

Cinema as (Tangible and Intangible) Cultural Heritage: A Need for a Legal Adaptation of International Humanitarian Law?

Gianluigi Mastandrea Bonaviri*

DOI: 10.26443/glsarsv2i1.200

Abstract

This research paper will put forward innovative solutions to strengthen the protection of cinema during armed conflicts, in particular by contending that cinema could be qualified as cultural heritage, thereby falling under the protection of the relevant international Conventions.

A special testimony made by artist Sergio Iovino will be first proposed, with a view to highlighting the importance to safeguard cinema and – broadly speaking – every kind of art in wartime. Moving from the current armed conflict in Ukraine, the paper will underline the need for a reassessment of the relevant international regulations. In particular, after having secured a comprehensive definition of cinema, still lacking in international law, it will propose an evolutionary interpretation of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage (1972), the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003) and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

The paper will then analyze the legal relations between International Humanitarian Law (IHL) and filmmaking, which remain nebulous. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict never refers to cinema, but simply mentions “objects of artistic interest” (art. 1), and already such a definition fails to accommodate cinema’s mongrel nature and complex production process. An adaption of IHL, starting from the 1949 Geneva Conventions and their Additional Protocols, will be therefore put forward in order to ensure that the art of filmmaking can enjoy legal protection in all phases of an armed conflict.

Keywords: *International Humanitarian Law, armed conflicts, cinema, UNESCO, cultural heritage, International Committee of the Red Cross.*

Résumé : Cet article proposera des solutions innovantes pour renforcer la protection du cinéma lors des conflits armés, en particulier en soutenant que le cinéma pourrait être qualifié de patrimoine culturel, et tomber ainsi sous la protection des conventions internationales concernées.

Un témoignage spécial de l’artiste Sergio Iovino sera d’abord proposé, dans le but de souligner l’importance de la protection du cinéma et – de manière générale – de toute forme d’art en temps de guerre. En partant du conflit armé en cours en Ukraine, l’article mettra l’accent sur le besoin

* Gianluigi Mastandrea Bonaviri, PhD in International and Comparative Law La Sapienza University Rome, Expert in International Humanitarian Law. Contact: gianluigimastandreabonaviri@gmail.com

d'une réévaluation des règles internationales pertinentes. Plus particulièrement, après avoir assuré une définition exhaustive du cinéma, encore manquante en droit international, l'article proposera une interprétation évolutive de la Convention concernant la protection du patrimoine mondial, culturel et naturel (UNESCO, 1972), de la Convention pour la sauvegarde du patrimoine culturel immatériel (UNESCO, 2003) et de la Convention sur la protection et la promotion de la diversité des expressions culturelles (UNESCO, 2005).

L'article analysera ensuite les relations juridiques entre le droit international humanitaire (DIH) et la réalisation audiovisuelle, qui restent nébuleuses. La Convention de 1954 pour la protection des biens culturels en cas de conflit armé ne fait aucune référence au cinéma, et mentionne simplement les « objets d'intérêt artistique » (art. 1). Une telle définition échoue déjà à tenir compte de la nature hybride du cinéma et de la complexité du processus de production. Une adaptation du DIH, en commençant par les Conventions de Genève de 1949 et leurs Protocoles additionnels, sera ainsi présentée afin d'assurer que l'art de la réalisation puisse bénéficier d'une protection juridique durant toutes les phases d'un conflit armé.

Mots-clés : *Droit international humanitaire, conflits armés, cinéma, UNESCO, héritage culturel, Comité International de la Croix-Rouge.*

Introduction

Wars, confrontations and conflicts in general, between two or more opposed factions, has always affected cinema in several and significant ways. Indeed, armed conflicts not only challenge the integrity of film archives and cinema studios but also undermine freedom of expression and therefore the art of filmmaking and film production. History clearly shows this alarming pattern. For instance, during World War II cinema was the most popular form of entertainment, but it was only used as a means of distributing propaganda, leaving no space for independent production. Since the beginning of the uprising in March 2011, filmmaking and all other forms of artistic expression experienced a significant decline in Syria. The current armed conflict in Ukraine is further showing the dangers posed by wars to film production.

Since the first projection of a prototype of Kinetoscope by the company of Edison in 1891 and the first motion picture of the history in 1895 by the Lumière brothers, cinema has advanced considerably: visual effects scaled up upon the advancement of the technology and 3D films emerged.¹ Today, cinema could be considered one of the most complex and powerful art form available to us. Being them drama, comedy, romantic, thriller, movies are evidently very impactful in today's world: they can help us better understand our own lives, the lives of those around us and how our society and culture operate, shedding light on political and spiritual matters.² Films, videos and other forms of moving images are a powerful tool also to record, document and make sense of history, on both collective and personal scales.³

It is therefore crucial to protect cinema during armed conflict, by putting forward, first of all, a definition of cinema, currently lacking in international law. Cinema could be hardly limited to its finished product, be it digital or analog, but must account for all the different stages of filmmaking: from story and screenwriting, to casting shooting and post-production, all the way to screenings. Consequently, cinema could be considered as both tangible and intangible cultural heritage. This entails the need to adapt the relevant international Conventions, including the International Humanitarian Law (IHL) Convention, in order to ensure that the art of filmmaking — as cultural heritage — can enjoy legal protection in all phases of an armed conflict.

¹ For an overview on the history of cinema you can consul: *Film History* (Indiana University Press, 1987-2022), ISBN: 08922160, online <<https://www.jstor.org/journal/filmhistory>>.

² Istiak Mahmood, "Influence and Importance of Cinema on the Lifestyle of Educated Youth: A study on University Students of Bangladesh" (2013) 17(6) *Journal Of Humanities And Social Science* 77.

³ Trevor Ponech, "The substance of cinema in Thinking Through Cinema: Film as Philosophy" (2006) 64 (1) *The Journal of Aesthetics and Art Criticism*, Special Issue, online <<https://ur.booksc.me/book/53177555/9b67a5>>.

Part 1. The Importance to Safeguard Cinema and Art During Armed Conflict: A Special Testimony by the Art Director Sergio Iovino

During my presentation of this research paper in the occasion of the 15th Annual McGill Law Graduate Conference, I had the pleasure to involve artist Sergio Iovino as a special testimony of the importance to safeguard art, including cinema, during armed conflicts. First, he recalled the text of a song he wrote in order to represent the importance of protecting education and schools during war, presented at the Fourth International Conference of the Safe Schools, which took place in Nigeria last October:

“I would you like to tell you the story of a child. One day at school I asked him. Who would you like to be when you grow up? Do you know what he replied to me? Not a pilot, not an astronaut, not a surgeon, teach me to be happy.”

Starting from this emblematic song and moving from the dramatic situation in Ukraine, the artist recalled that also in Syria, Libya, Yemen, Congo, Mali, wars continue to have devastating consequences, in particular on the civilian population and the more vulnerable categories such as women and children. Together with armed conflicts, also poverty, environmental damages, climate change and pollution participate in the destruction of cultural sites thereby endangering the root of our history. He highlighted that artists have not only the right but also — and above all — the duty to “teach children how to be happy”. By using any form of art, they should raise awareness all over the world on the need to put an end to every kind of war and violence. Mr. Iovino also declared that it is crucial to increasingly use cinema as a tool for the dissemination of International Humanitarian Law, especially among the youth, thereby highlighting the importance to respect the rights and safety of the most vulnerable categories during wars. In the spirit of this belief, and as Art Director of the Universities Network for Children in Armed Conflicts, he produced a short film which represents the sense and the objectives of the Security Council resolution 1325 (2000) on Women, Peace and Security.⁴ The short film aims, on the one hand, to underline the importance of women’s involvement in mediation and peace processes, showing how they can successfully contribute to solve situations of armed conflict and post-conflict. On the other hand, the short highlights the need to respect IHL, especially in favor of the most vulnerable categories, including girls, our future women mediators. After showing the trailer of the short, he hoped that it will

⁴ Security Council Resolution 1325 (2000), online <<https://peacemaker.un.org/node/105>>.

really help the fight against any form of war and violence, guaranteeing that “children could learn how to be happy”.

This is a special testimony of the important role of cinema and — more broadly speaking — of any kind of art during armed conflicts. The words of the artist show how cinema should be protected and safeguarded during armed conflict; but also how it can be used as a tool to raise awareness and prevent any form of violence and war.

Part 2. Cinema in the Current Armed Conflict in Ukraine

Film producer Darya Bassels has recently stated that “Ukraine’s filmmakers can’t pick up guns, but their cameras are vital weapons”. The war in Ukraine took a starring role on the opening night of the 75th Cannes Film Festival and it has rarely been out of frame since. While the parties have continued nonstop, together with the red-carpet frenzy, throughout the French Riviera a serious discussion on the role of cinema in wartime was nevertheless carried out. Movie screens have lit up with footage from the front lines and films with trenchant meaning in relationship to the conflict. In solidarity with the Ukrainian film industry, EFP (European Film Promotion) is now also offering promotional support for finished and unfinished films from Ukraine via its initiative “Film Sales Support (FSS)”.⁵ Among the other initiatives, “the Guardian [celebrated] Ukrainian cinema with a specially curated selection of documentaries, made before the current war. Presented in collaboration with the Kyiv-based Docudays UA Film Festival, these award-winning movies offer insight into the modern history of the country, its culture and its people.”⁶

It is crucial to understand how to currently protect movies in Ukraine, in particular to guarantee that Ukrainian film archives are preserved. Oleksandr Dovzhenko National Center, the State film archive and national cultural cluster, is of particular importance. It operates as a film

⁵ The EFP (European Film Promotion) promotes European films and talent around the world. With Film Sales Support (FSS), it backs marketing campaigns of European world sales companies targeting countries outside of Europe. Public calls invite sales companies who have registered in the Funding & Tender Opportunities Portal of the European Commission and have been approved by the national film promotion institutes to submit applications by set deadlines. Film Sales Support is funded by the Creative Europe – MEDIA Programme of the European Union. For more information: <<https://www.efp-online.com/en/>>.

⁶ Alina Gorlova et al., “Cinema of Ukraine: artists reflect on modern history, culture and people” (March 31, 2022) online: *The Guardian* <<https://www.theguardian.com/world/video/2022/mar/31/cinema-of-ukraine-artists-reflect-on-modern-history-culture-and-people>>.

depository, as a chemical and digital film laboratory, and features a Film Museum, a film archive and a mediatheque. The Dovzhenko Center's film collection includes over 7,000 Ukrainian, Russian, American and European documentary and animation films; thousands of archive documents, photos, posters and other artifacts that represent the history of Ukrainian cinema from the beginning of 20th century until the present day. The oldest film print preserved by the Center dates back to 1910, and the oldest Ukrainian feature film in the Centre's collection was produced in 1922.⁷

It is also pivotal to guarantee the continuation of Ukrainian Cinema Film Festivals. For instance, the Kyiv International Film Festival, also known as the Molodist International Film Festival, which takes place every October in Kyiv, has a very important value. It is the only film festival in Ukraine accredited by the International Federation of Film Producers Associations and belongs to the list of 26 specialized international competition festivals. The Molodist Festival develops a national and an international short film platform and aims to discover new filmmaking forms and methods in Ukraine and abroad. It represents a meeting point for filmmakers, a source of inspiration and new knowledge for experts, students and cinema lovers in Ukraine. Because of Russia's war against Ukraine, Kyiv IFF Molodist "has no choice but to postpone its 51st edition, earlier planned for May 28 — June 5, 2022, indefinitely".⁸ The Odesa International Film Festival (OIFF) is particularly important as well. It was "established in 2010 to promote high-quality intellectual cinema among Ukrainian audiences as well as to support the development of Ukrainian film industry locally and internationally. Over the years, the festival has managed to become the brightest film event of the summer in Ukraine, as well as firmly establish itself on the world cinema map."⁹ Due to the current armed conflicts, "[t]he National Competition program of the 13th edition of the Festival could not be organized in Ukraine and will be held as part of the Warsaw International Film Festival, October 14-23, 2022. Full-length feature and documentary films, as well as short feature films are invited to participate in the OIFF national competition program in Warsaw."¹⁰

⁷ You can consult the official website here: Dovzhenko Centre, "About" online: *Dovzhenko Centre* <<https://dovzhenkocentre.org/en/about>>.

⁸ Taken from the official communication of the organizers available here: Moldosit, "Molodist-51 Postponed Indefinitely Due to Russia's War Against Ukraine", online: *Molodist* <<https://molodist.com/en/article/molodist-51-postponed-indefinitely-due-to-russias-war-against-ukraine>>.

⁹ OIFF, "About us", online: <<https://oiff.com.ua/en/oiff/about.html>>.

¹⁰ "The National Competition of the 13th OIFF will be held at the Warsaw International Film Festival" (June 8, 2022), online: *OIFF* <<https://oiff.com.ua/en/festival/news/the-national-competition-of-the-13th-oiff-will-be-held-at-the-warsaw-international-film-festival1654681281.html>>.

The case of Ukraine shows the need to strengthen IHL with regard to cinema's protection and will be framed in this paper as a way to identify the relevant legal lacks and propose concrete solutions.

Part 3. The Relations Between Cinema and International Law: An Evolutionary Interpretation of the Relevant UNESCO Conventions

International law does not provide a comprehensive framework for the protection and promotion of cinema, film production and film archives. The Council of Europe Convention on Cinematographic Co-production (Rotterdam, 2017),¹¹ the only existing international relevant Convention, regulates the co-production of films involving production companies established in three or more State Parties, but never defines cinema nor outlines principles and values underpinning its protection within the Council of Europe.

Meanwhile, with the exception of few cases,¹² cinema has never been explicitly defined nor qualified as — tangible or intangible — cultural heritage.¹³ At first glance, therefore, it cannot benefit of the protection provided by the relevant UNESCO Conventions, and fails to fall under the purposes of the *UNESCO Convention for the Protection of the World Cultural and Natural Heritage* (1972), which considers as “cultural heritage”: monuments; groups of buildings; sites (art. 1).¹⁴ While there is no possibility to include films in the legal category of “monuments” and “groups of building”, it seems reasonable to take into deeper consideration the relations between “sites” and “film archives”. According to art. 2 of the Convention, sites are “works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding

¹¹ Julia Hammett-Jamart, Petar Mitric and Eva Novrup Redvall, “Introduction: European Film and Television Co-production” in *European Film and Television Co-production: Policy and Practice*, Julia Hammett-Jamart et al., eds., (Palgrave European Film and Media Studies, 2018), DOI <10.1007/978-3-319-97157-5> The chapter offers an up-to-date analysis of film and television co-production in Europe, bringing together the voices of policy professionals, industry practitioners and media industry scholars to trace the contours of a complex practice that is of increasing significance in the global media landscape: the co-production.

¹² Sanjukta Ray Pahari, “Preservation of Cinema as Cultural Heritage of a Nation with Special Reference to India” (2009) CALIBER 68, online: <<https://caliber.inflibnet.ac.in/caliber2009/CaliberPDF/9.pdf>>.

¹³ Dawson Munjeri, “Tangible and Intangible Heritage: from difference to convergence” (2004) 56 (1-2) *Museum International* 12, DOI <10.1111/j.1350-0775.2004.00453.x>.

¹⁴ UN Educational, Scientific and Cultural Organization (UNESCO), *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, online <<https://whc.unesco.org/en/conventiontext>>. According to art.1, for the purposes of the Convention, the following shall be considered as “cultural heritage”: monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

universal value from the historical, aesthetic, ethnological or anthropological point of view”. It is therefore very difficult to legally consider film archives as “sites” under the World Heritage Convention. Furthermore, the World Heritage Committee, as well as other relevant treaty bodies, State parties and experts in the management and conservation of cultural heritage, never refer to cinema, movies or film archives, nor consider cinema and filmmaking as “cultural heritage” under the Convention.

Nevertheless, film archives are sometimes located within “sites” recognized by the World Heritage Convention. This could happen, above all, in the case of the “historic centers” of cities,¹⁵ which often house important film archives or national archives containing motion pictures, together with other cultural products.

In order to mark a first step in favor of cinema’s protection, States should take into special consideration film archives for the identification and the description of cultural property — in particular “sites” — to be included in the World Heritage List. The *Operational Guidelines for the Implementation of the World Heritage Convention*, lastly revised in July 2021, provide ten criteria to evaluate the “Outstanding Universal Value” of a property, and determine whether it can be inscribed into the World Heritage List. Upon close inspection, film archives are actually eligible to meet at least four of these criteria: they could represent a masterpiece of human creative genius; they could exhibit an important interchange of human values, over a span of time or within a cultural area of the world; they could bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; they could be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding.¹⁶

Also, according to these criteria, State Parties shall consider, in so far as possible, the existence of cinema archives while submitting to the World Heritage Committee an inventory of property forming part of the cultural heritage, situated in its territory and suitable for inclusion in the list (art. 11 of the Convention). Locating and mapping the most important film archives would be the first step in order to progressively create a “cinema archives heritage”, with special reference to films with a strong cultural value. The International Council of Monuments and Sites

¹⁵ More than 50 historic centers are currently included in the World Heritage List, see list online: <<https://whc.unesco.org/en/list/>>.

¹⁶ For a complete analysis, please see: Roha W. Khalaf, “The Implementation of the UNESCO World Heritage Convention: Continuity and Compatibility as Qualifying Conditions of Integrity” (2020) 3 *Heritage* 384. The *Operational Guidelines for the Implementation of the World Heritage Convention* (2021), WHC.21/01, are available online: <<https://whc.unesco.org/en/guidelines/>>.

(ICOMOS), in collaboration with the International Federation of Film Archives, which brings together the world's leading institutions in the field of moving picture heritage, seem best placed to realize this mapping work, thereby opening a new scenario for the protection of the unique legacy of cinema as “cultural heritage” under World Heritage Convention.

The 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage* never mentions cinema, while referring to intangible cultural heritage as “the practices, representations, expressions, knowledge, skills — as well as the instruments, objects, artefacts and cultural spaces associated therewith — that communities, groups and, in some cases, individuals recognize as part of their cultural heritage”.¹⁷ According to art. 2 of the Convention, intangible cultural heritage is manifested, inter alia, in oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; performing arts, social practices, rituals and festive events; knowledge and practices concerning nature and the universe; traditional craftsmanship. The list is intended to be inclusive rather than exclusive, and is not necessarily meant to be ‘complete’, as the expression “inter alia” clearly demonstrates. While the Convention sets out a framework for identifying forms of intangible cultural heritage, a degree of freedom and variation is allowed in how we are to conceptually understand these notions.

Cinema could be considered as a further domain or a new sub-category to existing domains. The different stages of filmmaking involve a set of practices, representations, expressions, knowledge and skills, which make cinema clearly fall in the definition provided by art. 2. Furthermore, cinema can involve the representation of traditional music and dance, prayers and songs as well as ritual and ceremonial practices and an acute awareness and knowledge of the natural world, included in the definition.

Cinema could also be included in domains that already exist, such as the “performing arts”. According to UNESCO, the performing arts range from vocal and instrumental music, dance and theatre to pantomime, sung verse and beyond, including numerous cultural expressions that reflect human creativity and are performed live in front of an audience.¹⁸ The contention that cinema might be a performing art clearly exerts a strong appeal today, putting at stake the “liveness” of

¹⁷ According to the Convention “this intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.” UN Educational, Scientific and Cultural Organization (UNESCO), *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, online <<https://ich.unesco.org/en/convention>>.

¹⁸ UNESCO definition of performing art is available here: UNESCO, “Performing arts (such as traditional music, dance and theatre)”, online: *UNESCO* <<https://ich.unesco.org/en/performing-arts-00054>>.

films, even if they are not performed live. First, films can include dance, drama, music, and other forms of entertainment that are usually referred to as performing arts. Secondly, even though it is projected on a screen, a movie always involves a “direct” relation with its audience, thereby creating a significant empathy between the public and the actors.

In order to ensure better visibility to cinema as intangible cultural heritage and to spread awareness of its value, the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage should start considering registering some specific art of filmmaking in the Representative List of the Intangible Cultural Heritage of Humanity. Films form a vital part of the cultural identity of individuals, communities, peoples and by extension humanity as a whole. The importance of movies does not simply lie in the cultural manifestation itself, but also in the wealth of knowledge and skills that is transmitted through it from one generation to the next. The social and economic value of this transmission of knowledge is relevant for minority groups and for mainstream social groups within a State, and is equally important for developing States as it is for developed ones.

In this regard, for instance, it is worth mentioning some Australian films realized by Indigenous persons in order to entertain but, above all, to document their cultures and identities.

This is highlighted by critical and box-office hits such as *Samson and Delilah* (Dir. Warwick Thornton, 2009) and *Bran Nue Dae* (Dir. Rachel Perkins, 2009), both of which deal with complex Indigenous issues and feature Aboriginal actors and characters. This reshaping of a cultural landscape and shift for Australian cinema’s national identity came about through a gradual reframing of Indigenous rights within the Australian legal system, combined with government support for the development of Indigenous filmmakers.¹⁹

This is only one example to show how cinema can help shape the identity of a community and why it should not be excluded from the scope of application of the 2003 *UNESCO Convention*. In light of this it would be advisable that the next revision of the *Operational Guidelines*, which are the implementing rules governing the operation of the Convention, interpretation and evolution, should take into account the art of filmmaking.

¹⁹ Liz McNiven, “The Rise of Indigenous Screen Culture”, online: NFSA <<https://www.nfsa.gov.au/latest/short-history-indigenous-filmmaking>>.

Film production could also be included in the scope of application of the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005), even if cinema is not explicitly mentioned in any of its provisions. Based on human rights and fundamental freedoms, the Convention represents a milestone in international cultural policy, recognizing the dual nature, both cultural and economic, of contemporary cultural expressions produced by artists and cultural professionals. Cinema could fall into the category of “cultural activities, goods and services” which — according to the Convention — refers to those activities, goods and services, which are considered as a specific attribute, use or purpose, and embody or convey cultural expressions, irrespective of the commercial value they may have. “Cultural industries”, meant as industries producing and distributing cultural goods or services, also include cinema.

The importance attached to cinema by the Convention was confirmed during the 8th Conference of Parties, last year, where several side events were focused on movies. The preliminary results of UNESCO’s study on the film and audio-visual industry in Africa were also presented (“Focus on the cinema industry in Africa: structural reforms and digital transitions for diversity”). Furthermore, since 2010, the International Fund for Cultural Diversity, established by the Convention, has invested approximately US\$ 9.497.896 for the funding of 129 projects in 65 developing countries, which also include filmmaking (for instance the one aimed at encouraging the use of cinema in Madagascar as a means of expression among youth with a view to supporting the development of the film industry).²⁰

The three UNESCO Conventions, if interpreted all together in the new light proposed in this paper, seem to offer innovative solutions in favor of the protection and promotion of cinema, even though they never directly refer to it. Beyond the relevant legal international framework, a new comprehensive approach to “cinema heritage”²¹ is surely needed, with a view to mark a shift of paradigm in favor of its value and development. Facilitating new conversations between States, agencies, international and regional organizations, filmmakers, audience and civil society, is crucial to progressively develop the multidimensional character of cinema as both tangible and intangible cultural heritage.

²⁰ The project aims to support the development of the film industry in Madagascar by raising awareness and developing the skills of young people. You can read the full project (“Encourage the use of cinema as a means of expression among youth with a view to developing a film industry”) here: UNESCO’ “IFCD Projects”, online: *UNESCO* <<https://en.unesco.org/creativity/ifcd/projects/encourage-use-cinema-means-expression-among-youth-view>>.

²¹ Pierluigi Ercole, Daniela Treveri Gennari, Silvia Dibeltulo, and Lies Van de Vijver Kesting, “Cinema Heritage in Europe: Preserving and Sharing Culture by Engaging with Film Exhibition and Audiences” (2009) *Alphaville Journal of Film and Screen Media* 1, DOI: <10.33178>.

Part 4. International Humanitarian Law and the Protection of Cinema

In order to effectively safeguard cinema during armed conflicts, it is crucial to not only protect film archives, movie pictures and cinema studios but also filmmaking itself. This entails the need to guarantee the safety of directors, producers, camera operators, actors, sound mixers, screenwriters, photographers and casting directors.

*UNESCO Military Manual on the protection of cultural property*²² states that the centerpiece of the relevant treaty-law is the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* ('1954 Hague Convention')²³ and its two Optional Protocols, one adopted in 1954 at the same time of the Convention, the other one in 1999. Nevertheless, the Convention and its Optional Protocols never refer to cinema, film production and film archives. Furthermore, they consider only tangible cultural heritage, in particular moveable or immovable properties, leaving intangible cultural heritage outside of their field of application.²⁴ It is difficult to currently foresee a legal revision of the Hague system, but an evolutionary interpretation of the Convention and their Protocols, taking specifically into account cinema as cultural heritage, could be a step forward in the right direction.

Article 1 of the 1954 Hague Convention states that the term "cultural property" shall cover, irrespective of origin or ownership, inter alia, "objects of artistic interest" and "collections and important collections of archives or of reproductions of the property defined in the article" as well as "depositories of archives and centers containing a large amount of cultural property". It is reasonable to consider movie pictures as "objects of artistic interest", while film archives could be considered as "as well as scientific collections and important collections of books or archives or of reproductions of the property defined above".²⁵ States would therefore be obliged to refrain

²² UNESCO, *Protection of Cultural Property: Military Manual* by Roger O'Keefe, Camille Péron, Tofiq Musayev and Gianluca Ferrari O'Keefe (Paris: UNESCO, 2016).

²³ Protection of cultural property in the event of armed conflict ICRC, "Protection of cultural property in the event of armed conflict" (29 October 2010), online: ICRC <<https://www.icrc.org/en/doc/war-and-law/conduct-hostilities/cultural-property/overview-cultural-property.htm>>. In this regard, see also: ICCROM, *Protecting Cultural Heritage in Times of Conflict: Contributions from the participants of the International course on First Aid to Cultural Heritage in Times of Conflict*, Simon Lambert and Cynthia Rockwell, eds, online <https://www.iccrom.org/sites/default/files/ICCROM_18_ProtectingHeritageConflict_en_0.pdf>; UNESCO, *Protect cultural property in the event of armed conflict*, CLT/CIH/MCO/2008/PI/69 REV (2005), online: <<https://unesdoc.unesco.org/ark:/48223/pf0000138645>>.

²⁴ Tajwer Shamsi, "Armed Conflict and Intangible Cultural Heritage" (2022), online: *Diplomacy, Law, Politics Forum DPL Forum* <<https://www.dlpforum.org/2022/02/18/armed-conflict-and-intangible-cultural-heritage/>>.

²⁵ Article 1 of the UN Educational, Scientific and Cultural Organization (UNESCO), *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, online <<https://www.refworld.org/docid/40422c914.html>> states: For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest;

from using film archives - and their immediate surroundings — or the appliances in use for their protection for purposes which are likely to expose them to destruction or damage in the event of armed conflict, and to refrain from any act of hostility directed against such archives (art. 4 of the Convention).

Nevertheless, it seems hard to assert that film archives or archive materials may be placed under the so-called “special protection” provided by the Convention.²⁶ Article 8 states that, subject to strict conditions,²⁷ only a limited number of refuges for sheltering movable cultural property could enter the “International Register of Cultural Property under Special Protection” maintained by the Director-General of UNESCO. The Convention’s system of special protection has been applied, over the years, only to a small number of refuges and centers containing monuments worldwide. Therefore, film archives cannot be included in the field of application of art. 8.

For the same reasons, it would be very difficult to put film archives under the so-called “enhanced protection” provided by the II Additional Protocol to the Convention, which includes “cultural heritage of the greatest importance for humanity, protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection”.²⁸

This does not mean though that film archives could not be granted the distinctive emblem of the Convention, which has the form of a shield, pointed below, per saltire blue and white²⁹. The distinctive emblem repeated three times may be used only as a means of identification of propriety under special protection, but the emblem alone could be used to identify cultural property which is not under special protection. Marking film archives with this distinctive emblem would represent a significant progress for their protection, facilitating their recognition by all the parties

works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

²⁶ Jean-Marie Henckaerts, “New rules for the protection of cultural property in armed conflict” (1999) 835 (81) *International Review of the Red Cross* 593.

²⁷ According to article 8 of the UN Educational, Scientific and Cultural Organization (UNESCO), *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, online <https://en.unesco.org/sites/default/files/1954_Convention_EN_2020.pdf>: “There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centers containing monuments and other immovable cultural property of very great importance, provided that they: (a) are situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication; (b) are not used for military purposes.”

²⁸ *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, 26 March 1999, online <<https://unesdoc.unesco.org/ark:/48223/pf0000130696>>.

²⁹ The blue shield is a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle.

participating to the armed conflict and contributing to reduce the risk of unintentionally damaging them.

The Committee for the Protection of Cultural Property in the Event of Armed Conflict, established by the II Protocol of the Hague Convention, could also play a crucial role in order to strengthen the protection of film archives. According to art. 27, in addition to the tasks set by the Protocol, the Committee could perform any other function, which may be assigned to it by the Meeting of the Parties. Charging it with the task of mapping film archives and cinema studios would be fundamental to have a clear picture of their location and to consequently find new ways to guarantee their protection during armed conflicts. The Committee should also consider emending the Guidelines for the implementation of the Second Protocol so as to include some relevant provisions in favor of the integrity and safety of film archives and cinema studios. Meanwhile, cinema should be taken into account in the periodic reporting mechanism established by the 1954 Hague Convention and its two Protocols. The periodic reports, submitted by each State every four years to the UNESCO Director-General, represent an essential source of information for cultural heritage professionals, researchers and policy makers about measures taken by Governments. Introducing into these reports a specific chapter on cinema would significantly encourage States to implement measures for its protection.

What has been proposed so far would surely open a new path to gradually pursue a legal adaptation of the Hague system aimed at guaranteeing the protection of “cinema heritage” during armed conflicts.

It is also crucial to examine some relevant provisions of the 1977 Additional Protocols to the 1949 Geneva Conventions. Article 53 of the I Additional Protocol to the *1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts* and art 16. of the II Additional Protocol relating to Non-International Armed Conflicts state that — without prejudice to the provisions of the Hague Convention — it is prohibited: “to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of people; to use such objects in support of the military effort; to make such objects the object of reprisals.”³⁰

³⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977, online <<https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and-0>>.

Neither of these two Protocols nor the International Committee of the Red Cross ICRC 1987 Commentaries to the same Protocols give a clear definition of “works of art”; the expression should be considered as a generic term: in the event of any doubt, reference should be made to the 1954 Hague Convention, even though said convention fails to provide a clear definition of the term as well.³¹ A particular and influential author in these fields defined a work of art as “a single movie picture, work of art in the visual arts is a physical two- or three- dimensional object that is professionally determined or otherwise considered to fulfill a primarily independent aesthetic function. A singular art object is often seen in the context of a larger art movement or artistic era, such as: a genre, aesthetic convention, culture, or regional-national distinction”.³² According to this general notion, it is possible to consider movie pictures as “works of art”, thereby including them in the protection provided by both the Protocols during international and non-international armed conflicts.

The protection of film archives and cinema studios is also guaranteed by the World Heritage Convention, which does not cease to apply in armed conflict. According to the UNESCO Military Manual on the protection of cultural property, compliance with the IHL relevant rules guarantees compliance with the World Heritage Convention. Conversely, however, breach of IHL can amount further to a breach of the World Heritage Convention. According to what was claimed in the previous paragraph, it is advisable that State Parties to the 1972 UNESCO Convention submit to the World Heritage Committee an inventory of property forming part of their “cinema heritage”. An inventory of this kind could be of utmost importance to ensure that film archives are effectively protected during armed conflicts, also by establishing “safe zones” to specifically safeguard them, in particular those located within any “site” recognized by the World Heritage List.

The “intangible part” of cinema should be protected during armed conflicts as well.³³ Intangible cultural heritage comes to life, primarily, through its “realization” by interpreters or

³¹ Article 56 of the Regulations annexed to Geneva Convention IV should also be considered, which applies in the case of occupation. *Convention (IV) respecting the Laws and Customs of War on Land* and its annex: *Regulations concerning the Laws and Customs of War on Land. The Hague*, 18 October 1907, online <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4D47F92DF3966A7EC12563CD002D6788>>.

³² Alfred Gell, *Art and Agency: an Anthropological Theory* (Oxford ; New York : Clarendon Press, 1998).

³³ Kalliopi Chainoglou, “The Protection of Intangible Cultural Heritage in Armed Conflict: Dissolving the Boundaries Between the Existing Legal Regimes?” (2017) 2(3) *Santander Art and Culture Law Review* 109, DOI <10.4467/2450050XSNR.17.017.8426>.

bearers.³⁴ Interpreters or bearers could be actors, musicians or dancers; writers, painters or poets; or officiants, clergy and spiritual leaders. The “bearers of cinema” could include, amongst others, directors, producers, camera operators, actors, sound mixers, screenwriters, directors of photography and casting directors. International Humanitarian Law protects them all as civilians³⁵, but none of its provisions could really be interpreted in such a way as to extend that protection to their functions as performers. In this regard, perhaps the new Commentary of the ICRC could specifically consider their function of bearers of the art of filmmaking, especially considering how strictly linked the cultural identity of individuals, communities and people to films can be (as demonstrated with the example of Indigenous filmmaking in Australia highlighted in the previous paragraph).

To preserve the film production process, it would also be fundamental to protect drama schools and films schools at all levels with a view to guarantee that knowledge concerning movie making is transmitted to the future generations. According to art. 11 of the 2003 UNESCO Convention, States Parties shall take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in their territory. This provision applies to all contexts, including when intangible cultural heritage is affected by an emergency such as an armed conflict. In that case, States Parties shall endeavor to ensure the widest possible participation of communities in safeguarding actions, including welcoming internally displaced persons and migrants present in their territories. Assuming that cinema is included in the field of application of the Convention (as was claimed in the previous paragraph) would entail that communities, also during armed conflicts, should be fully involved in the safeguarding of cinema, also contributing to guarantee the continuation of training of all kinds of filmmaking, film production and distribution.

The role of communities in the safeguarding of intangible cultural heritage during armed conflicts, including cinema, is also well highlighted by the *Operational principles and modalities for safeguarding intangible cultural heritage in emergencies*, adopted by UNESCO in response to the rising

³⁴ Christiane Johannot-Gradis “Protecting the past for the future: How does law protect tangible and intangible cultural heritage in armed conflict?” (2105) 97 (900) *International Review of the Red Cross* 1253, DOI: <10.1017/S1816383115000879>.

³⁵ “International law on the conduct of hostilities: overview” (2010), online: *International Committee of the Red Cross* <<https://www.icrc.org/en/doc/war-and-law/conduct-hostilities/overview-conduct-of-hostilities.htm>>. The protection of civilians during armed conflict, indeed, is a cornerstone of international humanitarian law. Civilians protected under international humanitarian law both by the 1949 Geneva Convention and by their Optional Protocols, (*Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977, and *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977).

number of conflicts and natural hazards worldwide. The Operational principles clearly state that “intangible cultural heritage exists only in its enactment by the communities who practice and transmit it, and is inseparable from their social, cultural and economic life. Its safeguarding is therefore indivisible from the protection of the lives and well-being of its bearers. In all phases of emergency, including during armed conflicts, the communities shall play a primary role in identifying their intangible cultural heritage”. Therefore, during armed conflicts it is crucial to directly include communities in identifying how their intangible cultural heritage, including cinema, might have been affected by the war and what measures are needed to safeguard it, as well as how they might draw on it as a resource for enhancing their resilience, facilitating recovery and re-establishing trust and peaceful coexistence within and between communities.

Lastly, the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005) recognizes “the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment.”³⁶ Parties may determine the existence of special situations where cultural expressions on their territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding. This is, of course, also the case for armed conflict, where Parties may take all appropriate measures to protect and preserve cultural expressions, including cinema, in a manner consistent with the provisions of the Convention. It is also important to underline that Parties shall report to the Intergovernmental Committee referred to in art. 23 all measures taken to meet the exigencies of the situation, and the Committee may make appropriate recommendations. States shall cooperate in providing assistance to each other, and, in particular to developing countries, in situations referred to under art. 8 to establish procedures and other mechanisms for consultation aimed at promoting the objectives and principles of this Convention in other international forums.

The protection of cinema during armed conflicts could also fall into the 2005 Strategy for reinforcing UNESCO’s action for the protection of culture and the promotion of cultural pluralism in the event of armed conflict. The Strategy recognizes that the protection of cultural diversity and the promotion of cultural pluralism, through the safeguarding of the tangible and intangible heritage of communities and the protection of human rights and fundamental freedoms, is more than a cultural emergency. It is a security and humanitarian imperative in conflict and transition situations, and an essential element in ensuring sustainable peace and development.

³⁶ UN Educational, Scientific and Cultural Organization (UNESCO), *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, available here: <<https://en.unesco.org/creativity/convention>>.

Participation and access to culture and its living expressions, including intangible heritage, can help strengthen people's resilience and sustain their efforts to live through and overcome crisis. Filmmaking should be surely considered as one of the major forms of cultural expression and pluralism, thereby being included in the Strategy.

Conclusion

The existing international instruments protect cinema only if we legally “adapt” them to this specific art form, by giving them a specific and evolutionary interpretation. In particular, if we consider cinema as - tangible and intangible - cultural heritage, by means of what was put forward in this paper, it should be included in the protection provided by the *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* and its two (1954 and 1999) Protocols, the *1972 World Convention for the Protection of the World Cultural and Natural Heritage*, the *2003 Convention on the Safeguarding of Intangible Cultural Heritage*, the 1977 Additional Protocols to the 1949 Geneva.

Respecting and implementing the obligations stemming from all the Conventions aforementioned is decisive. For instance, in the case of Ukraine, if States were to act accordingly to what has been suggested in paragraph 4, they would be obliged to refrain from any use of the Oleksandr Dovzhenko National Centre (part 2) — and its immediate surroundings — or of the appliances in use for its protection, for purposes which are likely to expose it to destruction or damage in the event of armed conflict, and to refrain from any act of hostility directed against such archive (art. 4 of the 1954 Hague Convention). Furthermore, Oleksandr Dovzhenko National Center should be granted the distinctive emblem of the Convention that would facilitate its recognition by all the parties to the armed conflict and contribute to reduce the risk of unintentionally damaging it (art. 8 of the same Convention).

In addition, the creation of a “safe zone” to organize festivals within Ukraine seems the only solution to keep Ukrainian cinema truly rooted; this would also guarantee that Ukrainians have a chance to enjoy some moments of leisure and entertainment. Furthermore, if cinema were to be included in the field of application of the 2003 Convention on the Safeguarding of Intangible Cultural Heritage Convention, as suggested in the part 2, this would entail that Ukrainian communities should be fully involved in the safeguarding of cinema, also contributing to guarantee the continuation of training of all kinds of filmmaking, film production and distribution.

What could represent a real step forward is also the inscription of film archives and cinema studios in the International List of Cultural Property under Enhanced Protection. “This special list

was established by the 1999 Second Protocol to provide a higher level of protection to cultural property during armed conflict.”³⁷ In cases where individuals do not respect the enhanced protection granted to a cultural property, criminal sanctions have been laid down by the 1999 Second Protocol: its rules governing serious violations provide for criminal penalties in the case of individuals who intentionally attack cultural property or use cultural property under enhanced protection or its immediate surroundings to support military action.³⁸ In order to provide swift protection of cultural property, the 1999 Second Protocol lays down a special simplified procedure for granting enhanced protection on an emergency basis. In the case of Ukraine, even if the Russian Federation did not sign the Protocol, registering cultural heritage, including film archives, into this list would surely contribute to raise awareness on film’s importance and to increase its protection.

Moreover, a new approach is urgently required - at both international and national level — to make effective the link between protection of cultural heritage and diversity, including cinema, as well as to strengthen humanitarian action, peace-building processes and security policies. In defining this new approach, a number of new actors, at all levels, governmental and non-governmental, international and regional must be taken into account. These include well-established international organizations, such as the International Criminal Police Organization (INTERPOL), the World Customs Organization, The International Institute for the Unification of Private Law (UNODC), the International Institute for the Unification of Private Law (UNIDROIT), but also the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), the International Council on Monuments and Sites (ICOMOS), that could play a crucial role for the protection of cinema both in time of peace and during armed conflicts.

The legal adaptation proposed with respect to cinema could be subsequently extended and applied to a wider group of art forms, such as performing arts and visual art, in order to achieve a new comprehensive protection of art in wartime.

³⁷ “The Committee for the Protection of Cultural Property in the Event of Armed Conflict held an emergency meeting dedicated to Ukraine”, (March 22, 2022) online: *UNESCO* <<https://www.unesco.org/en/articles/committee-protection-cultural-property-event-armed-conflict-held-emergency-meeting-dedicated-ukraine>>.

³⁸ UNESCO booklet, *Cultural Property under Enhanced Protection*, 2021, <https://www.levillae.com/wp-content/uploads/2020/12/Enhanced-Protection-EN.pdf>