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PUBLIC-INTEREST LITIGATION BEFORE THE ECTHR: TOWARDS A HUMAN RIGHTS APPROACH TO THE "UNIVERSAL" PROTECTION OF CULTURAL HERITAGE?

1. *Introduction*

In the 29 February 2019 inadmissibility decision in the case *Auhnbay and others v. Turkey*, the European Court of Human Rights (ECtHR, or "the Court") ruled that the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR, or "the Convention") does not (yet) guarantee «un droit individual universel à la protection de tel ou de tel héritage culturel»[1]. While the Court's approach has been defined as «more than regrettable»[2], the outcome of the case was far from straightforward and the Court motivated its conclusions. As the Court observed, the existence of such right under international law is

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[1] *Ahunbay and others v. Turkey*, No. 6080/06, § 25 ECHR (decision of 29 January 2019). See also B. AYKAN, *Saving Hasankeyf: Limits and Possibilities of Human Rights Law*, in *Int. Jour. Cult. Prop.*, 2018, p. 11 s.

[2] European Rivers Network, *European Court for Human Rights takes no Responsibility for Hasankyef (Ilisu Dam in Turkey)*, 25 February 2019, available online on: https://www.ern.org/en/european-court-for-human-rights-takes-no-responsability-for-hasankyef/.

not clear. However, one may wonder whether the ECtHR could have attributed more relevance to the European and international trend towards the recognition of an inextricable connection between conservation of, and access to, cultural heritage, on the one hand, and the protection of human rights and human dignity[3], on the other. Within the Council of Europe (CoE), indeed, such link might be inferred, for example, from the Faro Convention on the Value of Cultural Heritage for Society[4]. Moreover, the Court could have stressed, while seeking to identify a "new right" under the Convention, the need to balance, on the one hand, the principle of sovereignty, which implies a right to use a State's territory in the way the State considers necessary for the protection of its own needs and interests, and the principle of human dignity[5] which requires the protection of cultural heritage as a part of the right to individual and collective cultural identity. Therefore, irrespective of the conclusions reached in the specific case, the decision offers the possibility of reflecting on some important procedural and substantial issues in proceedings initiated before the ECtHR *in the collective interest*[6], namely those aiming at the protection of *common values and common goods*[7] as recognized under international law.

In particular, from a *procedural* point of view, the Court did not rule – since it declared the case inadmissible for another, preliminary, reason – on whether individuals have *locus standi* for alleging the violation of rights which are considered to pertain to abstract entities such as "humanity" and/or present and future "generations" (Section 2). The importance of said question goes well beyond the mentioned case and the subject matter of the protection of cultural heritage. It touches upon the protection of collective interests in international law, such as the environment, which are currently being brought before both domestic and international courts.

From a *substantial* point of view, the decision raises further reflections concerning some general trends in the Court's approach in relation to the extensive and evolutive interpretation of the Convention, and pointing towards a more restrictive approach in the

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[3] United Nations, Human Rights Council, *Report of the independent expert in the field of cultural rights, Farida Shaheed*, UN Doc. A/HRC/17/38, 21 March 2011, § 5: «The concept of heritage reflects the dynamic character of something that has been developed, built or created, interpreted and re-interpreted in history, and transmitted from generation to generation. Cultural heritage links the past, the present and the future as it encompasses things inherited from the past that are considered to be of such value or significance today, that *individuals and communities* want to transmit them to *future generations*» (emphasis added).

[4] Council of Europe Framework Convention on the Value of Cultural Heritage for Society, of 27 October 2005, Faro (*C.E.T.S.* No. 199), entered into force on 1 June 2011.

[5] One of the links between the protection of cultural heritage and human rights has been found in the concept of human dignity. See J. BLAKE, *Taking a Human Rights Approach to Cultural Heritage Protection*, in *Heritage and Society*, 2011, p. 199 s., who stipulates that the protection of cultural heritage is linked to human dignity because of its strict connection with cultural identity, which implies a right of everyone to choose and develop his/her cultural identity, both alone and in connection with others; the right of groups to maintain and develop their culture, as well as an individual right to freely take part to cultural life.

[6] See E. BENVENISTI, G. NOLTE (eds.), *Community Interests Across International Law*, Oxford, 2018; M. IOVANE, F.M. PALOMBINO, D. AMOROSO, G. ZARRA, *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry*, Oxford, 2021.

[7] H. MIEREANU, *Representing the 'Unrepresentable'? Recognising the Rights of Future Generations, Nature and the Issue of Legal Standing*, in S. NAILEY, G. FARREL, U. MATTEI (eds.), *Protecting Future Generations through Commons*, Strasbourg, 2014, p. 147 s., p. 148: «'Common goods' refer to socially constructed resources and natural goods as rare and endangered collective resources forming part of human heritage that is common to present and future generations. Their key features are subtractability and rivalry. Restricting access to them is difficult; consuming them reduces their global availability. To arrange now for effective legal protection of common goods that are so essential to future generations is clearly in the latters' interests».

identification of "new rights" (Section 3). And indeed, in that case the Court seemed less willing than in the past to act as an international agent aimed at developing, and not only applying, international human rights law.

2. *Public-Interest Litigation before the ECtHR?*

The application in the case *Ahunbay* was lodged by five Turkish citizens with regard to the imminent destruction of the cultural and archeological site of the old city of Hasankyef[8], as a consequence of a project aimed at the construction of the "Ilasu dam"[9].

They argued that this would have implied a violation of several ECHR provisions, notably: Articles 1 (concerning the general duty of ECHR Member States to secure to everyone within their jurisdiction the rights and duties defined in Section I of the Convention), 2 (right to life[10]), 5 (personal liberty), 9 (freedom of thought, conscience and religion), 10 (freedom of expression[11]) and 14 (prohibition of discrimination). In their opinion, the destruction of the archeological site, because of its scientific and historical importance, would have violated their human rights, as well as of the rights of humanity as a whole[12]. Moreover, they invoked Article 2 of Protocol 1 to the ECHR (right to education), arguing that it would have implied the violation of the right to education of present and future generations[13]. More generally, they relied on the interests of *humanity* and *present and future generations* to transmit cultural values and cultural knowledge[14]. In short, the applicants argued that, under international human rights law, everyone has a right to the protection of, and to access to and knowledge of, cultural, historical and natural heritage, which, therefore,

[8] The city is situated in the Batman province, along the banks of the river Tigris and has an history of 10.000 years: it consists of human made cave dwellings from the Neolithic period; it was the first capital of Artuqids and it shows traces from the Roman, the Byzantine, the Suljuk and the Ottoman Empire. However, the State had been planning the construction of a dam within a wider plan of economic and social development of the region (to supply Turkey's energy needs). While according to some initial plans the archeological site would have not been completely destroyed, and some preservation projects were developed, it was clear that the realization of the power plant would have implied the destruction of the site. Notwithstanding several judicial initiatives before the Turkish courts, in 2020 the city of Hasankeyf was flooded as a consequence of the construction of the dam.

[9] According to the Committee on Culture, Science and Education of the Council of Europe's Parliamentary Assembly, *Cultural Aspects of the Ilasu Dam Project*, information report, 18 December 2001, § 6.3.2.: «thousands of years of human ingenuity is being destroyed for a short-lived power project».

[10] They argued that the right to life should be interpreted in order to include the «cultural survival» of human beings and the protection of «human values and the need to pass them on to future generations» (*Ahunbay and others v. Turkey, Austria and Germany*, No. 6080/06, ECHR § 86 (decision of 21 June 2016).

[11] The applicants claimed that all those articles should be interpreted as including a «right to heritage» as a right to freely share and transmit cultural values and information (*ibidem*).

[12] *Ivi*, § 86.

[13] *Ivi*, § 87.

[14] *Ivi*, § 88: «Les requérants, mettant en évidence l'irrévocabilité d'une éventuelle destruction du site, s'appuient sur les points ci-dessous qui commanderaient que l'on protège à tout prix l'héritage culturel: des valeurs humaines et du besoin de les transmettre aux générations futures, notions qui appelleraient une protection sur le terrain du droit à la vie que les Parties doivent de reconnaître à quiconque; d'une élément inhérent au droit à l'instruction, chaque individu ayant le droit de connaître le patrimoine culturel et, en conséquence, le droit d'apprendre et de prendre conscience; du besoin de partager librement l'information culturelle, sans quoi le droit d'information serait entravé et le transfert des valeurs entre civilisations interrompu; de la nécessité d'interdire toute discrimination entre les valeurs culturelles à protéger et les ouvres d'art qui en naissent».

should be protected by the State, and that they had *locus standi* for claiming the violation of such rights, both as they considered to be personally affected by such violations and in the interests of the abovementioned "abstract entities".

On 21 June 2016 the Court issued a decision. It Court stipulated that it would have examined the complaints under Articles 8 (right to private life) and 10 (freedom of expression, opinion and information), but it postponed the ruling on the admissibility. At the same time, it communicated the application to the Turkish government and submitted some questions to the parties. Among the questions, one is extremely important from a procedural perspective. The Court asked whether

> peut-on considérer que les requérants ont le *locus standi* pour se prévaloir d'un intérêt lésé du fait des menaces de destruction pesant sur le patrimoine culturel et historique que représente la région de Hasankeyf, classée site archéologique, et pour lequel ils pourraient saisir la Cour, en faisant valoir les dispositions susmentionnées, prises isolément ou lues ensable? [15]

The Court asked whether, should the individual right to the protection of cultural and historical heritage exist under the ECHR[16], the applicants could be considered has having *locus standi* for applying to the Court with the aim of protecting such interests[17]. Given that the Court answered negatively to the first question, it did not rule on the existence of the applicant's *locus standi*. In the present Section, therefore, we will try to ascertain whether abstract entities, such as "humanity" or "generations", are allowed to apply to the Court and, in that case. Answering to such questions requires ascertaining whether: "humanity" or "generations" can be considered as *rights-holders* under the Convention (Sec. 2.1.) and, in the affirmative case, how they can be represented in proceedings before the Court (Sec. 2.2.).

2.1. *Future Generations'* Locus Standi

In principle, the ECtHR is not a *forum* for "public interest litigation"[18], although the Court did not entirely exclude that possibility[19]. Under Article 34 ECHR, individual

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[15] *Ahunbay and others v. Turkey*, No. 6080/2006, ECHR § 1, question b) (communicated case of 21 June 2016).

[16] In this regard, the Court asked whether, under international law, Turkish law and the domestic law of other CoE Member States, as well as under the Court's case-law concerning Articles 8 and 10 ECHR, it can be argued that an «individual right to the protection of cultural and historical heritage» as well as a «right to freely take part to cultural life» exists.

[17] The Court also asked whether the applicants have *locus standi* for alleging a violation of *their* interest to the protection of the cultural and historical site of Hasankeyf. In that case, the irreversible destruction of the site would imply an interference with the rights protected under Articles 8 and 10 of the ECHR? Or do the national authorities have stricken a fair balance between the collective (economic) interests supporting the construction of the dam, and the interests of the applicants as well as present and future generations to the protection of cultural and historical heritage?

[18] R. PAVONI, *Public Interest Environmental Litigation and the European Court of Human Rights: No Love at First Sight*, in F. LANZERINI, A.F. VRDOLJAK (eds.), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, Oxford and Portland, 2014, p. 331 s.

[19] *Greenpeace E.V. and others v. Germany*, No. 18215/06, ECHR (decision of 12 May 2009). The applicants were the environmental NGO Greenpeace and four individuals. They complained of the German authorities' «refusal to take specific measures to curb respirable dust emissions of diesel vehicles» (§ 1). The Court did not completely rule out the possibility for an NGO to be qualified as a victim in a case concerning health and environmental issues. And indeed, it merely stipulated that «[t]he Court considers, at the outset, that it is not prima facie persuaded that Greenpeace E.V., in the specific circumstances of the case, can claim to be a victim of a violation of Article 8 of the Convention. […] An association is *in principle* not in a position to rely on health

application can be lodged by «any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto». The applicant must fit into one of these categories and must claim to hold (and to be the victim of the violation of) one of the rights protected under the Convention. Under Article 1 ECHR, rights and liberties are recognized to «everyone» under the jurisdiction of one of the States parties. Therefore, one should acknowledge whether "humanity" or "generations" can be qualified under the heading of "everyone" who, holding the conventional rights, can be victims of the violations thereof. From a *temporal* perspective, the relevant issue is whether the fall under Member States' jurisdiction. Given that the second issue would require a completely different inquiry[20], we will focus on the first one.

While it is hard to imagine that "humanity" as such has *locus standi* before the Court, the answer is not straightforward as far as "generations" are concerned. The Court has repeatedly stipulated that the notion of victim «is not to be applied in a rigid, mechanical and inflexible way»[21] and «must also be interpreted in an evolutive manner in the light of conditions in contemporary society»[22], given that «any other, excessively formalistic interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory»[23]. Therefore, one could argue that, in modern societies, where "collective interests", "common values" and "common goods" are increasingly relevant from a social and legal viewpoint, and whose protection is often demanded in the interests of present and future generations[24], the victim requirement should be interpreted

considerations to allege a violation of Article 8. The Court considers, however, that *it need not to decide this issue* as the application is, in any event, inadmissible […]» (emphasis added).

[20] In particular, *future generations* do not exist yet. The existence of State's jurisdiction is a «threshold criterion […] a necessary condition» for the existence of State's responsibility under the Convention (see, recently, *Güzelyurtlu and others v. Cyprus and Turkey*, No. 36925/07, ECHR § 178 (judgment of 29 January 2019)). However, the notion of jurisdiction has been interpreted extensively in order to include hypothesis of exercise of extra-territorial jurisdiction. Therefore, one could try to frame an extra-temporal (or inter-temporal) dimension of State jurisdiction. One could think, for example, to the UN Human Rights Committee interpretation of extra-territorial jurisdiction as triggered by a «special relation of dependency». The Committee relied on factual elements (the capacity of the State to protect someone interests) in conjunction with the existence of relevant legal obligations under international law (*S.A. and others v. Italy*, No. 3043/2017, UN Human Rights Committee § 7.8 (views of 27 January 2021). A similar reasoning could be applied in order to argue, for example, that future generation fall under State's jurisdiction when States have the capacity of protecting their (future) rights and the legal obligation under international law to do so (as arising, for example, under treaties concerning the protection of the environment or the protection of cultural heritage). Among such obligations, indeed, one should also consider, for interpretative purposes, those arising from the principle of intergenerational equity. See, in this regard, B. LEWIS, *Human Rights Duties Towards Future Generations and the Potential for Achieving Climate Justice*, in *Neth. Quart. Hum. Rights*, 2014, p. 206 s., p. 217: "A strict reading of international human rights law would suggest that States do not owe obligations to people who have not yet been born, as they would not fall within the class of citizens or persons under the jurisdiction of that State. However, where a State has the ability to affect the rights of a person (be they currently alive or not yet born) then it is argued that the State must exercise that power in a way that is consistent with human rights. It makes no difference whether the consequences of a State's exercise of power or control occur in the short or long-term – the duties to respect, protect and fulfill human rights are owed to members of both present and future generations where those persons can be considered wither citizens of the State or under the jurisdiction or control of the State".

[21] *Micallef v. Malta*, No. 17056/06, ECHR (GC) § 45 (judgment of 15 October 2009).

[22] *Gorrzai Lizarraga and others v. Spain*, No. 62543/00, ECHR § 28 (judgment of 25 April 2004).

[23] *Ibidem.*

[24] See, for example, Council of Europe, *Final Declaration by the Georgian Presidency of the Committee of Ministers*, High-Level Conference organized under the aegis of the Georgian Presidency of the Committee of Ministers,

and applied accordingly. Cultural heritage[25] and the environment[26] are among those interests whose protection has been considered a common concern of humankind, including both present and future generations. In determining whether the latters can be considered as rights-holders, therefore, the Court can take into consideration the trends in international[27] and European law, as well as in the law[28] and practice of the Member States of the Convention.

It is true that, when assessing the victim status, one must observe that "future generations" do not exist yet. While worldwide a trend towards the attribution of rights to the latters can be ascertained (for example, in Australia[29] and the Philippines[30]) in Europe the answer is not clear-cut. The German Federal Constitutional Court, for example, recognized that the protection of future generations' interests is grounded on an *objective* (and not subjective) approach, given that they do not enjoy (yet) fundamental rights as such[31]. Moreover, even if the ECtHR would be willing to recognize future generations as rights holders, the victim status requirement demands that the applicant is *directly* or *indirectly* affected by the alleged violation[32]. The Convention, indeed, does not allow the *actio popularis* and does not institute a system for the review of the *in abstracto* compatibility of law, rules or practices with the ECHR itself[33]. However, the Court stated that, under certain conditions, potential and future victims might lodge applications, too. Therefore, at least in principle, future generations could be considered as *potential victims*, that is to say those that are able to show «reasonable and convincing evidence of the probability of the occurring of a violation» and not only «mere suspicions and conjectures»[34].

Environmental Protection and Human Rights, 27 February 2020, available online at https://www.coe.int/en/web/human-rights-rule-of-law/final-declaration-by-the-presidency-of-the-committee-of-ministers: «[g]reater collective action at the European level would set a global precedent and reduce the foreseeable risk of irreparable harm to the human rights of future generations».

25 F. FRANCIONI, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, in *Michigan Jour. Int. Law*, 2004, p. 1209 s.

26 R. JOHNSTON, *Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation*, in *Tilburg Law Rev.*, 2016, p. 31 s.

27 United Nations Framework Convention on Climate Change, of 9 May 1992, Rio (*U.N.T.S.* Vol. 1771, p. 107), entered into force on 21 March 1994, Article 3(1), according to which the States Parties «should protect the climate system for the benefit of present and future generations of human kind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities».

28 Article 112 of the Norwegian Constitution: «[…] Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this rights for future generations as well».

29 Federal Court of Australia, Sharma by her litigation representative Sister Marie Brigid Arthur v. Minister for the Environment, judgment of 27 May 2021, [2021] FCA 560, recognizes that the environment must be protected «in the interests of future generations» but do not specify whether future generations are already rights holders.

30 Supreme Court of Philippines, *Minors Oposa v. Secretary of the Department of Environment and Natural Resources*, judgment of 30 July 1993, 33 I.L.M. 173 (1994), according to which to which the plaintiff have standing to represent «their yet unborn posterity».

31 German Federal Constitutional Court, *Neubauer and others v. Germany*, order of the First Senate of 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR, 288/29, § 146: «The duty to afford protection against risks to life and health can also establish a duty to protect future generations […]. However, this duty to afford intergenerational protection has a solely objective dimension because future generations – either as a whole or as the sum of individuals not yet bord – do not yet carry any fundamental rights in the present».

32 *Roman Zakharov v. Russia*, No. 47143/06, ECHR (GC) § 164 (judgment of 4 December 2015).

33 *Klass and others v. Germany*, No. 5029/71, ECHR (Plenary) § 33 (judgment of 6 September 1978).

34 *Asselbourg and others v. Luxembourg*, No 29121/95, ECHR (decision of 29 June 1999). On the victim status requirement concerning human rights violations in the context of climate change see B. LEWIS, *Human Rights*

As for "present generation", victims do exist, but it is impossible to clearly identify the members of the group. However, the impossibility of clearly identifying the victim should not exclude that someone is actually a rights-holder and a victim of human rights violations. In this regard, the German Federal Constitutional Court observed that «[t]he mere fact that very large numbers of people are affected does not exclude persons from being individually affected in their own fundamental rights»[35] One could argue that exactly because of the *material impossibility* of clearly identify the members of the group, it should be allowed to third parties to represent their interests. The said issue – the possibility of lodging application on behalf of victims who exist but cannot be identified – is currently under the Court examination[36] and has already been decided in the context of mass surveillance, since in such cases it would be impossible to demonstrate that the applicant has been "directly affected" by the measure[37].

2.2 *Future Generations' Representation*

Should abstract entities as present and/or future "generations" be considered as having *locus standi* to lodge applications with the Court, the second issue would be: who can actually and adequately represent their rights and interests in the proceedings? As such, they are not able to apply to national and international judicial institutions for the protection of their rights and interests. In this regard, several authors proposed the adoption of a "guardianship model": it means that the power of representation should be recognized to existing entities, such as other individuals or NGOs[38].

The "guardianship model" is not unknown to the ECtHR. In the field of litigation for the protection of collective interests, it could apply its own case-law concerning "*de facto* representation", which has been developed with the aim of guaranteeing extremely vulnerable individuals' (children and persons with serious mental disabilities) right to access to (international) justice[39]. Indeed, given that those individuals are not *de jure* and/or *de facto*

Duties Towards Future Generations and the Potential for Achieving Climate Justice, cit., p. 212: "For future generations, the impact of climate change […] can be understood in terms of both direct and indirect interference with human rights"; "The fact that identities of future persons are currently unknown and are subject to change does not alter the fact that current actions will determine the quality of the life they enjoy".

[35] *Neubauer and others v. Germany*, cit., § 100 and 131.

[36] *Lawyers' Association for the Protection of Human Rights v. Italy*, No. 7494/12, ECHR (communicated case of 18 June 2020). An NGO, in that case, applied to the Court claiming exactly that it was acting as a victim, because the violation has been realized in respect of an entire group of people which cannot be previously identified. The Court asked, in the question to the parties, whether «[i]n its quality of non-governmental organization acting for the protection of human rights, can the applicant claim to be a victim of a violation of Article 8 of the Convention, protecting private life?».

[37] *Big Brother Watch and others v. the United Kingdom*, Nos. 58170/13 and others, ECHR (GC) § 467-472 (judgment of 25 May 2021).

[38] K. SKAGEN EKELI, *The Principle of Liberty and Legal Representation of Posterity*, in *Res Public*, 2006 Vol. 12, p. 385 s., p. 388: «It is possible to imagine a system of legal representation of future generations that is based on the latter guardianship model. If such a system is adopted, this would imply that existing agents (for instance private individuals, groups or organizations, such as environmental NGOs) are ascribed a procedural right or the power to initiate legal proceedings in behalf of posterity. In this way, such representatives could function as guardians of future people with legal standing before national and international courts»; L. HORN, *Climate Change Litigation Actions for Future Generations*, in *Environment and Planning Law Journal*, 2008, p. 115 s.

[39] See, in this regard, *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania,* No. 47848/08, ECHR (GC) (judgment of 17 July 2014); *Association for the Defence of Human Rights in Romania – Helsinki Committee on Behalf of Ionel Garcea v. Romania,* No. 2959/11, ECHR (judgment of 24 March 2015); *L. R. v. North Macedonia,*

able to protect their interests, the Court recognised that third parties (namely, NGOs) must be allowed to act as their representatives. One could argue that the interests of the future generations must be represented before the Court by third parties exactly because, otherwise, they would not be protected. As far as now, however, the said case-law has been applied by the Court only in relation to serious violations of the core rights protected under the Convention, namely the right to life (Article 2) and the right not to be subjected to inhuman and degrading treatments (Article 3), by arguing that:

> To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level […]. Allowing the respondent [State] to escape accountability in this manner would not be consistent with the general spirit of the Convention not to hinder in any way the effective exercise of the right to bring an application before the Court.[40]

The Court's approach is grounded on the existence of some "exceptional circumstances" of the case, which justify a flexible (evolutive and effective) interpretation of the victim requirement and of the rules concerning representation before the ECtHR. One could, however, try to adapt the said approach to the representation of present or future generations. Some differences exist, but they seem not to exclude *a priori* the applicability of the *de facto* case-law to the legal representation of abstract entities. And indeed, a similar approach has been recently taken by the European Network of National Human Rights Institutions, in its third-party intervention[41] in the climate change related case against Switzerland[42]. Moreover, the CoE Commissioner for Human Rights, in her third-party intervention in the climate change case against 33 ECHR Member States, highlighted the need to interpret the victim status and the rules on representation in such a way as to allow «young people's present and future rights» to be adjudicated before the Court[43].

First of all, at least as far as future generations are considered, they can be considered "vulnerable" victims. And indeed, they are more exposed to some human rights violations[44] (such as those related to the destruction of cultural heritage or the degradation of the

No. 38067/15, ECHR (judgment of 23 January 2020); *Association Innocence en Danger and Association Enfance et Partage c. Francia,* Nos. 15343/14 e 16806/15, ECHR (judgment of 4 June 2020).

[40] *Centre for Legal Resources on Behalf of Valentin Câmpeanu*, cit., § 112.

[41] ENNHRI, *Written Observations in Application No. 53600/20. Verein Klimaseniorinnen Schweiz et autres c. la Suisse.* On this point see also J. SANDVIG, H.C. BRÆNDEN, P. DAWSON, *European National Human Rights Institutions Intervene in a High-Profile Climate Case*, in *Strasbourg Observers*, 3 December 2021: «The rationale for rejecting complaints from associations on the basis that there are 'adult persons with full legal capacity to act' who can 'lodge complaints with the Court in their own name' (Identoba, § 45) does not necessarily apply with equal force here, since the most threatened by climate-induced risks for life and physical integrity are children (and future generations) without legal capacity to act not, or elderly persons whose age-specific interest is perishable». The third party intervention also highlights that the ECHR is also aimed at protecting common interests, as the Preamble's recital 5 and Article 37(1) of the Convention make clear.

[42] *Varei Klimaseniorinnen Schweix and others v. Switzerland*, No. 53600/20, ECHR (communicated case of 17 March 2021).

[43] CoE, Commissioner for Human Rights, *Third Party Intervention, Claudia Duarte Agostinho and others v. Portugal and other 32 States*, Strasbourg, 5 May 2021, CommDH(2021)16, § 46: «the present case is also an opportunity to demonstrate that states – and European human rights institutions – are ready to remove barriers faced by children in accessing justice […]. This is particularly salient given the extent to which young people's present and future rights are in jeopardy, and given states' legal commitments to intergenerational equity».

[44] L. PERONI, A. TIMMER, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, in *International Journal of Constitutional Law*, 2013, p. 1056 s., p. 1064.

environment) because they will experience such violations more intensively (and for longer periods) than current generations. The notion of "extreme vulnerability", by contrast, is grounded on the absence of legal or factual capacity to act in order to protect their interests[45] and on the fact that some individuals «are inevitably dependent on the cooperation of others»[46]. The said condition is fulfilled: given that future generations do not exist yet, they are not able to act in order to protect their rights.

Secondly, according to the case-law on *de facto* representation, the Court must examine whether there is a *sufficiently strict connection* between the interests whose protection is claimed in the proceedings and the individual or NGO who claims to act on behalf of someone else. In that case, the condition will be more easily satisfied by those NGO whose activity, because of their statutes, is aimed at protecting the said interests[47], especially in those case where "representation of future generation" is expressly mentioned. Much more difficult it would be for private individuals, such as those acting in the *Ahunbay* case, to demonstrate the said connection. While in their application they argued that they would be *personally* affected by the destruction of the cultural site of Hasankeyf[48], they failed to explain why they should be allowed to represent the interest of the "present and future generations" or of "humanity". However, given the collective importance of the values, rights and interests protected in cases such as the mentioned one, the Court could find that there is an exception to the need of the existence of a *special interest*. The International Court of Justice ("ICJ") has adopted a similar stance as far as applications lodged in the interests of the international community are concerned, namely those relating to the protection of common values (*erga omnes* obligations[49]).

Thirdly, in order for a third party to be recognized as *de facto* representative of someone else's interests, the alleged representative must have been recognized as a party in the domestic proceedings related to the interests which for the object of the application or, at least, must have exercised all the faculties that it retains under domestic law to pursue the said interests. The said condition was respected in the *Ahunbay* case.

In conclusion, while several differences exist between the issue of the legal representation of "extremely vulnerable individuals" and that of "present and future

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[45] In some States, however, a specific Ombudsman for the protection of future generations has been established exactly with that aim. L. BECKAM, F. UGGLA, *An Ombudsman for Future Generations. Legitimate and Effective?*, in I. GONZÁLEZ-RICOY, A. GOSSERIES (eds.), *Institutions for Future Generations*, Oxford, 2016, p. 117 s.; L. ZÓLYOM, *The Rights of Future Generations, and Representing Them in the Present*, in *Acta Juridica Hungarica*, 2002, p. 135 s. In those cases, therefore, the legal representative exists and should be allowed to act in their name.

[46] L. PERONI, A. TIMMER, *Vulnerable Groups*, p. 1059 s.

[47] H. MIEREANU, *Representing the 'Unrepresentable'?*, cit. p. 153: «Without going so far as to subvert the whole theory of judicial action, some environmental associations may already be granted the right to bring proceedings as an exception to the traditional rule that the interest in bringing proceedings must be personal and direct. In French law, this possibility corresponds to what are known as actions 'in the interests of third parties'. Associations may thus act in the defence of a collective interest, on the basis of a statutory authorization or subject to the condition that the purpose of the claim is consistent with the social goal. This possibility for environmental associations to bring judicial proceedings serves indirectly to protect future generations».

[48] They were three scholars and professional in the field of archeology – who had taken part to the excavation and restoration of the archeological site – an attorney and a journalist. The argued, however, that they would have been specially affected by the destruction not because of their special relationship with the site, but because they argued the existence of a universal right to the protection of, and access to, cultural heritage.

[49] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Reports 2012, p. 422, § 69 (judgment of 20 July 2012): «If a special interest were required for that purpose, in many cases no State would be in a position to make such claim».

generations", the Court's case-law could be adapted to the latters needs. Allowing the *de facto* interpretation would fit with the Court's case law, according to which «recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to [victims] whereby they can defend their particular interests effectively»[50]. Moreover, the Court has the faculty to recognise *locus standi* when the application raises issue of general interest[51]. In particular, the Court may decide to continue the examination of a case even when, for example, the victim has lost his life[52] and there are no heirs who are interested in pursuing the case, when "moral interests" and the interest in the protection of human rights so require[53]. Therefore, as such interests may demand adjudicating the rights of individuals who are not alive (anymore), the effective protection of human rights may demand adjudicating the rights of those individuals who are not yet alive, as well.

3. *Filling Substantial Lacunas in the ECtHR: On the Existence, or Inexistence, of an Individual Right to the Protection of Cultural Heritage*

As already said, in the *Ahunbay* case the Court did not rule on the above-examined procedural issue because it found the application inadmissible for being incompatible *ratione materiae* with the Convention: it considered that it had no jurisdiction in determining whether the construction of the dam would have caused a prejudice to the protection of cultural heritage. Indeed, in the Court's view no universal right to the protection of, and access to, cultural heritage is protected under the ECHR, for the following reasons:

> 22. La Cour observe que la prise de conscience progressive des valeurs liées à la conservation de l'héritage culturel et à l'accès à ce dernier peut passer pour avoir abouti à certain cadre juridique international et la présente affaire pourrait, dès lors, être considérée comme relevant d'un sujet en évolution. 23. […] la Cour est prête à considérer qu'il existe une communauté de vue européenne et internationale sur la nécessité de protéger le droit d'accès à l'héritage culturel. Cependant, force est de constater que cette protection vise généralement les situations et des réglementations pourtant sur le droit des minorités de jouir librement de leur propre culture ainsi que sur le droit des peuples autochtones de conserver, contrôler et protéger leur héritage culturel. […] 25. Par contre, elle n'observe, à ce jour, aucun 'consensus européen' ni même une tendance parmi les États membres du Conseil de l'Europe qui aurait pu nécessiter une remise en cause de l'étendue des droits en question ou qui aurait autorisé

[50] *Gorrzai Lizarraga and others v. Spain*, cit., § 38.
[51] *Micallef v. Malta*, cit., § 45; *Aksu v. Turkey*, Nos. 4149/94 and 41029/04, ECHR § 32 (judgment of 15 March 2012).
[52] *Karner v. Austria*, No. 40016/98, ECHR § 25 (judgment of 24 July 2003): «While under Article 34 of the Convention the existence of a 'victim of a violation' […] is indispensable for putting the protection mechanism of the Convention into motion, this criterion cannot be applied in a rigid, mechanical and inflexible way throughout the whole proceedings. […] As the Court pointed out in *Malhous* […] human rights cases before the Court generally also have a moral dimension, which must be taken into account when considering whether the examination of an application after the applicant's death should be continued. All the more so if the main issue raised by the case transcends the person and the interests of the applicant».
[53] Ivi, par. 26: «The Court has repeatedly stated that its 'judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of their engagements undertaken by them as Contracting Parties' […]. Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention System».

> que l'on inférât des dispositions de la Convention un droit individuel universel à la protection de tel ou de tel héritage culturel, comme il est revendiqué dans la présente requête.

The Court's decision was grounded on the "European consensus" doctrine[54]. According to the latter, in cases in which a "legal lacuna" seems to exist under the Convention, the Court examines the (internal) practice of the Member States and the general trends in the European and international legal order. The said analysis aims at ascertaining whether the recognition of "new rights" under the Convention, or an evolutive interpretation of the existing ones, are legally justifiable without violating the principle of sovereignty[55] (according to which, limitation to State's freedom should in principle derive from the free consent of the State)[56]. In the *Auhnbay* case the Court considered that, while there is an international and European consensus concerning the need to protect cultural heritage and the right to access to it[57], it is limited to those cases where the protection of cultural heritage is connected to the protection of minority rights (to freely enjoy their culture), and to the protection of indigenous people (to control and protect their cultural goods and properties).

3.1. *The Protection of Cultural Heritage under the ECHR*

It is not the first time that the Court excluded the existence, under the ECHR, of a human right to the protection of cultural, historical and natural heritage as such[58]. In the

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[54] *Demir and Bayakara v. Turkey,* No. 34503/97, ECHR § 85 (judgment of 12 November 2009): «in defining the meaning of terms and notions in the text of the Convention, the Court can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the *practice of European States reflecting their common values.* The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases» (emphasis added).

[55] V. P. TZEVELEKOS, *The Making of International Human Rights Law,* in C.M. BRÖLMANN, Y. RADI (eds.), *Research Handbook on the Theory and Practice of International Law-Making*, Cheltenham, 206 p. 329 s., p. 348: «[…] instead of relying of that type of generic philosophical foundation [balancing of principles], the ECtHR often attempts to collect the elements that support and offer legitimacy to its 'activism' in state practice within Europe, as well as within the broader international legal system. […] The consensus-based approach does not rely on majorities in the society, nor is it a form of judicial 'referendum'. What the ECtHR is valuing is *state practice, reflecting the will of sovereigns*. Unlike national judges, whose powers stem from constitutions, international judges are competent because states allow them to be. […] [International human rights] are posited within and by the system of international law, and that very system, despite the aforementioned ambiguity about the inner source of its normativity, remain state-centric, with rules being created either by treaties that reflect state will, or by custom that stems from state practice that is accepted as law again by states. This is besides why the argument has been in this study that the consensus technique is akin to recognition of regional custom» (emphasis added).

[56] L.-A. SICILIANOS, *Interpretation of the European Convention on Human Rights: Remarks on the Court's Approach,* at the seminar *The Contribution of the ECtHR to the Development of Public International Law,* organized by the Ministry of Foreign Affairs of the Czech Republic at the 59th session of the Consultive Committee for public international law of the Council of Europe, Prague, 23 September 2020, p. 6 e p. 8: «[t]he Court continuously refines its methodology in order to establish 'European consensus' as a form of 'subsequent State practice'».

[57] *Bayatyan c. Arménie*, No. 23459/03, ECHR (GC) § 122 (judgment of 7 July 2011); *Hämäläinen c. Finlande*, No 37359/09, ECHR (GC) § 72-75 (judgment of 16 July 2014); *Magyar Helsinki Bizottság c. Hungary*, No. 18030/11, ECHR (GC) § 138 (judgment of 8 November 2016).

[58] The same approach has been adopted by the Court in relation to the "right to a healthy environment" (see, *ex multis*, *Hamer v. Belgium*, No. 21861/03, ECHR § 79 (judgment of 27 November 2007): «[La Cour] rappelle […] que si aucune disposition de la Convention n'est spécialement destinée à assurer une protection générale de l'environnement en tant que tel […] la société d'aujourd'hui se soucie sans cesse davantage de le préserver […]. L'environnement constitue une valeur dont la défense suscite dans l'opinion publique, et par conséquent auprès des pouvoirs publics, un intérêt constant et soutenu. Des impératifs économiques et même certains

Syllogos Ton Athinaion case the Court stipulated that «the applicant has failed to point out any case of this Court where it has held that Article 8 gives rise to a general right to the protection of cultural heritage and of the nature considered in the present case»[59]. According to the Court, cultural heritage is relevant under the ECHR only in very specific situations.

In a *first* group of cases, it considered that the protection of cultural heritage is a *legitimate aim* of Governments, which may justify an interference with the rights and liberties protected under the Convention, provided that the other conditions for the legitimacy of such an interference are fulfilled (in particular, the existence of a reasonable relation of proportionality between the interference and the aim pursued by the State)[60]. In a *second* group of cases, the Court considered cultural and historical heritage as protected, as individual rights, under the Convention: the link between cultural and historical heritage and human rights has been found in the notion of *identity*[61]. Therefore, cultural heritage is protected under the Convention in those cases where it was related to minorities' identity, like ethnic groups[62] and the property rights of indigenous people[63].

However, in the already mentioned partial decision on the admissibility issued in 2016 in the *Auhnbay* case, the Court seemed willing to identify, within the international and

droits fondamentaux, comme le droit de propriété, ne devraient pas se voir accorder la primauté face à des considérations relatives à la protection de l'environnement, en particulier lorsque l'État a légiféré en la matière. Les pouvoirs publics assument alors une responsabilité qui devrait se concrétiser par leur intervention au moment opportun afin de ne pas priver de tout effet utile les dispositions protectrices de l'environnement qu'ils ont décidé de mettre en œuvre». And indeed, in 2021 the Parliamentary Assembly proposed the adoption of a specific Protocol on that subject (see Council of Europe, Parliamentary Assembly, *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe*, Recommendation 2211 (2021), 29 September 2021).

[59] The case had been brought to the Court by an association seeking the return of Parthenon Marbles to Greece, from where they had been removed at the beginning of the Nineteenth century. See *Syllogos Ton Athinaion v. the United Kingdom*, No 48259/15, ECHR (decision of 31 May 2016).

[60] *Beyeler v. Italy*, No. 33202/96, ECHR § 112-113 (judgment of 5 January 2000): «the Court considers that the control by the State of the market in works of art is a legitimate aim for the purposes of protecting a country's cultural and artistic heritage. […] the Court recognizes that, in relation of works of art lawfully on its territory and belonging to the cultural heritage of all nations, it is legitimate for a State to take measures designed to facilitate in the most effective way wide public access to them, in the general interest of universal culture»; at §114: «[t]he concern to achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights is reflected in the structure of Article 1 as a whole and entails the need for a reasonable relationship of proportionality between the means employed and the aim sought to be realized». See also *SCEA Ferme de Fresnoy v. France*, No. 61093/00, ECHR (decision of 1 December 2005); *Kozacioglu v. Turkey*, no. 2334/03, ECHR (GC) § 54-55 (judgment of 19 February 2009); *Debelianovi v. Bulgaria*, No. 61951/00, ECHR § 53-54 (judgment of 29 March 2007)

[61] H. SILVERMAN, D. FAIRCHILD RUGGLES, *Cultural Heritage and Human Rights,* H. SILVERMAN, D. FAIRCHILD RUGGLES (eds.), *Cultural Heritage and Human Rights*, New York, 2007, p. 3 s., argue that the protection of cultural heritage is part of human rights because it related to the recognition, preservation and development of *individual* or *group*'s identity and essential worth.

[62] *Chapman v. the United Kingdom*, No. 27238/95, ECHR (GC) § 76 and 93-96 (judgment of 18 January 2001): «The Court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. […] Measures affecting the applicant's stationing of her caravan therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition». See also *Yordanova and others v. Bulgaria*, No. 25446/06, ECHR (judgment of 24 February 2012); *Winterstein and others v. France*, No. 27013/07, ECHR (judgment of 17 October 2013).

[63] *Hingitaq 53 and others v. Denmark*, No. 18584/04, ECHR (decision of 12 January 2006). The case, however, was declared inadmissible as manifestly ill-founded, given that the State had paid compensations.

European legal framework, a tendency[64] towards the recognition of an individual right to the protection of, and access to, cultural heritage[65]. In particular, the Court – by provisionally upholding the arguments of the applicants – noted that the European Convention for the Protection of Archeological Heritage[66] «érige un principe universel pour la sauvegarde et la mise en valeur du patrimoine représentatif de toutes les forms d'expression culturelle ayant vu le jour tout au lung de l'histoire d'une territoire donné, indépendamment du context politique»[67]. Moreover, according to the Court, the Framework Convention on the Value of Cultural Heritage for Society (not ratified by Turkey[68]), provides that «la valeur du patrimoine culturel est aussi mesurée par l'effectivité de sa contribution à la vie de chacun en Europe»[69] Lastly, it mentioned some human rights instruments, such as the Universal Declaration on Human Rights[70] (UDHR) and the International Covenant on Economic, Social and Cultural Rights[71] (ICESCR). One may wonder whether those instruments could have led to a different conclusion, namely that there is a sufficient consensus concerning the existence of an individual right to the protection of, and access to, cultural and historical heritage. Moreover, as the Court stressed that the international consensus on the protection of cultural heritage is limited to *specific groups*, it could have assessed whether such groups include future generations. And indeed, the need to protect cultural heritage in the interests of future generations has been enshrined in several international instruments, such as the Convention

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[64] B. DRAZEWSKA, *Hasankeyf, the Ilisu Dam, and the Existence of Common European Standards on Cultural Heritage Protection*, Santander Art and Culture Law Review, 2018, No. 2, pp. 89 ss., p. 110: "In light of the […] 2016 Decision, it certainly appeared as though that the Court intended to look for evidence of commonly accepted standards pertaining to cultural heritage in a variety of international legal instruments and documents"; p. 111: "[j]udging from that decision only, it certainly appeared as though that the Court was minded to treat the referenced documents as manifestations of 'common European standards' in protecting cultural heritage in its discussion over whether Turkey has violated its obligations under the ECHR".

[65] Among others, the Court mentioned: (1) the Council of Europe's Committee of Ministers recommendation No. R (89) 5 concerning the protection and enhancement of the archeological heritage in the context of town and country planning operations (13 April 1989); (2) the Council of Europe's Parliamentary Assembly Recommendation No. 750 (1975) on the Conservation of Europe's architectural heritage; (3) the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972); (4) the Universal Declaration of Human Rights; (5) the International Covenant on Economic, Social and Cultural Rights.

[66] European Convention on the Protection of Archeological Heritage (Revised), of 16 January 1992, La Valletta (*C.E.T.S.* No. 143), entered into force on 16 January 1992.

[67] ECtHR, *Ahunbay and others v. Turkey, Austria and Germany*, cit., para. 69.

[68] The absence of Turkish ratification does not exclude the possibility of resorting to the Convention for interpretative purposes, under the systematic interpretation criterion provided for in Article 31(3)(c) of the 1969 Convention on the Law of Treaties. And indeed, the ECtHR does not distinguish between binding and non-binding instruments when selecting those which are relevant for interpreting the ECHR. See A. NUßBERGER, *Hard Law or Soft Law–Does it Matter? Distinction Between Different Sources of International Law in the Jurispurdence of the ECtHR*, in A. VAN AAKEN, J. MOTOC (eds.), *The European Convention on Human Rights and General International Law*, Oxford, 2018, p. 41 s.

[69] ECtHR, *Ahunbay and others v. Turkey, Austria and Germany*, cit., par. 75: "La conséquence de cette approche serait que les efforts de conservation et d'appréciation du patrimoine doivent être perçus non pas comme une activité secondaire, mais comme une action indispensable au maintien et à la mise en valeur de biens essentiels pour la qualité de la vie quotidienne et le progrès futur".

[70] Universal Declaration of Human Rights, of 10 December 1948, New York (UN General Assembly Resolution 217 A(III).

[71] International Covenant on Economic, Social and Cultural Rights, of 16 December 1966, New York (*U.N.T.S.* Vol. 993, p. 3), entered into force 3 January 1976.

concerning the Protection of the World Cultural and Natural Heritage[72] and the UNESCO Declaration on the Responsibilities of the Present Generations towards Future Generations[73], which, although not legally binding, stresses the need to adopt an approach grounded on the principle of intergenerational equity in the protection of cultural heritage.

3.2. *An International Consensus on the Protection of Cultural Heritage as a Human Rights?*

More generally, a strict connection between the protection of cultural heritage and human rights has been recognised in several international (binding and non-binding) instruments. A reference can be found in Articles 22 and 27 of the UDHR which stipulate, respectively, the recognition of the «economic social and cultural rights indispensable for [everyone's] dignity and the free development of [everyone's] personality», and the «right to participate in the cultural life of the community». The latter has been recognized also in Article 15 of the ICESCR[74].

It is true that some international human rights instruments confirm the ECtHR's assumption that the protection of cultural heritage is a human right when linked to the protection of minorities[75] and indigenous people[76]. However, there are also several instruments that identify a wider relationship between the protection of cultural heritage and the protection of human rights and human dignity *as such*. The Preamble of the Convention for the Protection of Cultural Property in the Event of Armed Conflicts[77] recognizes that

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[72] UNESCO, Convention concerning the Protection of the World Cultural and Natural Heritage, of 16 November 1972, Paris (*U.N.T.S.* Vol. 1037, p. 151), entered into force on 16 January 1992, Article 4: "Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles and 2 and situated on its territory, belongs primarily to that State".

[73] UNESCO, *Declaration on the Responsibilities of the Present Generations towards Future Generations*, Paris, 12 November 1997, Art. 7 (Cultural diversity and cultural heritage): "With due respect for human rights and fundamental freedoms, the present generations should take care to preserve the cultural diversity of humankind. The present generations have the responsibility to identify, protect and safeguard the tangible and intangible cultural heritage and to transmit this common heritage to future generations"; Art. 8: (Common heritage of humankind): "The present generations may use the common heritage of humankind, as defined in international law, provided that this does not entail compromising it irreversibly".

[74] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 21 on the Right of Everyone to Take Part in Cultural Life*, UN Doc. E/C.12/GC/21, 21 December 2009. The Committee observed that "the right to heritage" is part of the right to take part in cultural rights", and emphasised "States parties' obligation to guarantee the right to everyone, individually or in association with others, to access to, and benefit of, their own heritage *and that of others*". While the General Comment referred to the rights of minorities and indigenous people, it also invited States to protect cultural heritage of *all groups* while drafting economic development programs. See also UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Turkey*, UN Doc. E/C.12/TUR/CO/1, 2011, in which the Committee considered that Turkey's project concerning the dam had a potential impact on the enjoyment of economic, social and cultural rights, and invited Turkey to «take into account a human-rights based approach» in its project.

[75] Article 27 of the International Covenant on Civil and Political Rights, which provides for a right to enjoy one own's culture which is limited to members of "ethnic, religious or linguistic minorities"

[76] United Nations Declaration on the Rights of Indigenous People, of 13 September 2007, New York (UN General Assembly Resolution A/RES/61/295. Art. 8 stipulates the people's and individual members' right not to be subjected to the destruction of their culture; Art. 21 recognizes their right to «maintain, control, protect and develop» their cultural heritage.

[77] UNESCO, Convention for the Protection of Cultural Property in the Event of Armed Conflicts, of 14 May 1954, The Hague (*U.N.T.S.* Vol. 2253, p. 172, entered into force 7 August 1956.

«damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world». The Preamble of the Declaration concerning the Intentional Destruction of Cultural Heritage[78] stipulates that «cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights». Similarly, the Preamble of the Convention on the Protection of the Archeological Heritage recalls the CoE aim of safeguarding and realizing the Member States' common heritage and considers that archeological heritage «is essential to knowledge of the history of mankind», while that of the Convention on the Value of Cultural Heritage for Society stresses «the need to put people and human values at the center of an enlarged cross-disciplinary concept of cultural heritage». The latter, which adopts a human-based approach to the protection of cultural heritage, establishes States' obligations to undertake measures to implement access to cultural heritage and democratic participation (Article 12), knowledge and research on cultural heritage (Article 13), and to enhance information and study in this subject (Article 14).

Moreover, some reports and recommendations of UN organs and independent experts clearly show a close link between the protection of cultural heritage and cultural rights, in particular, and, more generally, human rights. For example, the 2011 Report of the independent expert in the field of cultural rights acknowledges the importance the protection of cultural heritage may have for different individuals and communities[79] and stipulates that

> [a]s reflected in international law and practice, the need to preserve/safeguard cultural heritage is a human rights issue. Cultural heritage is important not only in itself, but also in relation to its human dimension, in particular its significance for *individuals and communities* and their *identity and development* processes.[80]

More recently, the Special Rapporteur on the field of cultural rights, when issuing recommendations on the topic of the intentional destruction of cultural heritage, requested a human rights approach to the protection of cultural heritage. The Report, while acknowledging the existence of specific individuals and communities which can be more affected by the destruction of cultural heritage, observes that «damage to any cultural property damages the cultural heritage of all humankind, since each people makes its contribution to the culture of the world»[81]. Moreover, in the Special Rapporteur's view, «[t]he right of access and enjoyment of cultural heritage [which is protected under the ICESCR] includes the right of individuals and collectivities to, inter alia, know, understand, visit, make use of, maintain, exchange elements and develop cultural heritage»[82].

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[78] UNESCO, Declaration concerning the Intentional Destruction of Cultural Heritage, Paris, 17 October 2003.
[79] United Nations, Human Rights Council, *Report of the independent expert in the field of cultural rights, Farida Shaheed*, cit., § 62: «Distinction should be made between: (a) originators or 'source communities', communities which consider themselves as custodians/owners of a specific cultural heritage […]; (b) individuals and communities, including local communities, who consider the cultural heritage in question as integral part of the life of the community, but may not be actively involved in its maintenance; (c) scientists and artists; and (d) the *general public* accessing the cultural heritage of others. Interestingly, the Faro Convention refers to the notion of 'heritage community', which 'consists of people who value specific aspect of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations'».
[80] *Ivi*, § 77.
[81] United Nations, General Assembly, *Report of the Special Rapporteur in the field of cultural rights, Karima Bennoune*, UN Doc. A/71/317, 9 August 2016, § 8.
[82] *Ivi*, § 14.

Lastly, the Human Rights Council's Resolution on cultural rights and the protection of cultural heritage must be mentioned. The Resolution takes some stances in the Preambular part[83]. More importantly, in its operative part it calls upon States to take actions in the field of the protection of cultural heritage as a way to protect human rights: In particular, the Council:

> 1. *Calls upon* all States to respect, promote and protect the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage; […] 6. *Calls for* the development of partnerships between competent national authorities and civil society […] with the aim of enhancing the protection of cultural rights and promoting the right of everyone to participate in cultural life, including the ability to access and enjoy cultural heritage; 7. *Also calls* for the identification of innovative ways and best practices, at the national, regional and international level, for the prevention of violations and abuses of cultural rights, and for the prevention and mitigation of damage caused to cultural heritage, both tangible or intangible.

In the judicial practice, the idea of a "universal right" to the protection of cultural heritage has been proposed by Judge Cançado Trindade, in his opinion attached to the 2011 ICJ provisional measures order in the case concerning the Request for interpretation of the Temple of Preah Vihear judgment:

> 113. Cultural and spiritual heritage appears more closely related to the *human context*, rather than to the traditional State-centric context; it appears to transcend the purely inter-State dimension that the Court is used to […]. 114. In any case, beyond the States are human beings who organize themselves socially and compose them. The State is not, and has never been, conceived as an end in itself, but rather as a means to regulate and improve the living conditions of the *societas gentium*, keeping in mind the basic *principle of humanity*, amongst the other fundamental principles of the law of nations, as to achieve the *common good*. Beyond the State, the ultimate *titularies* of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole". 115. As it can be inferred from the present case of the *Temple of Preah Vihear*, we are here in the domain of superior *human values*, the protection of which is not unknown to the law of nations, although not sufficiently worked upon in international case law and doctrine to date. It is beyond doubt that the States, as promoters of the *common good*, are under the duty of co-operation between themselves to that end of the safeguard and preservation of the cultural and spiritual heritage.[84]

The relevance Judge Cançado Trindade assigned to *human values* and to the *principle of humanity* in the field of the protection of cultural heritage leads to further reflections. One may wonder whether the ECtHR, in the *Ahunbay* case, could have adopted a value-based

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[83] United Nations, Human Rights Council, *Cultural rights and the protection of cultural heritage*, UN Doc. A/HRC/RES/33/20, 6 October 2016 (Resolution adopted on 30 September 2016), Preambular part: «*Convinced* that the damage to cultural heritage, both tangible and intangible, of any people constitutes damage to the cultural heritage of humanity as a whole"; *Noting* that the destruction of or damage to cultural heritage may have a detrimental and irreversible impact on the enjoyment of cultural rights, in particular the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage; […] *Recognizing further* that the violation or abuse of the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage, may threaten stability, social cohesion and cultural identity […]».

[84] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia v. Thailand) *(Cambodia v. Thailand*), ICJ Reports 2011, p. 537, ICJ (order of 18 July 2011), Separate Opinion of Judge Cançado Trindade.

approach in considering whether, under the ECHR, a "universal" right to the protection of cultural heritage has emerged. For his part, in his separate opinion in the *Gabčikovo-Nagymaros* case judge Weeramantry stressed the importance of a principled and valued-based judicial approach in further developing international law, when the protection of common interests of the international community are concerned[85].

In the past, the ECtHR did resort to such a principled approach. While it (mostly) resorts to the European consensus doctrine, it has been recognised that "consensus and state practice are not the only means international [human rights] courts, including the ECtHR, use for the recognition of 'fresh' [human rights]" [86]. There are cases in which the same Court, even absent a European consensus, concluded that the Convention should be integrated by a "non-written" right or "new" right as a result of a balancing of the values and principles which are relevant in the specific case[87]. One can consider, for example, the *Vinter* case, when it recognized that the absence of a European consensus does not exclude the finding that, in the light of the principle of human dignity, the irreducible sentence to life imprisonment is contrary to Article 3 ECHR (prohibition of torture and inhuman or degrading treatments)[88]. More recently, the Court adopted the same approach in the *Viola* case[89].

In this regard, the same Court previously recognised the universal value that cultural heritage has for humanity and specific populations[90]. And it has been highlighted above that

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[85] *Case concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, p. 7 (judgment of 25 September 1997), Separate Opinin of Judge Weeramantry, p. 91 s.

[86] V. TZEVELEKOS, *The Making of International Human Rights Law*, cit., p. 349.

[87] On the technical issues related to the balancing technique, see P. DE SENA, L. ACCONCIAMESSA, *Balancing Test*, in H. RUIZ FABRI, *Max Planck Encyclopedia of International Procedural Law*, Oxford, 2021. On the theoretical issues related to the balancing of values in international human rights law, see: R. KOLB, *Les droits fondamentaux de l'individu comme principes normatifs d'optimisation de valeurs et d'intérêts sociaux: dix exemples tirées da la jurisprudence récente de la Cour européenne des droits de l'homme*, in *Revue universelle des droits de l'homme*, 1999, p. 125 s., p. 134: «l'aspect technique inhérent à l'administration du droit s'efface devant l'idée d'une concrétisation directe des valeurs fondamentales que ces principes proclament. L'application des droits fondamentaux est donc d'abord une fonction politique, liée à la représentation des valeurs indispensables au bon déroulement de la vie publique. Cette application ne diffère pas par nature du processus législatif ; elle est très proche de lui. Dans les deux cas il s'agit de peser des intérêts réciproques également respectables dans l'abstrait, de dégager un système de conciliation et de priorités contextuelles pondéré, de trouver par la communication des points d'équilibre le plus largement consensuels, équitables, légitimes ou optimaux. Les juges de Strasbourg s'y emploient pour donner une solution à l'espèce qui leur est soumise ; le législateur pour construire un corps de normes abstrait et général. Mais non seulement la démarché est la même, de plus il n'y a aucune différence spécifique entre la production de normes plus générales par le législateur : dans les deux cas il y a bien production d'une norme. De fait. L'herméneutique moderne a montré […] que toute application du droit comporte aussi des éléments de création de droit […] ce processus est le plus prononcé dans la jurisprudence sur les droits de l'homme. […] La jurisprudence sur les droits de l'homme est l'œuvre d'un auditoire s'employant à peser des droits et intérêts dans un système ouvert en vue d'atteindre le consensus le plus large possible sur les priorités raisonnables dans le contexte et selon l'ordre des valeurs promues par l'ensable du système des droits fondamentaux».

[88] *Vinter and others v. the United Kingdom*, Nos. 66069/09, 130/10 and 3896/10, ECHR (GC) (judgment of 9 July 2013). Although the Government opposed that «[t]here was a lack of consensus among the Contracting States in respect of life sentences» (§ 92), the Court concluded that an irreducible sentence to life imprisonment would be at odds with the Convention system, «the very essence of which, as the Court has often stated, is respect for human dignity» (§ 113).

[89] *Marcello Viola v. Italy (N. 2),* No. 77633/16, ECHR § 136 (judgment of 13 June 2019): «La Cour tient à rappeler que la dignité humaine, qui se trouve au cœur même du système mis en place par la Convention, empêche de priver un personne de sa liberté par la contrainte sans œuvrer en même temps à sa réinsertion et sans lui fournir une chance de recouvrer un jour cette liberté».

[90] *Kozacioglu v. Turkey*, No. 2334/03, ECHR (GC) § 81 (judgment of 12 February 2009): «The Court points out […] that the conservation of the cultural heritage and, where appropriate, its sustainable use, have as their aim,

there is a strict connection, in the international community, between human dignity, human rights and the protection of cultural heritage. The same Court observed that there is a growing trend towards the recognition of an individual right to the protection of, and access to, cultural, historical and natural heritage. Therefore, it could have stressed its role not only as a guardian for the respect of the rights expressly established in the ECHR's test, but also, as stressed in the Preamble of the Convention, as an actor included in a system aimed at achieving «greater unity» among CoE Member States, through the «maintenance and *further realization* of human rights and fundamental freedoms» and the elaboration of a «*common understanding* and observance» of the latters[91].

In the *Ahunbay* case, indeed, Turkey was basically invoking its margin of appreciation in balancing the protection of the rights invoked by the applicants, on the one hand, and the protection of its economic interests (allegedly) fulfilled by the construction of the Ilasu dam. However, a balancing approach, grounded on the principle of proportionality in the wide sense[92] (and the suitability, necessity and proportionality in the strict sense tests that it entails), would have also allowed the Court to consider the specificities of the case: for example, while the dam will have a short life, the destruction of the cultural site will be irreversible. It is true that the realization of such a balancing test would have presupposed the recognition of the existence of the right invoked by the applicants and, therefore, the applicability of Art. 8 ECHR (and of the limitation clause provided for in its paragraph 2). However, nothing excludes, at least in principle, that the balancing test (between the principle of sovereignty and the principle of human dignity) could have provided the Court with a sufficient rational basis for justifying the same existence of a right to the protection of, and access to, cultural, archeological and historical heritage.

4. *Conclusions*

It is true that, between the 2016 and the 2019 decisions in the *Ahunbay* case, the Court seems to have changed its approach. While in the former the Court seemed willing to find a way to justify, under the ECHR interpretative techniques, the existence of a human right to the protection of cultural heritage, in the latter it dismissed the case. However, the case is relevant for it shows the potential of public interest litigation before the ECtHR and the Court's willing to take in due consideration such interests, although within the boundaries arising from the principle of subsidiarity and States' margin of appreciation, which are now expressly mentioned in the ECHR's Preamble. It is also the first case which proposed the

in addition to the maintenance of a certain quality of life, the preservation of the historical, cultural and artistic roots of a region and its inhabitants. As such, they are an essential value, the protection and promotion of which are incumbent on the public authorities».

[91] *Cossey v. the United Kingdom*, No. 10843/84, ECHR (Plenary) § 3.6.3. (judgment of 27 September 1990), Dissenting opinion of Judge Martens: «It is, therefore, up to the Court to decide, in every case […] whether a 'margin of appreciation' should be left to the State […]. For this decision various factors may be relevant and will, at the end of the day, have to be balanced. On the one hand, the Preamble of the Convention […] seems to invite the Court to develop common standards. To the extent that the number of member States increases, this side of the Court's mandate gains in weight, for in such a larger, diversified community the development of common standards may well prove the best, if not the only way of achieving the Court's professed aim of ensuring that the Convention remains a living instrument in line with present day conditions. Judicial self-restraint may, on the other hand, be called by the specific features of the case or the fact that cannot be decided without taking into consideration special situations obtaining in the defendant State».

[92] P. DE SENA, *Proportionality and Human Rights in International Law: Some… "Utilitarian" Reflections*, in *Riv. dir. int.*, 2016, p. 1009.

idea of representing future generations in human rights litigation. Although the Court did not rule on the issue, this article tried to demonstrate that the recognition of future generations' *locus standi* before the ECtHR is not at odds with a possible evolutive and flexible interpretation of the victim status requirement under Art. 34 ECHR. At the same time, it proposed a possible inter-temporal dimension of the notion of State jurisdiction under Article 1 ECHR, but a more in-depth research is needed on such an issue. And indeed, with the growth of applications in the field of climate change and the protection of the environment, which are often lodged by NGOs claiming to represent collective and general interests, the Court will have to rule on such issues very soon.