is therefore beyond question.

C50S5

Mutual Supportiveness of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention with the CSICH

C50P28

The relationship of the 1970 UNESCO and the 1995 UNIDROIT Conventions with the CSICH cannot be conceived in conflictual terms only. On the contrary, it is also possible to rely on *mutual supportiveness*. This technique consists of holding provisions included in different legal instruments 'to act concurrently, mutually supporting each other',[47] and allows, to the extent possible, for the contextual preservation of the different values protected or safeguarded by the different treaties. Mutual supportiveness may first of all be put into practice by means of clauses included in treaties. For instance, Article 20(1)(a) of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) establishes that States Parties 'shall foster mutual supportiveness

[43] See Lenzerini (n 8) 114–18; Federico Lenzerini, 'The Tension between Communities' Cultural Rights and Global Interests: The Case of the Māori *Mokomokai*' in Silvia Borelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law* (Brill/Martinus Nijhoff 2012) 169, 173–6.

[44] Generally on this issue see Ana F Vrdoljak, 'Reparations for Cultural Loss' in Federico Lenzerini (ed.), *Reparations for Indigenous Peoples. International and Comparative Perspectives* (Oxford University Press, 2008) 197.

[45] The right of indigenous peoples to reparation for the wrongs suffered is also sanctioned by a rule of customary international law; see ILA Resolution No 5/2012 (n 28) para 10.

[46] See Lenzerini (n 43) 174; Lenzerini, 'Reparations for Wrongs against Indigenous Peoples' (n 17) 340–1.

[47] See Report on Fragmentation (n 19) para 19.

between this Convention and the other treaties to which they are parties'.[48] This and other similar provisions belong to the category of conflict clauses, which, as seen in the previous section, are also included in the 1995 UNIDROIT Convention and in the CSICH, but are not very useful for solving the possible conflicts between them. However, mutual supportiveness may also be realized through other provisions which try to integrate within a treaty the values protected by other legal texts, establishing synergies between the instruments in question. Such an approach is especially pursued by the 1995 UNIDROIT Convention, which devotes particular attention to sacred or communally important cultural objects belonging to, and used by, a tribal or indigenous community. More specifically, Article 3(8) extends to such objects, when used 'in a Contracting State as part of that community's traditional or ritual use', the same time limitation established for claims of restitution applicable to public collections, which are subject to no time limitations, 'other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor',[49] unless a State Party to the Convention has declared that 'a claim is subject to a time limitation of 75 years or such longer period as is provided in its law'.[50] Similarly, Article 5(3)(d) stipulates that the court or other competent authority of the requested state shall order the return of an illegally exported cultural object if the requesting state has established that the removal of the object from its territory significantly impairs 'the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State'. Finally, Article 7(2) establishes that, even though the provisions of Chapter III of the Convention—concerning return of illegally exported cultural objects—does not normally apply where an object was exported during the lifetime of its creator or within a period of fifty years following the death of such person, such provisions regularly apply 'where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community'. At the same time, however, the applicability of the 1995 UNIDROIT Convention to sacred and ceremonial objects of indigenous peoples remains problematic for the reason that it 'reserves the right to demand the return of illegally exported cultural objects exclusively to the state (therefore barring private individuals and indigenous communities)'.[51] As a consequence, indigenous or other communities wishing to recover lost cultural objects associated with their own intangible cultural heritage need to rely on states, which are the only entities with the competence of advancing claims to that purpose. In addition, the 1995 UNIDROIT Convention 'has no retroactive force as it applies only to cases of cultural objects that were stolen or illegally exported after its entry into force (Art. 10(1) and (2))',[52] making it useless for the reclamation of cultural objects of which an indigenous community was deprived before its entry into force.

[48] See Beatriz Barreiro Carril, 'Article 20 of the UNESCO Convention on Cultural Diversity: Its Use for Promoting Respect for Cultural Diversity in WTO Law' (2014) 6 *Cuadernos de Derecho Transnacional* 108.

[49] See Art 3(4) of the 1995 UNIDROIT Convention.

[50] See Art 3(5) of the 1995 UNIDROIT Convention.

[51] See Athanasios Yupsanis, 'Cultural Property Aspects in International Law: The Case of the (Still) Inadequate Safeguarding of Indigenous Peoples' (Tangible) Cultural Heritage' (2011) 58 *Netherlands International Law Review* 335, 357.

[52] ibid.

C50P29 As far as the 1970 UNESCO Convention is concerned, it does not include any reference to cultural objects of indigenous peoples or to their intangible significance. However, Article 13(d)—in establishing that States Parties undertake, consistent with their own domestic law, 'to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the state concerned in cases where it has been exported'—may be used to safeguard elements of the intangible cultural heritage through classifying and declaring movable objects associated to them as inalienable.

C50P30 Under the perspective of the CSICH, the fact that a movable cultural object is associated with an element of the intangible cultural heritage safeguarded under such a Convention may reinforce state claims aimed at obtaining the return of that object under both the 1970 UNESCO and the 1995 UNIDROIT Conventions. As regards the former, in particular, the special value of the object concerned determined by the fact that it is associated with national intangible cultural heritage would easily allow it to be classified as inalienable, pursuant to Article 13(d). With respect to the latter, one may safely assume that the removal of an object associated with elements of the intangible cultural heritage from the territory of a State Party—even when it is not a sacred or communally important cultural object belonging to, and used by, tribal or indigenous communities—significantly impairs 'the physical preservation of the … context' of the object, obliging the court or other competent authority of the state addressed to order its return to the requesting state—if illegally exported—pursuant to Article 5(3)(a) of the Convention. Indeed, the element of the intangible cultural heritage with which the object concerned is associated may well be considered its *context*. Also, although the negotiators of the 1995 UNIDROIT Convention definitely did not intend the expression 'physical preservation' to refer to elements of the intangible cultural heritage,[53] its evolutionary interpretation[54] suggests that it is extensive enough to cover such elements.

C50P31 The latter consideration confirms the decisive importance of interpretation. In fact, mutual supportiveness may be achieved through an hermeneutic approach by which the treaties concerned are interpreted 'in manner which preserves the rights and obligations under both treaties in a maximal way … ("mutually supportive")'.[55] In practice, however, such an approach may either determine that the relevant provisions are 'applied in a mutually supportive way or [, when this is not possible,] [that] one rule or principle should have definite priority over the other'.[56] In other words, it implies that 'States "disqualify" solutions to tensions between competing regimes involving the subordination of one regime to the other'.[57] This process exactly corresponds to the technique of *systemic integration*,[58] promoted in the previous section of this chapter.

[53] See, in this respect, Draft Final Provisions capable of embodiment in the draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, with Explanatory Notes (n 22) para 84: '… sub-paragraph (a) refers to "the physical preservation of the object or of its context" and is intended to cover physical damage to monuments and archaeological sites (including that caused by illegal excavations and pillage) as well as physical damage suffered by delicate objects as a result of their careless handling by looters, smugglers, dealers and possessors etc. implicated in their illegal export.'

[54] On the evolutionary interpretation of international treaties, see Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014).

[55] See Report on Fragmentation (n 19) para 281. [56] ibid para 220.

[57] See CBD, 'Specialized International Access and Benefit-Sharing Instruments in the Context of Article 4, paragraph 4, of the Nagoya Protocol', Note by the Executive Secretary, Doc CBD/SBI/2/6, 14 May 2018, para 13.

[58] See Report on Fragmentation (n 19) para 220.

C50P32 In recent practice, an interesting example of use by a court of the 1970 UNESCO and the 1995 UNIDROIT Conventions for pursuing the repatriation of cultural objects of intangible significance is represented by the 2017 judgment of the Constitutional Court of Colombia concerning the *Quimbaya Treasure*.[59] In this judgment the Court found that the Colombian government had a duty to pursue repatriation from Spain, on behalf of the indigenous Quimbaya community, of a treasure of 122 golden objects lost in 1893. The decision of the Court was built on the assumption that, under contemporary international law, indigenous peoples are entitled to a number of substantive rights, also grounded on the principle of self-determination of peoples, considered by the Court as a rule of *jus cogens*. Such rights include the right to their ancestral cultural heritage, which, in turn, implies, *inter alia*, a duty for state authorities to undertake the appropriate actions with a view of guaranteeing restitution of such heritage to the communities concerned. The most effective international instruments to achieve repatriation of cultural properties of archaeological and cultural value are, according to the Court, the UNDRIP, the ICCPR, and the CSICH, ratified by Colombia in 2008. As regards the latter, the Court emphasized that intangible cultural heritage represents the invisible part of cultural heritage which is found in the very spirit of the peoples and is expressed in the set of distinctive, spiritual, intellectual, and affective traits characterizing a society or a social group, which include the 'modus vivendi', value systems, traditions, and beliefs of each human community. Most notably, the Court recognized the irreplaceable intangible values attached to certain material cultural objects (like the ones dealt with in the controversy); such values significantly contribute to the definition of the distinctive traits and traditions of a human community. The Court also based its position on the 1995 UNIDROIT Convention and, particularly, the 1970 UNESCO Convention, of which both Colombia and Spain are parties. According to the judges, the latter Convention needs to be interpreted as evolutionary, taking into account international standards on human rights. Furthermore, the Court considered the 1970 UNESCO Convention applicable to the case submitted to its attention relying on the principle of intertemporal law and holding that recognition of its non-retroactivity would lead to an unreasonable outcome, which would be incompatible with the rule of *effet utile* and would divest the system for restitution of cultural property of any practical effect.

C50P33 Although the judgment just summarily described is unlikely to produce any concrete outcomes in the real world—as the Spanish government reacted by declaring that the Quimbaya Treasure has today become Spanish patrimony and is consequently inalienable[60]—and while some of the arguments used by the Constitutional Court of Colombia are certainly debatable, the decision definitely shows how an integrated approach to the 1970 UNESCO Convention, the 1995 UNIDROIT Convention, and the CSICH may allow to contextually pursue the purposes of all three treaties, as well as how states may act on behalf of indigenous and other communities in order to promote

[59] Constitutional Court of Colombia, Judgment SU-649/17 (2017) <https://www.corteconstitucional.gov.co/relatoria/2017/SU649-17.htm> (accessed 22 February 2023); see Diego Mejía-Lemos, 'The "Quimbaya Treasure", Judgment SU-649/17' (2019) 113 *American Journal of International Law* 122; Evelien Campfens, 'Whose Cultural Objects? Introducing Heritage Title for Cross-Border Cultural Property Claims', (2020) 67 *Netherlands International Law Review* 257, 289.

[60] See 'What is the Quimbaya treasure, the valuable collection of pre-Columbian pieces that Spain refuses to return to Colombia', Newsroom Infobae, 31 March 2022 <https://www.infobae.com/en/2022/03/31/what-is-the-quimbaya-treasure-the-valuable-collection-of-pre-columbian-pieces-that-spain-refuses-to-return-to-colombia/> (accessed 22 February 2023).

repatriation of their cultural objects associated with the intangible cultural heritage. As regards in particular the latter point, some virtuous examples may be found in the recent practice of successful actions by domestic institutions allowing repatriation of cultural objects of intangible value on behalf of local communities. The campaign for the repatriation of hundreds of mummified Māori heads (*Mokomokai*) to New Zealand—from museums as well as private collections around the world—either to be returned to their relatives or to the Museum of New Zealand Te Papa Tongarewa, in Wellington, for storage (not display), is one of the most famous examples of such practice.[61] With respect to this example, however, it is important to keep in mind that—as noted at the end of the previous section—when it comes to human remains not much controversy exists on the fact that they must be returned to the communities to which they *culturally* belong, on account of their very special significance for such communities, attributing to them a characterization going well beyond that of cultural objects.

Conclusion C50S6

C50P34 In consideration of the specificity of international treaties concerning the protection or safeguarding of cultural heritage, in many cases the attempt to ensure a contextual and harmonic application between two or more of them may prove quite challenging. The relationship of the 1970 UNESCO and the 1995 UNIDROIT Conventions with the CSICH does not escape this reality. However, as described in this chapter, the problems potentially arising from such a relationship may be overcome, at least partially, through a systemic interpretation combining—to the extent possible—the different interests incorporated in the relevant treaties, based on an evolutionary approach recognizing and promoting the need to pursue the values attached to cultural heritage which are of particular significance for human communities. When this is not possible, one rule must be recognized as a priority over the other,[62] consistent with the considerations developed in the previous sections. Indeed, the method of systemic interpretation (or systemic integration) definitely appears the best approach to properly manage the relationship of the 1970 UNESCO and the 1995 UNIDROIT Conventions with the CSICH.

[61] See Lenzerini (n 43) 158–9.

[62] See text corresponding to n 54.