

Indigenous Cultural Heritage in Development and Trade: Perspectives from the Dynamics of Intangible Cultural Heritage Law and Policy

Rosemary J. Coombe (Canada Research Chair in Law, Culture and Communication, York University) with Joseph F. Turcotte (PhD Candidate, Communication and Culture Program, York University)

1. Introduction

The protection of cultural heritage has become a matter of great concern in the past two decades and been the subject of intense policy negotiations. An emerging awareness of the complexity of issues pertaining to indigenous cultural heritage (ICH) has been one consequence of this process and has arguably shaped it, enabling scholars, activists and international policy makers to more clearly understand the ways in which cultural heritage is both a source of identity and a resource for sustainable development. In these global processes of deliberation, conventional international cultural policy principles that privileged the interests and agency of long-established European nation states and their definitions of cultural heritage are increasingly challenged.¹ New states and states assuming greater international prominence have put new issues on the cultural policy table, as have historically colonised peoples, minority groups and globally organised indigenous peoples' movements and their advocates. The latter, in particular, have contested the propriety of state dominance in protecting, maintaining and safeguarding heritage properties, while insisting upon the distinctive role that cultural heritage plays in the constitution of their identities and their futures as distinct peoples.² Linking issues of cultural heritage to the human rights principle of self-determination makes the issue of indigenous political participation in heritage management a central one. Any approach to issues of trade involving ICH, must take this political context as its starting point.

Considering the obligations with respect to the trade of ICH goods under international laws and policy frameworks pertaining to cultural heritage is a far more difficult task than it first appears, for reasons which relate precisely to the ways in which indigenous peoples and their cultural traditions have been historically marginalised, subjugated, appropriated and targeted for

¹ See Laurajane Smith, *Archaeological Theory and the Politics of Cultural Heritage*, London: Routledge, 2004.

² See Rosemary J. Coombe, 'The Expanding Purview of Cultural Properties and their Politics' (2009) *Annual Review of Law and Social Sciences*, 5, pp. 393-412.

erasure and assimilation by the modern state. As a consequence of this history of dispossession, ICH is internationally governed by a variety of distinctive legal instruments, none of which has superior jurisdiction in all contexts. The very nature of the 'goods' that concern us – those cultural forms and their material manifestations that express meaning and significance constitutive of indigenous identity – advises us to adopt legal pluralism as a starting point for governance inquiries. Indigenous cultural forms and their manifestations have histories that pre-exist those of modern nation states and their legal hegemony and indeed – at least in those instances where the settler state was founded upon treaty relationships with indigenous nations – underwrite those states' legitimacy.³ Consequentially, we must acknowledge indigenous customary law as a legitimate source of relevant and authoritative juridical norms for governing heritage of such significance that it implicates the identities of indigenous collectives and polities. Although international cultural heritage law continues to privilege the nation state as the holder and manager of all cultural heritage within its borders and taken to be within its jurisdiction, this privilege may be politically challenged as a denial of basic human rights that undermines indigenous self-determination. Moreover, to the extent that it leaves indigenous peoples dependent upon states to recognise them as deserving 'communities' who bear the appropriate form of 'culture' deserving of protection, any state-centred and state-dominated regimes of governance for trade in ICH are unlikely to command respect or legitimacy amongst indigenous peoples.

We have found it necessary to move beyond the positive doctrinal field encompassed by the international law of cultural heritage as conventionally understood. Rather we explore it as a field of evolving postcolonial politics in which new understandings of culture are emergent and contested. In considering the issues potentially posed by trade in indigenous intangible cultural heritage, we encountered many gaps and aporias that remain unaddressed in both the law and secondary scholarship that have required both speculation and further questions on our part. We have approached our topic as far as possible so that we do not overlap with the work of other contributors to the volume. Thus, for example, we deal only with intangible heritage, assuming issues specific to tangible heritage to be capably covered by Rebecca Tsosie's consideration of cultural property,⁴ and we deal with TCEs and TK only incidentally, as these are categories more properly within the remit of Christoph Antons',⁵ and Martin Girsberger and Benny Müller's coverage of WIPO activities.⁶ Finally, we deal with the area of intangible cultural heritage primarily as it has evolved historically through UNESCO Conventions, recognising that UNESCO is part of the UN system and fundamentally committed to human rights norms as these are expressed internationally. While there may be some dispute as to whether indigenous

³ See for example the able legal argument elegantly expressed by James Sákéj Henderson, 'Sui Generis and Treaty Citizenship' (2002) *Citizenship Studies*, 6 (4), pp. 415-440.

⁴ Rebecca Tsosie, 'International Trade in Indigenous Cultural Heritage: An Argument for Indigenous Governance of Cultural Property', in this volume.

⁵ Christoph Antons, 'International Trade in Indigenous Cultural Heritage: A Perspective on the Intellectual Property Side of the Debate', in this volume.

⁶ Martin Girsberger and Benny Müller, 'International Trade in Indigenous Cultural Heritage – An IP Perspective', in this volume.

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Comment: Is this why you do not discuss the Convention on the Protection and Promotion of the Diversity of Cultural Expressions? It is not necessary that you do, but perhaps a footnote or short sentence explaining this would be suitable. WE ADDED NEW SECTION ON THIS.

rights are human rights or distinctive rights (even amongst indigenous peoples),⁷ we will follow the UNESCO practice, which we read as deferential to indigenous rights as part of recognised international human rights norms and practice, which is part of international customary – if not yet positive – law in most jurisdictions.⁸

We begin, then, by sizing the terrain within which questions of intangible cultural heritage law and policy have emerged as international issues through a succession of UNESCO Conventions and their implementation. We explore the development of these instruments and their interpretation and operation over time to consider the growing international acknowledgement of the significance of intangible cultural heritage as fundamental to human rights and to sustainable development based on the development of human capacities. We consider the specificity of indigenous concerns in this process, before addressing the difficulties of reconciling practices of international trade with those of safeguarding and revitalising intangible cultural heritage. Finally, we consider the trade-based implications of this history, making some modest proposals for the creative deployment of certain intellectual property vehicles that might encompass and advance indigenous development and self-determination in trade contexts.

2. Sizing the Political Terrain: International Cultural Heritage Protection and Policy as it Implicates Indigenous Peoples

Before moving into the history of UNESCO instruments that frame the international law addressing the protection of intangible cultural heritage, we need to understand the history of the concept of cultural heritage and the objectives that underlie its protection. The term cultural heritage has no single definition internationally and definitions have substantially shifted and evolved even during the latter part of the twentieth century.⁹ From the 1954 Hague Definition of ‘the world’s inheritance of works of art and monuments of history and science’¹⁰ through ‘manifestations of human life which represent a particular view of life and witness the history and validity of that view’¹¹ and, more recently, ‘culture and landscape that are cared for by the community and passed on to the future to serve people’s needs for a sense of identity and belonging’,¹² the concept has transformed to meet changing needs and interests. The value of cultural heritage lies in its significance to human communities and these values fundamentally relate to the kinds of

⁷ This is discussed in John Scott and Federico Lenzerini, ‘International Indigenous and Human Rights Law in the Context of International Trade in Indigenous Cultural Heritage’, in this volume.

⁸ For the argument that indigenous rights are part of international customary law see James S. Anaya, *Indigenous Peoples in International Law*, 2nd edn, Oxford: Oxford University Press, 2004.

⁹ There are five, or arguably, six, UNESCO Conventions on cultural heritage that span more almost fifty years, beginning with the 1956 Hague Convention, and culminating with the Convention on Cultural Diversity in 2005. Because of the ad hoc approach of the Conventions, each of which was devised to deal with an emerging issue or recognised problem, no single definition captures the meaning of the term ‘cultural heritage’ for all purposes.

¹⁰ Laurajane Smith, *Uses of Heritage*, New York: Routledge, 2006, at p. 74.

¹¹ Lyndell Prott and Patrick J. O’Keefe, ‘Cultural Heritage or Cultural Property?’ (1992) *International Journal of Cultural Property*, 1(2), pp. 307-320, at p. 201.

¹² Toulani Loulanski, ‘Revising the Concept of Cultural Heritage: The Argument for a Functional Approach’ (2006) *International Journal of Cultural Property*, 13(2), pp. 207-233, at p. 209.

significance it has. Since cultural heritage may be embodied in intangible forms as well as tangible ones, we are always dealing with terrains of cultural meaning and thus of potential social contestation. The notion of heritage presupposes a focus on inherited forms that may be passed on to future generations in the reproduction of social identities.

The protection of cultural heritage may involve a number of different activities depending upon the values the heritage in question is recognised to possess. When we wish to protect cultural heritage as heritage, we seek to protect not the object or the expression or particular expressive practice per se, but the significance that the object, expression or practice has to those for whom it is cultural heritage, according to legal scholar Craig Forrest in his superb overview of the field.¹³ While intangible cultural heritage may be embodied in any number of expressive forms, it is not the expression itself that laws of intangible cultural heritage regimes seek to protect (unlike intellectual property regimes that do precisely that, so as to protect an author's moral or material interests). Rather, it is the significance of the expression in the social life of a community that is, or should be, the policy focus of heritage protection, according to contemporary wisdom. Moreover, just as processes of attributing value are dynamic and evolving, so too must relevant forms of legal protection be capable of evolution and change.

Nonetheless, certain values have assumed dominance in UNESCO regimes in particular time periods, dictating the form that protection has historically assumed. Cultural heritage may have expressive value that is aesthetic, religious or moral in nature, it may have historical and scientific value, and it may have economic value, to consider three forms of value that have received particular emphasis.¹⁴ Groups, communities, national 'publics', nation states, and in some instances, humankind as a whole may be interested in appropriate forms of valuation. The term 'culture' as a qualifier to the concept of heritage acknowledges a social collective to whom the forms have significance. The relative political power of a given community may determine whether and how heritage goods are valued. Minority groups and indigenous peoples with little formal authority in an international system dominated by nation states as sole sources of legitimate political authority, have limited capacities to define the scope of their relevant heritage or to object to heritage claims made by others. Social collectives have restricted capacities to act in national and international political arenas, although these restrictions are increasingly challenged by minorities, indigenous peoples and local communities on human rights grounds.¹⁵ Group rights, although evolving, have yet to gain full normative recognition in international law, but these are increasingly recognised as an important dimension of sustainable development and environmental protection. The right of communities, minorities and indigenous peoples to participate in the process of determining how cultural heritage of significance to them will be protected

¹³ Craig Forrest, *International Law and the Protection of Cultural Heritage*, London and New York: Routledge, 2010, at pp. 3-4.

¹⁴ *Ibid.*, at pp. 3-5.

¹⁵ *Ibid.*, at pp. 8-9.

is arguably the most important issue of cultural heritage law and policy today.¹⁶

European state governments historically valued cultural heritage as patrimony to be used in nation-building exercises; all cultural forms located or created within state territory were considered public goods or public domain material. Still, nationalist sentiments have long co-existed with 'universalist' perspectives in which the state is considered primarily a steward or guardian for the 'common heritage of humankind'. The latter term, however, also has a long history of ideological deployment to legitimate diverse forms of plunder.¹⁷ If cultural heritage is a public good – and the relevant 'public' may be contentious – it may still be ascribed economic value and subject to market exchange. Various combinations of public and private ventures may be deemed appropriate to realise economic value provided that cultural heritage significance is maintained. Intangible cultural heritage, for instance, is often the basis for tourism industries, which may include commodified performances, experiences of landscapes, handicraft sales and types of hospitality offered as new heritage products. It may also be the basis for new industries such as traditional medicine, ecological tourism, sustainable agriculture and environmental impact assessment.

According to a universalist position, cultural heritage is best appreciated and protected when it is visible and accessible to the largest numbers of persons.¹⁸ Arguably, however, this privileges culturally specific presuppositions about meanings and values that may not accord with those of the group for whom such heritage is significant, whose own values must be given priority if it is to be protected *as* cultural heritage. Amongst developing countries, retaining cultural heritage has become an important means of protection because the economic benefits of tourism and the licensing of intellectual property rights promise more sustainable forms of development than the sale and export of cultural goods characteristic of their colonial past.¹⁹ Heritage forms have scholarly value and convey information about human history and cultural development, but the conditions under which they do so are evolving to serve a broader range of interests than their historical capture as relics and antiquities to grace metropolitan museums. Those means of protection which serve general educational and scholarly needs, for example, no longer take precedence over activities that enable host communities to realise economic benefits from local patrimony. These objectives should not be presumed to be antithetical, however, as community-based archaeological research on ICH increasingly illustrates.²⁰

¹⁶ For a process-based model of regulation where the participation of the most relevant stakeholders, including indigenous peoples, is a central element, see Christoph B. Graber, 'Stimulating Indigenous Cultural Heritage Trade and Development by Means of International Law: Issues of Legitimacy and Method', in this volume.

¹⁷ *Ibid.*, at p. 12. See also Ugo Mattei and Laura Nadar, *Plunder: When the Rule of Law is Illegal*, San Francisco, CA: Wiley Publishers, 2008.

¹⁸ Forrest, *supra* note 13, at p. 14.

¹⁹ *Ibid.*, at p. 17.

²⁰ See, for examples, the essays collected in Thomas Killian (ed.), *Opening Archaeology: Repatriation's Impact on Contemporary Research and Practice*, Santa Fe: School of American Research, 2008, at pp. 79-90; George Nicholas and Kelly Bannister, 'Copyrighting the Past? Emerging Intellectual Property Rights Issues in Archaeology' (2004) *Current Anthropology*, 45 (3), pp. 327-350; and more recently, Shelly Greer, 'Heritage and Empowerment: Community-based Indigenous Cultural

With respect to intangible cultural heritage, states have recently obliged themselves to ‘safeguard’ heritage values, a term that legal expert Janet Blake argues is broader than the concept of protection and requires states to engage in positive actions to promote intangible cultural heritage by creating environments conducive to its flourishing and future production.²¹ This requires parties to take a participatory approach in relation to ‘measures aimed at ensuring the viability of the intangible cultural heritage, including ... [its] identification, documentation, research, preservation, protection, promotion, enhancement, transmission ... revitalization’.²² Finally, legal recognition itself provides a means of ‘protecting’ cultural heritage by reinforcing and legitimating heritage values.²³

The term cultural heritage has special relevance for indigenous peoples in international law precisely because one of its earliest uses as a category emerges from the realisation that international legal recognition of world heritage and cultural property had historically ill-served them. In her influential report *Protection of the Heritage of Indigenous Peoples* (1995) – hereinafter the Daes Report – Erica Daes, as Special Rapporteur, stressed that in the UNESCO Declaration of the Principles of International Cultural Cooperation (1966), the free exchange of cultural knowledge was expressly linked with ‘respect’ and ‘reciprocity’ among cultures. Her study documented the extent to which respect and reciprocity have been lacking in the widespread practice of appropriation of indigenous peoples’ cultural heritage by other societies. She expressed reservations about the term cultural property in international law, and suggested that the apparent division between tangible and intangible cultural heritage in international law was inappropriate as it pertained to indigenous peoples. The term cultural heritage, Daes suggested, more precisely signified the interrelationship between the tangible and intangible qualities of goods in a matrix of relationships that imply responsibilities by members of a collective that are more characteristic of indigenous values.²⁴ Since both cultural properties and intangible cultural goods are alienable as commodities – the latter through intellectual property laws – cultural heritage was proffered as a better concept for appreciating the complex forms of inalienability through which tangible and intangible goods together sustain indigenous collectivities. The concept of cultural heritage reflects the fact that goods of cultural significance, unlike properties per se, are not separate from the social processes which sustain their values. Understanding cultural heritage as a dynamic, expressive and productive practice of dialogue, rather than a passive appreciation for a field

Heritage in Northern Australia’ (2010) *International Journal of Heritage Management*, 16 (1-2), pp. 45–58 and Jonathan Pragnall, Anne Ross and Brian Coghill, ‘Power Relations and Community Involvement in Landscape-Based Cultural Heritage Management Practice: An Australian Case Study’ (2010) *International Journal of Heritage Studies*, 16 (1), pp. 140-155.

²¹ Janet E. Blake, *Commentary on the UNESCO 2003 Safeguarding of the Intangible Cultural Heritage*, Leicester: Institute of Art and Law, 2006, at p. 23.

²² Janet E. Blake, ‘UNESCO’s 2003 Convention on Intangible Cultural Heritage: the Implications of Community Involvement in “Safeguarding”’, in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage*, New York and London: Routledge, 2009, pp. 45-73, at p. 50.

²³ Forrest, *supra* note 13, at p. 19.

²⁴ See discussion in Mohsen al Attar, Nicole Aylwin and Rosemary J. Coombe, ‘Indigenous Cultural Rights in International Human Rights Law’, in Catherine Bell and Robert K. Paterson (eds), *Protection of First Nations Cultural Heritage: Laws, Policy and Reform*, Vancouver, BC: UBC Press, 2009, pp. 311-342, at p. 319.

of static cultural works is consonant with an international movement to revalue cultural diversity and reconceptualise heritage values that clearly situates such cultural activities in the normative field of human rights.

The human rights orientation of cultural heritage protection is found in the very first Article of the Constitution of UNESCO, which establishes that its purpose is to:²⁵

contribute to peace and security by promoting collaboration among the nations through education, science, and culture in order to further universal respect for justice, for the rule of law, and for the human rights and fundamental freedoms which are affirmed for the peoples of the world. ... by the Charter of the United Nations.

Human rights principles expressly frame and limit intangible cultural heritage protections²⁶ and claims are politically articulated as human rights issues, especially when they involve indigenous peoples. This emphasis upon human rights as the overarching normative framework for interpreting cultural heritage law is especially important for indigenous peoples because intangible cultural heritage claims are central means by which the political, economic and social project of achieving self-determination²⁷ is facilitated.²⁸

Principles for the protection of ICH emerged internationally in a human rights context, framed by the concerns of the Sub-Commission on the Human Rights and made their way into the Declaration of the Rights of Indigenous Peoples, in which heritage rights clearly relate to territorial rights from which they are deemed inseparable and indivisible.²⁹ Indeed, international recognition of indigenous land rights is tied to its cultural value to indigenous peoples. It is suggested that 'the protection of Indigenous peoples' land rights fits more into the category of cultural rights rather than the right to property, and human rights law has provided indigenous peoples with legal avenues for the recognition of their specific cultural attachment to their traditional territories.'³⁰ Indigenous communities' representatives and the non-governmental organisations that support them have been successful in compelling the international community to address issues of cultural protection, recognition and valuation of traditional knowledge and the integral relation of these to aboriginal territories.³¹ Moreover, ICH protection is often linked to a broader project of decolonisation that stresses the inextricable link between cultural heritage and the maintenance,

²⁵ UNESCO, 'Constitution of the United Nations Educational, Scientific and Cultural Organization', (adopted 16 November 1945, amended at 31st session), at Article 1.

²⁶ The Convention on Intangible Cultural Heritage's extensive preamble includes a prominent citation of the 1948 Universal Declaration on Human Rights and the two 1966 human rights Covenants in its second recital. Article 2 (1) provides that consideration shall only be given to such intangible cultural heritage as is compatible with existing international rights instruments.

²⁷ Forrest, *supra* note 13, at p. 363.

²⁸ Val Napoleon, 'Looking beyond the Law: Questions about Indigenous Peoples' Tangible and Intangible Property', in Catherine Bell and Robert K. Paterson (eds), *Protection of First Nations Cultural Heritage: Laws, Policy and Reform*, Vancouver, BC: UBC Press, 2009, pp. 370-393, at p. 371.

²⁹ Al Attar et al., *supra* note 24, at p. 317, note 28.

³⁰ Jeremie Gilbert, 'Custodians of the Land: Indigenous Peoples, Human Rights and Cultural Integrity', in Michele Langfield, William Logan and Mairead Nic Craith (eds), *Cultural Diversity, Heritage and Human Rights*, Abingdon: Routledge, 2010, pp. 31-44, at p. 35.

³¹ Al Attar et al., *supra* note 24, at p. 323.

strengthening, transmission and renewal of indigenous peoples' identity, knowledge, laws and practices.³²

The Declaration of the Rights of Indigenous Peoples (hereinafter the Declaration), has also provided a strong normative vocabulary with which to make these claims, providing as it does:³³

an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law ... The principles and rights affirmed in the Declaration constitute or add to the normative frameworks for the activities of United Nations human rights institutions, mechanisms and specialized agencies as they relate to indigenous peoples.

Thus, human rights standards seem to be fundamental in framing most if not all principles of international ICH protection. With co-authors, Coombe has canvassed the field of international human rights law pertaining to ICH elsewhere to conclude that the rights of indigenous peoples to a measure of control over the use of their cultural heritage is widely recognised and arguably constitutes a principle of international customary law.³⁴

UNESCO is the primary UN body responsible for preparing and interpreting international normative principles and instruments with regard to cultural rights as a special category of human rights in international law. International human rights norms generally demand a special sensitivity to the rights of the disadvantaged. Minorities and indigenous peoples are precisely those whose cultural rights have historically been violated, often through state sanctioned initiatives to forcibly assimilate them, prohibit their cultural practices, penalise the use of their languages and the practice of their spiritual life, seize their cultural goods and relegate their culture to a form of historical information.³⁵ Over the last two decades international policy has recognised that ICH is not a residual remainder of a lost past, but an evolving repertoire of knowledge, practices, innovations and expressions that are significant for maintaining the interlinked goods of cultural and biological diversity while providing the basis for sustainable development.³⁶ A number of international and national legal instruments promoting the ethnic, cultural, linguistic and religious identities of national minorities affirm community rights to participate in decisions that involve the use of their cultural heritage and recognize cultural diversity as a grounds for sustainable development.

³² George Nicholas et al., 'Intellectual Property Issues in Heritage Management-Part 2: Legal Dimension, Ethical Considerations, and Collaborative Research Practices' (2010) *Heritage Management*, 3(1), pp. 117-147, at p. 121.

³³ UN, General Assembly, Human Rights Council, 'Report of the Special Rapporteur, Mr. S. James Anaya, on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' (A/HRC/9/9, 2008).

³⁴ Al Attar et al., *supra* note 24.

³⁵ George Nicholas, 'Indigenous Cultural Heritage in the Age of Technological Reproducibility: Towards a Postcolonial Ethic of the Public Domain', in Rosemary J. Coombe, Darren Wershler and Martin Zeilinger (eds), *Dynamic Fair Dealing: Creating Canadian Culture Online*, Toronto: University of Toronto Press, forthcoming. See also, Elizabeth Coleman and Rosemary J. Coombe, 'A Broken Record: Subjecting "Music" to Cultural Rights', in James C. Young and Conrad Brunck (eds), *Ethics of Cultural Appropriation*, London: Blackwell, 2008, pp. 179-210.

³⁶ Rosemary J. Coombe and Nicole Aylwin, 'Repositioning Cultural Heritage Ethics Using Human Rights Norms', in Rosemary J. Coombe, Darren Wershler and Martin Zeilinger (eds), *Dynamic Fair Dealing: Creating Canadian Culture Online*, Toronto: University of Toronto Press, forthcoming.

Our focus therefore, is primarily upon the protection, preservation, safeguarding and development of intangible cultural heritage as a cultural right, rather than as an economic right, which is more properly the purview of WIPO. Nonetheless, to the extent that UNESCO is committed to maintaining both cultural identity and furthering sustainable development, it becomes necessary to consider the extent to which economic rights may need to be shaped or limited to serve these objectives.

International instruments addressing the rights of indigenous peoples, it might be argued, have fundamentally altered the international consensus on the scope and meaning of cultural rights.³⁷ Prior to the negotiation of the Declaration (a twenty-year process), international law largely objectified culture. Cultural rights protected heritage practices and cultural identifications with heritage goods primarily as static monuments, icons, and symbols subject to state cultural recognition³⁸ not as material domains with respect to which communities other than nations might have legitimate authority and a political voice.³⁹ Regarded as an activity and as a resource, however, the political and economic dimensions of culture have come to the fore, putting new emphasis on community security, economic stability and sustainable development; cultural rights claims have increasingly enabled groups to achieve control over significant material resources⁴⁰ and heightened their stakes in fields of cultural representation.

Within the wider field of cultural rights (which includes the moral and material interests of authors more properly covered by a discussion of intellectual property) we focus on obligations to protect, safeguard, maintain and develop intangible cultural heritage of particular concern to indigenous peoples.⁴¹ Although the term 'intangible cultural heritage' formally emerges only with the 2003 Convention on the Intangible Cultural Heritage, it would be a mistake to consider this the only UNESCO Convention concerned with the intangible dimensions of cultural heritage. Properties are only of interest to UNESCO to the extent that a property has the kind of value embraced by the term cultural heritage. Historically, the term 'cultural property' served as an expedient referent; nonetheless, 'it is essentially the value attributed to the objects that is to be protected'⁴² and thus the intangible aspects that warranted policy attention. Nonetheless, critics point to the dominant meanings that property has as a concept in common law, particularly to commercial significations that privilege exclusive private rights of exclusion, alienation, exploitation, and even absolute rights of destruction that do not denote protective considerations. Although the term cultural heritage emerges in the 1972 World Heritage Convention as the target of protection, the Convention's limited application to immoveables, such as monuments, archaeological sites,

³⁷ Cindy Holder, 'Culture as an Activity and Human Right: An Important Advance for Indigenous Peoples and International Law' (2008) *Alternatives*, 33, pp. 7-28.

³⁸ *Ibid.*, at p. 17.

³⁹ *Ibid.*, at p. 12.

⁴⁰ Bruce Robbins and Elsa Stamatapoulou, 'Reflections on Culture and Cultural Rights' (2004) *South Atlantic Quarterly*, 103(2/3), pp. 419-434.

⁴¹ Reference will be made to other UNESCO Conventions and Instruments, as well as WIPO activities, only when these help to clarify issues that remain obscure when focusing primarily upon the major Conventions.

⁴² Forrest, *supra* note 13, at p. 23.

relics and landscapes is perceived to have detracted attention from the values themselves.

In some cases, state and international focus upon the fixed property unfortunately damaged the cultural values that the form was designated as heritage to protect. For example, the physical protection of world heritage sites like Angkor (and their development for more widespread appreciation) is widely acknowledged to have damaged the cultural connection between the Cambodian people and this manifestation of their heritage. By 1995 experts recognized that the concept of cultural heritage, having become too based on architectural and archaeological heritage, unduly focuses on the physical side, 'completely ignoring the question of the function in contemporary society.'⁴³

Other forms of cultural heritage which lacked tangible manifestation, such as ritual, behaviour, oral histories, knowledge, skills and practices were also slighted by this emphasis upon materiality. These intangible forms had not historically received protection arguably because they were possessed by less powerful peoples with denigrated cultural value systems⁴⁴ whose cultural forms were often deemed primitive and backward --destined to disappear under policies of modernity, assimilation and development. To the extent that these were legally recognized it was as folklore that was properly part of the public domain.⁴⁵ Ultimately, then, cultural heritage as a concept had become so associated with its tangible manifestations rather than the values therein embodied that policymakers deemed it necessary to add the qualifier 'intangible' to the primary term cultural heritage. This provided a clear means of referring to aspects of cultural heritage which had no material fixity capable of rendering these properties (or authorship attributes capable of rendering them intellectual properties).

During the 1980s, debates about the meaning and value of cultural heritage took place in relationship to larger international deliberations about the relationship between culture and development. In 1987, the UN launched its World Decade for Cultural Development (1987-1997), in which a more anthropological view of culture as a way of life and form of social organisation, was adopted. This served to reinforce the idea that cultural heritage could not be restricted to historical sites and monuments but needed to include oral tradition and a wider field of expressive culture.⁴⁶ In 1995, at the UNESCO General Conference, The World Commission on Culture and Development solidified this new perspective in its report, *Our Creative Diversity*, by highlighting that heritage is made up of more than monuments and historical sites, and that both tangible and intangible cultural heritage are key to 'ensuring the flourishing of human existence.'⁴⁷

⁴³ As cited in Forrest, *ibid.*, at p. 28.

⁴⁴ Jessica Myers Moran, 'Legal Means for Protecting the Intangible Cultural Heritage of Indigenous Peoples in a Post-Colonial World' (2008) *Holy Cross Journal of Law and Public Policy*, 12 (71), at p. 71.

⁴⁵ Coombe and Aylwin, *supra* note 36. See also Brigitte Vézina, 'Are They In or Are They Out? Traditional Cultural Expressions and the Public Domain – Implications for Trade', in this volume.

⁴⁶ Blake, *supra* note 22, at p. 48.

⁴⁷ Lourdes Arizpe, 'The Cultural politics of Intangible Cultural Heritage', in Janet Blake (ed.), *Safeguarding Intangible Cultural Heritage: Challenges and Approaches*, Great Britain: Institute of Art and Law, 2007, pp. 25-41, at p. 32.

In the collective struggles of many marginalised people, culture is a concept used reflexively to engage with state and non-governmental institutions for purposes of asserting identity, demanding greater inclusion in political life, local autonomy, and control over resources, while seeking new forms of engagement with global markets (as well as resistances thereto).⁴⁸ Cultural distinction has gained new international purchase as a valuable social, political and economic resource.⁴⁹ Cultural rights have become legal vehicles through which political claims are pursued; cultural rights claims now figure in struggles for political autonomy, legal entitlements to territory and other resources and designs for alternative forms of development.⁵⁰ Issues of safeguarding, managing, and developing ICH are integrally embedded in this larger field of politics.

2. The Development of Intangible Cultural Heritage Law and Policy

To explore the development of intangible cultural heritage law and policy within the international framework, we examine the UNESCO instruments most likely to impact upon indigenous intangible cultural heritage, avoiding those that pertain primarily to material cultural property except when these include sites of cultural significance to indigenous peoples from which significant forms of intangible cultural heritage might arise and require protection, preservation, or development. As the following summary description of the main features of the relevant legal instruments illustrates, UNESCO's interest in and commitment to the protection of intangible ICH has become stronger as institutional concerns have focused increasingly upon maintaining cultural identities and cultural diversity..

2.1. 1972 World Heritage Convention (WHC)

The WHC reflects the convergence of three international initiatives, one for protecting monuments and sites of universal value, another for conservation of natural heritage, and a declaration on the value of human environments. Coming into force in 1975, it had been adopted by virtually all states by 2009.

⁴⁸ See Rosemary J. Coombe, 'First Nations Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law', in Catherine Bell and Robert K. Paterson (eds), *Protection of First Nations Cultural Heritage: Laws, Policy and Reform*, Vancouver, BC: UBC Press, 2009, pp. 247-277.

⁴⁹ As elaborated in John Comaroff and Jean Comaroff, *Ethnicity, Inc.*, Chicago: University of Chicago Press, 2009. See also, Rosemary J. Coombe, 'Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference' (2005) *Law, Culture and Humanities*, 1 (1), pp. 32-55; George Yudice, *The Expediency of Culture*, Durham: Duke University Press, 2003; and Vijayendra Rao and Michael Walton (eds), *Culture and Public Action*, Palo Alto, CA: Stanford University Press, 2004.

⁵⁰ See Rosemary J. Coombe, "'Possessing Culture": Political Economies of Community Subjects and their Properties', in Mark Busse and Veronica Strang (eds), *Ownership and Appropriation*, London: Berg Publishers, 2011, pp. 105-127; Rosemary J. Coombe, 'Cultural Agencies: "Constructing" Community Subjects and their Rights', in Mario Biagioli, Peter Jaszi, and Martha Woodmansee (eds), *Making and Unmaking Intellectual Property*, Chicago: University of Chicago Press, 2011, pp. 79-98; Henrietta Marrie, 'The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the Protection and Maintenance of the Intangible Cultural Heritage of Indigenous Peoples', in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage*, New York and London: Routledge, 2009, pp. 169-192; and Bruce Robbins and Elsa Stamatopoulou, 'Reflections on Culture and Cultural Rights', (2004) *South Atlantic Quarterly*, 103 (2/3), pp. 419-434.

The Convention was based upon the universalist premise that heritage is the world heritage of global humankind and to qualify for the regime's inscription and protection, it must be of 'outstanding universal value'. This concept has been amended through Operational Guidelines which have had six distinct variations since 1977, reflecting a shift from iconic and historic sites to those more representative of the world's diversity and living traditions. Contemporary Guidelines evaluate a site's integrity and authenticity within the cultural context in which the site has significance. Ultimately, however, it is the state party that must identify and nominate potential sites and pledge to conserve these. State sovereignty over heritage within its territory is fundamental to the regime but state duties have little discernable positive content. While states are encouraged to adopt policies that give the cultural and natural heritage a function in the life of the community, set-up services for protection, work out operating methods to counteract dangers to the heritage, and establish training centres for heritage protection, they are only asked to endeavor to do so. States are required to maintain inventories of sites suitable for inclusion in a Tentative List of possible nominations and for many years have been encouraged to prepare these lists 'with the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, NGOs, and other interested parties and partners'.⁵¹

The International Council on Monuments and Sites (ICOMOS) was established in 1965 and played an important role in the conceptualisation of cultural heritage. Its mandate was restricted to monuments (real property) and sites (a group of elements, whether natural or man-made or combinations of the two, which it is in the public interest to preserve) but not moveable property. This reflected a growing interest in environmental and anthropological aspects of historical preservation⁵² and an acknowledgment that the setting for archaeological works may be significant to their cultural value.⁵³ Sites may have heritage value because of their association with events, living traditions, ideas, beliefs or artistic and literary works of outstanding universal significance, for instance.

Still, the WHC definition of monuments 'which are of outstanding universal value from the point of view of history, art, or science' clearly privileges some kinds of intangible values over others. Similarly the definition of sites as 'works of man or combined works of man and nature' undervalues the cultural values that many indigenous communities hold with respect to natural sites.⁵⁴ Laurajane Smith provides an extensive critical discussion of how the politics of cultural resource management with respect to ICH in Australia has worked to empower archaeologists at the political expense of indigenous peoples themselves, devaluing their knowledge, denying their authority, defining their identity and in some cases even denying their contemporary existence as aboriginal peoples.⁵⁵ Despite the establishment of codes of ethics requiring archaeologists to consult with indigenous peoples,

⁵¹ Forrest, *supra* note 13, at p. 251.

⁵² *Ibid.*, at p. 226.

⁵³ *Ibid.*, at p. 230.

⁵⁴ Laurajane Smith, *Uses of Heritage*, London: Routledge, 2006, at p. 96.

⁵⁵ Smith, *supra* note 10, at p. 96.

these consultation processes have been experienced by indigenous peoples as disrespectful, patronising and tokenistic – in short, monologic rather than dialogic. Significantly, Smith illustrates that many professional experts in this field remain ignorant of the political consequences of their work for indigenous peoples and the ways in which their historical pronouncements may impact upon aboriginal rights to land, resources and livelihoods. Her work helps to explain the distrust with which indigenous peoples may still greet legal processes of protecting cultural heritage and associated activities of state initiated cultural resource management.⁵⁶

2.2. 1992 Instrument on Cultural Landscapes

The recognition of cultural landscapes as an explicit category of heritage in 1992 was one response to allegations that the World Heritage Committee's selection criteria were unbalanced and Eurocentric and failed to appreciate the significance of ICH in many parts of the world. At about the same period, following the Rio Earth Summit, global policymakers were considering issues of biological diversity, which posited indigenous knowledge and its vulnerability as significant issues to be addressed. The WHC's definition of heritage provided an innovative and powerful opportunity for the protection of cultural landscapes as 'combined works of nature and man'.⁵⁷ In 1992, the World Heritage Committee adopted three categories of cultural landscapes as qualifying for listing. The most easily identifiable was the clearly defined landscape designed and created intentionally by man, which embraces garden and parkland landscapes constructed for aesthetic reasons that may be associated with religious or other monumental buildings. The second category is the organically evolved landscape that 'results from an initial social, economic, administrative, and/or religious imperative and has developed its present form by association with and in response to its natural environment' falling into two sub-categories, the first pertaining to relic landscapes that are no longer evolving, and the second, a continuing landscape which retains an active social role in contemporary society.⁵⁸ The final category of 'associative cultural landscapes' was deemed 'justifiable by virtue of the powerful religious, artistic or cultural associations of the natural element rather than material cultural evidence'. Thus the 'associated intangible values' of natural places of cultural significance could provide the basis for inscription on the World Heritage List.⁵⁹

⁵⁶ See also Jane Lydon 'Contested Landscapes: Rights to History, Rights to Place: who controls archaeological places?', in B. David and J. Thomas (eds), *Handbook of Landscape Archaeology*, Walnut Creek, CA: Left Coast Press, 2008, pp. 654-659.

⁵⁷ UNESCO, 'Convention on Protection of the World's Cultural and Natural Heritage', adopted at the 17th Session of the General Conference of UNESCO (adopted on 16 November 1972, entered into force 17 December 1975), Article 1 [hereinafter 'Heritage Convention'].

⁵⁸ UNESCO, 'Guidelines on the Inscription of Certain Types of Properties on the World Heritage List', Annex 3 to the *World Heritage Committee Operational Guidelines for the Implementation of the World Heritage Convention*, 2008, at Annex 10 of Annex 3, available online at: <http://whc.unesco.org/archive/opguide08-en.pdf>.

⁵⁹ See discussion in Jean-Louis Luxen, 'The Intangible Dimension of Monuments and Sites' (2000) *ICOMOS Newsletter*, March-July, available at <http://www.international.icomos.org/ga2002.htm> and in Harriet J. Deacon and O. Beazley, 'The Safeguarding of Intangible Heritage Values under the World Heritage Convention: Auschwitz, Hiroshima and Robben Island', in Janet E. Blake (ed.), *Safeguarding Intangible Cultural Heritage - Challenges and Approaches*, Bulth Wells, UK: Institute of Art and Law, 2007, pp. 93-107.

According to UNESCO insiders, the category of cultural landscape has been crucial for fully legitimating the heritage of local communities and indigenous people:⁶⁰

The primary difference was the acceptance of communities and their relationship with the environment. There are many places with associative cultural values, or sacred sites, which may be physical entities or mental images embedded in a people's spirituality, cultural tradition, and practice. The category of sacred sites has an immense potential, as many protected areas have been basically protected because they are sacred places. Well before the categorization of protected areas into national parks, nature reserves, and landscapes, indigenous peoples have protected their sacred sites and groves. Through these mechanisms they have contributed to preserving unique sites, biological diversity and cultural spaces transmitted to future generations.

It was only in 1998, however, that the Operational Guidelines were changed to allow for the inclusion of a traditionally managed natural site – East Rennell (Solomon Islands) – to be inscribed on the World Heritage List. Consequentially, the involvement of local people in nomination processes was considered desirable; in 2005 the Operational Guidelines formally encouraged community involvement. Ideally, the Convention will evolve to recognise traditional management systems, customary law and traditional environmental knowledge as legitimate forms of protection and thereby 'contribute to sustainable local and regional development'.⁶¹ New governance structures might combine community managed systems and traditional national park management in a vision of shared responsibilities amongst stakeholders where local capacity building and employment for community members are linked to national institutional support and indigenous peoples are considered prime beneficiaries.⁶²

As Janet Blake notes, this type of landscape is exemplified by Uluru Kata Tjuta in Australia and Tongariro National Park in New Zealand, where indigenous peoples assume management roles.⁶³ Inscribed on the World Heritage List in 1994 as a cultural landscape manifesting the interaction of humanity and its natural environment as both a 'continuing' and 'associative' cultural landscape, the management of indigenous intangible cultural heritage has been structured so as to provide economic benefits for indigenous communities that may well be relevant for considerations of trade. Anangu Aboriginal peoples' cosmologies are central to the site's perceived significance and has evolved under traditional management practices that stress a code of behaviour governing both interpersonal relationships and environmental management. These include ceremonies performed according to *Tjukurpa*, an indigenous philosophy often referred to in English as the Dreaming, a term that Anangu reject because it implies that the relationships between humans, animals, plants, and their descendants are in some sense

⁶⁰ Mechtild Rössler, 'World Heritage Cultural Landscapes: A UNESCO Flagship Programme' (2006) *Landscape Research*, 31 (4), pp. 333-353, at p. 336.

⁶¹ *Ibid.*, at p. 334.

⁶² *Ibid.*, at p. 348.

⁶³ Blake, *supra* note 1, at p. 51. See also J. Simmonds, 'UNESCO World Heritage Convention' (1997) *Art, Antiquity and Law*, 2 (3), pp. 251-281.

unreal or imaginary.⁶⁴ This philosophy is arguably local customary law in the region and is sometimes translated as 'time of the law'.⁶⁵ Moreover:⁶⁶

... the material forms of Uluru and Kata Tjuta incorporate the actions, artefacts and bodies of the ancestral beings celebrated in Anangu religion and culture through narratives, elaborate song cycles, visual arts and dance. The numerous paintings in the rock shelters at the foot of Uluru express the ideas (*kulini*, or physical thinking) of *Tjukurpa*. They were made as a teaching tool . . . one of the park's Anangu rangers, describes the painted shelters as an 'Anangu blackboard'. It is incumbent on modern Anangu to follow *Tjukurpa*, both in their management of the environment and in their social relationships.

It is precisely these spiritual 'associations' with 'country' that are protected through the Uluru-Kata Tjuta National Park Board of Management, the Central Land Council and the Office for Joint Management. The landscape is actively managed by Aboriginal communities "using traditional practices and knowledge ... and management techniques to conserve biodiversity such as the use of fire and the creation and maintenance of water sources such as wells and rock waterholes"⁶⁷ as well as through maintenance of traditional ceremonial activities within Anangu communities. Management of the park, access to the sites, and the information conveyed to visitors all embody respect for Anangu ritual values and incorporate activities Anangu deem necessary for the maintenance of *Tjukurpa*, including transmission of traditional knowledge to youth to enable them to find water, food, and bush medicine, ritualised visiting of sacred sites, keeping visitors safe by respecting traditional forms of power vested in sites, caretaking through rockhole cleaning and traditional burning, and keeping the country alive through ceremony and song.⁶⁸ Anangu peoples are employed in all natural resource management activities and Anangu traditional ecological knowledge of flora, fauna, habitat, seasons, places and their history is prized in park management.⁶⁹

Protecting *Nguraritja* 'intellectual and cultural property rights' is asserted as necessary to protect traditional knowledge and Anangu cultural work. *Nguraritja* refers to traditional custodians with respect to sites, who acquire responsibilities through birth and ancestral connections. Although all Anangu peoples are recognised as having rights to control their cultural heritage, Anangu management plans vest such rights of control as responsibilities to be exercised by *Nguraritja*.⁷⁰ The Park features a Cultural Centre, opened ten years after the park was returned to its traditional Anangu owners, and the documentation and storage of traditional knowledge as well as the

⁶⁴ Graeme Calma and Lynette Liddle, 'Uluru-Kata Tjuta National Park: Sustainable Management and Development', in UNESCO, *Cultural Landscapes: the Challenges of Conservation, World Heritage Paper No. 7*, Paris: World Heritage Centre, 2003, pp. 104-119, at p. 105.

⁶⁵ Robert Layton, 'Relating to the Country in the Western Desert', in Eric Hirsch and Michael O'Hanlon (eds), *The Anthropology of Landscape: Perspectives on Space and Place*, Oxford: Clarendon Press, 1997, pp. 210-231.

⁶⁶ Calma and Liddle, *supra* note 66, at p. 105.

⁶⁷ *Ibid.*, at p. 107.

⁶⁸ *Ibid.*, at p. 109.

⁶⁹ *Ibid.*, at p. 108.

⁷⁰ Australian National Government, 'World Heritage' Director of National Parks (2009), available online at <http://www.aph.gov.au/house/committee/environ/whainq/whirpt/contents.htm>.

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Comment: The citation doesn't appear to match the web reference. Should this read: Standing Committee on Environment, Recreation and the Arts, 'Managing Australia's World Heritage', *Committee Report* (4 November 1996), available online at <http://www.aph.gov.au/house/committee/environ/whainq/whirpt/contents.htm>, last updated 7 February 2011? Yes, that is correct.

transmission of *Tjurkurpa* values to future generations and to the public is one of its central missions.⁷¹ New media such as film, video and digital sound recording are used for storing oral histories and recording relationships between songs and landscape features in the presentation of ‘soundscapes’ enabling visitors to virtually explore the cultural landscape. Paintings on the rock faces of the two rock formations reflect aspects of religion and ceremony and serve pedagogical purposes for both community members and visitors; Anangu use the same symbols today in sand drawings, body painting and acrylic paintings.

Indigenous participation in the management of cultural landscapes is not restricted to World Heritage sites, however. UNESCO values may be translated into the domestic policies of state parties even where sites are not nominated for inscription. For example, Canada began to recognise cultural landscapes in the 1990s and added aboriginal cultural landscapes to its national parks system in 1999,⁷² incorporating principles of community involvement and management that have put emphasis upon the significance of such sites to aboriginal peoples and privilege their management.⁷³ Certainly the evolution of world heritage to include cultural landscapes seems to better accord with indigenous values. Nonetheless, there is a long legacy of managing heritage sites in a way that privileges aesthetic values and displacing indigenous values with respect to natural sites that will need to be overcome.

Social geographer Jennifer Carter provides an extensive case study from Fraser Island in Australia that demonstrates the continuing tendency of professional experts to rhetorically ‘depopulate’ significant heritage sites, while misunderstanding the complex connections between nature and culture characteristic of indigenous values.⁷⁴ Despite official federal acknowledgment of the hybridity of nature and culture in heritage discourse, state planning and site management continues to maintain ‘separate environmental impact and cultural heritage assessments, relying on documented evidence within a structured inventory and a material-centred approach to the categorising of “natural” or “cultural” values’,⁷⁵ ignoring the indigenous imprint upon the landscape and the landscape’s significance to aboriginal identity. Nonetheless, she acknowledges that the contemporary recognition of cultural landscapes ‘might allow Indigenous people to more fully receive the benefits they desire through tourism, park management, fishing, education, planning, and the provision of roads and local services, and so forth. Whether or not

⁷¹ Calma and Liddle, *supra* note 66, at p. 108.

⁷² Meryl Olivier, ‘Cultural Landscape Conservation Experiences in Canada’, in UNESCO, *Cultural Landscapes: the Challenges of Conservation*, World Heritage Paper No. 7, Paris: World Heritage Centre, 2003, pp. 101-103.

⁷³ Susan Buggie and Nora Mitchell, ‘Cultural Landscape Management Challenges and Promising New Directions in the United States and Canada’, in UNESCO, *Cultural Landscapes: the Challenges of Conservation*, World Heritage Paper No. 7, Paris: World Heritage Centre, 2003, pp. 92-100, at p. 92.

⁷⁴ Jennifer Carter, ‘Displacing Indigenous Cultural Landscapes: the Naturalistic Gaze at Fraser Island World Heritage Area’ (2010) *Geographical Research*, 48 (4), pp. 398-410.

⁷⁵ *Ibid.*, at p. 399 citing Germán I. Andrade, ‘The Non-Material Values of the Machu Picchu World Heritage Site from Acknowledgement to Action’ (2000) *Parks*, 10, pp. 49-62; and Sue Jackson, ‘Compartmentalising Culture: the Articulation and Consideration of Values in Water Resource Management’ (2006) *Australian Geographer*, 37, pp. 19-31.

renomination occurs, world heritage inscription needs to be realised as people's connection with place.'⁷⁶

2.3. 2003 Convention For The Safeguarding Of Intangible Cultural Heritage (ICHC)

If 'intangible cultural heritage is not an object, not a performance, not a site; . . . may be embodied or given material form in any of these, but basically . . . an enactment of meanings embodied in collective memory',⁷⁷ it is not surprising that attempts to safeguard such an amorphous corpus have involved decades of struggle. Many societies value intangible heritage passed down over generations more than the physical manifestations of this heritage and view such manifestations as meaningless outside of the social context of their transmission, yet these values were effectively marginalised in global policy circles for decades. International attention was focused upon intangible cultural heritage by a remarkable confluence of concerns and energies that conjoined multiple international agencies.

The negotiation of the ICHC at the end of the twentieth century was influenced by a widely held concern that the dominance of commercial cultural forces had the potential to undermine the diversity of the world's cultural heritage and that the decline of languages, traditional practices and traditional knowledges posed grave consequences for the preservation of biological diversity and for sustainable development.⁷⁸ The preservation of intangible cultural heritage had thus become a matter of concern to international organisations that would not normally focus their energies on cultural matters per se. These include the United Nations Environment Programme, the Food and Agricultural Organisation, the International Labour Organization, the World Bank and the World Trade Organization, which has also ensured that intangible cultural heritage is now addressed by multiple and overlapping regimes.

The intangible dimensions of culture have been long recognised by UNESCO, but no normative regime of protection emerged, despite years of attempts to facilitate lawmaking in this area, beginning in the early 1970s when UNESCO collaborated with WIPO to include folklore in model laws for copyright protection. It was not until 1989, however, that UNESCO adopted the Recommendation of the Safeguarding of Traditional Culture and Folklore, which sought to encourage international co-operation between states and national measures for identification, conservation, protection and dissemination. Whether due to a lack of incentives and support, or to ideological opposition, few states gave effect to these proposed 'soft law' measures. The perceived overlap between intangible cultural heritage and intellectual property protections has continued to characterise international efforts, which indigenous peoples have regarded as putting too much

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Comment: In this section and the following (i.e. sections 3.3 and 4), 'ICH' has been used to mean both 'Indigenous Cultural Heritage' or 'Intangible Cultural Heritage'. Could you please ensure that it is only used to mean the former.

RJC: This is because we had not known that you would be using the acronym for indigenous cultural heritage...we had never used it for this purpose. When you introduced it for the book, it created a duplicate in our article thus necessitating that you remove our earlier use of the acronym. We have now done so.

⁷⁶ Ibid., at p. 408 [internal citations omitted].

⁷⁷ Arizpe, supra note 47, at p. 362.

⁷⁸ Toshiyuki Kono, 'UNESCO and Intangible Cultural Heritage from the Viewpoint of Sustainable Development', in Abdulqawi A. Yusef (ed.), *Standard Setting in UNESCO: Normative Action in Education, Science and Culture*, Leiden: Martinus Nijhoff and UNESCO Publishing, 2007, at p. 237.

emphasis upon proprietary models for protection.⁷⁹ Indeed, although it is beyond the scope of this chapter to argue, indigenous rejection of proprietary models arguably helped to shape the norms and values reflected in the ICHC and its Operational Guidelines. Adopted in 2003 and entered into force in 2006, the ICHC had over one hundred state parties by 2008.

The full impact of the Convention is yet to be realised because guidelines for implementation have only recently been established.⁸⁰ The prehistory of its adoption is, however, of special significance to indigenous peoples. The ICHC is the product of negotiations marked by considerable political tension both between state parties and between states and those advocating for more local interests. Impetus for early developments such as the 'Living Human Treasures' program to celebrate 'exponents of traditional culture' came from Japan and Korea, who felt that criteria for recognition in the WHC disregarded the qualities of their cultural traditions. Moreover, frustration in the Global South with the criteria used to populate the World Heritage List and a perceived lack of global interest in the living form of cultural heritage in practical activities are amongst the reasons UNESCO was urged to amend the WHC to incorporate intangible cultural heritage.⁸¹ The failure of global efforts to protect folklore, the marginalisation of community interests in heritage, and the subsumption of folklore under WIPO's intellectual property mandate and hence its perceived commercialisation were also factors in building the political will to develop an independent normative regime.⁸² The Masterpieces of Oral and Intangible Heritage of Humanity programme in 1997 was thus launched as an awareness raising and educational tool to alert states to the importance of safeguarding oral heritage in danger of disappearing. Critics, however, assert that the programme privileges 'colourful and exotic examples of intangible heritage, that represent nationally valued cultural events or performances, and which coincide with romanticised Western perceptions, while Indigenous works remain under-represented.'⁸³ Moreover, historical records suggest that states with large indigenous populations were disturbed by the programme.⁸⁴ Nonetheless, the ensuing debates about the propriety of the term 'masterpiece', the notion of 'universal value' and the importance of involving practitioner communities worked to clear the political ground for the ICHC.

The scope of UNESCO's interest in ICH is quite limited. Avoiding overlap with other UN agencies such as WIPO, ILO, WHO, CBD and UNCTAD, it

⁷⁹ Marrie, *supra* note 51, at p. 181.

⁸⁰ Nonetheless, because it is relatively recent and because the scholars and activists involved in its negotiation are still with us and deliberately documented its negotiation and are actively studying its implementation, we have a remarkable body of scholarship exploring its key concepts, against which its implementation can be assessed.

⁸¹ Noriko Aikawa-Faure, 'From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage', in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage*, New York and London: Routledge, 2009, pp. 13-44, at p. 15.

⁸² H. Deacon et al., *The Subtle Power of Intangible Heritage*, South Africa: HSRC Press, 2004, at p. 17.

⁸³ Laurajane Smith and Natsuko Akagawa, 'Introduction', in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage*, New York and London: Routledge, 2009, pp. 1-12, at p. 4, citing Richard Kurin 'Comments' (2002) *Current Anthropology*, 43 (1), pp. 144-145; Richard Kurin, 'Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: a Critical Appraisal' (2004) *Museum International*, 56 (1-2), pp. 66-76; and Barbara Kirshenblatt-Gimblett, 'Intangible Heritage as Metacultural Production' (2004) *Museum International*, 56 (1-2), pp. 52-64.

⁸⁴ *Ibid.*, at p. 3.

seeks primarily to further its priority policies in the field of culture, which at this point in time were the promotion of cultural diversity and cultural identity – hence the emphasis on the processes *within communities* that generate such diversity and identity.⁸⁵ Clearly influenced, if only negatively, by prior collaborations between UNESCO and WIPO, deliberators rejected the term folklore as being too oriented to products, rather than symbols, values and processes and as neglecting the practitioners and communities whose stake in creating, performing, enacting, preserving and disseminating traditional cultural forms is primary.⁸⁶ They favoured more holistic anthropological understandings of culture that put indigenous and traditional knowledge into an ecological context that emphasised ways of life or livelihood. Indeed, some participants felt that the Daes Report definition of intangible cultural heritage more clearly captured the spirit and meaning of the range of forms that a new instrument or Convention should attempt to protect.⁸⁷ The eventual definition of ICH adopted in the Convention is widely acknowledged to be vague but perhaps this is a strength given the unpredictability of those forms it may be asked to protect. Article 2.1 defines the 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. 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.

Noriko Aikawa-Faure, responsible for the programme of ICH in UNESCO Headquarters from 1993 and witness to numerous and various deliberations leading to the Convention shows both how criticisms of the earlier folklore deliberations triggered the creation of the ICHC and that perceptions of indigenous peoples' interests were central to many of the expert reports relied upon to define ICH and shaped the principle of safeguarding that evolved to replace the more limited concept of protection.⁸⁸ Nonetheless, for indigenous critics, 'the general tone of this Convention and its provisions fall way below that of the two bench-mark instruments by which it can be evaluated, namely, the United Nations Declaration on the Rights of Indigenous Peoples (DRIP)

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Comment: Is the Francioni citation correct? I can't find any reference to intellectual property. Moreover, the online Encyclopedia has no page numbers, but paragraphs. You are correct that these are paragraph citations.

⁸⁵ Ibid.

⁸⁶ Aikawa-Faure, *supra* note 84, at p. 21. During the Convention's negotiation, experts routinely reaffirmed that UNESCO 'should not duplicate the activities of other organisations, particularly in the field of economic rights for which specialised agencies such as WIPO and WTO have specific expertise' and that its emphasis should be upon 'the cultural dimension of ICH covering the domains not yet covered by other organizations' (*ibid.* at p. 34). Francesco Francioni, in particular, emphasised the limits of the IPR approach, especially its failure to respect, acknowledge, or ensure the viability of the societal structures and processes through which cultural products are derived, or recognise innovations that are the collective expressions of social necessities transmitted from generation to generation as discussed in Federico Lenzerini, 'Indigenous Peoples' Cultural Rights and the Controversy Over the Commercial Use of Their Traditional Knowledge', in Francesco Francioni and Martin Scheinin (eds.), *Cultural Human Rights*, Leiden and Boston: Nijhoff, 2008, pp. 119-150 at p. 144.

⁸⁷ Blake, *supra* note 22, at pp. 49-51.

⁸⁸ Aikawa-Faure, *supra* note 84.

and ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169).⁸⁹ Critical scholars have pointed to the divergence between the Convention Preamble, which provides the only mention of indigenous peoples (recognised for their important role in producing and safeguarding ICH), and the substantive provisions of the Convention, which require that state parties engage in activities with respect to ICH that may not be welcomed by indigenous communities themselves.⁹⁰ For example, the global demand that states create inventories and attempt to publicise ICH may be met with great distrust by indigenous peoples who are only too familiar with state attempts to locate, catalogue and 'salvage' their cultural goods and traditions. Long subject to state surveillance activities on cultural grounds, they are unlikely to welcome such initiatives.

The Convention does, however, require that states respect 'customary practices governing access', thereby acknowledging that indigenous peoples may have traditional strictures against the recording and transmission of some cultural forms, but this does not necessarily empower indigenous peoples with agency because indigenous peoples are historically quite familiar with having their 'customs' determined by state powers for ends that are not their own. There is very little in the Convention itself, save for exhortations to involve communities that would seem to provide independent *political* agency to those indigenous peoples whose heritage is endangered. The most ready explanation for the limits of the Convention 'is that Indigenous peoples were not included in the negotiation processes, either by having direct representation (for example, through the Working Group on Indigenous Populations or the UN Permanent Forum on Indigenous Issues), or by having Indigenous representation in the national delegations sent to negotiate the Convention.'⁹¹ It is worth noting that, not only did many Western countries not see any necessity for the Convention, the most grave reservations were expressed by those countries with significant indigenous populations⁹² indicating that international acknowledgement of indigenous community rights to control over intangible cultural heritage remains limited. While there were no votes against the Convention, a number of countries, notably Australia, Canada, the UK, Switzerland and the USA, abstained from voting.⁹³ This might suggest that these states are unlikely to use the Convention on behalf of indigenous peoples' interests; there is certainly no guarantee that inventories established and maintained by states will reflect the perils of cultural survival facing indigenous peoples as they themselves perceive these.

The capacities of the Convention to meet indigenous peoples' needs for the safeguarding, maintenance and development of their ICH lie in implementing and giving effect to the principles of community involvement that are unique to it, and arguably unprecedented in international law. The specific character of ICH itself is necessarily dependant upon its continuing enactment by its practitioners; only by securing their involvement and

⁸⁹ Marrie, *supra* note 51, at p. 174.

⁹⁰ See for example, Moran, *supra* note 45.

⁹¹ Marrie, *supra* note 51, at p. 174.

⁹² Smith and Akagawa, *supra* note 86, at p. 3.

⁹³ As noted in Kurin, *supra* note 86, at p. 66.

participation in the maintenance and development of their heritage will it be safeguarded.⁹⁴ In this sense, the safeguarding of ICH is an exercise of cultural rights. If, as a matter of international law, states have primary agencies and duties, the Convention is structured so as to encourage state safeguarding activities to raise awareness of ICH in communities and to actively encourage community involvement in implementation. Recognising that global economic and cultural forces may be one of the threats to distinctive ICH held at the local level, communities and groups are to be empowered and capacitated to maintain ICH as the source of their own identities.⁹⁵

Nonetheless, there is plenty of evidence that the nature of community participation was a matter of great controversy during the Convention's negotiation by the Intergovernmental Committee. Certainly both experts and state parties were divided between those giving practitioner communities responsibilities and rights, while enabling them to exercise these, and those prioritising state control and favouring only weak exhortations to encourage states to engage communities.⁹⁶ Although the ultimate priority given to the involvement of communities and civil society is evident, the appropriate mechanisms to achieve this without state initiative are unclear. Indeed, the principle of community participation was difficult to implement even in negotiations. In more than ten governmental and non-governmental meetings, only two appear to have benefited from anything that might remotely be called the 'active participation' of 'representatives of communities and practitioners.'⁹⁷ Considerable work remains to be done to engage indigenous peoples and their representatives in UNESCO ICH decision-making processes; Henrietta Marrie suggests numerous procedural possibilities for so doing.⁹⁸ At the very least, we can expect that the UN Permanent Forum on Indigenous Issues will be more prominently represented in the implementation and operationalisation of UNESCO Conventions going forward but a more formal intersessional process of consultation with indigenous groups on indigenous issues would be preferable.

2.4 2005 Convention on the Protection and Promotion of the Diversity Of Cultural Expressions (Diversity Convention)

It might be argued that the Diversity Convention does not concern itself with issues of cultural heritage and thus is not within our remit. Nonetheless, as the most recent international legal instrument to attend to issues of cultural protection and as the ultimate legal expression of UNESCO's 2001 Declaration on Cultural Diversity, it expresses values and commitments that are likely to influence approaches to cultural heritage issues. Certainly the preservation and safeguarding of diversity has been a core value in cultural heritage protections generally and ICH especially, because indigenous peoples are regarded as members of distinct societies whose distinction is manifested culturally. Moreover, as the first international instrument to express cultural rights principles in

⁹⁴ Blake, *supra* note 22, at pp. 45-46.

⁹⁵ *Ibid.*, at p. 47.

⁹⁶ Aikawa-Faure, *supra* note 84, at p. 28.

⁹⁷ *Ibid.*, at p. 39.

⁹⁸ Marrie, *supra* note **Error! Bookmark not defined.**

relationship to trade, the Diversity Convention speaks perhaps most squarely to this volume's themes. Nonetheless, we give it short shrift here for several reasons.

The Diversity Convention has two guiding rationales which are not always complementary. The first, grounded in human rights promotes cultural development and intercultural dialogue, whereas the second is premised on the desire to protect state autonomy with respect to the governance of the products of creative industries from production through distribution and consumption.⁹⁹ The Convention acknowledges 'that cultural goods and services have dual nature and constitute on the one hand, commodities that can be traded and are, on the other hand, 'vehicles of identity, values and meaning.'¹⁰⁰ but the assertion that therefore, 'the relationship between the two is somehow natural'¹⁰¹ begs the question of when cultural goods and services become tradeable commodities and under what circumstances commodified exchange supports cultural identity and when it undermines it. The Convention does little to provide any guidance and largely focuses on the diversity of media as means to convey a diversity of expression. Sovereign parties are encouraged to undertake measures with respect to cultural policy which may include support for civil society initiatives and promotional and preservation initiatives, but since the Convention does not require that states even recognize diversity within their territories, and there are no monitoring bodies, measurement of the impact of the Convention is difficult

As a recent treaty there is understandably little commentary on the Diversity Convention's operation, but even as a text, critics find it lacking in clarity, particularly as it confuses the larger issue of cultural diversity with the narrower question of diversity in cultural expressions and largely focuses on expressions which circulate primarily as market goods.¹⁰² Although there are references in the Preamble to the cultures of minorities and indigenous peoples, manifested in their freedom to create, disseminate and distribute their traditional cultural expressions so as to benefit from them for their own development, the Diversity Convention puts overarching emphasis upon State sovereignty. It provides no rights to minorities, to communities, or to individuals although civil society is acknowledged to play a fundamental role in creating, producing, disseminating and distributing diverse forms of cultural expression.¹⁰³ It contains few if any enforceable state obligations and the lack of any effective dispute settlement mechanism or the capacity to develop authoritative interpretations of the Convention's key provisions renders it of little legal consequence.¹⁰⁴

⁹⁹ Nina Obuljen, 'From Our Creative Diversity to the Convention on Cultural Diversity: Introduction to the debate', in Nina Obuljen and Joost Smiers, eds., *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expression: Making it Work*, Zagreb: Institute for International Relations, 2006, pp. 17-38 at 16-20.

¹⁰⁰ Mira Burri-Nenova (2008) "Trade and Culture: Making the WTO Legal Framework conducive to Cultural Considerations" *Manchester Journal of International Economic Law*, 5(3): 2-38.

¹⁰¹ *Ibid.* at 4.

¹⁰² Karen Donders, 'The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression' in Hildegard Schneider and Peter van den Bossche, eds., *Protection of Cultural Diversity from a European and International Perspective*, Antwerpen-Oxford: Intersentia, 2008, pp. 1-30.

¹⁰³ H  l  ne Ruiz Fabri, 'Reflections on Possible Future Legal Implications of the Convention', in Nina Obuljen and Joost Smiers, eds., *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expression: Making it Work*, Zagreb: Institute for International Relations, 2006, pp. 71-88 at 81.

¹⁰⁴ Christophe Graber, 'Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity' in Hildegard Schneider and Peter van den Bossche, eds., *Protection of Cultural*

Nonetheless civil society initiatives pursuant to the Convention such as those of the International Network for Cultural Diversity (INCD) emphasize a wider range of diversity and indicated a desire to assist indigenous peoples in protecting, promoting, and disseminating their distinctive cultural expressions.¹⁰⁵ As director Garry Neil asserts:

A key priority for the INCD in its organising activities is to continue to work to ensure that the concerns of traditionally marginalised communities are fully integrated into the global movement . . . While the Convention does not provide a formal role for civil society groups to raise concerns about forms of cultural expressions that are “at risk of extinction, under serious threat, or in urgent need of safeguarding,” this will be on INCD’s agenda in the coming years. There are several priorities for building the movement. The first is to respond to the needs of the indigenous communities to create a forum, initially in the Americas, in which representatives from these communities can work together to address the particular challenges which globalisation presents to their arts and culture, including their languages. Preliminary work has been undertaken with a range of representatives from Indigenous Peoples in a number of countries (Neil //):

However, the momentum of this civil society network appears to have been slowed since the ratification of the Convention and there is insufficient evidence available to us to ascertain what if any impact this activity has had upon trade in indigenous intangible cultural heritage. Due to the extent of the uncertainties that surround the international legitimacy and legality of this Convention’s provisions and fact that any such uncertainties would be resolved by state action without provision for indigenous involvement, we will not cover it in any further detail here.

3. Considering Intangible Cultural Heritage and International Trade

Any reading of UNESCO documents and critical research on cultural heritage generally clearly illustrates that heritage is now expected to ‘pay its keep’. As a central component of sustainable development agendas, new means are being found to ensure that ICH delivers economic benefits to communities. As Blake notes, as a topic of international policy, cultural heritage indexes combined concerns with identity and development. During the UN World Decade for Cultural Development (1987-1997), UNESCO officially noted the need to highlight the function of the intangible cultural heritage for the community as a living culture of the people, and asserted that it ‘should be regarded as one of the major assets of a multidimensional type of

Diversity from a European and International Perspective, Antwerpen-Oxford: Intersentia, 2008, pp.141-162.

¹⁰⁵ Garry Neil, ‘After the Convention: What’s next for INCD and the cultural diversity movement?’ in Nina Obuljen and Joost Smiers, eds., *UNESCO’s Convention on the Protection and Promotion of the Diversity of Cultural Expression: Making it Work*, Zagreb: Institute for International Relations, 2006, pp. 255-266 and in Thomas MacPhail (2010) *Global Communication and Technologies: Theories, Stakeholders and Trends*. Third edition. London: Wiley-Blackwell Publishers, at p. 22.

development.¹⁰⁶ Thus we have the strange policy phenomenon of states being asked to 'apply' 'bottom-up approaches' that are community-driven.¹⁰⁷

Tourism and associated industries in souvenirs, the development of new place-based marketing for traditional foodstuffs and services, and capitalising upon local handicrafts are popular means to ensure revenues from heritage industries.¹⁰⁸ As sociologist Antonio Arantes notes, UNESCO activities have encouraged emphasis upon 'traditional know-how and forms of expression. ... as effective cornerstones for the implementation and promotion of humanitarian as well as social and economic development programs in the poorer regions of the globe' and 'it is becoming part of the common sense among policy makers that the protection and enhancement of heritage can contribute to social and economic development.'¹⁰⁹

Once distinctive cultural heritage is identified with specific social groups as a target of preservation or safeguarding efforts, it tends to become a resource for the production of consumer goods and services that circulate in wider economic circuits that may impose upon local communities demands that are in conflict with or put pressures upon local social organisation. Crafts production, for instance, when oriented to a tourist market tends to demand increased volumes, standardisation, and adaptation to tastes and values that are not necessarily the community's own. New demands tend to be brokered by outside agents, and there is always a danger of local communities losing control of the process and having their work processes transformed in ways that are alienating and break down community social bonds. The desire to maximise returns has inevitably led to questions of collective intellectual property,¹¹⁰ an issue that continues to vex WIPO and elsewhere addressed in this volume.

If we return to the management of cultural landscapes as world heritage, we witness a growing interest in finding ways to use these protected sites to support communities. In addition to employment in site management, tourism is recognised as adding value to the economic activities that have given rise to the distinctive cultural landscape,¹¹¹ particularly rural and associative cultural landscapes. Tourism is understood as potentially having a low impact on the cultural landscape, but helping to assist communities seeking transition to a more complex and diversified economic base, particularly when they are remote from metropolitan areas or in regions where more urban migration is undesirable. Seeking means to ensure that tourism benefits are reinvested in local communities, promoting local products that reflect local values, and seeking new governance structures for provision of transport, accommodation and touring that provide income and

¹⁰⁶ UNESCO, 1990, at para. 209, cited in Noriko Aikawa-Faure, 'The Conceptual Development of UNESCO's Programme on Intangible Cultural Heritage', in James Blake (ed.), *Safeguarding Intangible Heritage: Challenges and Approaches*, Bullith Wells: Institute of Art Law, 2007.

¹⁰⁷ Blake, supra note 22, at p. 49.

¹⁰⁸ Colin Long and Sophia Labadi, 'Introduction', in *Heritage and Globalisation*, London and New York: Routledge, 2010, pp. 1-16.

¹⁰⁹ Antonio Arantes, 'Diversity, Heritage and Cultural Politics' (2007) *Theory Culture Society*, 24, pp. 290-296, at p. 294.

¹¹⁰ *Ibid.*

¹¹¹ Jane Lennon, 'Values as the Basis for Management of World Heritage Cultural Landscapes', in UNESCO, *Cultural Landscapes: the Challenges of Conservation*, World Heritage Paper No. 7, Paris: World Heritage Centre, 2003, pp. 120-126, at p. 123.

build capacity are all areas of ongoing research. As Lennon notes, 'generating income in ways that do not conflict with heritage conservation and are culturally sensitive is a management challenge'.¹¹²

Where the associative values that make cultural landscapes 'outstanding' are derived from the social life of resident communities, issues of sustainability become especially significant, which is one of the reasons why communities are now recognised as central agents in the process of maintaining heritage and finding ways to capitalise upon it. As the new Operational Directive under the ICHC stresses:¹¹³

Commercial activities that can emerge from certain forms of intangible cultural heritage and trade in cultural goods and services related to intangible cultural heritage can raise awareness about the importance of such heritage and generate income for its practitioners. They can contribute to improving the living standards of the communities that bear and practice the heritage, enhance the local economy, and contribute to social cohesion. These activities and trade should not, however, threaten the viability of the intangible cultural heritage, and all appropriate measures should be taken to ensure that the communities concerned are their primary beneficiaries. Particular attention should be given to the way such activities might affect the nature and viability of the intangible cultural heritage, in particular the intangible cultural heritage manifested in the domains of rituals, social practices or knowledge about nature and the universe.

For example, farming communities may be encouraged to designate traditional foods that might be marketed without negatively affecting agricultural practice. Communities may need to find ways for traditional custodians to transmit landscape values to youth while providing viable employment for them in activities, such as cultural mapping, while using such maps to design activities for visitors. Sustainable development of ICH may also involve deciding how and if tourists will be welcome at festival and ritual events and what souvenirs they should take home with them. Although marketing is encouraged to increase revenues, promotional materials now focus more on the values of ICH for the communities themselves rather than educational or entertainment value for visitors.¹¹⁴

Janet Blake explains in great detail how communities are empowered under the ICHC (and its Operational Directives), and why their own free, prior, and informed consent is necessary for identification, nomination, inscription and for the preparation, recognition and implementation of any safeguarding programmes.¹¹⁵ Since the community is the essential social context for maintaining the vitality and viability of ICH, the economic, social and cultural rights of communities in heritage management (and in some circumstances, groups and individuals) must assume priority. The new national policies envisioned under the ICHC are designed to give local communities far more power in determining what will be regarded as

¹¹² Ibid.

¹¹³ UNESCO, 'Convention For the Safeguarding of the Intangible Cultural Heritage', (UNESCO Doc. ITH/10/3.GA/CONF.201/Resolutions Rev, 2010), Article 116.

¹¹⁴ Ibid., at Article 120.

¹¹⁵ Blake, *supra* note 22, at pp. 48-52.

heritage, undermining state authority to designate official culture for a monolithic public, democratising the process, and providing better benefits to local communities in the process of giving them political voice.¹¹⁶ Trade policy proposals must pay heed to these priorities, promoting trade in intangible heritage goods only where this further reinforces culture as a source of identity and furthers community sustainable development. Issues of representation, misrepresentation, and sustainability of economic practices to enhance community security must be given emphasis. Rethinking unfair competition laws to meet community values in maintaining the integrity of indigenous identity, projecting community values through heritage goods that bear marks indicating conditions of origin, securing marketing assistance and building community capacities for communicating indigenous values in markets may be the most immediate needs.

We might also consider whether a single solution to managing indigenous ICH in a global trade regime is desirable, given the very different attitudes of states with respect to the recognition of indigenous peoples within their territories. Many indigenous peoples live within states that refuse to recognise them as such. Other groups have arbitrarily been declared 'extinct' by states that are not likely to negotiate on their behalf. Moreover, in some countries with colonial legacies there are many different layers of indigenous governance in place representing different moments in histories of decolonisation. Indigenous political representatives with whom states wish to negotiate are not necessarily those whom communities recognise as legitimate. Moreover, we need to recognise that indigenous identities and governance structures are evolving; not all indigenous peoples are in the same position in terms of the level and scale of their political organisation. Histories of cultural dispossession by the modern state have made it extremely difficult for indigenous peoples to fully reassemble and assert their customary laws; claims to control ICH are in fact integral to their struggle to reassert political autonomy.

There is plenty of evidence to suggest that indigenous peoples, particularly those in Australia, Canada, New Zealand, have been independently engaged in this process over the past two decades. Hence a great deal of the local institutional work to enable indigenous peoples to connect to national heritage bodies and to seek UNESCO benefits may already have been done. Whether they will choose to do so, however, is another question. As Amanda Kearney suggests, indigenous peoples have their own impetus for developing autonomous, localised projects that reflect and reinforce indigenous knowledge systems and governance principles so as to document these in furtherance of their self-determination:

'internationally, Indigenous people are lobbying for the right to determine what constitutes their ICH, to administer the mechanisms

¹¹⁶ To support the vision of community involvement with respect to managing ICH embodied here, Blake (*ibid.* at pp. 56-57) points to the Mataatua Declaration (1993) on the Intellectual and Cultural Property (ICP) Rights of Indigenous Peoples, which indicated that Indigenous communities should define their own intellectual and cultural property, define the principles under which it is recorded, establish educational, research, and training centres, develop and maintain customary practices for its protection, preservation and revitalisation, while creating local and representative bodies for this purpose.

for safeguarding, developing and promoting ICH and to control any research methodologies and investigations that purport to protect this heritage.¹¹⁷

The Yanyuwa, indigenous peoples in northern Australia, for example, engage in documentation of their intangible cultural heritage – ‘expressions, knowledges, and intimacies associated with spiritually powerful places across their homelands’¹¹⁸ Such material is governed by customary law and mediated through community heritage management programs that involve scholars, filmmakers and lawyers in collaborative research projects with host communities that deploy this documentation to further indigenous land claims.¹¹⁹

Proponents of enhanced roles for communities point to precisely such activities as models for what Convention activities in member states might and should aspire to. Politically, however, this may be rather unrealistic. Where indigenous peoples have some political power and many outstanding legal complaints, the states in whose jurisdictions they are resident are unlikely to want to use an international instrument and the scrutiny it brings to bear to support activities that might further indigenous rights claims. On the other hand, the new normative obligations upon states that the ICHC imposes may provide new leverage and opportunities for indigenous peoples resident in state jurisdictions where relations are not so tense. Whether states will be prepared to assume a secondary and supportive role with respect to communities in these new partnerships with respect to ICH is uncertain.

As anthropologist Regina Bendix suggests, the process of ‘heritagisation’ involves the strategic invocation of tradition and authenticity, the projection of identity and the cultivation of symbolic capital, the contestation of heritage values, and the symbolic work that goes into their marketing.¹²⁰ Inevitably, the intangibility of that which is ennobled as ICH will require new mechanisms to make it tangible in some way in order to ensure profit from this new status.¹²¹ Although tourists may be entreated to come and imbibe pure values, they are likely to desire and to demand a more tangible takeaway; whether in photographs, videos, CDs, or souvenirs. Once the goods and experiences they consume are marked for marketing purposes, new forms of rivalry and competition may ensue. A community that successfully develops and builds its ICH into marketable goods will inevitably face competitors who will seek to replicate such goods as well as counterfeiters.

As communities seek to maintain profits from heritage goods against competition, they may well consider forms of intellectual property as means

¹¹⁷ Amanda Kearney, ‘Intangible cultural heritage: Global awareness and local interest’, in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage*, New York and London: Routledge, 2009, pp. 209-226, at p. 218.

¹¹⁸ *Ibid.*, at p. 219.

¹¹⁹ *Ibid.*, at p. 219.

¹²⁰ Regina Bendix, ‘Heritage Between Economy and Politics: An Assessment from the Perspective of Cultural Anthropology’, in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage*, New York and London: Routledge, 2009, pp. 253-269, at p. 256.

¹²¹ *Ibid.*, at p. 263.

to do so.¹²² This is not an area over which UNESCO has any jurisdiction. WIPO will be the international body responsible, either for developing new forms of intellectual property, or new guidelines for its governance with respect to community and indigenous intangible cultural heritage. This has already been a prolonged process that has produced much in the way of principle, but little in the way of state requirements or implemented legislation. Nonetheless, we would argue that certain kinds of intellectual property lend themselves to the goals of safeguarding ICH better than others. Marks indicating conditions of origin, such as certification and collective marks as well as geographical indications, appear to be especially suitable for the marketing of goods based upon traditional knowledge and ICH.¹²³ Because they can be collectively held and managed, mark places of origin and the reputation of particular localities, may be used to reflect local cultural values and are in significant ways inalienable, they are amenable to use in the furtherance of the community development and empowerment envisioned by UNESCO and desired by indigenous peoples. For instance we can imagine that in cultural landscapes protected as World Heritage sites as well as those recognised as such under national law, resident communities rightly seek employment opportunities, economic benefits, and must decide whether or not to encourage tourism and under what conditions. If they do so and local cultural values do not otherwise discourage commercial use, indexical features of that site, such as petroglyphs or rock art of significance to the community and characteristic of the site might be used to mark goods coming from this place of origin.

The use of a legally protected mark – a collective or certification mark or even a geographical indication – might provide communities with means to educate consumers, protect them against unauthentic goods, and protect themselves against the production and distribution of counterfeit goods that do not embody community values in their creation. This is one means by which an iconic indicia of a particular cultural landscape, for example, might become the intellectual property of the communities now resident there without resorting to inappropriate forms of privatisation or commodification. There is a growing emphasis upon the use of such marks to designate community heritage values. For example, Chiara Bortolotto shows how the Board of the Chamber of Commerce of Matera, a town in Southern Italy possessing inhabitable caves carved into limestone, has encouraged use of a denomination of origin to promote and market traditional products based on traditional knowledge that are associated with traditional values associated with the site.¹²⁴ The community marked the interrelationship between the natural and cultural dimensions of their territorially based intangible cultural

¹²² For example see Markus Tauschek, 'Cultural Property as Strategy. The Carnival of Binche, the Creation of Cultural Heritage and Cultural Property' (2009) *Ethnologia Europaea*, 39 (2), pp. 67-80.

¹²³ Rosemary J. Coombe and Nicole Aylwin, 'Bordering Diversity and Desire: Desire: Intellectual Property and Marking Place based Products in Commerce' (2011) *Environment and Planning A: Society and Space New Borders of Consumption* 43 (9), forthcoming; and Nicole Aylwin and Rosemary J. Coombe, 'Marks Indicating Conditions of Origin in Rights-based and Sustainable Development', in Per Zumbansen and Ruth Buchanan (eds), *Human Rights, Development and Restorative Justice: An Osgoode Reader*, Oxford: Hart Publishing, forthcoming.

¹²⁴ Chia Bortolotto, 'Globalising Intangible cultural heritage? Between international arenas and local appropriations', in Sophia Lavbadi and Colin Long (eds), *Heritage and Globalisation*, London and New York: Routledge, 2010, pp. 97-114, at p. 108-109.

heritage using a collective mark that indicated the local origin and guaranteed the authenticity of products from the region.¹²⁵

Such a strategy might well accord with and help to project indigenous values in a trade context while supporting arts and craftsmanship and protecting customary intellectual properties. To the extent that this strategy might also be integrated in the development of indigenous cultural tourism, further benefits are possible. Finally, the strategy has the benefit of being in compliance with the TRIPs Agreement and avoiding the kinds of conflict of interest questions that emerged pursuant to the UNESCO Cultural Diversity Convention of 2005 and has limited the perceived capacities of this instrument to achieve its mandate of internationally protecting cultural goods against trade-based pressures.¹²⁶ Indeed, we would go so far as to suggest that marks indicating conditions of origin are one of the few legal vehicles that might ensure that cultural goods and services retain their capacities to act as vehicles of identity, values and meaning while being traded as commodities.

Other trade issues will inevitably emerge as indigenous communities become more involved in managing cultural heritage sites. What recourse do communities have against the state should the state seek to license others to manufacture goods bearing such indicia without their permission? To what extent do UNESCO principles of community safeguarding ICH give indigenous peoples any greater power than they would have if such materials were treated as being in the public domain? In what circumstances could or would UNESCO support community collective properties? If an indigenous community chooses *not* to commercialise indicia of their cultural landscapes, what recourse would they have against those who seek to capitalise upon the site's notoriety by marketing goods bearing these signs as souvenirs? Ironically, they might find themselves in a position of having to seek trademark, collective mark or certification mark protection to *prevent* unauthorised commercial usages of such symbolism. Some jurisdictions have allowed indigenous peoples to act as guardians of such symbols pursuant to legislation giving rights to public authorities to hold exclusive rights to the use of symbols in the public interest,¹²⁷ but such legislation is contentious and not widely available. Could UNESCO assume a proactive stance here, using its considerable powers as an international public authority to protect

¹²⁵ Ibid., at p. 110.

¹²⁶ See Mira Burri-Nenova, 'Trade and Culture in International Law: Paths to (Re)conciliation' (2010) *Journal of World Trade*, 44 (1), pp. 49-80, at p. 49; Anke Dährendorf 'Free Trade Meets Cultural Diversity: The Legal Relationship Between WTO Rules and the UNESCO Convention on the Protection of the Diversity of Cultural Expressions', in Hildegard Schneider and Peter van der Bossche (eds), *Protection of Cultural Diversity from a European and International Perspective*, Antwerpen, Oxford: Intersentia, 2008, pp. 31-84; Shin-Yi Peng, 'International Trade in "Cultural Products": UNESCO's Commitment to Promoting Cultural Diversity and its Relations with the WTO' (2008) *International Trade and Business Law Review*, 11, pp. 218-235; and Jan Wouters and Bart De Meester, 'Cultural Diversity and the WTO: David versus Goliath?', in Hildegard Schneider and Peter van der Bossche (eds), *Protection of Cultural Diversity from a European and International Perspective*, Antwerpen-Oxford: Intersentia, 2008, pp. 85-140.

¹²⁷ For example, indigenous communities in Canada have registered images from petroglyphs found in their ancestral territories as marks held by them as a public authority so as to prevent their reproduction by others in commercial contexts they found objectionable. See George P. Nicholas and Kelly P. Bannister, 'Intellectual Property Rights and Indigenous Cultural Heritage in Archaeology' in Mary Riley, ed., *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions*, Walnut Creek, CA: Alta Mira Press, pp. 309-340 at 327.

indigenous communities from unfair and misleading competition that would siphon profits away from community safeguarding efforts?

Such questions raise the whole issue of property in a new way. Although the understanding of cultural heritage *as* property is one that has been undermined, it is nonetheless the case that properties, intellectual or otherwise, may embody ICH.¹²⁸ Although the WHC clearly indicates that recognition of a site as world heritage is ‘without prejudice to property rights as provided in national legislation’,¹²⁹ this would not make such sites national property in situations where property rights are contested or under negotiation, as they are with respect to many of the territories and resources held or claimed by the world’s indigenous peoples. With respect to ICH, issues of property promise to be particularly problematic. As Kearney argues, if acknowledging cultural rights to be specific to particular groups and communities is the key theme of the ICHC, state parties maintain ultimate control over the processes involved and are not called upon to formally recognise indigenous rights to ownership and control over their ICH.¹³⁰ No indigenous rights independent of those of states are acknowledged, which ultimately positions indigenous peoples as mere stakeholders with respect to the ICH that is acknowledged to provide them with a primary source of identity.

Although the WHC stressed the concept of ‘the shared heritage’ of humanity through its central focus on the concept of the ‘universal value’ of heritage, it was routinely criticised for legitimising a particular Western – if not Western European – perception of heritage both in policy and in practice.¹³¹ As we have shown, the World Heritage List was exposed as being not only Eurocentric in its vision and its composition, but as dominated by monumental and aesthetic valuations.¹³² The ICHC is posited as a counterpoint to the WHC, and represents an honest attempt to acknowledge and privilege non-Western manifestations and practices of heritage. Proponents stressed its greater relevance to Asian, African and South American countries and to indigenous heritage practices.¹³³ Arguably, ICHC embodies some fundamental contradictions; while it was deemed advisable to make reference to ICH as ‘a universal heritage of humanity’ in the Preamble as a justification for international activity, the term is not used in the definition itself, so as to safeguard the specific value that this heritage has for the community while underlining the need for its international protection.¹³⁴

As we have seen, however, indigenous peoples themselves remain unconvinced that an international treaty produced without their input reflects

¹²⁸ Manlio Frigo, ‘Cultural Property v. Cultural Heritage: A “Battle of Concepts” in International law?’, in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage*, New York and London: Routledge, 2009, pp. 45-73.

¹²⁹ UNESCO, ‘Convention Concerning The Protection of the World Cultural and Natural Heritage’, (adopted by the General Conference on 16 November 1972), at Article 6.1.

¹³⁰ Kearney, *supra* note 120, at p. 209.

¹³¹ See Smith and Akagawa, *supra* note 11, at p. 1; and Forrest, *supra* note 13 citing numerous scholars.

¹³² Lourdes Arizpe with Alonso Guimar, ‘Culture, Trade and Globalization’ (2000) *Human Development Report Working Papers*, New York: UNDP at p. 36; Cleere, *supra* note 132; and Kenji Yoshida ‘The Museum and the Intangible Cultural Heritage’ (2004) *Museum International*, 56 (1-2), pp. 108-112, at p. 109.

¹³³ Smith and Akagawa, *supra* note 86; and Arizpe, *supra* note 47.

¹³⁴ Blake, *supra* note 22, at p. 12.

their values, and to the extent that local cultural values are determinative in evaluating the significance of ICH, and such significance is the criteria for international recognition, UNESCO may find itself at an impasse with respect to indigenous intangible cultural heritage. This impasse may only be overcome if indigenous peoples are politically recognised as the primary actors with whom UNESCO must negotiate to incorporate intangible ICH into the intangible cultural heritage internationally recognised as in need of safeguarding, which seems unlikely except in those rare instances where indigenous peoples have considerable power *vis-à-vis* state governments (as, for example, they increasingly do in South America). Whether or not indigenous peoples wish to have their ICH so acknowledged is another discrete and distinct question, the answer to which will lie in the particular circumstances in which any given indigenous people or community finds itself in relationship to the state in which they are resident, their need for NGO and UNESCO assistance, and the political value of the international publicity that recognition of their ICH might afford.

State-based systems of assistance for trade in indigenous heritage goods pose particular dilemmas because of the likelihood that they will be based upon historical forms of governance over indigenous peoples and perpetuate state based identifications of indigenous peoples and their cultures that have been experienced as colonial forms of discipline and power. For example, New Zealand attempted to create a system whereby craftspersons could apply to attain the designation of 'traditional Māori weaver' to certify their goods and prevent non Māori created imitations from circulating as Māori goods. The endeavour faced considerable resistance from Māori who were not willing to have themselves designated either as Māori or as traditional by a state government body that they themselves did not control. Indigenous peoples routinely reject state projects that identify them, ascertain their traditions, decide what is authentic, customary, or traditional to them, and otherwise recognise them according to criteria which are not their own. It is difficult to ascertain how a state-based system could avoid violating the human rights principle of indigenous self-identification.

We must also consider the possibility that states party to the ICHC have interests in safeguarding ICH that are less exalted than serving the interests of humankind and that indigenous resistance to the incorporation of their intangible cultural heritage into such regimes of recognition is less a particular rejection of state involvement in a regime of benign cosmopolitanism, and rather a rejection of the state's desire to incorporate them into new regimes of neoliberal market governmentality. Anthropologist Philip Scher reminds us that the new global emphasis upon heritage and cultural patrimony as well as the desire to capitalise upon these values is accompanied by new forms of state discipline and surveillance as neoliberal nationalism is accompanied by new forms of cultural privatisation.¹³⁵ The new emphasis upon inventorising ICH, reifying it, assigning appropriate caretakers for it, and investing in 'capacity-building' to develop local expertise, arguably constitutes a new regime of power which poses both

¹³⁵ Philip Scher, 'UNESCO Conventions and Culture as a Resource' (2010) *Journal of Folklore Research*, 47 (1-2), pp. 197-202.

promise and peril for the local communities and indigenous peoples deemed to bear the distinctive culture that these new regimes seek to value.¹³⁶ To the extent that those who hold ICH are recognised as such because new markets in informational capital seek to locate those who can contractually negotiate with respect to its use, indigenous peoples have reason to be wary that the esteem in which their culture is suddenly held reflects the fact that it is being targeted in new regimes of capital accumulation that do not necessarily accord with their own values and aspirations.

Similarly, we need to remain wary of responsibilities being vested in 'communities' who are not provided with resources with which to meet these new demands, considering also how 'communities' are constructed by states, who have particular ways of making communities visible and legible that may not necessarily accord with local values or social histories of identification and belonging. The devolution of responsibilities to lower levels of governance may entail greater democratisation, but it is also a way of extending neoliberal systems of government that encumber local peoples without necessarily empowering them¹³⁷ and may subject them to new forms of moral opprobrium and blame¹³⁸ for situations not of their own making. Conflicts over the appropriate scales for managing both cultural properties and cultural commons are endemic under new conditions of informational capital¹³⁹ and we have little sense of how or if UNESCO has any independent powers to intervene on behalf of communities if a state party refuses to fully respect the principles of community participation and involvement in safeguarding activities, or does so in ways that indigenous communities find unacceptable. The ICHC may achieve greater legitimacy amongst indigenous communities to the extent that the concepts of property it validates are those recognised in indigenous customary law¹⁴⁰ and any trade-based measures must also accord with these norms and values.

4. Conclusion

International intangible cultural heritage protection has evolved over the last sixty years in a fashion that has brought it progressively more in line with human rights principles and indigenous interests in self-determination. Indeed, indigenous struggles to control cultural heritage to facilitate community development have helped to shape the direction of international law in this field. Although a history of preoccupation with issues of property, economic valuations, commercial considerations and the hegemony of market exchange is arguably rejected by recent policy developments pertaining to intangible cultural heritage, the desire to harness intangible cultural heritage

¹³⁶ Coombe, supra note **Error! Bookmark not defined.**

¹³⁷ Mary Coffee, 'From Nation to Community: Museums and the Reconfiguration of Mexican Society Under Neoliberalism', in Jack Z. Bratich, Jeremy Parker and Cameron McCarthy (eds), *Foucault, Cultural Studies and Governmentality*, Albany: Suny University Press, 2003, pp. 207-242.

¹³⁸ Kathryn Lafrenz Samuels, 'Material Heritage and Poverty Reduction', in Sophia Labadi and Colin Long (eds), *Heritage and Globalisation*, London and New York: Routledge, 2010, pp. 202-218.

¹³⁹ Lorraine V. Aragon and James Leach, 'Arts and Owners: Intellectual Property Law and the Politics of Scale in Indonesian Arts' (2008) *American Ethnologist*, 35 (4), pp. 607-631; and Coombe, supra note **Error! Bookmark not defined.**

¹⁴⁰ Kearney, supra note 120.

for the purposes of community sustainable development are likely to ensure that issues of trade must be reconsidered.

While rejecting state-based regimes as politically inappropriate, we have suggested that protection against misrepresentation coupled with the creative use of intellectual property vehicles such as pre-emptive trademarks, geographical indications and marks indicating conditions of origin more generally are potential means through which indigenous peoples may seek to benefit from intangible cultural heritage in trade contexts. Ultimately, however, indigenous peoples are unlikely to accept principles and practices of international intangible cultural heritage law until they are recognised as political agents capable of representing their own interests in UNESCO policy-making fora. Only then will we be able to begin the difficult work of recognising the viability of indigenous customary law as a necessary and possibly superior juridical resource for addressing issues pertaining to trade in intangible cultural heritage in a field of genuine legal pluralism.