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**DISSERTATION**

The right of local communities under International Human Rights Law to access cultural heritage: case study of Barrios Altos in Lima (Peru)

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**Abstract**

This dissertation explains how the right of local communities to cultural heritage, under International Human Rights Law, requires States to react to its destruction by private actors during peacetime. This work is relevant because there has been attacks against cultural heritage by such actors for the realization of economic activities during times of peace, but literature on cultural heritage has generally focused on its protection in the context of armed conflicts. This research argues that this right obliges States to prevent the destruction of cultural heritage through the enforcement of laws, to effectively punish the destruction via administrative and criminal avenues, and to provide access to remedies that facilitate the participation and access to information. It applies the legal framework on the right to cultural heritage to a case study: the destruction of two historic buildings in Barrios Altos (Lima).

## Introduction

Communities and individuals have created and developed cultural objects and manifestations, through which they have formed and expressed their cultural identity. They have inherited and transmitted such expressions. Due to its connection with human dignity, cultural heritage is considered a human right involving the entitlements of communities and individuals to its access and enjoyment.<sup>1</sup> States on their part are obliged to respect, protect and fulfil this right.<sup>2</sup>

Nevertheless, cultural heritage has been attacked or damaged by States and non-state actors in conflict and non-conflict situations. Destruction of cultural heritage has taken place in armed conflicts because of its military use or objective.<sup>3</sup> In many instances, whether in peacetime and wartime, harm to cultural heritage has been generated by States and non-actors to persecute individuals and communities on the basis of their cultural identity.<sup>4</sup> In order to protect cultural heritage in these situations, international law has created and developed international instruments in the specialist areas of International Humanitarian Law and International Criminal Law.

It is worth noting that the destruction of cultural heritage has not only occurred in wartime, nor only has it been motivated on the link of cultural heritage with cultural identity. There has been attacks against cultural heritage in peacetime for the realization of economic activities by non-state actors. Barrios Altos, in Lima (Peru), is an example. This is an urban area of the Historic Centre of Lima, which possesses an extensive tangible cultural heritage, composed of historic buildings, churches, squares, monuments,<sup>5</sup> and archaeological sites,<sup>6</sup> alongside intangible cultural expressions developed by its local communities or residents.<sup>7</sup> Approximately, since the 1990s, many historic buildings have been demolished by individuals and business companies

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<sup>1</sup> UNHRC 'Report of the Special Rapporteur in the field of cultural rights on the right of access to and enjoyment of cultural heritage' (2011) UN Doc A/HRC/17/38, para. 58-60.

<sup>2</sup> UNHRC (n 1) para. 64-72.

<sup>3</sup> UNHRC 'Report of the Special Rapporteur in the field of cultural rights on the intentional destruction of cultural heritage' (2016) UN Doc A/71/317, para. 17-24, 47-51.

<sup>4</sup> UNHRC (n 3) para. 33-42.

<sup>5</sup> Centro de Investigación, Documentación y Asesoría Poblacional and others (eds), *Centro Histórico de Lima. Patrimonio Humano y Cultural en Riesgo* (Maña Publicidad 2011), 28-41.

<sup>6</sup> Municipalidad Metropolitana de Lima. Ordenanza N°2194, que aprueba el Plan Maestro del Centro Histórico de Lima al 2019 con visión al 2035, Sección II. Diagnóstico, 17.

<sup>7</sup> Municipalidad Metropolitana de Lima (n 6) Sección II. Diagnóstico, 404; Alejandro Reyes, *Barrios Altos. La otra historia de Lima. Siglos XVIII-XX* (2nd edn, Qellca.com 2021), 265.

with the aim of constructing warehouses, used for the wholesale of products.<sup>8</sup> These works have led to the destruction of cultural heritage of local communities.<sup>9</sup>

As the damage to cultural objects and manifestations is a human rights issue,<sup>10</sup> it is relevant to reflect on the role of States in safeguarding cultural heritage. In this regard, state obligations derived from the right to cultural heritage are key to identifying such a role, thereby this research poses the following research question: How does the right of local communities to cultural heritage require States to react to its destruction by non-state actors during peacetime?

This dissertation argues that the right of local communities to cultural heritage and its concomitant state obligations require States to prevent the destruction of cultural heritage through the enforcement of laws, to effectively punish the destruction via administrative and criminal avenues, and to provide access to remedies that promote participation and access to information.

The present dissertation analyses the nature of the right to access to and enjoyment of cultural heritage and the scope of its related state obligations in scenarios of the destruction of cultural heritage by non-actors in peacetime. This thesis explores this issue using Barrios Altos as a case-study.

This work uses a doctrinal analysis, as it explains the content of the right to cultural heritage and the scope of its related state obligations.<sup>11</sup> For this end, it conducts desk-research and relies on international legal instruments and case-law of international human rights bodies to determine the treatment given to the right to cultural heritage under International Human Rights Law. Legal

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<sup>8</sup> Alejandro Reyes (n 7) 267.

<sup>9</sup> Kelly Jaime and Diana Bernales, 'Barrios Altos: Hacia un nuevo contrato social para la reducción de desigualdades en el habitar urbano' (2021) Knowledge in Action for Urban Equality Working Paper Series 6 <<https://www.urban-know.com/no-6-esp-know-working-paper>> accessed 15 August 2022, 8, 12-13. UNESCO has identified that '(...) the uncontrolled commercial exploitation of ancient structures altered to build "popular commercial centres" (...) is one of the factors that degrades the cultural heritage of the Historic Centre of Lima. UNESCO, 'Historic Centre of Lima' (UNESCO World Heritage Convention) <<https://whc.unesco.org/en/list/500/>> accessed 7 September 2022.

<sup>10</sup> UNHRC (n 3) para. 13.

<sup>11</sup> This work follows the definition of doctrinal legal research developed by Khushal Vibhute and Filipos Aynalem: 'Doctrinal legal research is defined as research into legal doctrines through analysis of statutory provisions and cases by the application of power of reasoning. It gives emphasis on analysis of legal rules, principles or doctrines'. Khushal Vibhute and Filipos Aynalem, *Legal Research Methods. Teaching Material* (Justice and Legal System Research Institute 2009), 70.



instruments encompass human rights treaties,<sup>12</sup> as well as culture conventions adopted within UNESCO. With the aim of interpreting article 15.1.a ICESCR, General Comment No. 21 is taken into account. The work of the Special Rapporteur in the Field of Cultural Rights is incorporated in the study of this article, including its landmark report on the right to cultural heritage.<sup>13</sup> In addition, case law -mainly of the Human Rights Committee (HRCee) and the Inter-American Court of Human Rights (IACtHR)- is discussed.<sup>14</sup> Furthermore, theoretical perspectives on the right to cultural heritage are included. This right is also interpreted taking into account its connection with other rights, especially the right to take part in cultural life.

The case study chosen in this research represent very well the scenario where non-state actors silently cause harm to cultural heritage for profit in times of peace. Two historic buildings in Barrios Altos (Lima) which were demolished for the construction of warehouses are selected for the case study. These buildings, considered tangible heritage, were also related to cultural manifestations of local communities of Barrios Altos. UNESCO documents, national law, state and NGOs reports, and academic publications are used for the description and analysis of this case-study. The author of this research also obtained public information held by the Ministry of Culture of Peru about the destruction of the historic buildings under study, by virtue of the right of access to public information. The present project analyzed facts concerning the case-study which occurred until 15 September 2022. Interviews with members of local communities of Barrios Altos could not be conducted due to time constrains, even though it would have contributed to understanding the impact of these private works and economic activities on their cultural heritage.

This work is structured in three parts. The first chapter examines the content of the right to cultural heritage and the scope of its concomitant state obligations under International Human Rights Law, especially in the context of the destruction of cultural heritage by non-state actors in peacetime. Alongside setting out the human dimension of cultural heritage, it develops the state obligation to protect, mainly the aspects concerning the enforcement of legal frameworks and reparation

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<sup>12</sup> This dissertation uses international legal instruments of the Universal and Inter-American Human Rights Systems, as the case-study is from Peru.

<sup>13</sup> UNHRC (n 1).

<sup>14</sup> This dissertation verified that in the Jurisprudence database of the Office of the High Commissioner for Human Rights there was not any view adopted by the ICESCR Committee concerning the right to take part in cultural life (article 15.1.a of the ICESCR). OHCHR, 'Jurisprudence database' (OHCHR) <<https://juris.ohchr.org/Search/Documents>> accessed 1 September 2022.

decisions, and participation in the processing of administrative remedies. This section studies comprehensively the right to cultural heritage, and therefore devotes a significant amount of research on this right, with the view to laying down what it means and entails, taking into account that cultural rights have historically been underdeveloped.<sup>15</sup> Therefore, this dissertation maintains that there is a need to provide a straightforward account of the right to cultural heritage.

The second chapter broadly describes the general context of the damage to the cultural heritage of Barrios Altos by private actors for the construction and operation of warehouses. It explains that this destruction aggravates the already severe situation of deterioration affecting historic buildings. Local communities or residents of Barrios Altos are identified and their relationship with traditional dwellings is laid down. This section also examines the protection afforded by the Peruvian legal system to the cultural heritage of this urban sector, in relation to the destruction by private actors. It particularly focuses on the role of the Ministry of Culture of Peru.

The third section, which contains the main legal analysis, presents the case study concerning the destruction of two historic buildings located in Barrios Altos. This chapter applies the right to cultural heritage to the case study; the state actions or omissions in relation to the protection of the cultural heritage of Barrios Altos are set out and it is asked if such conduct contravened the obligations stemmed from the right to cultural heritage.

The added value of this dissertation to the larger scholarship on the right to cultural heritage consists in the understanding of this right in the context of the destruction of cultural heritage by private actors in peacetime. Literature on cultural heritage has generally focused on its protection in the context of armed conflicts, and not in times of peace, where cultural heritage can also be harmed (for example, for profit). In addition, this dissertation fills a gap by applying a under explored legal framework to a case-study that has not been studied before: the destruction of historic buildings in Barrios Altos, Lima (Peru).

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<sup>15</sup> Scholars have not examined in detail the scope of state obligations derived from the right to cultural heritage in the context of its destruction by non-state actors.

## **Chapter 1: The right to cultural heritage in International Human Rights Law**

The right to access to and enjoyment of cultural heritage or the right to cultural heritage forms part of international and regional human rights instruments. The present chapter defines the content of this right based on such instruments and case-law. Its concomitant state obligations are developed, especially in relation to the conduct of non-state actors.

### **1.1. Categorization of the right to cultural heritage**

The right to cultural heritage has been recognized as a human right, due to its relation to human dignity and identity.<sup>16</sup> It allows individuals and collectivities to interact with cultural objects and manifestations that contribute to their development and to the formation of their identity.<sup>17</sup> The human rights approach to cultural heritage has been decisive in providing its status as a human right, as it focuses on the rights of individuals and collectivities involved in cultural creations.<sup>18</sup>

This right belongs to the realm of cultural rights. This set of rights protects the human creativity, the right to choose one's own identity and the freedom to recreate it, the right of individuals and collectivities to take part in the cultural life, their right to interact and share, the right of such subjects to gain access and enjoy cultural heritage, and their right to participate in the field of cultural heritage.<sup>19</sup>

Cultural rights are key to the overall realization of human rights, and form part of the responses to present-day challenges, including conflict and post-conflict situations, discrimination and poverty.<sup>20</sup> Said rights are empowering and transformative, as they provide opportunities for marginalized groups to exercise other human rights.<sup>21</sup> They are not a luxury, disposable when priorities must be established, because they are '(...) essential to people's sense of self as well as future aspirations'.<sup>22</sup>

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<sup>16</sup> UNHRC (n 1) para. 2.

<sup>17</sup> UNHRC (n 1) para. 6, 58.

<sup>18</sup> UNHRC (n 1) para. 2; UNHRC (n 3) para. 53; UNHRC 'Report of the Special Rapporteur in the field of cultural rights on mapping of cultural right and preliminary views of cultural heritage as a violation of human rights' (2016) UN Doc A/HRC/31/59, para. 70.

<sup>19</sup> UNHRC (n 18) para. 9.

<sup>20</sup> UNHRC (n 18) para. 5.

<sup>21</sup> Farida Shaheed, 'The United Nations cultural rights mandate: reflections on the significance and challenges' in Lucky Belder and Helle Porsdam (eds), *Negotiating cultural rights: issues at stake, challenges and recommendations* (Edward Elgar 2017), 34.

<sup>22</sup> *Ibid.*

The right to cultural heritage is legally recognized in articles 22 and 27 of the Universal Declaration of Human Rights (UDHR),<sup>23</sup> article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>24</sup> article 27 of the International Covenant on Civil and Political Rights (ICCPR),<sup>25</sup> articles 45, 47, 48 and 50 of the Organization of American States Charter (OAS Charter),<sup>26</sup> article XIII of the American Declaration of the Rights and Duties of Man (ADHR),<sup>27</sup> article 26 of the American Convention on Human Rights (ACHR),<sup>28</sup> and article 14 of the Protocol of San Salvador.<sup>29</sup>

## **1.2. Connection with the right to take part in cultural life: a window to key concepts**

By identifying the legal basis of the right to cultural heritage, it is noted that this right has a strong link with the right to take part in cultural life. The latter right '(...)' implies that individuals and communities have access to and enjoy cultural heritages that are meaningful to them, and that

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<sup>23</sup> With regard to UDHR, article 22 indicates that "Everyone, as a member of society, has the right (...) and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality", and article 27 asserts that '1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts (...)'

<sup>24</sup> In relation to ICESCR, article 15 envisages that '1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life (...)'. It is to be noted that numerals 2 and 4 of this article contemplate a set of measures that States should adopt in the field of cultural heritage.

<sup>25</sup> As regards ICCPR, article 27 sets out that 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture (...)'

<sup>26</sup> In respect to OAS Charter, article 45 holds that States Parties should adopt all efforts to attain a just social order, which implies the application of the following principles or mechanisms: '(...) f) The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the (...) cultural (...) life of the nation (...) g) Recognition of the importance of the contribution of (...) cultural (...) neighborhood, and community associations to the life of the society and to the development process (...)'. In addition, its article 47 establishes that 'The Member States will give primary importance within their development plans to the encouragement of education, science, technology, and culture, oriented toward the overall improvement of the individual, and as a foundation for democracy, social justice, and progress'. Furthermore, its article 48 indicates that States Parties '(...)' will consider themselves individually and jointly bound to preserve and enrich the cultural heritage of the American peoples'. Moreover, its article 50 enshrines that such States '(...)' will ensure that the benefits of culture will be available to the entire population'.

<sup>27</sup> With regard to ADHR, article XIII asserts that 'Every person has the right to take part in the cultural life of the community, to enjoy the arts (...)'

<sup>28</sup> In relation to ACHR, article 26 stipulates that 'The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires'.

<sup>29</sup> As regards Protocol of San Salvador, article 14 sets out that '1. The States Parties to this Protocol recognize the right of everyone: a. To take part in the cultural and artistic life of the community (...)'. Numerals 2 and 4 of this article establish a set of measures that States should adopt in the field of cultural heritage.

their freedom to continuously (re)create cultural heritage and transmit it to future generations should be protected'.<sup>30</sup>

Due to this connection, studying the right to take part in cultural life contributes to understanding central aspects of the right to cultural heritage.<sup>31</sup> As regards the term "cultural life" in the right to take part in cultural life, CESCR has held that it refers to '(...) culture as a living process, historical, dynamic and evolving, with a past, present and a future'.<sup>32</sup> Culture, according to this monitoring body, is broadly understood as '(...) all the manifestations of human existence',<sup>33</sup> including ways of life, the arts, customs and traditions, whereby '(...) individuals, groups of individuals, and communities express their humanity and the meaning they give to their existence, and build their world view (...)'.<sup>34</sup> In examining the content of the right of members of ethnic, religious and linguistic minorities to enjoy their own culture, the HRCee has also embraced a holistic notion of culture: '(...) [it] manifests itself in many forms, including a particular way of life associated with the use of land resources. (...)'.<sup>35</sup> Traditional activities of cultural communities such as animal-husbandry<sup>36</sup>, fishing<sup>37</sup> and hunting<sup>38</sup> have been considered part of culture. At the regional level, the IACtHR has maintained an ample concept of culture as well, including ways of life associated

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<sup>30</sup> UNHRC (n 1) para. 34.

<sup>31</sup> A valuable document by the CESCR on the right to take part in cultural life is General Comment No 21, which develops the normative content, elements, right-holders and state obligations concerning this right. CESCR, 'General Comment No 21: Right of everyone to take part in cultural life' (2009) UN Doc E/C.12/GC/21.

<sup>32</sup> CESCR (n 31) para. 11. As Yvonne Donders has maintained, 'Culture is not a static notion, but a dynamic one which can develop and change over time. It is less a product than a process, which has no well-defined boundaries and is influenced by internal and external interactions'. Yvonne Donders, 'Foundations of Collective Cultural Rights in International Human Rights Law' in Andrzej Jakubowski (ed), *Collective Cultural Rights and International Human Rights Law* (Brill 2016), 100.

<sup>33</sup> CESCR (n 31) para. 11.

<sup>34</sup> *Ibid*, para. 13.

<sup>35</sup> HRCee, 'General Comment No 23: The rights of minorities (Art. 27)' (1994) UN Doc CCPR/C/21/Rev.1/Add.5, para. 7.

<sup>36</sup> HRCee, *Jouni Lämsman and others v. Finland*, Communication No. 1023/2001 (17 March 2005), para. 10.1; HRCee, *Kitok v. Sweden*, Communication No. 197/1985 (27 May 1988), para. 9.1; HRCee, *Poma Poma v. Peru*, Communication No. 1457/2006 (27 March 2009), para. 7.3.

<sup>37</sup> HRCee, *Poma Poma v. Peru*, Communication No. 1457/2006 (27 March 2009), para. 7.2.

<sup>38</sup> HRCee, *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), para. 3.5, 29.1. and 33.

to nature's gifts, sacred sites, traditional ceremonies,<sup>39</sup> and customary access to water and food resources.<sup>40</sup>

In relation to the term "to take part", CESCR has explained that it encompasses a) Participation, through which everyone chooses his or her own identity, and seeks, develops and shares with others his or her cultural expressions; b) Access, whereby everyone knows and understands his or her own culture and that of others, including cultural heritage; and c) Contribution, through which everyone engages in the creation of cultural manifestations of the community, and participates in the definition, formulation and implementation of policies and decisions affecting his or her cultural rights.<sup>41</sup>

### **1.3. Entitlements of the right to cultural heritage**

The UN Special Rapporteur in the Field of Cultural Rights has explained the entitlements of the right to cultural heritage, expanding on the preceding term "to take part":

Access to and enjoyment of cultural heritage are interdependent concepts – one implying the other. They convey an ability to, inter alia, know, understand, enter, visit, make use of, maintain, exchange and develop cultural heritage, as well as to benefit from the cultural heritage and creations of others, without political, religious, economic or physical encumbrances. Individuals and communities cannot be seen as mere beneficiaries or users of cultural heritage. Access and enjoyment also imply contributing to the identification, interpretation and development of cultural heritage, as well as to the design and implementation of preservation/safeguard policies and programmes. Effective participation in decision-making processes relating to cultural heritage is a key element of these concepts.<sup>42</sup>

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<sup>39</sup> *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgement, Inter-American Court of Human Rights Series C No 245 (27 June 2012), para. 104-105.

<sup>40</sup> *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Judgement, Inter-American Court of Human Rights Series C No 400 (6 February 2020), para. 237, 284.

<sup>41</sup> CESCR (n 31), para. 15.

<sup>42</sup> UNHRC (n 1), para. 58.

#### 1.4. Titulaires of the right to cultural heritage

In respect to the holders of the right to cultural heritage, it is considered both an individual and collective right, as it may be exercised by a person '(...) alone, in association with others, or as a community', thereby its subjects are individuals and collective entities.<sup>43</sup>

In relation to collective rights, Yvonne Donders has clarified that they entail three categories of rights which are grounded on human rights provisions: a) community rights, whose right-holder is a collectivity, such as a people or a community; b) communal rights, whose titulaire is an individual who is a member of a collectivity, and in which this membership is often expressly mentioned; and c) individual rights with a collective dimension, whose right-holder is an individual, and not explicit mention is made to a collectivity, but the exercise of these rights has a collective dimension.<sup>44</sup> This collective dimension alludes, *inter alia*, to the object of the right, namely, a collective interest.<sup>45</sup> Culture and cultural heritage are considered collective interests.<sup>46</sup> Cultural rights are collective rights,<sup>47</sup> therefore the right to cultural heritage has also this character.

Particularly, the right to cultural heritage fits within these categories of collective rights: a) it is community right, when it is exercised by a collective entity (for example, a local community or an indigenous people); b) it is a communal right, when it is enjoyed by a member of a collective entity; and c) it is an individual right with a collective dimension, when it is exercised by an individual alone, but, due to the importance of cultural heritage for communities, this category also acquires the status of a collective right.

According to the type of connection between an individual or collectivity with a specific cultural heritage, right-holders have a varying degree of access and enjoyment of the cultural heritage involved, with priority given to those titulaires with the closest proximity to the cultural creation.<sup>48</sup>

As stated by the UN Special Rapporteur in the Field of Cultural Rights:

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<sup>43</sup> Ibid, para. 61.

<sup>44</sup> Donders (n 32), 89-90. In relation to cultural rights, Farid Shaheed has indicated that the collective aspect of such right is particularly relevant for local and indigenous communities. Shaheed (n 21), 25.

<sup>45</sup> Donders (n 32), 90.

<sup>46</sup> Ibid, 101, 111.

<sup>47</sup> Ibid, 101

<sup>48</sup> Yvonne Donders, 'Cultural Heritage and Human Rights' in Francesco Francioni and Ana Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020), 401.

Distinctions should be made between (a) originators or 'source communities', communities which consider themselves as the custodians/owners of a specific cultural heritage, people who are keeping cultural heritage alive and/or have taken responsibility for it; (b) individuals and communities, including local communities, who consider the cultural heritage in question an 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.<sup>49</sup>

Accordingly, local communities are holders of the right to cultural heritage. If they consider themselves as custodians of certain cultural creations or recreate them, they fall under the category a). Meanwhile, if they consider that a specific cultural heritage is part of their way of life, but may not actively participate in its maintenance, they correspond to the category b).<sup>50</sup>

### **1.5. Human dimension of cultural heritage**

According to the UN Special Rapporteur in the Field of Cultural Rights, the concept of cultural heritage in the human rights context alludes to

(...) the multiple heritages through which individuals and communities express their humanity, give meaning to their existence, build their worldviews and represent their encounter with the external forces affecting their lives. Cultural heritage is to be understood as resources enabling the cultural identification and development processes of individuals and communities which they, implicitly or explicitly, wish to transmit to future generations.<sup>51</sup>

This UN Special Procedure signals that there are three categories of cultural heritage:

(...) tangible heritage (e.g. sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value), intangible heritage (e.g. traditions, customs and practices, aesthetic and spiritual beliefs; vernacular or other languages; artistic expressions, folklore), and natural heritage (e.g. protected natural reserves; other

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<sup>49</sup> UNHRC (n 1) para. 62.

<sup>50</sup> It can be possible that certain members or communities do not identify with the existing cultural heritage in the territory where they live. In relation to that cultural heritage, they would fall under categories c) and/or d).

<sup>51</sup> UNHRC (n 1) para. 6.



protected biologically diverse areas; historic parks and gardens and cultural landscapes).<sup>52</sup>

The definition of cultural heritage envisaged in conventions adopted within UNESCO and other international bodies has expanded since the second half of the twentieth century: tangible heritage has been covered since the first culture treaty (1954 UNESCO Convention), natural heritage has been contemplated since the 1970s (UNESCO World Heritage Convention), and intangible heritage has been enshrined since the 2000s (UNESCO Convention for the Safeguarding of Intangible Cultural Heritage).<sup>53</sup> According to Yvonne Donders, tangible and intangible heritage should not be considered as isolated compartments, because tangible heritage also entails intangible aspects.<sup>54</sup>

The incorporation of intangible elements to the notion of cultural heritage has proved key to reinforcing the relationship of cultural heritage with communities and individuals. The intangible aspects of cultural heritage have stronger connection with the formation of the cultural identity of individuals and communities, compared to the tangible elements, which originally implied the protection of artifacts themselves and the rights of States over them.<sup>55</sup>

The inclusion of intangible elements into the concept of cultural heritage has also strengthened the human dimension of cultural heritage, as cultural identity forms part of human dignity.<sup>56</sup> This dimension refers to the understanding of cultural heritage as the source of identity and value to particular persons and groups.<sup>57</sup>

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<sup>52</sup> Ibid, para. 4.

<sup>53</sup> Francesco Francioni and Ana Vrdoljak, 'Introduction' in Francesco Francioni and Ana Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020), 2-3. Xanthaki refers to the significant role played by the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage in the incorporation of intangible cultural heritage into the definition of cultural heritage. Alexandra Xanthaki, 'International instruments on cultural heritage: Tales of fragmentation' in Alexandra Xanthaki and others (eds), *Indigenous Peoples' Cultural Heritage* (Brill 2017), 7.

<sup>54</sup> Donders has stated in this regard that 'Material and physical heritage needs to be placed in a historical and cultural context in order to understand its value'. Donders (n 48) 385.

<sup>55</sup> The definition of intangible cultural heritage, contemplated in the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, acknowledges that communities and individuals are those who create and maintain cultural heritage. Donders (n 48) 385.

<sup>56</sup> Ibid.

<sup>57</sup> UNHRC (n 1) para. 7, 77.

Currently, the concept of cultural heritage encompasses both tangible and intangible elements and has a dynamic nature: 'Cultural heritage is developed, created, interpreted, and re-interpreted in a dynamic world of interaction'.<sup>58</sup>

### **1.6. Shift in international law towards the recognition of the human dimension of cultural heritage**

The approach to cultural heritage in international law has changed towards the recognition of its human dimension: '(...) a shift has taken place from the preservation/safeguard of cultural heritage as such, based on its outstanding value for humanity, to the protection of cultural heritage as being of crucial value for individuals and communities in relation to their cultural identity'.<sup>59</sup>

This transition in international law has also been highlighted by scholars.<sup>60</sup> Yvonne Donders has underscored that in international law there has been a shift from the protection of cultural heritage based on its historical importance for humanity and its consideration as a matter of state sovereignty to the protection of cultural heritage as an important issue for communities and individuals in respect to the formation of their identity.<sup>61</sup> In other words, the safeguarding of cultural heritage for the public at large has geared towards the protection of cultural heritage of and for the communities involved.<sup>62</sup>

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<sup>58</sup> Ibid, para. 379-380. In this regard, the Special Rapporteur in the Field of Cultural Rights has also stressed the dynamic nature of cultural heritage: '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', UNHRC (n 1) para. 5.

<sup>59</sup> UNHRC (n 1) para. 20.

<sup>60</sup> Apart from the scholars referred to in the body text, see Andrzej Jakubowski, 'Culture and Human Rights: Concepts, Instruments and Institutions' in Andreas Wiesand and others (eds), *Culture and human rights: the Wroclaw commentaries* (De Gruyter 2017), 7.

<sup>61</sup> Donders (n 48) 380, 384.

<sup>62</sup> Ibid, 382. Blake has identified three approaches to cultural heritage making up that shift in international law: a) Nationalist or statist focus, which views cultural heritage as an issue of national identity. This position maintains that States of origin hold preferential rights over cultural objects (such as that of control and retainment). It is reflected in the 1970 UNESCO Convention for the prohibition and prevention of illicit trafficking and movement of cultural property and 1995 UNIDROIT Convention; b) Universalist focus, which considers cultural heritage as a matter of international cooperation, because it has elements that are of such outstanding value that they should be protected for the benefit of humankind. This position is envisaged in 1954 Convention and 1972 World Heritage Convention; c) Local focus, which conceives of cultural heritage as a source of value and identity to local communities. This position is reflected in the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. Janet Blake, *International cultural heritage law* (Oxford University Press 2015), 12-18.

Although international law has increasingly referred to the relationship of cultural heritage with communities and individuals, Yvonne Donders has noted that instruments of international humanitarian law, international criminal law and UNESCO treaty-law do not recognize a human right of individuals and communities to cultural heritage.<sup>63</sup> Some of these treaties allude to human rights instruments or the exercise of cultural rights.<sup>64</sup>

### **1.7. Elements of the right to cultural heritage**

The right to cultural heritage is composed of the elements of availability, accessibility, acceptability, adaptability and appropriateness. The CESCR has developed these principles in relation to the right to take part in cultural life in its General Comment No. 21.<sup>65</sup> Due to the link between both rights, this account contributes to ascertaining the application of such principles to the right to cultural heritage.

In respect to the element of availability of the right to cultural heritage, it implies that cultural objects and manifestations should be present and open for the enjoyment and benefit of all persons.

In relation to the element of accessibility, it means that everyone should have effective and actual opportunities to benefit from cultural objects and manifestations. Specifically, the UN Special Rapporteur in the Field of Cultural Rights has asserted that this principle contemplates four dimensions: a) physical access; b) economic access, whereby the cost of access should be affordable to everyone; c) access to information, whereby all persons have the right to seek, obtain and disseminate information on cultural heritage; d) access to decision-making processes and monitoring mechanisms, encompassing administrative and judicial remedies. A cross-cutting principle is that of equality and non-discrimination, with special focus on groups requiring special protection.<sup>66</sup>

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<sup>63</sup> Donders (n 48) 380. The conceptualization of cultural heritage as a human right was for the first time endorsed by the UN Special Rapporteur in the Field of Cultural Rights in its 2011 report on that right. UNHRC (n 1).

<sup>64</sup> An example is the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

<sup>65</sup> CESCR (n 31) para. 16.

<sup>66</sup> UNHRC (n 1) para. 60.

As regards the element of acceptability, it requires that the measures for the satisfaction of the right should be formulated and adopted by the State in a manner that is acceptable to the communities and individuals concerned. For that end consultations with them should be arranged.

In respect to the element of adaptability, it posits that the measures adopted by the State in the area of cultural heritage should be consistent with the cultural diversity of individuals and communities.

In relation to the element of appropriateness, it means that the measures adopted by the State to safeguard this right should take into account the cultural values that individuals and communities attach to cultural heritage.

### **1.8. General state obligations**

As regards the general legal obligations derived from the right to cultural heritage, articles 1, 2 and 26 of the ACHR,<sup>67</sup> articles 1 to 3 of the Protocol of San Salvador,<sup>68</sup> article 2 of ICESCR,<sup>69</sup> and article 2 of ICCPR<sup>70</sup> envisage that States should adopt all necessary and appropriate measures,

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<sup>67</sup> Article 1 of the ACHR holds that '(...) 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'; and its article 2 enshrines that 'Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedom'.

<sup>68</sup> Article 1 of the Protocol of San Salvador contemplates that '(...) States Parties (...) undertake to adopt all necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol', and its article 3 establishes that '(...) The States parties (...) undertake to guarantee the exercise of the rights set forth without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition'.

<sup>69</sup> Article 2 of ICESCR maintains that '(...) 1. Each State Party (...) undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

<sup>70</sup> Article 2 of ICCPR asserts that '(...) 1. Each State Party (...) undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary

individually or through international cooperation, to the maximum of their available resources, to progressively achieve the full observance of the right to cultural heritage, and that they should guarantee the exercise of this right, without any discrimination based on prohibited grounds.

The obligation to progressive realization of cultural rights alludes to the duty of States '(...) to move as expeditiously and effectively as possible towards that goal', and it implies that any deliberately retrogressive step in relation to said rights is prohibited, unless it is fully and adequately justified.<sup>71</sup>

The duty to take measures towards the full observance of cultural rights requires that States adopt such measures within a reasonably short time after the entry into force of the treaty that envisages such an obligation.<sup>72</sup> These steps '(...) should be deliberate, concrete and targeted as clearly as possible (...)'.<sup>73</sup>

The obligation to secure cultural rights without discrimination on prohibited grounds requires States to eliminate discrimination existing within the legal or policy framework and that occurring in practice. In relation to the latter type of discrimination, States should provide sufficient attention to groups suffering '(...) historical or persistent prejudice (...)', and adopt '(...) the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination'.<sup>74</sup>

### **1.9. Specific state obligations**

The specific legal obligations relating to the right to cultural heritage are of three levels: to respect, to protect and to fulfil. This dissertation mainly examines said obligations in relation to the destruction of cultural heritage by non-state actors in peacetime.

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steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.

<sup>71</sup> CESCR, 'General Comment No 3: The nature of States parties obligations (Art. 2, par. 1)' (1990) UN Doc E/1991/23, para. 9.

<sup>72</sup> Ibid, para. 2.

<sup>73</sup> Ibid.

<sup>74</sup> CESCR, 'General Comment No 20: Non-discrimination in economic, social and cultural rights' (2009) UN Doc E/C.12/GC/20, para. 8.

### Obligation to respect

By virtue of the obligation to respect, States must abstain from interfering, in a direct or indirect manner, with the right to cultural heritage.<sup>75</sup> For example, they should not adopt policies favoring business activities carried out by non-state actors that infringe upon cultural rights.<sup>76</sup>

It is worth noting that General Comment No. 21 of the CESCR on the right to take part in cultural life<sup>77</sup> is relevant to ascertain the obligation to respect the right to cultural heritage, whereby this obligation implies the adoption of concrete measures directed at the respect for the right of everyone to receive information on cultural heritage, to have access to cultural heritage, and to participate, in an informed, active and non-discriminatory manner, in any significant decision-making procedure that may have an impact on that right.

### Obligation to protect

As regards the obligation to protect, States are required to take measures to avoid any violation of the right to cultural heritage by private actors in general<sup>78</sup>, and by business enterprises in particular.<sup>79</sup> It implies undertaking appropriate measures to avert, investigate, punish and redress said violations,<sup>80</sup> through effective legislative, regulatory and policy frameworks, and adjudication.<sup>81</sup>

Among the measures to protect this right, States should provide appropriate, adequate, prompt and effective remedies, including reparation.<sup>82</sup> Remedies should be available to individuals and groups who consider that their right has been infringed upon.<sup>83</sup> Access to effective remedies

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<sup>75</sup> UNHRC (n 1) para. 66.

<sup>76</sup> CESCR, 'General Comment No 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (2017) UN Doc E/C.12/GC/24, para. 12.

<sup>77</sup> CESCR (n 31) para. 49.

<sup>78</sup> UNHRC (n 1) para. 66, 80 b).

<sup>79</sup> CESCR (n 76) para. 14.

<sup>80</sup> In relation to the scope of the obligation to protect human rights in general, see UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. UNGA Res 147 (21 March 2006) UN Doc A/RES/60/147, para. 3.

<sup>81</sup> As regards the scope of the obligation to protect human rights in the context of business activities, see Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Doc A/HRC/17/31, Principle 1.

<sup>82</sup> With regard to the access to remedies for violations of human rights, see UNGA (n 80) para. 2.

<sup>83</sup> UNHRC (n 1) para. 71, 80 l).

should also be supplied to victims in the context of business activities,<sup>84</sup> and it implies that '(...) victims seeking redress must have prompt access to an independent public authority, which must have the power to determine whether a violation has taken place and to order cessation of the violation and reparation to redress the harm done'.<sup>85</sup>

Remedies that States should make available are composed of judicial and non-judicial avenues.<sup>86</sup> The former includes criminal and civil remedies, which are adjudicated by the Judiciary.<sup>87</sup> The latter refers to administrative and quasi-judicial mechanisms, which can be resolved, inter alia, by state agencies, inspectorates, or supervision authorities.<sup>88</sup>

Access to justice entails providing reparations to victims for acts or omissions constituting violations of human rights that can be attributed to the State<sup>89</sup>. An example refers to the situation where States '(...) fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse'.<sup>90</sup> In addition, reparations should be provided by business corporations for violations of cultural rights linked to their business activities or for failing to operate with due diligence to mitigate risks resulting in such abuses.<sup>91</sup>

Individuals and groups should have access to remedies, in order to lodge claims for reparation and to obtain it, as appropriate.<sup>92</sup> In litigations processes, the specific link of communities to cultural manifestations or objects should be fully taken into account.<sup>93</sup>

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<sup>84</sup> CESCR (n 76) para. 14. The Human Rights Committee has pointed out that '(...) the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations', HRCee, 'General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para. 19.

<sup>85</sup> CESCR (n 76) para. 41.

<sup>86</sup> In relation to the access to remedies for gross violations of human rights, see UNGA (n 80) para. 12. In the context of business activities, see CESCR (n 76) para. 51-57.

<sup>87</sup> In the context of business activities, see CESCR (n 76) para. 51-52.

<sup>88</sup> Ibid, para. 53-57.

<sup>89</sup> UNGA (n 80) para. 15.

<sup>90</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (n 81) Commentary to Principle 1.

<sup>91</sup> CESCR (n 76) para. 15.

<sup>92</sup> UNGA (n 80) para. 13.

<sup>93</sup> UNHRC (n 1) para. 80 I).

Reparation measures '(...) should be proportional to the gravity of the violations and the harm suffered' and rely on the circumstances of each case.<sup>94</sup> Reparation for infringements of human rights can consist of restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition.<sup>95</sup>

States should enforce the decisions adopted over claims for reparation submitted by the victims,<sup>96</sup> and judgements for reparation '(...) against individuals or entities liable for the harm suffered (...)'.<sup>97</sup>

Additionally, within the scope of the obligation to protect, States should have a legal framework that allows victims to have access to information or evidence held by business corporations alleged to have violated cultural rights, so that victims can substantiate their claims, and these claims can be appropriately adjudicated.<sup>98</sup> Likewise, mechanisms or institutions vested with the responsibility to investigate and examine alleged abuses should publicize their results.<sup>99</sup>

As the destruction of cultural heritage is, in principle, a violation of cultural rights,<sup>100</sup> and States are obliged to prevent and punish such destruction, they should incorporate into their legal framework the prohibition of acts that amount to the destruction of cultural heritage, including those linked to economic activities carried out by individuals or business enterprises.<sup>101</sup>

The regulatory and policy frameworks developed by States to protect cultural rights should be enforced, thereby monitoring mechanisms are required.<sup>102</sup> This implies that States regularly evaluate the adequacy of such frameworks, determine whether recipients of such laws are

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<sup>94</sup> UNGA (n 80) para. 15, 18.

<sup>95</sup> CESCR (n 76) para. 41; HRCee (n 84) para. 16.

<sup>96</sup> CESCR (n 76) para. 24, 38, 55

<sup>97</sup> UNGA (n 80) para. 17

<sup>98</sup> CESCR (n 76) para. 45.

<sup>99</sup> CESCR (n 31) para. 72.

<sup>100</sup> UNHRC (n 3) para. 13.

<sup>101</sup> In the scenario that a certain business activity is not legally prohibited (as it does not, in principle, amount to the destruction of cultural heritage), but may have adverse impacts on the right to cultural heritage, it is necessary that States, by virtue of their obligation to protect, require business enterprises to conduct mandatory due diligence: 'The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant [ICESCR] rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights'. CESCR (n 76) para. 16.

<sup>102</sup> CESCR (n 76) para. 38. In relation to the obligation to monitor the realization of cultural rights, see CESCR (n 71) para. 11.



complying with them, and if not, identify the reasons for the compliance gap, and adopt measures to correct this situation.<sup>103</sup> Carrying out regular and effective inspections contribute to the enforcement of laws. States should produce information concerning the obstacles that may exist to the effectiveness of their existing remedies.<sup>104</sup>

#### Obligation to fulfil

In respect to the obligation to fulfil the right to cultural heritage, States must adopt all appropriate measures for its full realization by all people, which include dissemination of information on cultural heritage.<sup>105</sup> In referring to the right to take part in cultural life, the CESCR has explained that such measures encompass opportunities to access to diverse cultural expressions and existence of programmes for the preservation and restoration of cultural heritage.<sup>106</sup> Moreover, they involve the creation of effective mechanisms through which everyone effectively engage in decision-making processes, claim protection of his or her right and obtain compensation if it is found that the right has been violated.<sup>107</sup> In particular, sources communities should be consulted in order to provide their free, prior and informed consent, in relation to measures concerning their cultural heritage.<sup>108</sup>

#### Obligations concerning intentional destruction of cultural heritage

State duties are also relevant in the circumstance of intentional destruction of cultural heritage. According to the UN Special Rapporteur in the Field of Cultural Rights, the approach to put an end to intentional destruction requires a focus on prevention and punishment.<sup>109</sup> This focus implies that States adopt administrative, legislative, educational, budgetary and other appropriate measures to '(...) prevent, avert, stop and suppress intentional destruction of cultural heritage'.<sup>110</sup>

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<sup>103</sup> CESCR (n 76) para. 15; Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (n 81) Principle 3.

<sup>104</sup> HRCee (n 84) para. 20.

<sup>105</sup> UNHRC (n 1) para. 67, 80 j).

<sup>106</sup> CESCR (n 31) para. 52 a), 54 b).

<sup>107</sup> Ibid, para. 54. In relation to the participation in decision-making processes related to cultural heritage, an example is the consultation with people who identify with a cultural heritage, in order to ascertain, in the event of its destruction, '(...) whether (or not) they wish to rebuild, reconstruct and re-establish such a heritage and if so, how'. Ibid, para. 58.

<sup>108</sup> UNHRC (n 1) para. 80 c). In addition, the obligation to fulfil requires States to direct '(...) the efforts of business entities towards the fulfilment of Covenant [ICESCR] rights'. CESCR (n 76) para. 24.

<sup>109</sup> UNHRC (n 3) para. 77; UNHRC (n 18) para. 84, 88.

<sup>110</sup> UNHRC (n 3) para. 78 c); UNHRC (n 18) para. 91 c).

Moreover, it entails that States provide necessary training to public officials on the protection of cultural heritage, and take all measures to prosecute those responsible.<sup>111</sup> Understanding the reasons underlying the intentional destruction of cultural heritage (for example, profit) is key for effective prevention.<sup>112</sup> The response to this type of damage should be holistic, because it is '(...) often accompanied by other large-scale or grave assaults on human dignity and human rights'.<sup>113</sup>

The UN Special Rapporteur in the Field of Cultural Rights has added that States should respect, protect, stimulate and facilitate the work done by defenders of cultural rights, including those who strive for the promotion of the access to cultural heritage, and for its preservation and safeguarding.<sup>114</sup>

### **1.10. Core obligations**

The right to cultural heritage entails core obligations incumbent on the States, which include, *inter alia*, the removal of all barriers that, in a discriminatory manner, hinder the access of everyone to cultural heritage; the creation of programmes and policies to secure that everyone, without discrimination, have access to cultural events, activities and services; and the development of programmes to preserve and restore cultural heritage.<sup>115</sup> In addition, relying on the work of the CESCR in relation to the right to take part in cultural life,<sup>116</sup> it can be inferred that core obligations of the right to cultural heritage also cover the obligation to protect the right of all people to engage in their own cultural activities associated to cultural heritage, and imply that States incentivize the participation of persons belonging to minorities, indigenous peoples and other communities, in the formulation and implementation of policies and laws that have an impact on them.

### Conclusion

Cultural heritage is recognized as a human right under International Human Rights Law, as the interaction of individuals and communities with cultural heritages contributes to the satisfaction of their dignity, identity and development.

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<sup>111</sup> UNHRC (n 18) para. 78 d) and e).

<sup>112</sup> *Ibid*, para. 80.

<sup>113</sup> *Ibid*, para. 82.

<sup>114</sup> UNHRC (n 3) para. 78 k), l) and m); UNHRC (n 18) para. 74-75, 91 f).

<sup>115</sup> CESCR (n 31) para. 68.

<sup>116</sup> CESCR (n 31) para. 55.

In relation to the content of the right, it allows holders to, inter alia, learn about, understand, make use of, preserve and develop cultural heritage, as well as to benefit from cultural manifestations or objects. Such entitlements also require that individuals and communities are considered as participants in decision-making processes concerning cultural heritage.

With regards to the holders of this right, they are individuals and collective entities (for example, local communities). Priority is provided to those titulaires with the closest proximity to the cultural creation. In this regard, local communities keeping cultural heritage alive or considering it an integral part of their life have more degree of access and enjoyment of cultural heritage than artists, scientists and the general public.

In respect to the elements of the right to cultural heritage, they set out that participation of individuals and communities who identify with cultural heritage should be secured, and cultural creations should be present, open and physically accessible for the enjoyment and benefit of all persons. Particularly, the element of accessibility envisages that subjects of the right should have access to information and decision-making processes concerning cultural heritage (including remedies).

As regards state duties, the obligation to respect requires States to abstain from interfering in the right of everyone to access to information on cultural heritage and to participate, in an informed, active and non-discriminatory manner, in any significant decision-making procedure that may impact on the right.

The obligation to protect entails that States should adopt measures to avoid any violation of the right to cultural heritage by private actors. It requires the provision of judicial and non-judicial remedies, which should be appropriate, adequate, prompt and effective. Reparation decisions should be enforced by States. Victims require to be granted access to information on cultural heritage held by business corporations and public authorities hearing remedies. This obligation also requires the existence of effective monitoring mechanisms to secure the compliance of regulatory and policy frameworks on the right to cultural heritage.

The obligation to fulfil implies that States adopt appropriate measures to disseminate information on cultural heritage and to create effective mechanisms through which everyone effectively engage in decision-making processes.

Core obligations incumbent on States also underscore that States should promote the participation of communities in the formulation and implementation on laws that have an impact on their cultural heritage.

## **Chapter 2. Destruction of cultural heritage by non-state actors in Barrios Altos**

The present chapter describes the general context of destruction of cultural heritage by private actors involved in the activity of warehousing in Barrios Altos, which aggravates preceding inadequate housing conditions of historic buildings. Local communities of Barrios Altos are identified and their connection with this type of cultural heritage is explained. It examines the Peruvian legal framework concerning cultural heritage applicable to Barrios Altos.

### **2.1. The protection of the cultural heritage of Barrios Altos under the Peruvian legal system**

The right to cultural heritage is recognized in articles 1, 2, 3 and 21 of the National Constitution.<sup>117</sup> According to the Peruvian Constitutional Tribunal, '(...) the protection of national cultural heritage constitutes an authentic fundamental entitlement, whose status is basically diffuse'.<sup>118</sup>

According to the National Constitution, those treaties ratified by the Peruvian State and in force form part of the domestic legal system.<sup>119</sup> As Peru is a State party to the ICESCR, ICCPR, OAS Charter, ACHR and Protocol of San Salvador,<sup>120</sup> these treaties also make up the domestic legal framework.

As regards the notion of cultural heritage under the Peruvian legal system, it holds that cultural heritage encompasses

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<sup>117</sup> Article 1 establishes that 'The defense of the human person and respect for his dignity are the supreme purpose of the society and the State'.

Article 2 indicates that 'Every person has the right: (...) 17. To participate, individually or in association with others, in the political, economic, social and cultural life of the Nation. (...) 19. To his/her ethnic and cultural identity (...)'.  
Article 3 enshrines that 'The enumeration of rights established in this chapter [fundamental rights of the person] does not exclude others guaranteed by the Constitution, or others of a similar nature or those based on the dignity of the human being, nor those based on the principles of sovereignty of the people, the democratic rule of law, or the republican form of government'.

Article 21 envisages that 'Archaeological sites and remains, constructions, monuments, places, bibliographical documents and archival materials, art objects, and tokens of historical value, expressly declared cultural assets and those provisionally presumed to be so, are the cultural heritage of the Nation, irrespective of whether they are private or public property. They are protected by the State. (...)'.  
<sup>118</sup> Decision by the Constitutional Tribunal of Peru on 9 May 2007 in the record N°00551-2013-PA/TC, concerning an amparo filed by Asociación Civil – Patronato del Bosque El Olivar de San Isidro against María Rey, Hernando Aguirre and James Berckemeyer.

<sup>119</sup> Article 55 asserts that 'Treaties ratified by the State and in force take part of the national law'.  
<sup>120</sup> UN, 'United Nations Treaty Collection' (UN)

<<https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=en>> accessed 10 September 2022; OAS, 'Multilateral Treaties' (OAS) <[https://www.oas.org/DIL/treaties\\_subject.htm#General](https://www.oas.org/DIL/treaties_subject.htm#General)> accessed 10 September 2022.

(...) all manifestations of human activity -tangible and intangible-, which, due to their paleontological, archaeological, architectural, historic, artistic, military, social, anthropologic, traditional, religious, ethnological, scientific, technological or intellectual importance, value and significance, either expressly declared as such or under which exists a legal presumption of so being.<sup>121</sup>

In relation to tangible cultural heritage, the Peruvian legal system signals that they

(...) encompass, in a non-exhaustive manner, buildings, infrastructure works, monumental settings and ensembles, historic centers and other constructions, or material evidence derived from urban/rural life and human activity, irrespective of whether they are composed of assets from diverse antiquity or purpose (...) their landscape and those submerged into aquatic spaces of the national territory.<sup>122</sup>

As regards intangible cultural heritage, it is composed of

(...) creations of a cultural community based on traditions, which are manifested by individuals, alone or in groups, and are a recognizable response to the expectations of the community, as an expression of the social and cultural identity, as well as the orally transmitted values, such as indigenous languages and dialects, traditional knowledge and wisdom, either artistic, gastronomic, medicinal, technological, folkloric or religious; collective knowledge of peoples and other cultural expressions and manifestations that altogether make up our cultural diversity.<sup>123</sup>

In relation to the cultural heritage existing in Barrios Altos, it is worth noting that Barrios Altos is a set of traditional neighborhoods located in eastern side of the Historic Centre of Lima.<sup>124</sup> It also forms part of the Monumental Zone of Lima which extends over the Historic Centre of Lima,<sup>125</sup>

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<sup>121</sup> Ley General del Patrimonio Cultural de la Nación, Article II of its Preliminary Section.

<sup>122</sup> Ibid, article 1.

<sup>123</sup> Ibid.

<sup>124</sup> Regarding the concept of historic center, article 7 of the Resolución Directoral Nacional N°061-INC stipulates that it is '(...) a living human settlement, strongly conditioned to a physical structure derived from the past, recognized as representative of the evolution of a people'.

<sup>125</sup> Resolución Suprema N°2900, 21. According to article 10 of the Resolución Directoral Nacional N°061-INC, the notion of Urban Monumental Zone refers to those '(...) sectors or neighborhoods of a city whose physical characteristics must be preserved for any of the following reasons: They own a collective urban value; possess a bibliographical, historic and/or artistic value; and/or gather a considerable number of monuments or monumental urban settings'.

and encompasses a set of monumental urban settings.<sup>126</sup> It has historic buildings from colonial and republican times, such as mansions built by then well-off families, as well as alleyways (callejones) and other multi-family housing units (quintas) erected for low and middle classes.<sup>127</sup> It has also archaeological sites.<sup>128</sup> Therefore, the Peruvian legal system recognizes that Barrios Altos has tangible cultural heritage.

*Picture 1. Historic buildings in Áncash street, Barrios Altos. 2019. Photograph by Marco Gamarra Galindo.*



Certain cultural heritages of Barrios Altos are also protected by the inscription of the Historic Centre of Lima in the World Heritage List of UNESCO in 1991.<sup>129</sup> The area of this World Heritage Property covers some urban blocks and lots of Barrios Altos.<sup>130</sup>

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<sup>126</sup> According to article 5 of Resolución Directoral Nacional N°061-INC, monumental urban settings are '(...) those public spaces whose physical characteristics and elements, due to their collective urban value, such as scale, height, volumetry, should be partially or fully preserved'. The list of monumental urban settings existing in Barrios Altos can be found in the following website: Ministerio de Cultura, 'Sistema de consulta de bienes inmuebles' (Ministerio de Cultura) <<http://sistemas.cultura.gob.pe/MINC-BIMWEB/pages/principal/login.jsfx>> accessed 1 September 2022.

<sup>127</sup> Reyes (n 7), 31-36, 40-257-265.

<sup>128</sup> Municipalidad Metropolitana de Lima (n 6) Sección II. Diagnóstico, 17.

<sup>129</sup> UNESCO (n 9).

<sup>130</sup> The remaining area belongs to the buffer zone.

Picture 2. Historic buildings in Junín street, Barrios Altos. 2019. Photograph by Marco Gamarra Galindo.



Among the protection afforded to cultural heritage, the Peruvian legislation establishes that private ownership has limits and imply obligations on their titulares, based on the public interest and the need for its preservation:<sup>131</sup>

All public or private works consisting of new edification, remodeling, restauration, extensions, repairs, refurbishment, demolition, renovation and other work that involve a property constituting national cultural heritage, require the authorization of the Ministry of Culture for their implementation.<sup>132</sup>

Regulatory frameworks enacted by the Metropolitan Municipality of Lima are also relevant for the protection of the cultural heritage of Historic Centre of Lima, including that of Barrios Altos. Ordenanza N° 893 divides the area of the Historic Centre into zones reserved for different human activities or land uses.<sup>133</sup> This legal instrument poses limits to private ownership with the view to safeguarding cultural heritage. It prohibits the activity of warehousing in the Historic Centre of Lima.<sup>134</sup>

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<sup>131</sup> Ley General del Patrimonio Cultural de la Nación, article 4.

<sup>132</sup> Ibid, article 22.

<sup>133</sup> Municipalidad Metropolitana de Lima. Ordenanza N°893, que aprueba el Reajuste Integral de la Zonificación de los Usos del Suelo del Cercado de Lima.

<sup>134</sup> Ibid, article 3 and annex 3. In relation to this historic center, its article 2 and the chart N°01 of annex 2 of the Municipal Ordinance establish a maximum allowable height of buildings: 9 metres for buildings



In the scenario of threats and violations of the right to cultural heritage, the Peruvian State has made available judicial and non-judicial remedies, one of which is the administrative remedy heard and resolved by the Ministry of Culture. This state entity is competent to impose sanctions in the administrative plane:<sup>135</sup> *inter alia*, punitive fines for the alteration of cultural properties constituting national cultural heritage,<sup>136</sup> and demolition or punitive fines in the event of public or private work carried out in such properties without the authorization of the Ministry of Culture.<sup>137</sup> It can also order corrective measures, which are reparations in the form of restitution or mitigation of damages to cultural heritage.<sup>138</sup>

Through this remedial mechanism, the ministry carries out a set of acts aimed at determining the existence or not of administrative offences against cultural heritage and the responsibility of the defendants. For this end, this state entity collects, requests and obtain information, determines the value of the damaged cultural heritage, and evaluates the harm inflicted. It can take administrative measures to secure the efficacy of the reparation decision before (provisional measures) and during (precautionary measures) the opening of an sanctioning administrative proceeding.<sup>139</sup> Among such measures is the suspension of works.<sup>140</sup> The ministry can request the participation of the National Police to enforce such measures.<sup>141</sup> The ministry can open an investigation on its own initiative or in response to the presentation of a complaint.<sup>142</sup> The

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located in the area declared as World Heritage Site; and 11 metres for the other areas of the Historic Centre.

<sup>135</sup> Ley General del Patrimonio Cultural de la Nación, article 49.

<sup>136</sup> For this offence, alongside punitive fines, article 49 e) of the Ley General del Patrimonio Cultural de la Nación envisages that the Ministry of Culture can impose confiscation of means involved in the alteration of the cultural heritage.

<sup>137</sup> Article 49 f) of the Ley General del Patrimonio Cultural de la Nación signals that demolition and punitive fines can also be imposed on offenders when, having authorization to carry out a construction work by the Ministry of Culture, this work contravenes the authorization.

<sup>138</sup> Corrective measures are considered complementary to administrative sanctions. Decreto Supremo N°005-2019-MC, article 35.

<sup>139</sup> *Ibid*, articles 22, 27 and 31.

<sup>140</sup> *Ibid*, articles 28 and 32.

<sup>141</sup> *Ibid*, article 25.

<sup>142</sup> According to article 5.2 of the Directive regulating the processing of complaints on alleged damage to cultural heritage, contained in the Resolución Viceministerial N°060-2018-VMPCIC-MC, such complaints "(...) can be presented by any Peruvian or foreign citizen, with age of majority". This dissertation considers that this norm does not preclude collectivities nor other individuals from lodging a complaint. Rather, the article provides an example of possible complainants.

regulations concretizing this remedy also establish that claimants are not parties to the administrative proceeding.<sup>143</sup>

Another type of decisions adopted by the ministry, but not concerned with the processing of this remedy, are emergency measures, which aim at averting the loss or deterioration of a historic building in the event of an imminent risk.<sup>144</sup>

## **2.2. Local communities of Barrios Altos and their relationship with tangible cultural heritage**

Barrios Altos has historically housed communities and individuals from different ethnic origin. In pre-Hispanic times, Barrios Altos was inhabited by indigenous peoples.<sup>145</sup> In the colonial period, it became the periphery of the center of the Spanish administration (Damero de Pizarro), and mainly sheltered African and African-descent peoples, indigenous persons, mestizos, and impoverished whites.<sup>146</sup> In Republican times, specially from the XIX to the XX century, migrants from Italy, China, Japan and other regions of Peru reached Barrios Altos.<sup>147</sup> The way of life of these communities and individuals, and their interaction in different time periods have handed down a diverse cultural heritage from varied times and styles.

Current residents of Barrios Altos inhabit many of the historic buildings built in colonial and republican times. They impregnate urban spaces with a living character and hold cultural and social manifestations that single out their neighborhoods.<sup>148</sup> For example, they organize and participate in religious processions, preparation and sharing of food and dancing in and around their traditional dwellings.<sup>149</sup>

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<sup>143</sup> Decreto Supremo N°005-2019-MC, article 1.

<sup>144</sup> Decreto Supremo N°011-2006-ED, article 40. According to article 54 of the Decreto Supremo N°005-2013-MC, the Directorate of Historical Heritage Property of the Ministry of Culture (unit with competence in the territory of Lima) is entitled to adopt emergency measures. Meanwhile, article 74 of the Decreto Supremo N°005-2013-MC stipulates that the Directorate of Control and Supervision of the Ministry of Culture (unit with competence in the territory of Lima) is entitled to adopt provisional or precautionary measures.

<sup>145</sup> For example, Curacazgo of Guatca. Reyes (n 7) 21-26.

<sup>146</sup> Ibid, 41.

<sup>147</sup> Ibid, 139-154, 155-168, 231-249.

<sup>148</sup> Mariana Alegre et al, 'Informe final. Estudio socio-económico para conocer la capacidad y disposición de pago de los hogares de Barrios Altos' (Eficiencia Legal para la Inclusión Social 2014).

<sup>149</sup> Reyes (n 7) 265.

*Picture 3. Afro-Peruvian dance in El Cercado square, Barrios Altos, performed by Asociación Afroperuana Barrios Altos. 2019. Photograph by the Ministry of Culture.*



*Picture 4 . Gastronomic event in Santo Cristo square, Barrios Altos. 2020. Photograph by Habitar Construcción Colectiva.*



It is important to note that there are not comprehensive studies spelling out the relationship of residents of Barrios Altos with the totality of historic buildings, but reports circumscribed to the interactions with specific traditional dwellings or areas of Barrios Altos.

For example, in relation to the neighbors of the eighth block of Huánuco street (Barrios Altos), Alejandro Reyes has told of quinta San José, whose

(...) tradition is reflected in the many activities promoted by the new generations who annually worship Virgin of Carmel and Saint Joseph. For that end, they organize solemn masses in chapels, a procession in the nearby streets, distribution and selling of food and drinks. These activities end with a general dance celebration, which gathers neighbors and reinforces friendship and solidarity among them. Some former neighbors and friends reach the quinta, even from abroad, to reunite with their historic memory.<sup>150</sup>

The inhabitants of this quinta also organize annual carnivals, which involve the election of a queen, who is a distinguished elderly neighbor.<sup>151</sup> New generations celebrate Friendship Day in this collective dwelling, with a concert and dance in the patio of the quinta.<sup>152</sup>

*Picture 5. Asociación Afroperuana Barrios Altos, which promotes Afro-peruvian culture, in quinta San José. 2021. Photograph by Asociación Afroperuana Barrios Altos.*



As regards the families living in quinta Baselli, located in the thirteenth block of Junín street (Barrios Altos), Ana Carrillo has indicated that they do recreational activities such as going for a walk around Barrios Altos, and visiting their relatives.<sup>153</sup> Many children play among themselves in

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<sup>150</sup> Reyes (n 7) 264-265.

<sup>151</sup> Ibid, 265.

<sup>152</sup> Ibid.

<sup>153</sup> Ana Carrillo, 'Informe N°02-2017: Diagnóstico social a partir de la descripción etnográfica de cada quinta: identificación de potencialidades y habilidades de la población; identificación de patrimonio cultural inmaterial' (2017), 9. Ana Carrillo conducted a social diagnosis of four quintas of the Historic Centre of Lima, including Quinta Baselli, where she interviewed 251 inhabitants. This study was commissioned by the Ministry of Culture for the programme "For my quinta I give my life", with the view to facilitating the implementation of socio-cultural policies. Ana Carrillo, 'Informe N°01-2017. Encuesta

the communal areas of the quinta.<sup>154</sup> Teenagers take part of dance groups practicing in Italia Plaza.<sup>155</sup> Religious processions worshipping the Virgin of Carmen and the Lord of Miracles are also attended by residents.<sup>156</sup> Many of them form part of religious brotherhoods organizing events for their cult.<sup>157</sup>

*Picture 6. Italia square, Barrios Altos. 2019. Photograph by Marco Gamarra Galindo.*



In respect to two urban blocks and the façades of a third urban block in Barrios Altos, encompassing Jauja, Huanta, Áncash and Huánuco streets, a working group led by Mariana Alegre found that residents of this area have made refurbishment and repairs works (mainly informally) to improve their living conditions in the historic buildings which they occupy.<sup>158</sup> One of their general concerns is the deterioration of their dwellings.<sup>159</sup> Most families surveyed in this study declared that they wish to continue living in Barrios Altos, but in better habitability conditions.<sup>160</sup>

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socio demográfica (levantamiento de información acerca de oficios, procedencia, composición social, edades, grado de instrucción). Diagnóstico social de las Quintas: Tambo Huánuco – Los Huérfanos – Basselli – Corazón de Jesús, en el Centro Histórico de Lima y el Rímac’ (2017).

<sup>154</sup> Ana Carrillo, ‘Informe N°02-2017: Diagnóstico social a partir de la descripción etnográfica de cada quinta: identificación de potencialidades y habilidades de la población; identificación de patrimonio cultural inmaterial’ (2017), 9.

<sup>155</sup> Ibid, 9.

<sup>156</sup> Ibid, 13.

<sup>157</sup> Ibid.

<sup>158</sup> Alegre et al (n. 148) 36-38, 75.

<sup>159</sup> Ibid, 17.

<sup>160</sup> Ibid, 78.

Picture 7. A quinta in Áncash street. 2011. Photograph by Marco Gamarra Galindo.



Some neighbors of Barrios Altos have been living in this urban area for more than twenty years.<sup>161</sup> Due to this connection with their dwellings, these persons can play a key role in the safeguarding and promotion of the traditional aspects of their neighborhoods.<sup>162</sup>

Picture 8. Neighbor participating in the cleaning of a sculpture in El Cercado square, Barrios Altos. 2019. Photograph by the Ministry of Culture.



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<sup>161</sup> Ibid, 50; Carrillo (n. 154) 6.

<sup>162</sup> Alegre et al (n. 148) 50.

The Metropolitan Municipality of Lima has added that persons living in the Historic Centre of Lima for more than thirty years have the '(...) major potential to produce and transmit the traditions conferring the Historic Centre of Lima with its singularity', and those residing there for more than sixty years have created and transmitted traditions.<sup>163</sup>

*Picture 9. Neighbors paying tribute to Felipe Pinglo, songwriter of Peruvian Música Criolla, Barrios Altos. 2018. Photograph by Centro Social Musical Barrios Altos.*



As the way of life and social interactions of dwellers in Barrios Altos are shaped by the (un)certainly of tenure,<sup>164</sup> it is relevant to look at their property rights over traditional dwellings: residents of this sector are either owners, tenants (with recognition of their tenure rights), or occupants (with insecurity of tenure).<sup>165</sup> Most of the inhabitants fall into the latter situation.<sup>166</sup>

Among the population that inhabit Barrios Altos are vulnerable groups such as older people, children, and persons with disabilities.<sup>167</sup> Such groups are specially affected by illiteracy and high

<sup>163</sup> Municipalidad Metropolitana de Lima (n 6) Sección II. Diagnóstico, 404. In relation to recent inhabitants, they make new uses of the urban space of Barrios Altos. Alegre et al (n. 148) 50.

<sup>164</sup> Manuel Dammert, 'Precariedad urbana, desalojos y vivienda en el Centro Histórico de Lima' (2018) 35(94) Revista Invi <[https://www.scielo.cl/scielo.php?script=sci\\_arttext&pid=S0718-83582018000300051](https://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-83582018000300051)> accessed 15 August 2022, 66; Carrillo (n. 154) 3, 8. Inhabitants with insecurity of tenure live under the constant fear of eviction. Ana Carrillo, 'Informe N°01-2017. Encuesta socio demográfica (levantamiento de información acerca de oficios, procedencia, composición social, edades, grado de instrucción). Diagnóstico social de las Quintas: Tambo Huánuco – Los Huérfanos – Basselli – Corazón de Jesús, en el Centro Histórico de Lima y el Rímac' (2017), 2; Carrillo (n. 154), 7.

<sup>165</sup> Dammert (n. 164) 64-65; Jaime and Bernalles (n 9) 10.

<sup>166</sup> Jaime and Bernalles (n 9) 10.

<sup>167</sup> Municipalidad Metropolitana de Lima (n 6) Sección II. Diagnóstico, 406; Jaime and Bernalles (n 9) 8.

levels of poverty.<sup>168</sup> The most densely populated areas of Barrios Altos have lower purchasing power than other sectors of the district of Lima.<sup>169</sup>

As habitability conditions are determinants for the permanence of residents in an urban space, it is important to mention them.<sup>170</sup> In Barrios Altos, there are inadequate housing conditions, which harmfully impact on the life of its neighbors, including specially affected groups.<sup>171</sup> Many of the properties in Barrios Altos are in poor and very poor state of physical conservation,<sup>172</sup> even at the risk of collapse.<sup>173</sup> It concentrates dilapidated dwellings,<sup>174</sup> which characterize as being overcrowded, lacking access to basic services, and entailing insecurity of tenure.<sup>175</sup>

Local communities of Barrios Altos are composed of residents that provide this sector with a living character, who consider historic buildings as part of their way of life. Some of them participate actively in the organization of cultural activities, which take place in or around such buildings.<sup>176</sup>

### **2.3. Destruction of cultural heritage of Barrios Altos by private actors**

The situation of severe deterioration of historic dwellings of Barrios Altos, explained above, is aggravated by the conduct of individuals and business enterprises involved in the activity of warehousing. Since late twentieth century, this economic activity has been taking place in Barrios Altos.<sup>177</sup>

These private actors have torn down many historic buildings of Barrios Altos, with the aim of constructing storage deposits to store goods and merchandise for the shopping centers and commercial galleries located around Mesa Redonda and Grau streets (west side of Barrios

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<sup>168</sup> Municipalidad Metropolitana de Lima (n 6) Sección II. Diagnóstico, 406.

<sup>169</sup> Most population of the district of Lima belongs to low and middle income sectors. Metropolitan Municipality of Lima (n 6) Sección II. Diagnóstico, 152.

<sup>170</sup> Ibid, Sección II. Diagnóstico, 361. The situation of severe deterioration of historic dwellings of Barrios Altos can be traced back to the second half of the twentieth century. Dammert (n. 164) 58.

<sup>171</sup> Municipalidad Metropolitana de Lima (n 6) Sección II. Diagnóstico, 406.

<sup>172</sup> Ibid, Sección II. Diagnóstico, 21.

<sup>173</sup> Jaime and Bernales (n 9) 8.

<sup>174</sup> Municipalidad Metropolitana de Lima (n 6) Sección II. Diagnóstico, 21.

<sup>175</sup> Dammert (n. 164) 54, 57; Alegre et al (n. 148) 7, 30, 63. Insecurity of tenure discourages owners and occupants to preserve historic buildings.

<sup>176</sup> If local communities of Barrios Altos have better housing conditions, there will be more opportunities for them to engage with the cultural heritage existing in this urban sector.

<sup>177</sup> Reyes (n 7) 267.



Altos).<sup>178</sup> These demolition and construction works do not generally have license by the Metropolitan Municipality of Lima,<sup>179</sup> nor authorization by the Ministry of Culture.

Commercial activities in this part of Barrios Altos intensified in the 1990s<sup>180</sup> and since then have continued growing<sup>181</sup> when the government promoted new private investments without regulatory frameworks.<sup>182</sup> As a result, large commercial clusters emerged.<sup>183</sup> UNESCO has also referred to these commercial activities: 'Historic Centre of Lima suffers from additional factors that degrade it in terms of physical, environmental, and urban image. The most evident of these are the uncontrolled commercial exploitation of ancient structures altered to build "popular commercial centres" (...)'.<sup>184</sup>

The commented commercial expansion has continued up until now and is stretching over traditional buildings inhabited by local communities.<sup>185</sup> It is giving way to the expulsion of such communities.<sup>186</sup> As the Metropolitan Municipality of Lima has asserted, warehouses in Barrios Altos '(...) have removed inhabitants from many properties that used to be allocated for housing. This is a harmful process for the life of the city, which should be reversed'.<sup>187</sup>

Alongside the destruction of traditional buildings, warehousing impairs the organization of cultural activities of local communities in the public space, as storage deposits need the entry and way out of trucks, the loading and unloading of goods, and the movement of pulling hand carts.<sup>188</sup>

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<sup>178</sup> Jaime and Bernales (n 9) 8, 12, 13.

<sup>179</sup> Ibid, 12.

<sup>180</sup> Ibid, 7; Dammert (n. 164) 60.

<sup>181</sup> Jaime and Bernales (n 9) 7.

<sup>182</sup> Ibid, 6-7.

<sup>183</sup> Ibid, 7.

<sup>184</sup> UNESCO (n 9).

<sup>185</sup> Jaime and Bernales (n 9) 7; Dammert (n. 164) 54.

<sup>186</sup> Jaime and Bernales (n 9) 7, 12

<sup>187</sup> Municipalidad Metropolitana de Lima (n 6) Sección II. Diagnóstico, 150. This state entity has rightly asserted that the most important land use for a living historic centre is that of housing. Ibid, Sección II. Diagnóstico, 362.

<sup>188</sup> María Vera, 'Protección y conservación en centros históricos: criterios para la composición patrimonial de la calle. Lima, 2017' (2017) 5 *Investiga Territorios* <<https://revistas.pucp.edu.pe/index.php/investigaterritorios/article/view/22842/21930>> accessed 1 September 2022, 78, 79, 88, 91.

Picture 10. Two warehouses in Junín street, Barrios Altos. 2020. Photograph by Marco Gamarra Galindo.



Picture 11. A truck carrying goods and merchandise for a warehouse in Barrios Altos. 2020. Photograph by Marco Gamarra Galindo.



As explained previously, warehousing is prohibited in the Historic Centre of Lima, including Barrios Altos. This activity is incompatible with this heritage area because it damages historic buildings and impairs the use of public spaces.<sup>189</sup>

<sup>189</sup> Municipalidad Metropolitana de Lima (n 6) Sección II. Diagnóstico, 266; Jaime and Bernales (n 9) 8.

## Conclusion

It is noted that the historic buildings of Barrios Altos are recognized as tangible cultural heritage under the Peruvian legal system. As such, they enjoy protection: individuals or business enterprises undertaking any work in such buildings should obtain beforehand an authorization of the Ministry of Culture in order to carry it out, and the activity of warehousing is prohibited in the Historic Centre of Lima, including Barrios Altos.

In the event of a threat to or violation of the right to cultural heritage, everyone is provided with an administrative remedy administered by the Ministry of Culture, through which it can open an investigation, determine administrative responsibility and impose sanctions.

There are residents of Barrios Altos who inhabit many historic buildings and consider that such buildings are integral part of their local communities. Additionally, there are neighbors that take part in religious processions, preparation and sharing of food, dancing, among other expressions, in and around traditional dwellings. Inhabitants also enjoy walking around public spaces of Barrios Altos during their leisure time. Some neighbors have been living in these buildings for many decades, creating and transmitting traditions. Nevertheless, their way of life in and around these spaces is imperiled by the (in)security of tenure and housing conditions.

The situation of severe deterioration of traditional dwellings is aggravated by the activity of warehousing undertaken by private actors. These parties destroy historic buildings for the construction of storage deposits, a practice that produces the expulsion of neighbors (and therefore of their cultural practices).

### **Chapter 3. The right to cultural heritage in the context of the destruction of cultural heritage in Barrios Altos**

Relying on the general context of destruction of cultural heritage of Barrios Altos by private actors, this chapter presents the case study relating to the demolition of two specific buildings located in that urban sector. The conduct of the Peruvian State in relation to the damage to such buildings is set out and it is analyzed whether it contravened the obligations derived from the right to cultural heritage, specifically concerning the participation of local communities in the processing of the administrative remedy heard by the Ministry of Culture, and the enforcement of reparations measures and the laws on the protection of cultural heritage.

#### **3.1. Aspects shared by the cases under study: instances of intentional destruction**

The following cases are concerned with the demolition of historic buildings and the subsequent construction of storage deposits, which were committed by private actors in peacetime, and impaired heritage areas and cultural practices held by neighbors. They are instances of intentional destruction, following the definition of this type of damage,<sup>190</sup> because the cultural heritages affected had been clearly recognized as such by the Peruvian legal framework (they were located in heritage areas). The destruction had an economic motivation: the construction of storage deposits to store goods for commercial galleries.<sup>191</sup>

These works constituted violations of the right to cultural heritage. As explained in the previous chapter, the destruction of cultural creations is, in principle, a violation of that right, because the conditions allowing everyone to access, contribute to and participate in the field of cultural heritage '(...) are greatly jeopardized when cultural heritage is at risk or destroyed'.<sup>192</sup> Tearing down these historic buildings meaningful to local communities harmed their ability to keep visiting, knowing and developing these places.

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<sup>190</sup> According to article II of the UNESCO Declaration concerning the intentional destruction of cultural heritage, '(...) 'intentional destruction' means an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience'.

<sup>191</sup> One of the motivations for the damage to cultural heritage can be economic. UNHRC (n 3) para. 48; UNHRC (n 18) para. 80.

<sup>192</sup> UNHRC (n 3) para. 13.

### 3.2. Case of historic building located in Huánuco street N°870, 872, 874, 878

This historic building stood in the Monumental Zone of Lima and the Monumental Urban Zone of Plaza Buenos Aires.<sup>193</sup> According to the Ministry of Culture, this cultural site was completely torn down by two individuals.<sup>194</sup> This entity referred to demolition works taking place in the building between 2016 and 2018.<sup>195</sup>

*Picture 12. Historic building in 2013 (before demolition). Photograph by Metropolitan Municipality of Lima.*



#### State conduct:

On 14 August 2018 the Ministry of Culture received a complaint by the Metropolitan Municipality of Lima about the total demolition of this historic building.<sup>196</sup> During the preliminary inquiry into this complaint, the ministry accounted of prior incidents in the historic building: in August 2015 the ministry was informed by the municipality that the building retained its two floors (although the second one did not have a roof), was unoccupied and its balcony had signals of detachment.<sup>197</sup>

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<sup>193</sup> These two areas were recognized as cultural heritage by the Resolución Suprema N°2900-72-ED.

<sup>194</sup> The Resolución Directoral N°113-2018-DGDP-VMPCIC/MC determined that Hermilio Carhuavilca and Rosa Brañez were administratively responsible for causing this damage.

<sup>195</sup> Ministerio de Cultura, 'Informe Técnico N°900030-2018-CST/DCS/DGDP/VMPCIC/MC' (2018), Section 2.3. This state body also noticed that the historic building lacked its roof in 2015. Ibid.

<sup>196</sup> The complaint was contained in the Oficio N°884-2018-MML-PMRCHL, which was received by Ministry of Culture with record N°0000104698-2018.

<sup>197</sup> Ministerio de Cultura (n. 195) Section 2.3. Antecedentes.

On 27 April 2016 the Ministry of Culture conducted an ocular inspection in the building, which revealed that the property suffered a demolition compromising almost the totality of its second floor.<sup>198</sup> This demolition had not been authorized by the ministry.<sup>199</sup> On 29 April 2016 the ministry was informed by the municipality about that destruction.<sup>200</sup> The background also mentioned that in October 2016 the ministry ordered to the owner the adoption of emergency measures of preventive character, with the view to averting any damage to the property and to persons.<sup>201</sup> These emergency measures consisted in the relocation of a wall standing in the second floor for its safeguarding, and the roping off of the area surrounding the building to protect passers-by.<sup>202</sup> Said measures did not involve the suspension of works.

*Picture 13. Historic building in April 2015. Photograph by Google Maps.*



<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

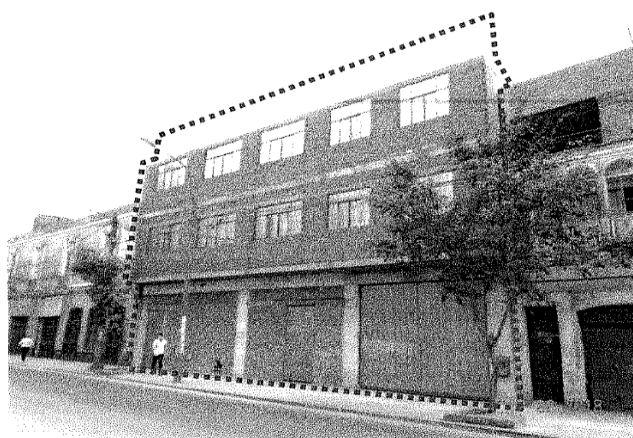
<sup>201</sup> Ibid.

<sup>202</sup> In addition, the ministry recommended the owners to elaborate a project to secure the conservation and integrity of the historic building. Ministerio de Cultura, 'Oficio N°001026 2016/DPHI/DGPC/VMPCIC/MC' (2016).

Picture 14. Historic building in March 2016. Photograph by the Metropolitan Municipality of Lima.



Picture 15. New construction standing in the place of the historic building. August 2018. Photograph by the Ministry of Culture.



As a result of the complaint presented by the Metropolitan Municipality of Lima on 14 August 2018, the ministry conducted an inspection on 17 August 2018.<sup>203</sup> During this inspection, it verified that the historic building had been completely demolished and there was a new building standing in its place.<sup>204</sup> This new building had three floors.<sup>205</sup> According to the municipality, it was a warehouse.<sup>206</sup>

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<sup>203</sup> Ibid, Sections I. Fecha y motivo de inspección and III. Inspección. This inspection did not order the suspension of works. Ministerio de Cultura, 'Acta de inspección de 17 de Agosto de 2018' (2018).

<sup>204</sup> Ibid, Section III. Inspección.

<sup>205</sup> This new building was made of reinforced concrete (columns and beams) and brick walls. Ibid, Section III. Inspección. A second inspection was conducted by the Ministry on 18 September 2018, which described the new building. It did not order the suspension of works. Ministerio de Cultura, 'Informe Técnico N°900042-2018-LGC/DCS/DGDP/VMPCIC/MC' (2018), Sections I. Fecha y motivo de la inspección and III. De la inspección.

<sup>206</sup> Municipalidad Metropolitana de Lima, 'Informe Técnico N°259-PMRCHL-2018' (2018).

Picture 16. The new building (on the left) altered the monumental setting. Photograph by the Ministry of Culture.



Following these inspections, the ministry opened an administrative proceeding against two individuals in order to investigate the alleged damage to cultural heritage.<sup>207</sup>

On 8 November 2018, the resolute body of the ministry took a decision on the merits, through which it found administrative responsibility of the defendants for altering the Monumental Urban Setting of Buenos Aires Plaza, and imposed a fine of 1.5 Peruvian Taxation Unit (UIT).<sup>208</sup> In working out this amount, this state body asserted that the damaged was unintentional, mild and reversible, and that the affected property had a significant value. It also took into account that the defendants recognized their responsibility.<sup>209</sup>

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<sup>207</sup> Resolución Directoral N°900036-2018/DCS/DGDP/VMPCIC/MC. In the administrative proceeding the alleged offenders argued that the property was in very poor state of physical conservation (risk of collapse), and that they did not know that an authorization by the Ministry of Culture was required to build a new construction. Document titled Descargos contra la Resolución Directoral N°900036-2018/DCS/VMPCIC/MC, presented to the Ministry of Culture with record N°112308 and Document titled Descargos Informe N°900093-2018/DCS/DGDP/VMPCIC/MC, presented to the Ministry of Culture with record N°0000115791-2018. The investigative body determined the value of the affected cultural heritages and evaluated the harm inflicted. Ministerio de Cultura, 'Informe Técnico Pericial N°900004-2018-LGC/DCS/DGDP/VMPCIC/MC' (2018), Sections III. Valoración del bien and IV. Evaluación del daño causado. It handed over its final report to the resolute body. Ministerio de Cultura, 'Informe N°900093-2018-DCS/DGDP/VMPCIC/MC' (2018).

<sup>208</sup> This quantity equated to 6,225 Peruvian Nuevo Soles (approximately 1,403 Great British Pounds). According to a cash receipt issued by the Ministry of Culture in November 2018, the offenders paid the fine. In addition to this sanction, the Resolución Directoral N°113-2018-DGDP/VMPCIC/MC also imposed a corrective measure on the offenders, which consisted in the presentation of an integral project to recover the typology of the facades and collective urban image of the Monumental Urban Setting of Buenos Aires Plaza. It is uncertain whether the offenders complied with this measure.

<sup>209</sup> Resolución Directoral N°113-2018-DGDP-VMPCIC/MC.



## Analysis

As it was explained in the first chapter, the right to cultural heritage imposes on States the obligation to protect, which requires them to adopt all appropriate measures to prevent, investigate, punish and redress violations of the right.

In order to prevent violations of the right to cultural heritage, States should have monitoring mechanisms to enforce regulatory and policy frameworks protecting this right. It implies regular, timely and effective inspections to determine whether recipients of such frameworks are complying with them. The Ministry of Culture of Peru is competent to supervise the compliance with the legal framework on cultural heritage,<sup>210</sup> including the norms prohibiting unauthorized works in historic buildings.

According to the background of the complaint presented by the municipality in 2018,<sup>211</sup> the Ministry of Culture was informed in August 2015 that the building (still standing with its two floors) lacked its roof. Nevertheless, there is no mention in the background of the complaint, reported by the ministry, that it conducted a timely inspection in response to that information. An inspection was carried out by the ministry in April 2016 (eight months later), and by then the building had its second floor almost completely dismantled. There is no reference in the background that in this inspection the ministry ordered the suspension of the ongoing works. The emergency measures issued by the ministry were necessary for the conservation of the building, but they did not entail the suspension of the private works, an essential measure to stop the demolition and protect the cultural site. In 2018, the ministry conducted two inspections, but by then the mansion had been completely destroyed.

Therefore, the Ministry of Culture did not conduct effective and timely inspections to stop the progressive demolition of the cultural site. Inspections took place when the private works had largely been developed. The ministry did not exercise a prerogative to stop the destruction of the cultural site, as it did not issue any order of suspension of private works during the inspections.

It can be argued that the vulnerability of the cultural heritage of Barrios Altos, due to the ongoing expansion of commercial activities, explained in the preceding chapter, reinforced the duty of the

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<sup>210</sup> Decreto Supremo N°011-2006-ED, article 5.6.

<sup>211</sup> Ministerio de Cultura (n. 195) Section 2.3 Antecedentes.

Peruvian State to carry out inspections in a regular manner, even in the absence of a complaint. Even though the Ministry of Culture carried out inspections (which were necessary), they were always undertaken in response to grievances (and not prior to them). Conducting periodic and surprise inspections would have helped to prevent private works in the property.

Hence, although the Peruvian State punished the damage to this historic building, it failed to adopt appropriate measures to prevent its destruction, as it did not undertake regular, effective and timely inspections to enforce the legislation on cultural heritage. These omissions constituted a breach of its obligation to protect the right to cultural heritage.

With regard to the participation of local communities of Barrios Altos in the handling of the complaint about the demolition of this site, it is pertinent to note that the obligation to protect requires States to allow such communities to access to information held by private actors concerning the impact of their activities on such a right. In addition, state bodies administering remedies should disseminate information about the results of their investigations. Particularly, that state obligation entails that the handling of complaints takes into account the specific link of communities to the cultural heritage involved.

Despite the regulations concretizing the administrative remedy provided by the Ministry of Culture do not recognize claimants as parties to an administrative proceeding, it does not mean that right-holders should be excluded from participation in the proceeding. The right to cultural heritage requires the ministry to facilitate their engagement in this decision-making process.

Among the effectiveness criteria of state-based non-judicial remedies is legitimacy, which envisages that state bodies should be accountable for the fair administration of such remedies.<sup>212</sup> This criterion requires that remedial mechanisms allow right-holders to raise comments and complaints about the manner in which such mechanisms investigate and adjudicate alleged abuses of human rights.<sup>213</sup> In this way, right-holders can monitor that remedial mechanisms are free from conflicts of interests and undue influences by private actors.

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<sup>212</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (n 81) Principle 31 a).

<sup>213</sup> OHCHR 'Report of the United Nations High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms' (2018) UN Doc A/HRC/38/20, policy objective 6, para. 6.3.

Another effectiveness criterion is equitability, which entails that right-holders have reasonable access to information that allows them to participate effectively in a remedial process.<sup>214</sup> It requires that complainants receive a) information regarding the arguments, allegations and evidence submitted by the alleged offenders, in an adequate and timely manner; b) access to evidence concerning the facts under investigation; c) appropriate opportunity to comment on the aspects referred to in points a) and b), before the adoption of any final determination or decision; d) the reasons behind any decision are provided with sufficient detail; e) information about the procedures to challenge a final determination or decision.<sup>215</sup>

Transparency also constitutes an effectiveness criterion of state-based non-judicial remedies. It entails that complainants have access to information on the progress of remedial processes and the performance of investigative or adjudicating bodies.<sup>216</sup>

State-based non-judicial mechanisms should be rights-compatible as well.<sup>217</sup> It entails that remedial processes are designed to secure that right-holders are consulted in relation to the conditions of an adequate and effective reparation in their particular case, and they have the opportunity to comment on any decisive decision taken by the state body administering the remedy.<sup>218</sup>

Therefore, local communities of Barrios Altos who identify with a damaged historic building have the right to participate actively in the remedial mechanism administered by the Ministry of Culture, by accessing to the information submitted by the alleged offenders and that elaborated by the state entity itself. They also should be granted the possibility to present complaints or comments about the manner in which the ministry investigates and adjudicates an alleged destruction of cultural heritage.

Nevertheless, none of the decisions concerning the processing of the remedy for the destruction of the historic building under study referred to any consultation with local communities. Neither

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<sup>214</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (n 81) Principle 31 d).

<sup>215</sup> OHCHR (n. 213) Annex, para. 9.2.

<sup>216</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (n 81) Principle 31 e).

<sup>217</sup> Ibid, Principle 31 f).

<sup>218</sup> OHCHR (n. 213) Annex, para. 11.3.

did the ministry inform them about the opening of the sanctioning administrative proceeding, and that they had the opportunity to participate. In this way, the Peruvian State failed to adopt measures to facilitate their engagement in the hearing of the remedy. These omissions constituted a breach of its obligation to protect and fulfil the right to cultural heritage.

### **3.3. Case of historic building located in Junín street N°1085**

This historic building stood in the Monumental Zone of Lima, the area of the Historic Centre of Lima inscribed as World Heritage Site, and the Monumental Urban Setting Old Way to town of El Cercado. According to the Ministry of Culture, this cultural site was completely destroyed by two individuals,<sup>219</sup> at least between February and April 2019.<sup>220</sup>

*Picture 17. The historic building (with a blue façade) before demolition. 1996. Photography by the Metropolitan Municipality of Lima.*



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<sup>219</sup> The Resolución Directoral N°148-2019-DGDP-VMPCIC/MC determined that Teodoro Quijano and Nila Yalle were administratively responsible for causing this damage.

<sup>220</sup> Ministerio de Cultura, 'Informe Técnico N°000022-2019-CST/DCS/DGDP/VMPCIC/MC' (2019), Sections 2.2 Antecedentes and III. Inspection.

## State conduct

On 8 February 2019, the Ministry of Culture received a complaint about the demolition of this historic building. In response to this grievance, the ministry conducted inspections on 12 February, 3 April and 24 April of that year.<sup>221</sup> In the first inspection the ministry verified that there were ongoing works in the property (not completely demolished, as it still had part of its façade), and ordered those responsible to suspend such works.<sup>222</sup> In the third inspection, it realized that the façade had been demolished and that works kept continuing.<sup>223</sup> During the preliminary inquiry into this complaint, the ministry did not mention that it had conducted any prior inspection to the complaint of 8 February 2019.

Following these inspections, the ministry opened an administrative proceeding against three individuals to investigate the alleged damage to cultural heritage.<sup>224</sup> Subsequently, this body received a complaint indicating that works continued, thereby it conducted inspections on 15 May, 28 May, 20 June, and 18 July of 2019, verifying the progressive construction of a new building.<sup>225</sup> In the latter inspection, it had six floors.

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<sup>221</sup> Ibid. The inspection undertaken on 3 April 2019 was part of a supervision in all Junin street. Ministerio de Cultura, 'Acta de inspección de 24 de Abril de 2019' (2019).

<sup>222</sup> Ministerio de Cultura, 'Acta de inspección de 12 de Febrero de 2019' (2019). The ministry requested the suspension of works again through Carta N°000043-2019/DCS/DGDP/VMPCIC/MC directed to one of the owners. Ministerio de Cultura (n. 220) Section 2.2. Antecedentes.

<sup>223</sup> In this inspection, the ministry noted that, instead of the façade, there was a steel structure. Ministerio de Cultura (n. 220) Sections 2.2 Antecedentes and III. Inspection. By 8 April 2019 the façade still existed. Ministerio de Cultura, 'Informe N°D000001-2019-DCS-ASH/MC' (2019), Section I. Antecedentes.

<sup>224</sup> Resolución Directoral N°D000005-2019-DCS/MC. The administrative proceeding was extended through Resolución Directoral N°D000016-2019-DCS/MC. In the administrative proceeding one of the alleged offenders argued that the building was in very poor state of physical conservation, and that he demolished it in order to safeguard his life and that of his family. Document titled "Se presentan descargos", presented to the Ministry of Culture with record N°2019-0026567. The investigative body determined the value of the affected cultural heritages and evaluated the harm inflicted. Ministerio de Cultura, 'Informe Técnico N°D000029-2019-DCS-CST/MC' (2019), Sections I. Valor del bien and II. Evaluación del daño. It handed over its final report to the resolute body. Ministerio de Cultura, 'Informe N°D000064-2019-DCS/MC' (2019).

<sup>225</sup> Ministerio de Cultura, 'Acta de inspección de 15 mayo de 2019' (2019); Ministerio de Cultura, 'Acta de inspección de 28 Mayo de 2019' (2019); Ministerio de Cultura, 'Acta de inspección de 20 de Junio de 2019' (2019); Ministerio de Cultura, 'Informe Técnico N°D000023-2019-DCS-CST/MC' (2019), Section 3.4. The inspections of 15 May and 20 June 2019 reiterated that works should be suspended.

Picture 18. Inspection of 12 February 2019. Photograph by the Ministry of Culture.



Picture 19. Inspection of 24 April 2019. Photograph by the Ministry of Culture.



Picture 20. Inspection of 15 May 2019. Photograph by the Ministry of Culture.



Picture 21. Inspection of 28 May 2019. Photograph by the Ministry of Culture.



Picture 22. Inspection of 20 June 2019. Photograph by the Ministry of Culture.



Picture 23. Inspection of 18 July 2019. Photograph by the Ministry of Culture.



On 5 November 2019, the resolute body of the Ministry of Culture took a decision on the merits, through which it found administrative responsibility of two of the defendants for demolishing the historic building and constructing a new one (private works), without authorization of the ministry. It imposed the sanction of demolition of the new building (six floors).<sup>226</sup> It found that this building harmed the Monumental Zone of Lima, the Historic Centre of Lima, and the Monumental Urban Setting Old Way to town of El Cercado. In determining this punishment, it asserted that the damaged was severe, intentional and that the affected properties had an exceptional value.<sup>227</sup>

*Picture 24. New building (on the right). December 2019. Author: Marco Gamarra Galindo.*



It is inferred from state documents that, as offenders did not timely appeal this sanction to the Judiciary, this decision became final.<sup>228</sup> However, the offenders have not complied with the sanction, as the new building still stands.

### Analysis

The obligation to protect the right to cultural heritage requires States to have effective and appropriate monitoring mechanisms to enforce the legislation safeguarding cultural heritage. It

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<sup>226</sup> In addition, it imposed on the offenders the corrective measure to restitute the historic building. The decision on the merits was appealed by one of the offenders to a higher authority of the Ministry of Culture in the administrative plane: this body upheld the decision on 27 January 2020. Resolución Viceministerial N°023-2020-VMPCIC-MC.

<sup>227</sup> Resolución Directoral N°148-2019-DGDP-VMPCIC/MC.

<sup>228</sup> Ministerio de Cultura, 'Memorandum N°000305-2021-OGA/MC' (2021); Ministerio de Cultura, 'Carta N°000001-2020-OEC/MC' (2020).



implies regular inspections to prevent any damage to cultural creations. The vulnerability of this historic building due to the nearby commercial activity reinforced the duty of the State to prevent any destruction. As stated above, there was no inspection before the presentation of the grievance of February 2019. In order to ascertain the state of the building before the complaint, the ministry resorted to Google Earth images, which are useful to identify illegal works, but do not equate to an inspection.<sup>229</sup> The omission to conduct inspections prior to the complaint of February 2019 constituted a breach of the obligation to protect the right to cultural heritage.

After the submission of this complaint, the ministry conducted regular inspections, which is consistent with its obligation to protect the right to cultural heritage. Nevertheless, such supervision was not effective because the orders of suspension of works were completely ignored by the offenders. The first order of suspension was issued on 12 February 2019, when part of the historic building was still standing. By 18 July 2019 there was a new six floors construction.

One effectiveness criteria of State-based non-judicial mechanisms is cooperation between law enforcement bodies,<sup>230</sup> with the view to safeguarding the rights of persons and groups for whom such mechanisms are established.<sup>231</sup> The Ministry of Culture is entitled to request the participation of the National Police to secure the effectiveness of its orders of suspension of works. Nevertheless, none of the documents issued by the ministry in the handling of the complaint requested that cooperation.<sup>232</sup> As the ministry did not take all the appropriate measures to secure the effectiveness of such orders, it infringed its obligation to protect.

With regards to the enforcement of reparation decisions, the obligation to protect the right to cultural heritage requires States to secure that individuals or entities liable for the damaged inflicted comply with such decisions.

Remedial outcomes should be effective, which means that States are obliged to adopt measures to address the risk of non-compliance with reparations decisions. Among such measures is the recognition and exercise of strong self-executing enforcement prerogatives, and follow-up

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<sup>229</sup> Ministerio de Cultura (n. 220) Section 3.2. Infracción.

<sup>230</sup> OHCHR (n. 213) Annex, para. 1.3.

<sup>231</sup> Ibid, Annex, para. 1.1.

<sup>232</sup> There was only a request by the ministry to the National Police to provide support for the conduction of one inspection (that of 15 May 2019), but not for the enforcement of the suspension of works. Ministerio de Cultura, 'Oficio D000026-2019-DCS/MC' (2019).

activities.<sup>233</sup> These activities should amount to effective procedures for the enforcement of reparation decisions.<sup>234</sup>

In the present case, in response to the non-compliance of the offenders with the demolition order, the ministry initiated the procedure for the enforcement of that sanction and took steps towards that aim.<sup>235</sup> This conduct is consistent with its obligation to protect the right to cultural heritage. However, the sanction (for six floors) cannot be enforced because the new construction has seven floors.<sup>236</sup> The omission to avert the expansion of this construction has made (so far) the sanction unenforceable, constituting this omission a breach of the obligation to protect the right to cultural heritage.

In respect to the participation of the local communities of Barrios Altos in the processing of the administrative remedy for the destruction of the historic building under study, none of the decisions concerning that processing referred to any consultation nor communication with local communities. In this way, the State failed to adopt measures to facilitate their participation in the hearing of the remedy. These omissions constituted a breach of its obligation to protect and fulfil the right to cultural heritage.

### Conclusion

The general context of destruction of cultural heritage by private actors in Barrios Altos is illustrated in two cases: the demolition of tangible cultural heritage located in Huánuco street N° N°870, 872, 874, 878 and Junín street N°1085, perpetrated by individuals involved in the activity of warehousing.

The works carried out by these individuals constituted intentional destruction of cultural heritage, because the damaged historic buildings were recognized as cultural heritage by the Peruvian legal system.

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<sup>233</sup> OHCHR (n. 213) Annex, para. 4.2.

<sup>234</sup> OHCHR (n. 80) para. 17.

<sup>235</sup> Resolución Coactiva N°12 in the record N°003-2021 – Lima.

<sup>236</sup> Ministerio de Cultura, 'Informe N°000112-2022-OEC/MC' (2022).

In examining whether the state conduct involved in these cases contravened the obligations derived from the right to cultural heritage, relevant duties were highlighted: the conduction of timely, effective and regular inspections to secure that private actors comply with the regulations safeguarding cultural heritage; the establishment of effective procedures for the enforcement of reparation decisions and legislation on cultural heritage; and the recognition that local communities should be granted the opportunity to engage in the processing of remedies.

## **Conclusion**

Cultural heritage is a human right under International Human Rights Law, due to the importance of cultural creations for the identity and human dignity. This right implies entitlements held by individuals and communities, elements that are required for the full observance of the right, and related state obligations. As cultural rights have been historically underdeveloped, this dissertation devoted a significant amount of research on clarifying these aspects.

Despite the value of cultural heritage for specific communities and individuals, it has been harmed and continues to be damaged. This destruction has not only occurred in wartime, nor only has it been a strategy to persecute cultural communities by extremist groups. There has been attacks against cultural heritage in peacetime for the realization of economic activities by private actors. Barrios Altos, a traditional sector of the Historic Centre of Lima, is a clear example. Due to the expansion of commercial activities, many historic dwellings have been torn down by individuals and enterprises with the view to constructing warehouses.

As the destruction of cultural heritage is, in principle, a violation of the right to cultural heritage, this dissertation raised the issue of the role of States in safeguarding cultural heritage. In this regard, its research question was the following: How does the right of local communities to cultural heritage require States to react to its destruction by private actors during peacetime?

This research argued that the right and its concomitant obligations require States to avert the destruction of cultural heritage through the enforcement of laws. By virtue of the obligation to protect, States should establish effective monitoring mechanisms, through which it regularly evaluates whether recipients of regulatory and policy frameworks comply with these instruments.

The present dissertation also held that the right obliges States to effectively punish the destruction via administrative and criminal avenues. In light of the obligation to protect, States should enforce reparation decisions, for which adequate follow-up mechanisms are needed.

This research maintained that the right requires States to provide access to remedies that facilitate participation and access to information in its very processing. By virtue of the obligations to respect, protect and fulfil, and the elements of the right, States should allow right-holders to engage in any decision-making process concerning cultural heritage. Particularly, it was explained that local communities (as holders of the right to cultural heritage) should be granted the opportunity to obtain the documents held by state bodies hearing administrative remedies and to comment on the performance of such bodies in respect to the investigation and adjudication of alleged abuses of the right.

Barrios Altos (Lima, Peru) as a case-study illustrates the relevance of the right to cultural heritage and its concomitant obligations to react to the destruction of cultural creations by private actors. The Peruvian State provides right-holders with an administrative remedy to investigate and adjudicate allegations of destruction of cultural heritage, has monitoring mechanisms to enforce legislation protecting cultural heritage, and has follow-up procedures to attain the compliance with reparation measures. Nevertheless, as the cases under study have shown, the aforementioned remedy should facilitate the participation of local communities, the monitoring mechanisms allocated should imply regular, timely and effective inspections, and the reparation measures should be enforced.

This dissertation has contributed to the understanding of the right to cultural heritage in the context of the destruction of cultural heritage by private actors in peacetime, and fills a gap by applying an under developed legal framework to the destruction of historic buildings in Barrios Altos.

This work encourages scholarship to expand on the study of the right to cultural heritage in the context of the destruction of private actors. For example, the participation of local communities in judicial remedies, and the determination of reparations for the damage to cultural heritage inflicted by private actors. In relation to the case-study of Barrios Altos, it is necessary that scholarship examines how the right to cultural heritage can contribute to solving the preceding inadequate

housing conditions and insecurity of tenure which also affect tangible and intangible cultural heritage.

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