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**Protection and safeguard of cultural heritage  
from risks connected to natural and man-made disasters.  
International, European and national perspectives**

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## **“Protection and safeguard of cultural heritage from risks connected to natural and man-made disasters. International, European and national perspectives”**

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### **Foreword**

The Conference “Protection and Safeguard of Cultural Heritage from Risks Connected to Natural and Man-made Disasters. International, European and national perspectives” was organized by dr. Flavia Zorzi Giustiniani, Assistant Professor of International Law and national coordinator of the International Disaster Law Project, with the assistance of dr. Alice Riccardi.

The event, which was held in Rome on 4 December 2013 at Sala delle Bandiere – Information Office of the European Parliament in Italy, builds on the growing interest of the scientific community in providing legal and practical answers to the problems arising in the context of disasters different from armed conflicts. In particular, an under-investigated aspect of the so-called international disaster law concerns the protection and safeguard of

cultural heritage in the event of calamities. This prompted the research unit of the International Telematic University Uninettuno to convene academics, legal experts and cultural heritage practitioners to discuss theoretical and concrete aspects of cultural heritage protection from disasters.

The first panel addressed the background question of the applicable law to the protection of cultural heritage in disaster situations from international, European and national perspectives. Against the absence of pertinent international and European provisions, panelists investigated whether it would be feasible to draw upon existing instruments providing for cultural heritage protection, and attempted to identify binding and non-binding provisions that could find application in the event of disasters. The analysis of national approaches focused on Switzerland, which recently upheld international commitment aimed at widening the scope of existing norms applicable to disasters situations.

The second panel – organized as a roundtable – was entirely devoted to the experience of experts and practitioners in the field of the protection and safeguard of cultural property. The conference brought together panelists with different backgrounds with a twofold aim. First, speakers' heterogeneous experiences were able to offer the most comprehensive overview of the main problems and concerns regarding the protection of cultural heritage in the event of disasters. Second, the Conference provided a forum where practitioners were given the chance to confront and share best practices.

## ***1. Legal Background***

### ***1.1. International Perspectives***

At present, international law does not specifically deal with the protection of cultural heritage from natural and man-made disasters. Nevertheless, existing norms of different fields of international law can provide guidance

in this respect. Panelists were thus invited to investigate for norms and principles which, while meant to address different contexts, could nonetheless be applicable to disaster situations.

### **1.1.1. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Applicability to Disasters**

International law is at present silent as to the protection of cultural property in times of natural and man-made disasters other than armed conflicts. Contrariwise, the latter situation is specifically regulated by the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter 1954 Convention) and the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter 1999 Protocol). A panelist investigated whether provisions established therein would be able to offer guidance in times of disasters other than armed conflicts. To this aim, existing relevant international law instruments have been surveyed and the effects they have on the protection of cultural heritage in peace-time have been analysed.

#### *1.1.1.1. Surveying Existing Law*

From a historical viewpoint, the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land and its 1907 annex Regulations concerning the Laws and Customs of War on Land embedded two relevant provisions in the context of cultural heritage protection. Though, these articles had a narrow scope, in that they both merely referred to some specific cultural properties – namely property of the communes, of religious, charitable and educational institutions, and those of arts and science.

Afterwards, the 1949 Geneva Conventions did not mention cultural property among other protected objects. Therefore, cultural heritage received protection under Geneva law insofar as it could be qualified as a civilian object. Such a lacuna is somehow surprising, considering that during the Second World War cultural heritage suffered twofold victimization. Indeed, it was both targeted as a military object when used for military purposes – e.g. in the Abbazia di Cassino case – and extensively looted.

The absence of any protection for cultural property within the Geneva law is even more surprising vis-à-vis the establishment in the aftermath of the war of the United Nations Educational, Scientific and Cultural Organization (hereinafter UNESCO). Upon its creation, UNESCO immediately put on its agenda the necessity to create an international instrument aimed at the protection of cultural property during armed conflicts.

Eventually, it succeeded only in 1954 with the approval of the mentioned 1954 Convention, which establishes a system of cultural property under special protection during armed conflicts. Afterwards, the elaboration of the 1977 Additional Protocols to the 1949 Geneva Conventions led to the incorporation of principles concerning the protection of cultural property within the law of armed conflicts, whereas the 1999 Protocol introduced an enhanced protection system compared to the one provided for in the 1954 Convention. Regrettably, only 95 States ratified the 1999 Protocol. As a consequence, the mechanism of enhanced protection established therein – granted on the basis of entry in the List of Cultural Property under Enhanced Protection – lacks widespread implementation. Indeed, only few properties today are in the 1999 Protocol List – partially due to the complications of the mechanism itself.

Moreover, the very same 1954 Convention meets some limits. Firstly, merely 126 States are at present parties to it – although in the auspices of the

drafters it should have worked as a corollary to the 1949 Geneva Conventions. Secondly, the system of special protection envisaged therein never worked. Thirdly, at a closer look, the protection established by the 1954 Convention does not substantially differ from the one envisaged in the 1949 Geneva Conventions for civilian objects.

#### *1.1.1.2. Quid Ius in Time of Disaster?*

Against this background, one is tempted to ask whether the mentioned provisions would apply in times of disaster. Strictly speaking, the answer is of course in the negative. Nevertheless, said principles and norms of international humanitarian law have also a bearing in other areas of international law, and in particular in international disaster law.

In the first place, mentioned provisions clearly show that reciprocity and bilateralism do not suffice when the protection of cultural heritage is concerned. Indeed, they convey the necessity of establishing a universal structure or mechanism for protection which is internationally managed. In other words, the 1954 Convention and its 1999 Protocol have a systematic effect, in that they have contributed to put the protection of cultural heritage on the international community agenda.

In the second place, it cannot be ignored that a number of obligations provided for in the mentioned instruments are applicable in peace-time. The Preamble to the 1954 Convention clearly affirms that “protection cannot be effective unless both national and international measures have been taken to organize it in time of peace”. Once established, these measures can well be used *hic et nunc* in peace-time when disasters other than armed conflicts take place. In this context, Article 5 of the 1999 Protocol concerning the safeguard of cultural property turns into a co-operation mechanism among States which operates in peace-time.

Thirdly, UNESCO's role within the 1954 Convention has proved fundamental. Indeed, in accordance with Article 23 of the Convention, States can call upon UNESCO either for technical assistance or "in connection with any other problem arising out of the application" of the Convention. As the guarantor of the concrete implementation of the system of protection and safeguard of cultural property established by the 1954 Convention, UNESCO also implicitly participates in the promotion of the very same principles in peace-time.

Fourth, and in connection with the abovementioned, before hostilities come about, States are bound to catalogue cultural properties – otherwise subsequent protection cannot be organized. Moreover, States shall offer armed forces specific trainings. Furthermore, they must modify their national legal orders in order to respect a number of non self-executing obligations established in the 1954 Convention. The implementation of these provisions is able to create and spread a culture of respect for cultural property which permeates the entire society.

Fifth, the 1999 Protocol strengthens mentioned effects. In particular, an important achievement is represented by its Article 24. This provision establishes the Committee for the protection of cultural property in the event of armed conflict and is open to civil society – namely, to international and national governmental and non-governmental organizations, eminent professional organizations and representatives of the International Committee of the Blue Shield, of the International Centre for the Study of the Preservation and Restoration of Cultural Property, and of the International Committee of the Red Cross. Being tasked by Article 27 to prepare its own report on the implementation of the 1999 Protocol, the Committee creates a peace-time mechanism which involves a great number of actors.

### *1.1.1.3. Conclusions*

The question of whether existing instruments protecting cultural property during armed conflicts can find application in peace-time requires a re-reading of the 1954 Convention and its 1999 Protocol, and should be ultimately answered in the positive. As shown, peace-time effects of mentioned provisions cannot be denied. Indeed, obligations arising from both instruments must be implemented before hostilities exacerbate, and international and national measures accordingly created can well be used in order to address crisis situations other than armed conflicts.

### **1.1.2. UNESCO Conventions on Cultural Heritage and their Relevance during Natural and Man-made Disasters**

Conventions concerning cultural heritage adopted under UNESCO's auspices are not assigned any specific role in case of natural and man-made disasters, nor they enshrine any specific provision aimed at protecting cultural heritage in mentioned situations. Notwithstanding, recent practice shows a consistent development towards an extension of their scope as a result of the growing recognition of cultural heritage as a common concern of humanity.

Such recent practice in particular demonstrates that UNESCO is involved in protecting cultural heritage in the event of disasters from a twofold perspective. *Ex ante*, through prevention; and *ex post*, through reconstruction and restoration.

#### *1.1.2.1. Prevention of Risks to Cultural Heritage in case of Natural and Man-made Disasters*

Various acts adopted under the UNESCO umbrella and a number of bodies created within it testify UNESCO's progressive involvement in the prevention of risks connected to disasters.

First, following the 2001 destruction by the Taliban of the Buddhas of Bamiyan in Afghanistan, in 2003 the UNESCO General Conference adopted a Declaration concerning the Intentional Destruction of Cultural Heritage. The Declaration does not create *per se* any legally binding obligation upon States but, being unanimously adopted, has a profound moral force. Remarkably, it expressly condemns wanton destruction of cultural heritage in all times – namely in time of peace, occupation, and armed conflict.

Second, UNESCO established a Section for Disaster Reduction in Headquarters. Such Section is tasked with the promotion of education, culture and science in preventing risks to cultural heritage, thus creating a multilayered system of *ex ante* protection.

Third, important initiatives and programmes have been adopted regarding specific natural hazards. With regard to earthquakes and tsunamis, UNESCO enabled a global warning system in direct coordination with national focal points. It goes without saying that such international initiatives can only work if States establish national systems of disaster prevention. As far as floods are concerned, UNESCO is well aware that climate change worsens their impact. The most relevant forum in this respect is the Intergovernmental Panel on Climate Change. Lastly, desertification is usually not referred to when speaking about natural disasters. Notwithstanding, desertification is capable of destroying both the physical and social life of affected populations together with their culture and traditions. Therefore, UNESCO adopted, within its Intergovernmental Man and the Biosphere Programme, the Sustainable Management of Marginal Drylands Project. In addition, a further evolution could occur when landscape will be recognized as a cultural element. Nevertheless, at present it seems that, due to economic concerns, the academic backed project to

draft a universal convention does not meet sufficient international support yet.

#### *1.1.2.2. Disaster Restoration*

In the aftermath of disasters two major problems arise. First, how to technically reconstruct. Second, how to authentically reconstruct. The identification of reconstruction recipients is therefore deemed fundamental. Reconstruction is indeed directed to the affected population, characterized in terms of its socio-cultural background. In turn, this entails that local population must participate in reconstruction itself, posited a nexus between the material element of cultural heritage and the cultural element attached to the social group which recognizes itself in destroyed or damaged cultural heritage. The use of traditional construction techniques is thus a way to address both abovementioned problems.

Sometimes though, policy-makers decide *not* to reconstruct. This happened in the mentioned Buddha case, although a reconstruction project was already in place. The decision was in that instance grounded on the idea that the destruction should symbolize the fundamentalist regime's senseless targeting of culture. In this very case, Buddhas had been memorialized and included in the World Heritage List in order to remember a pointless event of human brutality.

Lastly, in some cases policy-makers intentionally decide not to pursue authenticity. This happened for instance in the reconstruction of the Warsaw main square following the Second World War. The underlying idea in these situations is the one, again, of turning destroyed cultural heritage into a symbol.

### *1.1.2.3. Conclusions*

Although a precise and distinct *corpus* of provisions dealing with disaster law has not yet arisen, the international law system as a whole, being not compartmentalized, does say something vis-à-vis cultural heritage and disasters. International lawyers since 2005 have split oceans of ink describing the doctrine of responsibility to protect – the purpose of which is to achieve prevention, mitigation, halting, and restoration through international law. As it is well known, the doctrine of responsibility to protect has not been expressly linked to disaster law. Notwithstanding, international law does not evolve in parts. When a new norm arises, it can well be applicable to cases for which it was not originally elaborated. *De jure condendo*, this is valid as well for the doctrine of responsibility to protect. From a broad standpoint indeed, responsibility to protect entails that prevention must be a paramount concern in international relations – in whatever context of international law.

### **1.1.3. Cultural Heritage and Disaster Risk Reduction: Duties and Responsibilities of States Parties to the World Heritage Convention**

#### *1.1.3.1. Introduction*

In 1972, the UNESCO General Conference adopted the Convention concerning the Protection of the World Cultural and Natural Heritage (hereinafter WHC), which aims at protecting, conserving and presenting cultural heritage listed in the World Heritage List.

Although no WHC provision is specifically applicable in time of disasters, the Operational Guidelines for the Implementation of the World Heritage Convention (hereinafter Guidelines) do. The Guidelines are drafted and periodically developed in order to reflect new concepts, knowledge and

experience by the World Heritage Committee (hereinafter Committee), which is the intergovernmental body in charge of the implementation of the WHC. The Committee has progressively included within the Guidelines a number of operative paragraphs related to the issue of the protection of World Heritage from natural and man-made disasters. Nevertheless, it is disputable whether these paragraphs constitute mere recommendations or amount to obligations upon States Parties.

Against such background, one presentation aimed at identifying relevant Guidelines' operative paragraphs in the context of disasters, and at investigating whether they possess a binding character.

#### *1.1.3.2. Identifying Relevant Guidelines' Operative Paragraphs in Disaster Situations*

As abovementioned, the 2013 version of the Guidelines expressly mentions both natural and man-made disasters. Moreover, the Annexes to the Guidelines refer to calamities within the context of international assistance.

As far as the Guidelines are concerned, the Committee recommends, at paragraph 118, that States Parties “include risk preparedness as an element in their World Heritage site management plans and training strategies.” Moreover, paragraph 241 establishes that emergency assistance may be requested by States to address ascertained or potential threats to properties included in the World Heritage List which suffer or are in immediate danger of damage due to sudden “land subsidence, extensive fires, explosions, flooding or man-made disasters including war” – such list being non-exhaustive. A combined reading of paragraphs 241 and 237 reinforces the protection envisaged by the Guidelines for World Heritage during disasters. Indeed, the latter provision establishes, among other principles and priorities for international assistance, that the non-eligibility clause for international assistance for States in arrears of payments of their contribution to the

World Heritage Fund does not apply to requests for emergency assistance – i.e. in disaster time.

As far as the Annexes are concerned, it suffices to mention Annex 9 concerning the Evaluation Criteria of the Advisory Bodies for International Assistance Requests, which expressly refers to threats posed by disasters for emergency assistance requests.

*1.1.3.3. On the Nature of Provisions Meant to Protect World Heritage in Disaster Situations*

Against this background, it is disputable whether the mentioned operative paragraphs create obligations upon States Parties. Indeed, some doctrine argues that the Guidelines are mere recommendations, and hence are not able to establish obligations. Notwithstanding, such viewpoint is unsustainable. Indeed, the Guidelines are drafted and approved by the Committee, which is an intergovernmental treaty body. Thus, they provide an authoritative interpretation of the WHC.

Posited the Guidelines' capacity to create obligations, their nature is still unclear. Indeed, it can be contended whether they impose upon States obligations of conduct, or of result. In general terms, Article 5 WHC, by stating that States "shall endeavor, in so far as possible, and as appropriate for each country" to take effective measures for the protection, conservation and presentation of property located in their own territory, merely establishes due diligence obligations. Nevertheless, a different approach could be envisaged. Indeed, some part of the doctrine reads in Article 6(1) WHC obligations of result, where it states that the cultural properties included in the World Heritage List "constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate." In other words, States would be bound to actively cooperate in order to protect and maintain such properties. Therefore, once a property is

included in the List, an *erga omnes* obligation arises for the territorial State to respect obligations originating from the WHC. Nevertheless, the types of sanctions that the Committee can impose upon States that violate WHC obligations run counter the proposed interpretation. Indeed, the Committee is not empowered to impose on non-compliant States negative sanctions, nor can it refer the matter to an international adjudicatory body. Contrariwise, the Committee can only impose positive sanctions, such as the suspension of the concerned State's properties from the List, and the interruption of financial assistance. Still, the sanction powers conferred to the Committee cannot be belittled by denying their punitive nature. On the contrary, they somehow appear to express a governmental power of the Committee over World Heritage. In this vein, it could be argued that these sanctions are positive in so far as their absence constitutes an award for law-abiding States. In conclusion, the system established by the WHC does impose obligations of conduct upon States Parties, even in time of natural and man-made disasters.

#### **1.1.4. The Safeguard of Marine and Coastal Cultural Heritage and the Management of Natural and Man-made Disasters**

##### *1.1.4.1. Introduction*

With regard to the protection of marine cultural heritage, international law used to refer merely to underwater cultural heritage (hereinafter UCH). At present, the scope of this notion is expanding, so to include both underwater and coastal heritage. Such evolution is occurring thanks to the international community's progressive implementation of an integrated approach in the management of coastal areas. Consequently, all underwater and coastal properties which, due to their historical, cultural, and esthetic value, are relevant from a public interest viewpoint, deserve protection – also in time of disaster.

UCH is indeed threatened by both natural and man-made calamities. Whereas the former includes climate change, seaquakes, tsunamis and storms, the latter comprises the construction of artificial islands, exploitation of seabed and subsoil, underwater tourism, looting, fishing and military activities. Recent cases show the disruptive impact that disasters of both species can have on UCH, such as the damages caused to the wreck of the *Mercure*, sunk in 1812 in the Adriatic Sea, by certain types of fishing techniques. Sometimes, natural and man-made disasters are consequential to each other. For instance, a 2001 tropical storm which affected the Federated States of Micronesia caused severe damages to the wreck of the USA *Mississinewa*, which sunk in 1944. Consequently, thousands liters of fuel still on board poured out. As it is evident, accidents similar to the described ones happened due to the lack of prevention mechanisms. As anticipated, though, an evolution is currently occurring aimed at enabling integrated approaches to the management of UCH. Like in other areas of international disaster law, the described evolution concerning UCH protection from calamities is fragmented, and is taking place in particular at the regional level.

Against this background, one scholar presentation aimed at describing international, European, and Italian initiatives meant to protect UCH from natural and man-made disasters.

#### *1.1.4.2. The Protection of UCH from Disasters in International Law*

Both universal and regional initiatives have been undertaken in the last three decades to protect UCH.

As to the first ones, UCH protection dates back to the 1982 United Nations Convention on the Law of the Sea (hereinafter UNCLOS). Subsequently, a number of universal instruments such as the 1972 World Heritage Convention and the 2001 UNESCO Convention on the Protection of the

Underwater Cultural Heritage (hereinafter 2001 UNESCO Convention) strengthened the UNCLOS protection scheme.

In particular, the 2001 UNESCO Convention – which entered into force in 2009 – is fundamental in that it incorporates two set of provisions which are relevant in time of disasters. First, Articles 10(4) and 12(3) envisage an embryonic early warning system, empowering States to take all practicable measures to prevent an immediate danger to UCH, “whether arising from human activities or any other cause including looting.” Second, Article 5 provides for a compulsory prevention mechanism, which binds States to implement projects aimed at preventing or mitigating potential adverse effects to UCH of activities carried out under their jurisdiction. In any event, economic exploitation of UCH is deemed incompatible with its protection.

Among regional initiatives, the 2008 Protocol on Integrated Coastal Zone Management in the Mediterranean to the 1976 Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean is deemed fundamental, in that it represents a peculiar scheme of protection of the ecosystem within the broadest context of cultural marine landscape. The Protocol, which so far has been ratified by eight States (Albania, Croatia, France, Montenegro, Morocco, Slovenia, Spain, Syria) and by the European Union, establishes both a general cultural heritage protection regime, and a special regime of cultural heritage protection from natural disasters.

This instrument provides for obligations aimed at both preventing and responding to natural disasters. First, Article 22 binds the Parties to “develop policies for the prevention of natural hazards”, and in particular, to undertake (i) hazard assessments, (ii) preventative measures, (iii) and mitigation and adaptation measures to “address the effects of natural disasters”. Second, Article 24 establishes a best effort obligation for State

parties to “promote international cooperation to respond to natural disasters”, in particular regarding equipment for detection, warning and communication. Significantly, Article 24(3) underlines that cooperation efforts must be directed to “national, regional and local authorities, non-governmental organizations and other competent organizations for the provision on an urgent basis of humanitarian assistance”.

#### *1.1.4.3. The Protection of UCH from Disasters in the European Union Legal Order*

The last ten years witnessed an increasing European interest towards the protection of maritime and coastal cultural heritage, which in turn led to the enactment of binding instruments. In 2006, a green book proposed a EU maritime policy aimed at re-affirming a European maritime identity through the protection of the European maritime heritage. In 2007, a blue book followed, while in 2008 a directive was enacted establishing a protection strategy for the marine environment.

The Treaty on the Functioning of the European Union now explicitly recognizes, in Article 167, that in implementing any action the European Union must give due consideration to cultural heritage. Finally, in 2013 a directive proposal has been submitted with the aim to launch a strategy for the planning of maritime space and the integrated management of coastal areas.

#### *1.1.4.4. The Italian UCH Protection System*

The 2001 UNESCO Convention and its Annex were incorporated in Italian Law in 2004 through amendments to the Italian Code of Cultural Heritage and Landscape, which establishes that both instruments shall apply to UCH discovered within 12 nautical miles from the limit of the Italian territorial sea. The 2001 UNESCO Convention and its Annex also apply to the Italian

Archaeological Zone, which Italy created within its 24 nautical miles. Moreover, pursuant to the President of the Republic Decree 209/2011, an Ecologic Protection Zone has been established, with the aim to extend the protection accorded to UCH to properties located therein.

#### **1.1.5. Safeguarding and Protecting Cultural Heritage: Which Role for Indigenous People?**

Until recent times, international law did not assign any special role to indigenous peoples in the context of protection and safeguard of cultural heritage. Contrariwise, the classical approach of international law was to guarantee protection to the traditional knowledge of such groups with the objective to safeguard cultural and biological diversity.

In this context, a distinction should be made between the knowledge possessed by indigenous groups and the one possessed by the so-called local communities. Indigenous knowledge refers to the set of expertise developed by the native inhabitants of a given geographic area, who have their own culture and beliefs. Examples of such groups, which predate the formation of many contemporary States, include Masai from Kenya, Pigmei from Central equatorial Africa, and Australian aborigines. Local knowledge instead encompasses the expertise and techniques of whatever community which, while not being native of a certain territory, lives therein since long time. The great majority of African communities, such as Luo from Kenya and Zulu from South Africa, can be defined as local communities.

The distinction between the two concepts is relevant considering the different position of their holders within the international community. In fact, only indigenous peoples have been accorded a special status and rights at the international level. Nonetheless, in the context of disasters management, the said distinction does not emerge, since the expression most frequently adopted is that, all-embracing, of traditional knowledge.

An exception to this trend can be found in the practice of the Human Rights Council. This body in 2007 established the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), which was recently entrusted to prepare a study on the promotion and protection of the rights of indigenous peoples in natural disaster risk reduction, prevention and preparedness initiatives, including consultation and cooperation with the indigenous peoples concerned in elaborating national plans for natural disaster risk reduction (A/HRC/24/L.21 and A/HRC/24/L.22 of 26 September 2013). While laudable in principle, this initiative seems though to down-grade the status of indigenous peoples. The resolution in fact speaks in terms of ‘promoting’ the role of such peoples rather than recognizing and protecting their existing rights in the context of natural and man-made disasters.

#### *1.1.5.1. A New Perspective in Disasters Prevention and Reconstruction*

In recent times various studies have shown that traditional knowledge, far from being evidence of backwardness, can have a great potential in ameliorating prevention and reconstruction policies in the context of disasters. Recent practice which embraces the proposed distinction demonstrates indeed a shift in both disaster prevention and reconstruction approaches. Considerations for specific indigenous people knowledge can indeed prove fundamental in both sets of mentioned activities. The first formal recognition of the role of traditional knowledge in disasters happened at the UN Conference on Natural Disaster Reduction held in Yokohama in 1994. In its Plan of Action, one of the objectives is the strengthening of local communities’ resilience to disasters through the recognition and diffusion of their traditional knowledge. The final consecration of the importance of such knowledge has then taken place in 2005, at the following world conference on the subject held in Kobe. Lastly, within the context of the World Heritage Convention, a similar recognition

can be found in the Strategy for reducing risks at world heritage, launched in 2006 by the World Heritage Committee.

#### *1.1.5.2. Conclusions*

What emerges from mentioned soft law instruments is the acknowledgment that cultural heritage does not only constitute the object of protection, but can be rather turned into a tool in order to limit the negative impact of disasters.

As a consequence, the role of traditional knowledge should not be underestimated. Such knowledge does indeed include direct familiarity with affected territories, and could prove crucial in responding to disasters, as well as in preventing them. Moreover, enhancing the importance of traditional knowledge favors in turn a participative approach to disasters, thus eventually reducing external interventions and minimizing connected costs. Furthermore, the involvement of local affected populations in recovery activities facilitates reconstruction acceptance and guarantees the adoption of reconstruction techniques which are ecologically, socially and economically sustainable. In this regard, it bears noting that the Hyogo Framework for Action adopted under the auspices of the 2005 Kobe World Conference on Disaster Reduction attempts to associate traditional knowledge to more modern and sophisticated tools, with the aim of empowering local communities. The challenge for the future lies indeed in finding adequate modalities of integration of traditional knowledge with modern science and technologies.

### ***1.2. The European Perspective: Cultural Heritage and Global Changes – A New Challenge for Europe***

The question of whether and to what extent cultural heritage receives protection by the European Union legal order, and the consequent role

played by the EU itself is at present an under-explored area of EU law. One scholar presentation aimed precisely at describing existing provisions concerning cultural heritage and connected actions, in order to understand whether the latter are consonant with the former, and where EU practice it is currently heading.

### *1.2.1. Textual Elements Referring to Cultural Heritage in EU Primary Law*

Only three provisions within EU primary law expressly refer to cultural heritage, namely Article 3(3) of the Treaty on European Union (TEU), and Articles 167(2) and 107(3)(d) TFEU.

The first provision generally mentions, among other EU aims, the safeguard and enhancement of the European cultural heritage.

The second provision constitutes the operative consonant of the former. It establishes that EU action shall aim at encouraging cooperation and if necessary supporting and supplementing member States in the safeguard and conservation of cultural heritage of European significance.

Article 107(3)(d) TFEU is contrariwise independent from the abovementioned two provisions. It is generally devoted to aid granted through member States, and clearly establishes that such aid, if meant to promote culture and heritage conservation, can be considered as compatible with the internal market “when it does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest”.

Against this positive background, two remarks emerge. First, it is evident that none of mentioned provisions nor expressly neither specifically refer to the protection of cultural heritage in case of disasters. Second, it seems that they establish a distinction between the European cultural heritage and the cultural heritage *tout court*. As far as the former is concerned, it has been

suggested to create a register including only properties capable of expressing and developing European culture (see Decision No. 1194/2011/EU establishing a European Union action for the European Heritage Label).

Admittedly, existing primary EU law provisions do not reflect current practice. Indeed, at the level of EU institutions a number of actions have been adopted in order to protect cultural heritage *tout court* notwithstanding Article 3(3) TEU, which only refers to the European cultural heritage; it appears therefore that substantially, no demarcation line has been drawn between the two different types of cultural property – i.e. the European one, and the cultural heritage *tout court*.

#### *1.2.2. EU Policy Areas of Intervention*

As abovementioned, although at the primary law level no positive provision refers to the protection of cultural heritage in time of natural and man-made disasters, in the practice of EU institutions several sectoral policies are meant to address such issue and different mechanisms can be put in place to protect and safeguard cultural heritage. In particular, three sets of actions deserve to be mentioned.

First, the cohesion and EU solidarity funds established pursuant to EU regional policy provide for interventions to protect cultural heritage. In accordance with the former, for the period 2007-2013, 3 billion Euros have been reserved to cultural heritage. Moreover, pursuant to the latter, the EU is allowed to finance measures aimed at securing prevention infrastructures and at protecting cultural heritage.

Second, actions adopted within the environmental policy may be able to address cultural heritage protection in disaster situations. This is the case, for instance, of the EU Directive No. 2007/60 on the assessment and

management of flood risks, which expressly mentions among its purposes the reduction of the adverse consequences for cultural heritage. Unfortunately, the flood Directive still remains an isolated example of implementing the cultural heritage protection under the EU environmental policy. In this context, the European Parliament is currently particularly active in suggesting a wider implementation of the environmental policy in order to cover a different range of situations such as disasters. Indeed, actions adopted within the environment policy have inherent advantages such as their potentially horizontal implementation which would promote effectively cultural heritage protection in disaster situations. At the same time, though, the implementation of actions within the environmental policy would be precluded each time disasters damaged only cultural heritage and not also the environment as such.

Third, the Community Mechanism for Civil Protection would prove fundamental *vis-à-vis* the protection of cultural heritage in case of disasters. Indeed, pursuant to Article 1(2) of the Council Decision of 8 November 2007 establishing a Community Civil Protection Mechanism (recast) (2007/779/EC, Euratom), protection ensured by the Mechanism also covers cultural heritage “in the event of natural and man-made disasters, acts of terrorism and technological, radiological or environmental accidents, including accidental marine pollution” – occurring both inside or outside the EU. In other words, the scope of mentioned Article 1(2) seems to be wider than that of the previously cited sectoral tools. Regrettably, though, among the thirteen European Civil Protection Modules identified by the Commission together with member States – i.e. specialized teams equipped and trained to address specific tasks – none is devoted to the protection of cultural property in emergency situations (see Annex II to the Decision No. 2010/481).

### *1.2.3. Towards a Holistic Approach?*

In 2009 the Commission and the Council jointly submitted an initiative meant to offer a global approach to the protection of cultural heritage in the research sector, in order to avoid current fragmentation. As a consequence, the Commission Recommendation of 26 April 2010 on the research joint programming initiative ‘Cultural Heritage and Global Change: A new challenge for Europe’ (2010/238/EU) was adopted. The goal is to develop a “common vision on how cooperation and coordination in the field of research at Union level can help to preserve cultural heritage in all its forms” and establish a “common strategic research agenda”. In other words, a new EU platform for cultural heritage protection has been created, although one that – to date – only focuses on research. Future developments could in any event draw upon such common platform in order to widen its scope. Interestingly enough, the mentioned Recommendation does not make any distinction between European and cultural heritage *tout court*.

### *1.2.4. Conclusions*

In general terms, the very existence of a EU law of disasters can be doubted. Should its emergence be recognized, though, such branch of EU law is highly fragmented among diverse sectors and policies. This is especially true regarding the protection of cultural heritage. Generally speaking, such situation is somehow reflective of disaster law fragmentation at the international level.

It is nevertheless possible to suggest some areas of intervention in the short run.

First, the establishment of a common European record of cultural sites. Such suggestion has been embraced by the European Parliament in 2007. Against the fragmented scenario of EU law regarding cultural heritage, the

Parliament published a study on the protection of cultural heritage from natural disasters suggesting the establishment of a Pan European Cultural Heritage Mapping Initiative and the use of the Blue Shield to this end.

Second, more emphasis on the protection of cultural property should be introduced in the new Union Mechanism for Civil Protection. Regrettably, though, the current status of the revision drafting of the Mechanism does not envisage a more comprehensive approach to the protection of cultural heritage.

### ***1.3. National Perspectives on Planning and Managing Risks to Cultural Heritage: The Swiss Model***

#### *1.3.1. Introduction*

In 1966, upon ratification of the 1954 Convention, Switzerland enacted the implementing legislation, the *Loi federale sur la protection des biens culturels en cas de conflit armé* (hereinafter LPBC). Very recently concerns emerged as to whether the LPBC was consonant with current risks threatening cultural heritage. Furthermore, there were doubts as to whether the LPBC reflected the 1999 Protocol, which was ratified by the Swiss State in 2004, and the recent amendments to the *Loi fédérale sur la protection de la population et sur la protection civile*. In accordance with such sentiments – and vis-à-vis the fact that Switzerland is the country with the highest number of museums *pro capite* – on 15 March 2013 the Federal Council requested competent national authorities to start consultations aimed at the total revision of the LPBC.

In particular, the Federal Council expressed three concerns. First, it highlighted that LPBC is only capable of addressing the protection of cultural heritage during armed conflicts, whereas contemporaneous risks posed to it remain unregulated. Second, it emphasized that the revision of

the LPBC must reflect the Constitutional provisions according to which the Civil Protection is the competent authority to protect cultural heritage. Lastly, it urged to rethink current training of the civilian personnel of the institutions holding “objects of national importance”.

Following required consultations, a draft law was eventually submitted to the Federal Council, and will presumably enter into force in 2015. It would seem indeed that no referendum will be undertaken against its promulgation, due to the fact that it keenly preserves different competent authorities’ prerogatives today enshrined in the LPBC.

### *1.3.2. The Draft Law*

Several aspects of the new Swiss draft law appear interesting and could provide guidance to other States in drafting similar laws.

First, the new draft law does not reproduce 1954 Convention and 1999 Protocol provisions – in particular those concerning military necessity, occupation, transportation of cultural heritage – since they are considered self-executing. As a result, the draft is short and concise. Second, it does not include a definition of disaster but rather avoids it in order to enlarge as much as possible its scope. Third, it establishes a division of competences among the Confederation, Federal offices and Cantons in subsidiary terms. Accordingly, the latter must adopt all material and organizational measures apt to prevent damages to cultural heritage both during armed conflicts and in the event of other disasters. Among those measures, Cantons must establish records of cultural heritage present on the territory, including photographs and relevant documentation, in order to restore damaged goods.

Lastly, the new draft law distinguishes between shelters and safe havens. The former will be created to protect “objects of national importance”. The latter will instead be allocated to the protection of foreign cultural heritage.

This aspect is the one that attracted most interest from commentators. The Confederation will indeed offer to third States constructions where to deposit temporarily cultural objects threatened by disasters. According to this provision, therefore, the scope of safe haven provided for in the 1954 Convention is enlarged as to include situations other than armed conflicts. Moreover, the new draft establishes that safe havens will be offered to third States upon the conclusion of bilateral agreements, the contours of which are already established in the same provision – for sensitive issues such as responsibility, assurances, conservation and return of property.

### *1.3.3. Controversial Aspects*

Although the new draft law can be generally regarded as very positive, still some aspects remain obscure, and need further analysis in the future.

First, in order to implement the safe haven provision, the Confederation must put great efforts in coordinating with UNESCO and third States' national competent authorities. In particular, the new draft provision on safe haven does not sufficiently regulate transportation of cultural properties from the territory of third States to Switzerland. In this context, it would be preferable to further revise the law as to make reference to: (i) the applicable law to the transported item; (ii) the duty to establish a record of transported items within the national territory; (iii) and third States duties vis-à-vis items recovered in safe havens. Second, despite some Cantons' request to extend protection also to local cultural heritage, the law only refers to national cultural heritage. Third, no financial aid is envisaged for Cantons that must proceed at cultural heritage documentation procedures.

## ***2. Intervening and Cooperating in the Event of Disasters: The Viewpoint of Practitioners***

The discussion held during the roundtable among practitioners aimed at facilitating the emergence of main themes of concern and at the same time at collecting concrete proposals meant to resolve them. The latter can be grouped in three sets of suggestions.

### ***2.1. Promoting Preparedness Activities***

First, panelists underlined the pivotal role of preparedness, both in the event of armed conflicts and of natural and man-made disasters. It emerged that very few world cultural heritage sites implemented preparedness and management plans. As far as Italy is concerned, such plans are totally absent, notwithstanding the large number of properties included in world cultural heritage list, and the inherent territorial characteristics that threaten them. In this context, Italy possesses all qualities and capabilities to become an international model of disaster preparedness. In this sense, important lessons can be learned from the emergency plan prepared by the National Central Library of Florence. Such a plan, which was implemented with a multi-phased approach (inspection, prevention, drafting of a written plan, response, recovery), could offer fruitful guidance and best practices for similar institutions. Notably, all relevant stakeholders at the local level cooperated in the drafting of the plan (e.g. competent offices of the Florence Municipality, the Florence Fire Department etc.) and participated in practice sessions.

### ***2.2. Promoting Coordination among Concerned Actors***

Secondly, participants highlighted the urgent necessity of a coordination among (i) national authorities competent for cultural heritage protection and

those competent for disaster response operations and (ii) volunteers and professionals involved in early recovery activities.

As far as the first aspect is concerned, the widespread absence of memoranda of understanding among different actors involved contributes to deficiencies and delays in responding to disasters. As far as Italy is concerned, museums and other cultural sites' security plans should be coordinated with Civil Protection plans, which usually concern just the protection of persons and not also of cultural properties. Nevertheless, Italy strengthened its capacities drawing upon lessons learned from disasters that affected its territory.

In the aftermath of the 1980 Irpinia earthquake Italy faced the failure of response operations due to the absence of any civil protection mechanism. Later, pursuant to Law 225/1992, the Department of Civil Protection was established. However, since its competences did not include the protection and recovery of cultural heritage from calamitous disasters, following the 1997 Umbria and 2009 Abruzzo earthquakes *ad hoc* commissioners had to be appointed. In 2012, after the Emilia earthquake, the said Department was restructured through the approval of the Law Decree 59/2012. Eventually, its Conversion Law 100/2012 included among the Department's competences the protection of cultural heritage. In furtherance of such legislation, the Italian Ministry of Cultural Properties now participates in the activities of the Department of Civil Protection Operative Committee, thus guaranteeing a coordination among different national authorities concerned with the protection of cultural heritage.

Concerning the problem of coordination among volunteers and professionals engaged in recovery activities, panelists offered different views. Some argued that the involvement of volunteers could prove counterproductive and foster the risk of provoking further damages to

cultural heritage. Others stressed that a distinction must be made between reaction and recovery actions. Whereas the former can take advantage of the participation of specifically trained volunteers, the latter shall only be undertaken by professionals.

### ***2.3. Promoting the Role of Local Communities***

Thirdly, speakers favored a shift in the role of cultural heritage in disaster situations. Often considered merely as a casualty of disasters, cultural heritage shall be contrariwise seen as an opportunity. Traditional knowledge regarding construction techniques, for instance, can substantially contribute to both preventing damages and recovering affected cultural heritage. Local population is in this sense the best reconstruction resource. This is the reason why UNESCO, when involved in recovery activities, always stimulates local communities' participation and contribution.

## **List of speakers**

- Paolo Benvenuti, University of Roma Tre
- Federico Casolari, University of Bologna
- Alessandro Chechi, University of Geneva
- Francesco Francioni, European University Institute
- Lauso Zagato, Cà Foscari University
- Gemma Andreone, CNR – Istituto di Studi Giuridici Internazionali
- Flavia Zorzi Giustiniani, Uninettuno University
- Giovanni Puglisi, UNESCO Italian Commission, UTIU/IULM
- Giovanni Boccardi, UNESCO
- Tiziana Maffei, ICOM
- Roberto Conforti, SIPBC
- Clarissa Belardelli, SIPBC
- Anna Scalise, SIPBC
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- Francesca Ottaviani, Legambiente
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