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The Notion of “Heritage Community” in the Council of Europe’s Faro Convention. Its Impact on the European Legal Framework

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1 Introduction: Plan of the Work

The object of this paper is the framework Convention on the Value of Cultural Heritage for Society (hereinafter: Faro Convention) of the Council of Europe (hereinafter: CoE), with particular regard to the innovative notions it contains. Such notions are today at the core of the debate in that community of scholars, largely interdisciplinary – including anthropologists and jurists, but not only – that deals with cultural heritage.

In Section 2, the relevant definitions contained in the Faro Convention¹ (Carmosino 2013; CoE 2009; D’Alessandro 2014; Ferracuti 2011; Sciacchitano 2011a; Zagato 2012b, 2013, 2014b, d, forthcoming a) – namely the definitions of “cultural heritage,” of “common heritage of Europe,” and moreover of “heritage community” – shall be discussed in detail. In Section 3, the consequences of such “new entries” in the European legal framework shall come under scrutiny, with particular attention to (the emergence of) the notion of “heritage community.” Lastly, in Section 4, a comparison between the notion of “heritage community” of the Faro Convention and that of “community, groups and individuals” present in the

¹ Framework Convention on the Value of Cultural Heritage for Society, adopted in Faro on 27 October 2005, ETS n. 199. Entry into force on 1 June, 2011, in accordance with Article 18.

UNESCO 2003 Convention on the Safeguarding of Intangible Cultural Heritage² (hereinafter: C2003) will be introduced.³

2 The Faro Convention's Definitions: Cultural Heritage; Common Heritage of Europe; Heritage Community

The Preamble of the Faro Convention (Recital 4) reads as follows:

The member States of the Council of Europe, [...]

[...] Recognising that every person has a right to engage with the cultural heritage of their choice, while respecting the rights and freedoms of others, as an aspect of the right freely to participate in cultural life enshrined in the United Nations Universal Declaration of Human Rights (1948) and guaranteed by the International Covenant on Economic, Social and Cultural Rights (1966);

The above provision has to be read in connection with Article 27 of the United Nations Universal Declaration on Human Rights (hereinafter: the Universal Declaration), and Article 15, paragraph 1 let. a) of the International Covenant on Economic, Social and Cultural Rights; the content of Article 2 of the Faro Convention being but an aspect of the “right freely to participate in cultural life” enshrined in the Universal Declaration and guaranteed by the Covenant.

To be more precise, we must bear in mind that Article 27 of the Universal Declaration states: “Everyone has the right freely to participate in the cultural life *of the community*, to enjoy the arts and to share in scientific advancement and its benefits” (emphasis added). On the contrary, we do not find in the Covenant any reference to the cultural life of “the community.” Hence, the Faro Convention recalls the notion of “community” present in the original document – the 1948 Universal Declaration – which has been quite forgotten in the development of international human rights law, guaranteeing it a new strength.

The key to the Recital 4 of the Preamble – and to some extent to the whole Convention – is the statement that “every person has the right to engage with the cultural heritage of their choice.” The statement cannot be underestimated: For the first time, the right to cultural heritage is explicitly recognized in an international instrument as pertaining to the sphere of (individual, at least) human rights.

² Convention on the Safeguarding of Intangible Cultural Heritage, adopted by the UNESCO General Conference 32nd Session, Paris, 17 October 2003. Entry into force on 20 April 2006, in accordance with Article 34.

³ (Arantes 2011; Blake 2001, 2006, 2007; Bortolotto 2008a, 2008b, 2011; Ciminelli 2008; Kono 2007; Kurin 2004, 2007; Lapicciarella Zingari 2011; Lenzerini 2011; Mariotti 2011a, 2012; Scovazzi 2009, 2010, 2012a, 2012b, 2012c, 2014; Scovazzi, Ubetazzi, and Zagato 2012; Smith and Akagawa 2009; Sola 2008; Srinivas 2008; Tornatore 2007; Ubetazzi 2011a, 2011b, 2014; Zagato 2008, 2012a, 2012b; 2014a, 2014b, c, forthcoming a).

Neither C2003 nor UNESCO 2005 Convention on the Promotion and the Protection of Cultural Diversity⁴ (hereinafter: C2005) (Aylett 2010; Cabasino 2011; Cornu 2006; Ferri 2010; Gattini 2008; Pineschi 2008) include the right to cultural heritage. On the contrary, in both instruments the respect for human rights is a condition for the safeguarding of Intangible Cultural Heritage (hereinafter: ICH) (C2003, Article 2, paragraph 1) or for the protection of cultural diversity (C2005, Article 2, paragraph 1).⁵ In the UNESCO’s instruments there is no perception of the idea of inherence of the cultural identity/diversity in the sphere of human rights.

In literature, a detailed definition of cultural rights was provided by the Fribourg Group.⁶ According to the Group, the cultural right has some distinct features:

Right to identity and cultural heritage; Right to identification with the cultural community of his choice (= reference to cultural communities); Right to access and participation in cultural life; Right to education and training; Right to communication and Information; Right to participation in the cultural policies and cooperation (= right to cultural cooperation).

Some of the rights presented in the Fribourg Declaration are at the core of the traditional definition of cultural rights, as indicated in Article 15, paragraph 1a) of the International Covenant on Economic, Social and Cultural Rights⁷ (hereinafter: ICESCR). The first two rights are new, in particular the first one: the right to identity and cultural heritage. That means the rights (Fribourg Declaration, art. 3):

- a. To choose and to have one’s cultural identity respected, in the variety of its different means of expression. This right is exercised in the inter-connection with, in particular, the freedoms of thought, conscience, religion, opinion and expression;

⁴ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted by the UNESCO General Conference, 33rd Session, Paris, 20 October 2005. Entry into force on 18 March 2007, in accordance with Article 29.

⁵ In the latter, however, the relationship is formulated in two ways; in effect, Preamble (Recital 4) states that “cultural diversity is important for the full realization of human rights and fundamental freedoms”, see Zagato 2012c.

⁶ *Fribourg Declaration on Cultural Rights*, held May 7 2007: <https://www1.umn.edu/humanrts/instree/Fribourg%20Declaration.pdf> <accessed 30 January, 2015>, p. 2. The Declaration is a revised version of a document originally drafted for UNESCO (Meyer-Bisch 1998).

⁷ International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly Resolution 2200 A (XXI) of 16 December 1966. Entry into force on 3 January 1976, in accordance with Article 27. See in particular Committee on Economic, Social and Cultural Rights, General Comment No. 21, Right of Everyone to Take Part in Cultural Life (Article 15, paragraph 1a) of the International Covenant on Economic, Social and Cultural Rights, 21 December 2009.

- b. To know and to have one's own culture respected as well as those cultures that, in their diversity, make up the common heritage of humanity. This implies in particular the right to knowledge about human rights and fundamental freedoms, as these are values essential to this heritage;
- c. To access, notably through the enjoyment of the rights to education and information, cultural heritages that constitute the expression of different cultures as well as resources for both present and future generations.

The Fribourg Group's definition provides us with some support for further investigation. Since the Faro Convention's entry into force, in any case, there is no room for doubt: The right of everyone to engage with the cultural heritage of his choice has to be understood from now on as an aspect of the right "to participate in cultural life" as described in Article 15, paragraph 1a) of the Covenant.

Article 2 of the Faro Convention defines "cultural heritage:"

- a) cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time;

Although the provision appears, at first glance, generic and omni-comprehensive, it deserves an attentive analysis. Article 2 requires to be read in connection with the Preamble (Recitals 2, 3, 5, 6). Recital 6: "Convinced of the soundness of the principle of heritage policies and educational initiatives which treat all cultural heritages equitably and so promote dialogue among cultures and religions," presents a classical anti-discriminatory feature. Recital 3: "Emphasizing the value and potential of cultural heritage wisely used as a resource for sustainable development and quality of life in a constantly evolving society," points out the relationship between cultural heritage and sustainable development.

Of major importance are Recital 2: "Recognising the need to put people and human values at the centre of an enlarged and cross-disciplinary concept of cultural heritage," and Recital 5: "Convinced of the need to involve everyone in society in the ongoing process of defining and managing cultural heritage."

In comparing the above statements with Article 2a), the intentional interplay between the words "people" and "everyone" should be emphasized. The insertion of the word people instead of individuals (everyone, persons...), in Article 2a) introduces the collective profile of the notion of cultural heritage.

As for the word "resources," absent from the text of the C2003, it signifies a specific interest in the economic profile of the cultural heritage.

“Independently of ownership” means (in this case in perfect harmony with the C2003) the will not to be involved in complex issues related to intellectual property.

Environment is also important, in the spirit and continuity with the 2001 CoE European Landscape Convention⁸ (hereinafter: Florence Convention) (Alessandro and Marsano 2011; De Simonis, Lapicciarella Zingari and Mantovani 2013; Herrero de la Fuente 2001; Priore 2006; Sassatelli 2006).

Moreover, the expression “constantly evolving values, beliefs, knowledge and traditions” (art. 2) is original and introduces the very core of the Faro Convention’s dimension: The subjective elements (values, beliefs) prevail or in any case precede the objective ones (knowledge, traditions).

The doctrine has proven itself unsteadily confronted with the breadth of the definition; we note, in fact, a kind of embarrassment on the part of even the more favourable authors. An author defines it as a “meeting point of various factors usually considered separately” (Greffé 2009: 107); others refer to a “holistic definition of cultural heritage” (Thérond 2009: 110; see also D’Alessandro 2014).

The above judgments take into account some profiles, but do not catch the heart of the meaning of Article 2a). In the writer’s opinion, those who hit the mark (like Fairclough 2009) have emphasized how “The Faro definition of cultural heritage is comprehensive. It has no inherent time limits, nor limits of form or manifestation” (ibid.: 37). Such an assessment, indeed, identifies that aspect of flexibility that characterizes the definition, and is directly functional to the definitions that follows, to which we now turn.

Before moving on to these definitions, a last observation has to be underlined. The Italian official translation is *eredità culturale* (cultural inheritance). The translation is not satisfying. Nevertheless, it is justified by the possible negative consequences deriving from the introduction in the Italian legal order of the expression *patrimonio culturale* with the meaning just analyzed. In the Italian Code of Cultural heritage and Landscape, in fact, *patrimonio culturale* means something of very different nature (the sum of cultural property and natural heritage) and this would have caused problems of consistency in the text of the legislation.

Article 3 of the Faro Convention defines the “common heritage of Europe”:

The Parties agree to promote an understanding of the common heritage of Europe, which consists of:

- a) all forms of cultural heritage in Europe which together constitute a shared source of remembrance, understanding, identity, cohesion and creativity, and

⁸ European Landscape Convention, adopted in Florence on 20 October 2000, ETS n. 176. Entry into force at international level on 1 March 2005, in accordance with Article 13.

b) the ideals, principles and values, derived from the experience gained through progress and past conflicts, which foster the development of a peaceful and stable society, founded on respect for human rights, democracy and the rule of law.

The attempt to define the “common heritage of Europe” is one of great audacity in the author’s opinion. It probably had some not-negligible influence on the drafting of the Lisbon Treaty (see Section 3).

We can trace its origins back to the Florence Convention⁹. As a matter of fact, the Preamble of the Florence Convention (Recital 3) provides that member States are

Aware that the landscape contributes to the formation of local cultures and that it is a basic component of the European natural and cultural heritage, contributing to human well-being and consolidation of the European identity.

In any case, the key element of Article 3 of the Faro Convention is the notion of the “cultural heritage of Europe” as a “shared source”; the provision must be read in strict connection with the obligations described at 3b), last line.

In the perspective of the Faro Convention, the advantage of the “common heritage of Europe” approach is particularly evident in the regions of Europe affected by border and ethnic conflicts in the past decades. The Faro Convention itself, to a certain extent, is the result of the experience gained through past conflicts (see Section 3). This is the best answer to the critiques according to which the Faro Convention itself was not relevant because it was initially supported only by Eastern European countries. The argument has to be reversed. It is just because these countries faced terrible internal identitarian conflicts in the nineties of last century that they raised awareness in the Western European countries of the problems of cultural heritage and of the “cultural heritage of Europe.”

By this reasoning, then, we should agree with the opinion of the commentator (Ferracuti 2011) who observes how in the Faro Convention European identity is qualified “by its heritage of democracy, its capacity to guarantee basic rights to its own citizens”. According to this author, the common heritage of Europe must be read as the capacity of the (EU apparatus and of the) member States “to be the guarantors of freedom” (Ferracuti 2011: 217-218) of the citizens.

In any case, the author agrees with the thinking according to which the Faro and the Florence Convention share with C2003 and C2005 the idea that at the core of the “patrimonial apparatus” are the communities of “culture bearers.”¹⁰

⁹ See note 7, above.

¹⁰ See Lapicciarella Zingari: Documento di sintesi progetto officina del racconto. Associazione Fiesole Futura. Fiesole, March 2012.

Article 2b) introduces the definition of “heritage community”:

a heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations.

Even more than in the case of Article 2a), the word “people” is decisive. It has been inserted in Article 2b), only after a long discussion among delegates, to emphasize the collective profile of the notion. The choice is confirmed by Article 4a) and b), dedicated to rights and responsibilities.

The Parties recognize that:

- a) everyone, alone or collectively, has the right to benefit from the cultural heritage and to contribute towards its enrichment;
- b) everyone, alone or collectively, has the responsibility to respect the cultural heritage of others as much as their own heritage, and consequently the common heritage of Europe;

As for Article 4 c), it deserves particular attention:

- c) exercise of the right to cultural heritage may be subject only to those restrictions which are necessary in a democratic society for the protection of the public interest and the rights and freedoms of others.

The possibility for restriction by public authorities is reduced, not only in the light of the “democratic society” clause but, because of the nature of individual and collective profiles, in regard to the right to cultural heritage.

One author stresses that the heritage community is defined in the absence of “societal parameters, national, ethnic, religious, professional or based on class” (Dolff-Bonekämper 2009: 71). We could wonder if “heritage community” is defined “in the absence of” or instead, “by the absence of.” Even more intriguing is the observation by which “the heritage only grows to the extent that new ‘mediators’ succeed in adding further heritage categories to a list that is hedged about by criteria selected in a far from diversified or consensual fashion by routine, prejudice and conflicts of power” (Leniaud 2009: 139).

At this point, the notion of heritage community helps us in better understanding what the “right to cultural heritage” means: not only the right to benefit from the existing heritage, but also the right to take part in the selection of new cultural expressions aimed at belonging to the notion of cultural heritage.

The Flemish Vision Paper, edited by the Flanders Government in 2010, confirms this conclusion: “as a result the individual has a plural identity and identifies with various groups and communities. Heritage can be designated within each of these groups. If we use the concept of such a plural identity to develop an

intangible cultural policy, this means that we are looking for intangible cultural heritage which (alternatively composed) groups and communities in Flanders identify with.”¹¹

The important definition will be examined more thoroughly later on (Section 4), when the relationship between the Faro Convention and C2003 will come under close analysis. For now, we will only note how it strengthens, with its “plural identity” concept, a fluid and flexible approach to the problem of defining identity that is capable of lifting us out of the abyss of fixed and rigid identities.

Let us conclude this introductory section with the interesting statement made by the Steering Committee for Cultural Heritage and Landscape¹². The Committee introduces the relationship between the two notions of heritage community and the common heritage of Europe. In the view of the Committee, “the concept of the common heritage of Europe should be linked with the possible sense of multiple cultural affiliation of all human beings, both individually and collectively.” (paragraph 4). “Multiple cultural affiliation” is the very key to introduce ourselves into the new world created by the Faro Convention.¹³

With similar words, Article 4 of the Fribourg Declaration, dedicated to cultural communities, affirms that: “Everyone is free to choose to identify or not to identify with one or several cultural communities, regardless of frontiers, and to modify such a choice”; conversely, “no one shall have a cultural identity imposed or be assimilated into a cultural community against one’s will.” The time has come to enter the core sections of our investigation, beginning with the consequences of the Faro Convention on the European legal framework.

3 Consequences on the European Legal Framework

The role played by the CoE in relation to the protection of cultural heritage/property deserves attention, in particular with regard to the destruction of heritage in the context of conflicts. Indeed, the CoE was the first international organization to recognize, in the nineties, the emergence of new kinds of conflicts in which the identitarian dimension was dominant (Zagato 2007, 2012b). In other words, as of 1990 a new category of armed conflict has appeared and become predominant: Conflict in which the destruction of the opponent’s cultural heritage,

¹¹ Vision Paper – A Policy for Intangible Cultural Heritage in Flanders, inserted in the trilingual publication: The Government of Flanders’ Policy on Safeguarding Intangible Cultural Heritage (2010). Brussel: Government of Flanders.

¹² Council of Europe, Steering Committee for Cultural Heritage and Landscape (CDPATEP), Some Pointers to Help Understand the Faro Convention, Strasbourg, 20 April, 2009.

¹³ “In line with the ‘heritage community’ approach, all individuals have the option of identifying with one or more forms of tangible or intangible heritage, which reflect their past and present [...]” (paragraph 4). The only restriction is the respect for the fundamental values reflected, *inter alia*, in the case law of the European Court of Human Rights.

and of its cultural identity’s memory, becomes the target and constitutes the essential goal of the conflict. Indeed, the ultimate political goal of the opponents being “the *‘cleansing’ of any evidence of cultural continuity and identity*” (Seršić 1996: 38, emphasis added), the destruction of the cultural heritage turns out to be an essential military goal in the conduct of these conflicts.

A first significant document in this regard – the Resolution on Information as an Instrument for Protection against War Damages to the Cultural Heritage, drafted by a group of international experts set up in 1994 in Stockholm by the Swedish Government – stated: “The destruction of historic records, monuments and memories serves [...] the purpose of suppressing all that bears witness that the threatened people were ever living in the area.”¹⁴ Martin Segger (Director of the Maltwood Art Museum, Canada) specifies:

What differentiates today’s tribal and ethnic conflicts from those previously of nation States, is the extent to which erasing, not only ethnical identity but also ethnic memory, has been raised to the status of a legitimate goal.¹⁵

In this situation, the CoE was the first intergovernmental organization to move: The Vienna Declaration of the CoE’s State leaders of 9 October 1993, where the link between human rights and cultural heritage was emphasized, must be taken into account. Of an even greater importance are the preparatory documents of the Finnish and, respectively, of the Czech Delegation at the Helsinki Conference of 1995. Both offer an enlarged definition of cultural heritage (Zagato 2007); the first one by telling us: “the concept of cultural heritage covers all the manifestations and messages of cultural activity in our environment. These messages are passed on from generation to generation through learning, intellectual quest and insights.”¹⁶ The second evokes “the enlargement of the concepts of cultural heritage to cultural aspects or cultural resources of the environment and of the society, listed and unlisted, known and unknown, material and immaterial.”¹⁷

Notwithstanding the financial cuts due to the economic crisis and the reduction of programs, culture is even more present in the reformed CoE than before. In fact, since 2012 the pre-existing Steering Committees, in particular the Steering Committee for Cultural Heritage and Landscape, and the Steering Committee for Culture, have been unified in the new Steering Committee for Culture, Cultural Heritage and Landscape (CDCPP).

¹⁴ Resolution on Information as an Instrument for Protection against War Destruction to the Cultural Heritage, adopted at the Experts Meeting called by: Swedish Central Board of National Antiquities, Swedish National Commission for UNESCO, and ICOMOS Sweden, Stockholm, 10 June 1994: <http://www.iicc.org.cn/Info.aspx?ModelId=1&Id=423> <accessed 30 January, 2015>.

¹⁵ Martin Segger: Introduction to “Toward a Museology of Reconciliation. Dubrovnik, 11 may 1998: www.maltwood.uvic.ca/tmr/segger.html (date of last access 1 August 2014).

¹⁶ Cultural Heritage – a Key to Our Future, Strasbourg, 1996, DOC. MPC-4(96)7.

¹⁷ Cultural Heritage – a Key to Our Future, Strasbourg, 1996 DOC. MPC-4(96)5.

Culture and cultural heritage are at the core of the pillar of democracy in the re-organized CoE (Sciacchitano 2011b). The aim is to guarantee a higher level of coherence among the actions, and a higher level of participation by citizens in the activities relating to cultural heritage, landscape, and culture. In 2013, the Secretariat of the Council of Europe launched the “Action Plan for the Promotion of the Framework Convention on the Value of Cultural Heritage for Society”.¹⁸

In a recent document (March 2014) the Steering Committee for Culture, Heritage and Landscape (CDPCC) identifies three priorities related to the political objectives of the CoE: strengthening social cohesion by managing diversity; improving people’s living environment and quality of life; expanding democratic participation.¹⁹ In the light of the Marseilles experience, and in particular of the “Marseilles Forum on the social value of heritage and the value of heritage for society,”²⁰ the Committee, in its conclusions, shares with the Marseilles Forum an observation of particular relevance: “the geographically and culturally coherent territory becomes the source of a new rootedness.”²¹

Let us now turn to the European Union’s legal framework in the field of cultural heritage. Articles 107, paragraph 3d), and 167 of the Treaty on the Functioning of the European Union (hereinafter: TFEU)²², do not differ from the previous articles 87, paragraph 3d), and 151 of the Treaty establishing the European Community (Nice version, hereinafter: TEC) the first providing that:

¹⁸ Council of Europe, Steering Committee for Culture, Heritage and Landscape (CDCPP), Action Plan for the promotion of the Framework Convention on the Value of Cultural Heritage for Society, 2013 (16), Strasbourg, 17 May 2013: http://www.coe.int/t/dg4/cultureheritage/cdcp/plenary/CDCPP2013-16_EN.pdf (date of last access 30 January 2015).

¹⁹ Council of Europe, Steering Committee for Culture, Heritage and Landscape (CDCPP), Identification of Best Practices on Improving Living Spaces and Quality of Life, in Line with the Faro and Landscape Conventions, (2014) 13 rev., Strasbourg, 12 March 2014: www.coe.int/t/DG4/cultureheritage/CDCPP/Plenary/CDCPP2014-13_EN.pdf. (date of last access 1 August 2014).

²⁰ Held in Marseilles from 12 to 13 September 2013, organized by the CoE and the European Commission. Conclusions and Summary of the Marseilles Forum are reproduced as Appendix of the CDCPP Document of March 2014. The Marseilles Forum was preceded by the Conference held in Venice by the Venice Office of the CoE. In Spring 2014 two important events took place in Venice: the Workshop “The Faro Laboratory in Venice: ‘Rethinking Venice together.’ The Challenge of the Metropolitan City between the Past and the Future” (April 1) and moreover the Seminar “Venice between Past and Future. The Challenge of the Metropolitan City” (May 7, at Forte Marghera). Both have been organized by the CoE Office in Venice, in co-operation with the Veneto Region and Marco Polo G.E.I.E System.

²¹ In this way “the community becomes the key forum for sharing aspirations, expressing wishes and solidarities, sharing responsibilities, becoming actors and conducting practical action vis-à-vis an environment which has been appropriated and is now shared.” Marseilles Forum on the social value of heritage and the value of heritage for society, Appendix to the CDCPP Document of 12 March 2014. On the whole, the 2014 CDCPP Conclusions insist on a territorial approach, whose rigidity leaves room, in this author’s opinion, for further evaluation (see below, Conclusion).

²² Treaty on the Functioning of the European Union, adopted in Lisbon on 13 December 2007, Official Journal C 115, 9 May 2008. Entry into force on 1 December 2009, in accordance with article 357.

3. [...] may be considered to be compatible with internal Market: [...]

d) [State] aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.

and the second (art. 167 TFEU) reading that:²³

Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: [...]

– conservation and safeguarding of cultural heritage of European significance, [...]

But we find a very important difference when we focus on Article 3, paragraph 3 last paragraph of the Treaty of the European Union (hereinafter TEU)²⁴:

[The Union] shall respect its rich cultural and linguistic diversity and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.

On the contrary, Article 3.3 last paragraph of TEC stated that:

The activities of the Community shall include [...]

q) a contribution to the [...] flowering of the cultures of the member States.

Affirming that “the Union shall respect its cultural and linguistic diversity,” the Treaty moves away from its previous state-centric attitude. Moreover, “[The Union] shall ensure that Europe’s cultural heritage is safeguarded and enhanced”: The Union is emancipating itself from the limits imposed by articles 107 and 167 TFEU.

The EU competences in the field of cultural heritage become the object, by means of the solemn insertion among the first provisions of the TEU, of a kind of ‘constitutionalization’ (Zagato 2011a: 258; see also Sassatelli 2009). Not far from this opinion is the conclusion of another scholar (Craufurd Smith 2007: 64; see also Craufurd Smith 2004; Psychogiopoulou 2006, 2008) who observes:

The territory limited by the EU [can be looked at] as a common cultural resource. Such common cultural resource must be reconfigured in ways that look beyond familiar nationally oriented conceptions of culture.

To some extent we can hear in the new EU approach to culture and cultural heritage an echo of the Faro Convention’s Articles 2 and 3.

²³ Article 167, paragraph 5 TFEU differs from Article, 151 paragraph 5 TCE in relation to procedures, but procedure is not the point in this essay.

²⁴ Treaty on European Union, adopted in Lisbon on 13 December 2007, Official Journal C 115, 9 May 2008. Entry into force on 1 December 2009, in accordance with article 54.

First of all, there is a paradigm shift from the earlier “mosaic-type” approach (pursued by the Union, but also to some extent by the CoE). When we say “mosaic type” we mean that the member State’s mission in the field of culture and cultural heritage is thought of as reassembling the reciprocal cultural differences in a common belonging to Europe (e.g. the transfrontalier projects for the reciprocal knowledge and the sharing of the respective national heritages). We talk of a paradigm shift because the new approach is based on the cultural and heritage differences internal to the member states (or of a transnational character), which must guarantee the respect of the cultural freedom of people who live inside.

There is something more: In the case of the cultural heritage of Europe, the European institutions’ mission is to ensure that such heritage is enhanced. The expression ‘enhancement’ never appeared before in an EU instrument in relation to this topic. It appears in the Faro Convention, namely in Article 5b) (“Parties undertake to enhance the value of the cultural heritage through [...]”), 14 (“[...] enhance access to cultural heritage”) and 14b) (“supporting internationally compatible standards [...] for the enhancement [...] of cultural heritage”). A singular form of contamination is thus revealed (see below, Section 4): The definition contained in an Article of the new EU version (Lisbon Treaty) is only able to be fully interpreted in the light of that contained in another instrument parallel to it, produced by another organization, namely the Council of Europe.

A convergence emerges between the notion of heritage community, made by people who can move cross-culturally and through territories, social groups, time (as a consequence the same individuals may belong, contemporarily or in a sequence, to more than one heritage community) and the fluid, to some extent neonomadic, profiles of European citizenship: At least inside the “European political space,” as defined by the AG Maduro in the famous “Rottman” case,²⁵ a political and legal space based on the mobility of the men and women who are part of it (Rigo 2011), which identifies the internal migrant as its usufructuary, the so-called Erasmus generation as its social foundation, the common cultural resource as the core content of its territorial extent (Zagato 2011a, forthcoming c).

So, the Faro Convention and the new TEU architecture, in the field of cultural heritage, together provide a precious contribution: a non-rigid approach, changing and evolving, to the question of identity. In other words it creates the ideal basis, taking as its departure point the overcoming of the vision of Europe as the sum of culturally homogeneous nations (mosaic approach described above), to arrive at the perception of the European identity as “a continuous work in progress, never reassembled, inherently mobile: hybrid”²⁶ (Ferracuti 2011: 218).

²⁵ CGEU 2 March 2010, C-136/8, *Rottmann*, I-1683.

²⁶ At this point, Ferracuti introduces some very opportune considerations on the nexus between European identity and post-colonial debate. Precisely the development of the “Faro spirit” stimulates a further investigation on this complex issue. By helping to flush out the spectres, too long concealed,

4 “Heritage Communities” vs. “Communities, Groups and Individuals” according to the 2003 UNESCO Convention: Room for a (Fruitful) Contamination?

Article 2, paragraph 1 of the C2003 provides:

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

The doctrine identifies three components in the definition (Scovazzi 2009, 2012a, 2012b, 2012c; Urbinati 2012): a subjective or social component, “community, groups and in some cases individuals”; an objective component (the manifestations of cultural heritage); and a spatial one (cultural spaces). Moreover, an author (Urbinati 2012: 35) argues that, while the second and third components are usually common to Tangible and Intangible Cultural Heritage, the first relates mainly to Intangible Cultural Heritage. It is certainly a view worth sharing; however, Article 2, paragraph 1, only indirectly defines what one should understand for “communities, groups and, in some cases, individuals.” To be precise, it attributes a role to trustees and practitioners of Intangible Cultural Heritage in relation to the activity of safeguarding, which, under Article 2, paragraph 3, means:

[...] measures aimed at ensuring the viability of intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.

The participation of social actors in the conduct of such activities is specified in Articles 11 and 15; the latter, however, using the expression “shall endeavor” referring to member States, reveals not only that the responsibility of safeguarding remains with the member States – speaking of an international Convention there can be no doubt on this point (Zagato 2008: 35–36) – but also that there is no absolute obligation for the States to involve groups and communities (Urbinati 2012). The subsequent choice by the Intergovernmental Committee to invite the Subsidiary

that cling to Europe, or rather, forcing us to do so, the Faro Convention provides an added service, certainly no less important than those above quoted, to the men and women of Europe.

Body (hereafter: SB) to draft a document on the participation of “communities, groups, and, in some cases, individuals” for an application of the Convention at a national level, led to a project presented by the SB to the Intergovernmental Committee,²⁷ that invites States to develop this participation, giving guidance on how to foster the development of networks between communities, experts, groups of experts and research institutions; it does not, however, contain the clear obligation to do so. Subsequently, the SB, indirectly, has again expressed itself on the participation of communities and groups, and on adopting safeguard measures at national level (Bandarín 2012).²⁸ Amongst the various activities States have been urgently required to undertake, over time, to guarantee a role for communities, a particular mention needs the activity of taking inventory (Bortolotto 2008b, 2012; Broccolini 2012; Ciarcia 2007; Mariotti 2011b, 2011c).²⁹

Here, then, is the challenge: Is it possible to read the notion of “communities and groups” in Article 2, paragraph 1 of the C2003 in the light of the (wider and innovative) notion of “heritage community” introduced by the Faro Convention? In case of a positive answer, which are the limits (if any) of such a contamination?³⁰ Which are the possible consequences? And, moreover, why should we do that?

On the one hand, from the international legal order’s point of view, first of all, the said contamination is feasible (Zagato 2014b, forthcoming b, d).

Article 31 of the Vienna Convention on the Law of Treaties (hereinafter: CV)³¹ codifies at paragraph 3c) a rule of general international law, according to which, in the interpretation of any Treaty, consideration must be given to “Any relevant rules of international law applicable in the relations between the Parties.”

In 2001, in “Kordić and Čekić” (joint cases),³² the International Criminal Tribunal for the former Yugoslavia decided that the wide definition of cultural property present in the Article 1 of the Hague Convention of 1954 on the Protection of

²⁷ UNESCO doc. ITH/08/2.EXT.COM/Conf.201/6, 31 January 2008. Subsequently, the amended project has been adopted by the General Assembly of the States Parties, constituting the first part of Chapter III of the Guidelines.

²⁸ In this regard, see ultimately NGO Statement ICH-8.com, compiled in Baku at the meeting of the Intergovernmental Committee for the Safeguarding of Intangible Heritage, held in the Azerbaijani capital on 1-8 December 2013, <http://www.ichngoforum.org> (date of last access 31 August 2014). On the results of the work in Baku, see the report by V. Lapicciarella Zingari, coordinator of Simbdea-ICH (on the association’s website).

²⁹ At the international level, the state proposing an application for the inscription in one of the Lists has to prove, in compliance with the R4 requirement of the Guidelines, that the application takes into account “the widest possible participation of the communities, groups or [...] individuals concerned and with their free, prior and informed consent.”

³⁰ On the perspective of contamination in international law see Zagato 2014f.

³¹ Convention on the Law of Treaties, adopted in Vienna on 23 May 1969. Entry into force on 27 January 1980, in accordance with Article 84.

³² ICTY, 26 February 2001, *The Prosecutor v. Kordić and Čekić*, IT-95-14/2-T.

Cultural Property in the Event of Conflict (hereinafter: HC 1954)³³ had to be applied, instead of the “poor” concepts established by Article 3 of its Statute, deriving from Article 27 of the Regulation annex to the IV Convention of the Hague (1907) Respecting the Laws and Customs of War on Land (Zagato 2007). In the opinion of the Court, the *lex specialis/lex generalis* relationship between the latter (Article 1 of the HC 1954) and the previous provision (Article 27 of the 1907 Regulation)³⁴ was sufficient, even without having recourse to Article 31 CV.

Regarding the internal legal orders we must pay attention to the mechanisms of incorporation of international norms according to the internal division of competences between the State and the sub-State bodies.

The more the competences in our subject areas are divided between the central state and sub-state bodies, the easier it will be to realize the fruitful phenomenon of contamination discussed here. In the Italian case, the constitutional reform enacted with Constitutional Law No. 3 of 2001 amended in a functional sense the division of powers between the State and the Regions in the area of cultural heritage (Giampieretti 2011b). As far as the Regions governed by ordinary statute (*statuto ordinario*)³⁵ are concerned, the State maintains the responsibility of protection, while valorization becomes a matter of Region’s competence. Safeguarding, however, is a term with wider significance, as seen, which takes into account both protection and valorization, not separated from other standpoints. It deals with internationally derived notions as well. The *Codice dei beni culturali e del paesaggio* (Code of the Cultural and Landscape Heritage) takes into account the contents of recent international Conventions ratified by Italy, such as the Unidroit Convention (Article 87 *bis*)³⁶, the Florence Convention,³⁷ and the Convention on the Protection of the Underwater Cultural Heritage.³⁸ As far as C2003 and C2005 are concerned, the

³³ Convention on the Protection of Cultural Property in the Event of Armed Conflict, adopted at The Hague on 14 May 1954, in United Nations Treaty Series, v. 249 (1956), pp. 240-270. Entry into force 7 August 1956, in accordance with Article 33.

³⁴ Article 27 of the Annex says: “In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.”

³⁵ The competencies of the Regions under *statuto speciale* are determined by their respective special statutes; however, Article 116, paragraph 3 of the Constitution anticipates that “particular forms and conditions of autonomy” in relation to cultural assets can be conceded to the *statuto ordinario* Regions if they ask for them.

³⁶ Introduced by Decreto Legislativo 26 marzo 2008 n. 62.

³⁷ Article 131 (introduced by Decreto Legislativo 26 marzo 2008, n. 63).

³⁸ Adopted by the UNESCO General Conference 31st, Paris, 2 November 2001. Entry into force on 2 January 2009, in accordance with Article 27. The Convention not having been ratified by Italy at the time, Article 94 of the Code represents an interesting example of an anticipatory regulation (Giampieretti 2011b).

new Article 7bis of the Code of the Cultural and Landscape Heritage has legally codified only expressions of collective cultural identity; this, however, inasmuch as they “may be represented by material evidence,” subject to the prerequisites of Article 10, which defines in detail the various types of cultural property (for a critical appraisal, Giampieretti 2011a: 145-146; see also Sciuolo 2008).

In the void created by the silence coming from the central State, a larger space for initiatives by the Regions has been created. At present, Lombardy is the only region to have adopted a law for safeguarding Intangible Cultural Heritage,³⁹ namely *Legge regionale n.27* in 2008.⁴⁰ This law, in addition to the definition of Intangible Regional Cultural Heritage, indicates the agency – not created *ad hoc*, but already existing in the Archive of Ethnography and Social History (AESS) – charged to proceed with the safeguarding of Lombardy’s Intangible Regional Cultural Heritage. Article 2 of the regional law reproduces the various activities envisaged under Article 2, paragraph 3 of C2003 in relation to safeguarding, without using the term safeguarding. It is certainly a significant initiative. Looking forward in this direction, moreover, the proposed additions to the draft regional law on the culture and cultural heritage of the Veneto region are pushing ahead (Picchio Forlati 2014: 277-282; Giampieretti and Barel 2014), and refer to C2003, C2005 and the Faro Convention combined, introducing without doubt the notion of community heritage; this, even in the absence, at present, of an Italian ratification of the Faro Convention. If it is destined to arrive at a successful conclusion, the Veneto experiment will retrace the steps already taken by the Flanders government, reported in the Flemish Vision Paper.

The examples offered by the regional law of the Lombardy region, and even more by the draft law of the Veneto Region, not only confirm – following the path taken by the Flanders government – that the internal legal system of a country can proceed, within certain conditions, in the sense of a converging interpretation of provisions present in two different international instruments; they also confirm that the regional legislature can exercise a key role.

This does not preclude the lately supported claim relating to the different scope of the application of the Faro Convention’s *ratione materiae* if compared with C2003. It is certainly true that the first applies to both Tangible and Intangible Cultural Heritage and, therefore, under Italian law the responsibility, at least in part (protection of Tangible Cultural Heritage), undoubtedly belongs to the State. It has already been seen (Urbinati 2012) how the notion of communities inheres naturally in the subjective profile that characterises the domain of the Intangible: This is true also, and one could say above all, for the community heritage referred to in the

³⁹ On the subject see Giampieretti 2011a, 2011b; a detailed study on the connected case of the regional laws concerning the *ecomusei* is Da Re 2011.

⁴⁰ Regional Law 23 October 2008 n. 27, Valorizzazione del patrimonio culturale immateriale – B.U.R. 28/10/2008 n. 44 – recalling law 167/2007 authorizing the ratification and the implementation into the legal system of the Convention 17 October 2003, in G.U. n. 238 del 12/10/2007.

Faro Convention. This Convention, in fact, moves the focus from the value of the heritage in itself to the value that the different groups that make up civil society assign to specific objects and cultural behaviours (Zagato 2012b; see also Clemente 2011; D’Alessandro 2014; Ferracuti 2011).

On the other hand, there is no particular value in the observation that it would not be possible to interpret universal instruments such as C2003 in the same way as the innovations introduced by a regional instrument like the Faro Convention. The practice is full of such phenomena (Zagato 2014b). Amongst other things, one must consider that the Faro Convention provides for the possibility of the CoE inviting other non-European countries to join,⁴¹ a process now at an advanced stage, at least with a State of the Maghreb (Algeria). This open nature of the Faro Convention could lead, in time, to an expansion of the membership, in addition to the European countries and the neighbouring adherents of the CoE, to include the countries of Northern Africa and the so-called Eurasian Belt. In other words, the Faro Convention may be looked at as an instrument of variable geometry (Kuijper 2004; Zagato 2006a, 2011c).

Of great significance, but only *prima facie*, is the objection that the notion of heritage community (eredità culturale) would contain elements of otherness in respect to the process of heritization intended by C2003. The evolving interpretation of a treaty (in this case C2003) cannot, in fact, go against the text itself;⁴² nor is there any doubt that there are many cultural expressions produced by heritage communities that do not meet the criteria which are part of the operational guidelines for inclusion in one of the “three” lists envisaged by the C2003.⁴³ The objection would, in fact, make sense if there were in question a misunderstanding of the scope of an objective application of C2003, so as to invoke a sort of fungible relationship between the two instruments; something obviously impossible, since the notion of heritage community, within the meaning of the Faro Convention, clearly has wider reach than the “communities and groups” referred to in C2003.

⁴¹ Article 19 of the Faro Convention affirms: “After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any State not a member of the Council of Europe, and the European Community, to accede to the Convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.”

⁴² As noted by the International Law Commission on the Application of Article 31, paragraph 3 of the Vienna Convention. See the Report by the International Law Commission Study Group, Fragmentation of the International Law – Difficulties arising from the Diversification and Expansion of International Law (UN. Doc. A/CN.4/L.702), 18 July 2006, adopted by the International Law Commission at 58^o session.

⁴³ And that is: the List of Intangible Cultural Heritage of Humanity (Article 16), the List of Intangible Cultural Heritage in Need of Urgent Safeguarding (Article 17), the Register of Best Safeguarding Practices (Article 18). The reference to three Lists is provocative, being well known that the nature and purpose of the Register is different from those of the Lists (Blake 2006). In practice, however, the Register has worked similarly to a third List, but no further discussion can be here included about this issue.

We refer, rather – it is worth repeating – to a contamination between the two legal instruments, with regard to their objective field of application. From this point of view it is difficult to think of communities and groups who pass down and revitalise cultural expressions in the sense of Article 2 of C2003, as not falling within the notion of heritage community: from those determined at a local level⁴⁴ to those involving transnational communities.

The contamination between the two instruments in this sense has already determined a firm foothold on the European continent. It is useful to recall the Flemish Vision Paper (above, Section 2): This guides the work of the Flemish legislator on issues related Intangible Cultural Heritage, in line with the obligations undertaken after the Belgian ratification of C2003. It is not limited to this, however, though it certainly indicates the opportunity to interpret the concept of “communities and groups” on a par with the notion of heritage community, within the meaning of the Faro Convention (Zagato 2013); contamination between the two notions, on the other hand, is already well under way, as much in our daily business as in our theoretical reflections.⁴⁵

With time, the Faro Convention, and in particular the notion of “heritage community,” can become a parameter, a kind of model (law) useful in the application of C2003, even by States which are not interested in ratifying the previous one.

It remains to explain why the work of contamination might be necessary: It is not only a matter of reinvigorating the notion of communities (and groups) referred to in C2003 with the interpretative key provided by the notion of heritage community. It is indeed true that the notion of community is complex, at the centre of widespread debate, and above all considered with suspicion for its ethnicist/localist implications (with consequent racist and xenophobic undertones, see Fiorita 2011; Zagato 2011d) assumed in the end of millennium crisis.⁴⁶ Thus, it is from this fundamental perspective that the interpretative key given by the notion of heritage communities (Faro) intervenes to reinforce, and make more explicit, the meaning

⁴⁴ For example, the Venetian Cultural Heritage Walks, promoted by the Faro for Europe group of Venice, and the Marseille Cultural Heritage Walks that inspired the former.

⁴⁵ A somewhat similar phenomenon is occurring in Latin America (Zagato 2014b). On the Declaration of Rights of Indigenous Peoples and on the role of UNPFII (United Nations Permanent Forum on Indigenous Issues), see Chianese 2011; Rigo and Zagato 2012; Stavenhagen 2009; Tauli Corpuz 2005; Zagato 2011b.

⁴⁶ Interesting, in order also to recall the issues from where we started, is the definition of communities given by the UNESCO group of experts meeting in Tokyo in 2006: “communities are networks of people whose sense of identity or connectedness emerges from a shared historical relationship that is rooted in the practice and transmission of, or engagement with, their ICH;” UNESCO-ACCU, Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of 2003 Convention, 13-15 March 2006, Tokyo.

of “other” communities already implied in C2003,⁴⁷ even if this meaning has not been defined yet.

In this regard, it is worth recalling the opinion of the author who – catching the difference between so-called “natural” communities and heritage communities – observes that while the first is based on membership of an ethnic group, a territory and a history together, adherence to a heritage community is instead a mode of collective aggregation that “highlights the constructed nature of each community, whose members, dispersed in a space that can be transnational or discontinuous, constantly and voluntarily reaffirm their commitment” (Bortolotto 2012: 88–89). It is as much as saying the communities did not pre-exist the process, and cease to exist with the interruption of it. This enables us to emphatically affirm the nature of the idea of community heritage as the foundation of democratic heritage, placing it firmly out of the reach of the populists and ethnicists who foul the air around us.

5 Conclusion

This paper focuses on the most innovative concepts contained in the Faro Convention, the influence exerted on the European legal framework, and the effects of reciprocal contamination with the definitions contained in C2003. In this way other important aspects related to the obligations assumed by member States, have probably received less attention than they might deserve. We are referring in particular to Sections III (“Shared responsibility for cultural heritage and public participation”) and IV (“Monitoring and co-operation”) of the Convention. It is precisely in relation to this, then, in the wake of the Marseilles experience, that Italy has in recent months witnessed important developments.

On one hand, the Municipal Council of Fontecchio – in the province of Aquila, devastated by the terrible earthquake a few years ago – has officially declared its adhesion to the principles of the Faro Convention.⁴⁸ We are talking of a symbolic

⁴⁷ See Francesco Bandarin, *Sous-Directeur général pour la culture, discours à l’occasion de l’ouverture du colloque “Le patrimoine oui, mais quell patrimoine?”*, 3 avril 2012 (organisé pour la Commission nationale française pour l’UNESCO avec la collaboration de la MCM/Centre français du patrimoine culturel immatériel), Pp 1-7. Referring to the notion of communities in C2003, this author affirms (p. 6), “dans la logique de la Convention du patrimoine immatériel, la valeur est mise en relation avec la communauté: cette valeur devient évolutive, changeante et n’a pas de sens en l’absence de la communauté. Si la communauté disparaît, la valeur disparaît en même temps.” <http://unesdoc.unesco.org/images/0022/002256/225608F.pdf> < accessed 30 January, 2015>.

⁴⁸ Resolution of the Fontecchio Municipal Council, 2 December 2013, adhering to the principles of the Convention in the framework of the CoE on the Value of Cultural Heritage for Society. The resolution underscores the convergence between the principles expressed in the Faro Convention and the “Casa&Bottega” project launched by the administration, according to which “the historical public real estate portfolio is an instrument to combat depopulation, to start and manage artisanal economic initiatives, to protect the landscape, to promote sustainable development, to enhance the quality of life.”

gesture, but one that is richly significant. On the other hand, a group of interested people, from private and public spheres, but anyway belonging to Venetian civil society – thanks to the encouragement and the coordination efforts guaranteed by the CoE-Venice – produced the Venice Charter on the Value of Cultural Heritage for the Venice Community (7 May 2014). Thanks to the Charter, a still not quite completely defined “Venetian community” presents itself on the scene firmly indicating the principles of the Faro Convention under which it intends to pursue its course and simultaneously affirming (in the text of the Charter) its intention to strive “to set concrete measures for its full and effective implementation.” The novelty and interest of the experiment are evident both in terms of merit and, in the eyes of the scholar of International Law, from a scientific-technical point of view.

The latter will be discussed more widely elsewhere. In the meantime, the practice in various European countries allows us to move from the area of definitions to the field of the application of the Faro Convention.

And yet...the choice of focusing on the fundamental notions of the Faro Convention, nevertheless, in this writer’s opinion, has not been idle. The first attempts to implement the Faro Convention are occurring under a heightened territorial profile.⁴⁹ It is something understandable, a phenomenon that starts from the civil society, useful to rebut the ideologies inspired by ethnicist localism on their own home ground. It would be a misfortune, however, if along this path we would forget that the concept of heritage community is not necessarily caged by the territorial dimension. On the contrary, it has a much broader reach and serves for wide deployment.

The theoretical debate, as we say in these cases, has only just begun.

⁴⁹ The present writer is one of the drafters of the Venice Charter on the Value of Cultural Heritage for the Venice Community, and is actively involved, along with his fellow adventurers, old and new, in the effort to give it practical application.

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