

# antropologia e teatro

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ARTICOLO

## International Cultural Heritage: The 2003 ICH in Context di Monica Alcantar

### Abstract – ITA

In questo contributo, Monica Alcantar delinea le caratteristiche principali per valutare la Convenzione per la salvaguardia del patrimonio culturale immateriale a due decenni dalla sua adozione. L'autrice fornisce un quadro di riferimento per affrontare criticamente l'ampia gamma di considerazioni sul testo e sulla sua attuazione. Dall'impatto positivo senza precedenti che ha seguito l'espansione della concezione tradizionale del patrimonio per includere prospettive antropologiche e sociologiche. La Convenzione del 2003 non solo ha introdotto, ma ha amplificato la nozione di cultura in una dimensione evolutiva, dove il termine "salvaguardia" è diventato la misura per garantire la vitalità del patrimonio culturale immateriale, pur ammettendo la sua natura entropica.

### Abstract – ENG

In this contribution, Monica Alcantar outlines the main features for assessing the Convention for Safeguarding the Intangible Cultural Heritage two decades after its adoption. She provides a framework to critically approach the wide range of considerations over the text and its implementation. From the unprecedented positive impact that followed the expansion of the traditional conception of heritage to include anthropological and sociological perspectives, the 2003 Convention not only introduced but amplified the notion of culture under an evolving dimension, where the term "safeguarding" became the measure to ensure the viability of intangible cultural heritage while admitting its entropic nature.

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## International Cultural Heritage: The 2003 ICH in Context

di Monica Alcantar

*Introduction*

The Convention for the Safeguarding of the Intangible Cultural Heritage (ICH) seemed groundbreaking at the time of its adoption in 2003, as it reflected the Sustainable Development Goals (SDGs) issued at the turn of the millennium<sup>1</sup>. The ICH was built upon almost 60 years of concern on the part of UNESCO with the protection of intangible heritage and was the result of over three decades of reflection on living traditions, taking into consideration substantive measures from intellectual property law and human rights concerns. Characterized by an unprecedented approach to cultural heritage, the ICH generated an extraordinarily positive impact, in that it expanded the traditional conception of culture to include anthropological and sociological perspectives.

By amplifying the view of culture production under an evolving dimension, the ICH broadened the traditional interpretation of cultural heritage<sup>2</sup> to include the notion of intangible manifestations of human behavior that can only be embodied through traditional contexts within a specific sociocultural context, and which represent a particular view of life, while witnessing and validating that view as it evolves in a collective framework, being transmitted from one generation to the next. Therefore, one of the greatest achievements of the ICH is the understanding that communities are the real bearers of intangible cultural heritage, and that such heritage is defined in terms of its exercise, practice and production.

To broaden our practical understanding of cultural heritage and property, we must acknowledge the fact that the tangible and intangible reality of the work of art intersects with notions of cultural property in a complex dynamic between the cultural heritage and the subject, the meanings the work of art conveys, and how

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<sup>1</sup> Although the UN plan of action on Sustainable Development Goals (SDGs) was adopted by the UN General Assembly in 2015, United Nations Development Programme (UNDP) through both its Human Development Reports and Human Development Index had compassed the idea of the quality of growth into the mainstream policy discourse since 1990 (Haddad et al. 2015) <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Access on: 4 October 2023).

<sup>2</sup> Trying to make a distinction between heritage and cultural property might be unnecessary since both notions overlap. While the concept of 'cultural property' dominated legislation for a long time, as derived from a relevant category of natural law, the emphasis behind property law often drives onto several paradoxes, unlike the notion of heritage that finds its motivation behind a humanistic value that legitimates a universal consent to gain access for all. For a historiographical reference from the seventeenth-century ideology (Frigo 2004).

institutional discourse articulates and amplifies those meanings through identity, memory construction and dissemination.

### *1. Safeguarding intangible cultural heritage: A shifting discourse*

This section provides a brief overview<sup>3</sup> of the philosophy of cultural heritage at the time of the ICHC's inception. Observing developments in UNESCO's use of certain lexis and hybrid concepts presupposes a greater acknowledgment of cultural diversity. Prott and O'Keefe explain, "The phrase 'cultural property' was first used in English in a legal context in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict" (Prott O'Keefe 1992: 313). However, the term 'heritage' emerges "for the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage" (Prott and O'Keefe 1992: 318).

More importantly, these changes in terminology have influenced what cultural heritage represents when addressing concerns regarding sustainability and the production of economic benefits in consonance with cultural diversity values, responsible development and respect for human rights. It is important to consider the degree to which the ICH has transformed the discourse and global understanding of culture by implanting new concepts, such as the term 'safeguarding'. This is perhaps the most prominent example, since it implies a conception that goes beyond a mere protection or conservation purpose, functioning instead as a measure to ensure the viability of intangible cultural heritage while admitting its entropic nature. According to Article 3 of the Convention:

'Safeguarding' means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage (UNESCO 2003: art. 3).

The recognition of the need to safeguard intangible cultural heritage not only allows this heritage to be understood at an influential level, but also offers the possibility of defining and recognizing it under an institutional lens, of assessing its significance as relevant and valuable, of providing the necessary room to acknowledge its global prominence, and ultimately, of offering the right conditions for it to be appreciated and

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<sup>3</sup> For a more accurate analysis of the of UNESCO's use of terms in response to changing concepts see Antons - Logan (2018).

managed according to its potential. This latter aspect will be the main topic of this short paper, while linking coherence with intellectual property instruments. Specifically, ICH engages unavoidably with more subjective values such as cultural identity and with fundamental human rights such as self-determination<sup>4</sup>, decentering the roles of states and allowing non-state actors to have, to a certain extent, a voice in the conversation about their cultural heritage. The last part of this paper will demonstrate the role of intellectual property (IP) resources when UNESCO's instruments no longer represent a viable option to fully protect indigenous cultural heritage. Without claiming to present an exhaustive discussion of how international law has shifted and adapted to changes in the field of cultural heritage law, we identify in cultural heritage a more clearly defined, a more inclusive terminology. This terminology embraces the different historical intricacies that take into consideration the differences in cultural embodiment, materialization or manifestation derived from human existence to preserve and safeguard its different expressions and evolution.

Exploring the intricacies of cultural heritage law, we venture into a general definition of cultural heritage, drawn from its immediate etymology. The term 'heritage' (which entered the English language in the thirteenth century from the Latin *haeres*, meaning 'heir' or 'heiress') refers to inherited objects that deserve to be maintained, cherished, preserved and bestowed. Shyllon differentiates among "three types of heritage: tangible, intangible, and natural. The first two are clearly recognized as cultural, although some heritage people argue that seeing some parts of nature as 'heritage' is a cultural process" (Shyllon 2016: 55). Evidently, according to Shyllon, "not everything can, or should, be preserved. The choice depends on its significance illustrating the development of the human condition. Cultural heritage does not consist solely of a few select objects singled out by national legislation" (Shyllon 2016: 55). However, under the Convention, the definition of 'community' is left to the nation-state to designate, leaving some room for misunderstanding if not internal conflict or even manipulation. Lixinski says, "A way to attempt to define the community is as the set of actors who wish to engage in decision-making about the control of resources to which they have a physical, cultural, spiritual, economic or other connection" (Lixinski 2019b: 579).

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<sup>4</sup> Cultural rights are inherent rights, land rights and the right to self-determination. More specifically, they are concepts defined differently depending on the demands and situation of each community or indigenous peoples around the world (Xanthaki 2007).

The ICHC<sup>5</sup> is the most rapidly ratified Convention, exceeding by far the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>6</sup>. Two decades after its adoption, it continues to emancipate the notion of cultural heritage regarding the benefits of inscription of heritage elements according to three lists, integrating a comprehensive strategy not only to denominate, recognize and visualize ICH, but more importantly, to create plans that support its development throughout programs that pragmatically ensure the safeguarding<sup>7</sup> effort, working in cooperation with stakeholders and the communities concerned. Lixinski explains:

The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage was modelled after the 1972 World Heritage Convention to a significant extent. More specifically, it drew on the mechanisms of listing as a means of enhancing the visibility of intangible heritage. If intangible heritage is visible to the world, there is more of an incentive to safeguard it for the future, as stakeholders outside the community of origin come to learn about and appreciate that culture's representative heritage. By the same token, valorization by an external actor can also lead to the heritage gaining renewed importance for the community of origin, as the external recognition becomes a source of pride for the community of origin, and an incentive for safeguarding said heritage (Lixinski 2015: 393).

## 2. *The listing strategy in the intangible cultural environment*

The efficacy of the World Heritage List has already been proven, given that cultural heritage is situated both *vis-à-vis* individual nations and the international community as a whole. According to Article 11 of the UNESCO 1972 Convention:

Every State Party of this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable

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<sup>5</sup> Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, UN DOCMISC/2003/CLT/CH/14 (entered into force 20 April 2006). Number of States Parties as of July 2020: 180.

<sup>6</sup> Entered into force 24 April 1972 with 130 states parties to date: <https://en.unesco.org/aboutus/legal-affairs/convention-meansprohibiting-and-preventing-illicit-import-export-and> (Accessed on: 4 October 2023).

<sup>7</sup> Interestingly, this formula of safeguarding already appears, although without taking into consideration ICH, in the preamble of the Hague Convention and European Cultural Convention (Paris 1954), which states that "each Contracting Party shall regard the objects of European cultural value placed under its control as integral part of the common cultural heritage of Europe, shall take appropriate measure to safeguard them and shall ensure reasonable access thereto." However, the first attempt to construct a specific framework for ICH at a global level was through UNESCO in 1989: Recommendation on the Safeguarding of Traditional Culture and Folklore.

for inclusion in the list [...]. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance (UNESCO 1972: art. 11).

Following the model of listing, established under the 1972 Convention, the impulse to also create an international system of registration for endangered or vulnerable elements arose, with the intention of focusing attention and allocating resources where most needed. For the more general commitment of ensuring the objectives of the ICH were met, three different lists were created. The first list<sup>8</sup>, according to Article 16, the Representative list, has the objective “to ensure better visibility of intangible cultural heritage and awareness of its significance, in addition, to encourage dialogue which respects cultural diversity”. The second intends, according to Article 17, to “keep up to date and publish a List of Intangible Cultural Heritage in Need of Urgent Safeguarding” as a measure to “taking appropriate safeguarding measures”. The third list has the goal of integrating “programmes, projects and activities for the safeguarding of the intangible cultural heritage”. This last one is perhaps the most ambitious – and sadly, the most underused. For most stakeholders, the Urgent Safeguarding List might seem clear in its purpose, but it is often perceived as public evidence of failure in the commitment to safeguarding. The challenge remains to produce a mechanism that avoids this confusion, allowing the implementation of the necessary resources and cooperation between states and communities. The obligation introduced by the Convention regarding cooperation between states in respect of their own sovereignty was a compelling one, but perhaps it has been less effective than expected, as demonstrated by the Report of the evaluation of the ICH in 2013:

While the Representative List has contributed to increasing the visibility of the Convention and to raising awareness about intangible cultural heritage, its relative importance is overrated. Other mechanisms, such as the List of Intangible Cultural Heritage in Need of Urgent Safeguarding, the Register of Best Safeguarding Practices and the International Assistance are underused. A better balance needs to be found between these mechanisms by (a) clarifying all misperceptions regarding the concepts and intention of the Representative List; (b) promoting and re-positioning the Urgent Safeguarding List; (c) promoting the International Assistance Programme; and (d) rethinking the way best practices are identified and disseminated (IOS/EVS/PI/129 REV. October 2013).

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<sup>8</sup> To be inscribed on the Representative List, an element should satisfy the five criteria stipulated in the Operational Directives (I.2), see <https://ich.unesco.org/en/directives> (Access on: 4 October 2023) for the entire guideline.

Articulated with the best intention, the listing mechanism aligns with Article 1.2 of UNESCO's culture mandate, which intends to:

c) maintain, increase, and diffuse knowledge; by assuring the conservation and protection of the world's inheritance of books, works of art and monuments and history and science, and recommending to the nations concerned the necessary international conventions.

The Convention, now in its second decade of adoption, has already undergone evaluations in 2013 and 2021, which have addressed significant challenges posed by evolving identities, intellectual property law and cultural diversity issues. While maintaining a coherent collaboration with the administrative bureaucracy is not always easy, the intent is to reach a subtle equilibrium, where sustainable development, conflict resolution and human rights awareness may be provided beyond the symbolic gesture of inclusion on the list. As Lixinski explains:

The use of lists as a means of safeguarding heritage is not undisputed. An argument was made during the drafting of the 2003 UNESCO Convention that the creation of a list would necessarily create a hierarchy of heritage (the "listed" heritage being of greater importance than the "unlisted" heritage), and that instead a simple list of best practices for the safeguarding of intangible heritage should be established. Instead, the majority opinion at the drafting conference seemed to be that, by calling the principal list "Representative", it would be clear that no hierarchy exists, and that the list is simply a means of enhancing the visibility of intangible cultural heritage in general, and some manifestations in particular. An inventory of best practices for the safeguarding of intangible cultural heritage was also established alongside the two lists, and it contains twelve sets of best practices at the time of writing (Lixinski 2015: 394).

The complexity remains mostly related to the need for domestic policy management to align with international instances, reconciling with local priorities, as with the needs of the communities involved, groups and individuals concerned<sup>9</sup>. There may be a need to consider best practices to responsibly approach the development of policy, taking into consideration the continuity of the practices that involve the different traditions and their actual

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<sup>9</sup> For instance, the evaluation IOS/EVS/PI/200 from November 2021 presents mixed results regarding the Convention's listing mechanisms and consequently calls up for a simplification of the listing system in order to free up resources to address the multiple capacity building requests identified by experts and stakeholders. Among the main conclusions it states "UNESCO needs to address one central paradox, that the Convention's mechanisms are design for State Parties, but ICH lies within the communities" (2021, 46). For the focus examining the role and challenges that the listing mechanism play in Convention in addition to the criteria implemented, see Chapter 3: 59-71.

significance for their communities. In Lixinski's words:

Cultural heritage law is one possible means through which cultural identity or culture more generally gets to be protected. Cultural heritage in a sense embodies a cultural identity, and makes it graspable, within the reach and comprehension of the casual bystander. It is a means to give "culture" – amorphous, ever-changing, and all-encompassing – an element that can be more easily subject to legal protection – as cultural heritage is definable and more limited. Of course, there are many risks to reliance on cultural heritage as a proxy for culture: the biggest one is that it commodifies culture, turning it into "bites" for the comprehension, appreciation, and eventual consumption by outsiders (Lixinski 2015: 40).

The protection of the world's cultural inheritance is prioritized by UNESCO, and the Convention that was finally implemented in 2006 forms part of a "discursive continuum". According to Lixinski (2019a: 14-22), this concerns four other treaties in addition to the ICHC: the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict; the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage; and the 2001 Convention on the Protection of the Underwater Cultural Heritage. By relying on states' sovereignty and their respective ability to abide by the rules to their best ability, the concept of cultural heritage and the shift from cultural property in international law can be traced by looking at the drafting history of these UNESCO treaties with respect to the definitions of culture in each of them.

Harnessing the results for communities can, however, be challenging. While the listing mechanism for safeguarding intangible cultural heritage can improve its valorization, leading to "renewed importance for the community of origin, as the external recognition becomes a source of pride for the community of origin, and an incentive for safeguarding said heritage" (Lixinski 2015: 393), it can also create a process of commodification by pushing certain ICH into the market "as its status becomes 'added value' in attempts to promote tourism by the state and other stakeholders interested in the economic exploitation[...], without much regard as to the wishes of the community whose heritage is to be exploited" (Lixinski 2015: 294). The 2003 ICH has, in part, addressed this issue by requiring the community's free, prior and informed consent (FPIC) for list inscription; nevertheless this condition seems often insufficient and susceptible to manipulation (Lixinski 2011: 81).

There are many undesired outcomes that should be taken into consideration, as well as disruptions within the different intangible heritage practices that could result from a wide spectrum of exclusionary effects; these include exoticization, minority oppression and the use of heritage listing as a state centralizing control measure. These are all unintended consequences derived from the blind spots of the conservation regime. The 2003 ICH



is certainly a perfectible instrument that, in general, helps integrate the notion of cultural mobility into the conservation paradigm without disregarding the possibility of ICH innovation from within. It is worth mentioning that intangible cultural heritage has functioned in the task of restoring peace and social tissue after disruptive or armed conflict situations, thereby creating further arguments for its safeguarding; in other words, it acts as a transitional justice mechanism<sup>10</sup>. In this light, intangible cultural heritage is meant to be protected not in silo by states, nor by experts, but primarily by communities that create sense and sustain their respective practices as they function as a catalyst in times of social turmoil.

### *3. Respect for human rights and fundamental freedoms*

Since intangible cultural heritage invariably deals with identity, there is a very political side to it; this can prompt social reconciliation as much as channel controversy or engage with different social frictions derived from difficult contexts, such as historical or social inequalities related to race, class or gender. In this regard, the link between human rights and cultural diversity is essential for the purposes of adopting provisions that establish an effective system of collective protection of cultural rights, and of enabling an environment that fosters cultural production as a means of growth and sustainability. From this general perspective, the ICH can be compared to other UNESCO instruments, such as the 2001 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Cultural Diversity Convention).

There is no international instrument of law as such that can provide a comprehensive definition of cultural rights. In general, however, cultural rights concern creativity, freedom of expression, and artistic and intellectual freedom. The ICH refers to human rights as an attribute against potentially harmful cultural practices<sup>11</sup>. Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent<sup>12</sup>. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights, and Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights concerning the right to quality education that fully respect their cultural identity and

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<sup>10</sup> See United Nations Human Rights Council (2018; Cole 2014; Teitel 2014).

<sup>11</sup> One example is female genital mutilation (FGM), which is a violation of basic human rights and a discriminatory practice against women and girls. See World Health Organization 2008. Another example is the tradition of Sinterklaas in the Netherlands. This apparently innocent family tradition, which involves a white bishop character assisted by Zwarte Pieten, or “Black Peters,” usually portrayed in “blackface” is seen as a form of racism, an attempt to condone slavery and colonialism atrocities (Akagawa 2016).

<sup>12</sup> Regarding the overlap between cultural heritage and intellectual property, as we commemorate the 30<sup>th</sup> anniversary of the adoption of the Vienna Declaration and Program of Action (Art. 33, 34 and art. 78–82) succinctly on human rights education by the World Conference on Human Rights, cultural rights are further emphasized.

participation in cultural life. These rights are further emphasized by Article 5 of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions celebrated by UNESCO.

Distinguishing more systematically between a “narrow” and a “broad” sense of cultural rights (Donders 2012), such as the right to participate in cultural life or freedom of expression and the right to education, the provisions embedded in the ICH rely on a notion of cultural heritage in alignment with these. As stated in Article 2(1) of the ICHC:

For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development (UNESCO 2003: art. 2).

In this context, the ICH echoes the right to cultural diversity within a human rights-based approach, as a provision embedded in the Cultural Diversity Declaration, which was, in fact, adopted by consensus. The ICH has played an important role in modifying the way in which cultural heritage is appreciated and managed across all domains of heritage, particularly since it has enabled the dissemination of confidence and tolerance within an intercultural framework while providing a common space for dialogue with the communities involved.

#### *4. Parallel regimes: intangible cultural heritage and intellectual property law*

As mentioned, one of the most prominent achievements of the ICH is perhaps the shift in the discourse concerning cultural production and its perception by inserting the key concept of safeguarding, which embraces the entropic dimension of intangible cultural heritage, understood as a practice, expression, representation and skill. Therefore, the focus is settled on the processes of cultural production and the communities that conduct these processes, which are constantly recreated and open to change as long as each community finds a suitable context and engages with it, giving continuity to the respective traditions<sup>13</sup>. As mentioned, the shift of perspective from previous Conventions to the 2003 ICH followed a notion of the culture built on tradition but with an important emphasis on renewal and innovation. Indigenous cultural heritage has an unmistakable presence in the contemporary world, influencing everything from haute couture to the music we listen to.

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<sup>13</sup> Community involvement lies at the core of the ICH and we could say there is no other subject as relevant for safeguarding effectively intangible cultural expressions. This aspect is emphasized by art. 15 of the Convention but also pervades every guideline for the nomination and inscription process of ICH elements.

However, it is not entirely conclusive whether and to what extent traditional cultural expressions (TCEs) and traditional knowledge (TK) can find protection under UNESCO instruments for indigenous intangible heritage<sup>14</sup>, especially in cases of negligence by the state concerned. Thanks to the focus driven by the ICHC, intellectual property (IP) law has developed protective standards<sup>15</sup> for indigenous cultural heritage that can be solicited in autonomy<sup>16</sup>. Shyllon says:

Both cultural heritage and intellectual property are creations of the mind that have economic value, being species of property. Some cultural heritage, like folklore and traditional knowledge, can be copied, patented, and trademarked. Owners of intellectual property rights are conferred with exclusive rights to their property. Indigenous and traditional communities are now also claiming exclusive rights to their symbols and marks, though this trend has been influenced by the misuse and abuse of their culture. They are also of course influenced by the desire to get adequate compensation for the commercial use of their brands and brand names (Shyllon 2016: 58).

In recent years, indigenous peoples, local communities and governments, mainly but not exclusively in developing countries, have required IP protection for traditional forms of creativity and innovation. They have contested or openly rejected instances where the conventional IP system considers TK and TCEs to be in the public domain, arguing that this opens the possibility of unwanted misappropriation and misuse, causing vulnerability to the communities. However, the notorious inability to reconcile traditional practices with the international protection regime has allowed the development of a far more complex picture, which has affected the development of communities. Therefore, regulatory mechanisms still need to be perfected in order to ensure the protection of TK and TCEs and to decrease the vulnerability of the communities or custodians thereof. Discussions have frequently addressed the holistic nature of traditional culture and knowledge systems, and the need to recognize the complex interrelations between a community's social and cultural identity and the specific

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<sup>14</sup> Although we will not be discussing genetic resources (GRs), it is worth mentioning as part of the IP elements concerned with indigenous communities that are subject to access and benefit sharing regulations, in particular, within the international frameworks defined by the Convention on Biological Diversity and the Nagoya Protocol, as well as by the International Treaty on Genetic Resources for Food and Agriculture of the United Nations Food and Agriculture Organization.

<sup>15</sup> See for instance Duvelle (2014: 32-36).

<sup>16</sup> As an important precedent, the focus on intellectual property issues relating to folklore, and ways of ensuring the protection of folklore through copyright law. UNESCO in 1982 ratified with the World Intellectual Property Organization (WIPO), the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit and Other Forms of Prejudicial Action.

components of its knowledge base, where traditional technical know-how, traditional ecological practices, and aspects of lifestyle and spiritual systems may all interact. TCEs may be either tangible, intangible or, most usually, a combination of the two. What makes knowledge or cultural expressions traditional is not their antiquity but the role they play as part of the vital dynamic of many communities today. TK is a living body of information that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. Briefly, TK is understood as knowledge, know-how, skills, innovations or practices that are passed between generations in a traditional context and that form part of the traditional lifestyle of indigenous and local communities, who act as their guardian or custodian. According to the World Intellectual Property Organization (WIPO), TK can be preserved following two broad streams. The first is the notion of the living cultural and social context that can relate to a traditional framework for ensuring its production, transmission and governing access to cultural assets. The second is the idea of preservation in a fixed form, such as in the process of documentation, for the purpose of ensuring its existence for future generations of the original communities and of ensuring continuity within an essentially traditional framework. The goal of making TK available to a wider public, beyond scholars and researchers, in recognition of its importance as part of the collective cultural heritage of humanity, may be an outcome of pertinent legislation. WIPO says:

Traditional knowledge is not limited to any specific field of technology or the arts. Traditional knowledge systems in the fields of medicine and healing, biodiversity conservation, the environment and food and agriculture are well known. Other key components of traditional knowledge are the music, dance, and “artisanat” (i.e. designs, textiles, plastic arts, crafts, etc.) of a people. Although there are creations which may be done purely to satisfy the aesthetic will of the artisan, many such creations are symbolic of a deeper order or belief system. When a traditional singer performs a song, the cadence, melody, and form all follow rules maintained for generations. Thus, a song’s performance entertains and educates the current audience, but also unites the current population with the past (WIPO 2001: 211).

The IP system can be approached from two different angles in order to ensure the protection of TK and TCEs. Both approaches are generally referred as positive and defensive protection; they can be considered to be complementary. In this endeavor, documentation becomes a key tool for traditional communities that may straighten their position to identify and defend their IP-related interests. Prazmowska explains:

As such, Indigenous communities should take the lead in documenting their own heritage, as it may be a useful strategy for both the positive protection (establishing IP in their TCE) and for defensive protection (preventing the acquisition of IP by third parties). In order for Indigenous communities to hold rights in such databases, they must be regarded as the creators or makers of the databases, or at least acquire the rights from the creators (Prazmowska 2020: 142).

Nevertheless, skeptical views are relatively well represented in academic and non-governmental circles, including in certain indigenous peoples' statements and declarations that link the IP system to a Western industrial and intellectual approach. For example, the cost of filing and registering a patent is prohibitive for some communities, as is the cost of enforcement and infringement proceedings. WIPO says:

It is helpful, too, to draw careful distinctions between the IP system and how it is meant to work, on the one hand, and particular cases in which the system may have failed, on the other. Cases in which patents should not have been granted, for instance, are examples of bad patents, not necessarily a bad patent system. The growing importance attached to TK, coupled with concerns over the loss of cultural and biological diversity, has generated a maze of complex and rapidly-evolving public policy, ethical and legal questions in a multiplicity of national, regional and international fora. [...] Yet, amid increasing conflicts over rights and responsibilities over traditional knowledge resources, decision-makers are required to develop coherent and integrated policy responses (WIPO 2001: 218).

TCEs are entitled to protection by existing IP systems under a wide range of instruments, such as copyright and related rights, geographical indications, trademarks and certification and collective marks. Current original adaptations of TCEs may in some instances be copyrightable if operated by members of the communities or by third parties legitimized by them. Copyright protects the products of creativity against certain uses such as reproduction, adaptation, public performance, broadcasting and other forms of communication to the public. Laws for the protection of marks, geographical indications and industrial designs, as well as unfair competition law, may offer direct or indirect protection regarding TCEs. Existing IP laws have been successfully used to protect against some forms of misuse and misappropriation of TK, but in most cases, conventional IP systems and adaptations are not considered sufficient to provide for the unique character of TK and TCEs. This has prompted several countries to adapt existing IP regimes to develop their own distinct sui generis systems for protecting TK and TCEs.

As we have seen, cultural heritage and intellectual property are creative products of the mind, that have economic value; for this reason, the overlap with the concept of cultural property remains totally pertinent *vis-à-vis* the conservation paradigm in international law. However, the protection of intangible cultural heritage is still far from being all-encompassed into one single system as issues continue to appear in relation to concerns raised by indigenous communities and their interests. In the two decades since its adoption, the ICH has been challenged at several levels, producing alternatives that may complement the benefits of a possible inscription as intangible cultural heritage elements. In the field of IP, protective instruments related to TK and TCEs are still being developed along a shared concern for the respect of cultural rights, the promotion of artistic development, cultural exchange, the promotion of tradition-based innovation and addition to sustainable economic development<sup>17</sup>. In these efforts, we have identified the intricacies of current policies and some of the significant outcomes yet to be reached through cooperation among intergovernmental organizations and the communities concerned; their “collective intellectual property rights” (Santilli 2006: 2) may demonstrate the existence of greater resilience in a context dominated by states. Shyllon says:

Enshrining human rights as aspects of cultural heritage and intellectual property is emerging; [...] Definitions can take care of the grey areas: what to include and what to exclude. All multilateral treaties are compromises, the outcome of balancing processes. Accommodation should replace resistance, and compromise should take the place of conflict. It is not all or nothing, and by the same token it should not be nothing at all (Shyllon 2016: 75).

The role of the ICH in the current geopolitical situation<sup>18</sup> has translated into an essential function of custody of intangible cultural heritage that aims to foster participation among the elements inscribed in the lists. The Convention focuses on the concept of communities, encouraging and recognizing them as relevant actors and innovators of their respective traditions; however, the state-driven system tends to standardize the elements of heritage according to national narratives. Not surprisingly, a number of state parties of the Convention have

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<sup>17</sup> According to Duvelle “Questions concerning intellectual property rights had an important part in UNESCO’s discussions on conservation of culture since the early 1950s. [...] in subsequent years considered to require distinct responses, the question of intellectual property protection was taken on by WIPO, and the 2003 Convention specifically excludes intellectual property from its scope” (Duvelle 2014: 34). Also, is worth mentioning the Report of the evaluation of the ICH (2021: 45) on how WIPO, through its Intergovernmental Committee continues to work on topics related to the ICH.

<sup>18</sup> Most of the 76 ICH elements corresponding to 40 countries that have reached inscription in the List of Urgent Safeguarding heritage correspond to current war zones and territories where ideologic extremism has led to social instability and turmoil.

faced important challenges regarding its implementation; for some of them, “the question of community initiative is unclear, and local community tradition that does not fit the national legal framework may not be recognized” (Akagawa 2016: 79).

These two cases will serve to briefly exemplify how relevant community participation can be within the context of safeguarding. The images at the end of this article are deliberately added to deliver more efficiently the argument that even when tangible traces appear evident (such as mask, costumes, etc.) the actual embodiment of cultural heritage remains intangible. For this reason, the devices derived from the ICH need to be simplified to provide wider mobility between the list mechanism and help support capacity-building programs that ensure the continuity of these living traditions.

First, we approach a case of ICH that has successfully come to terms with the national safeguarding legislation aligned to the terms of the Convention: the *nōgaku* theatre, a form of Japanese performance art<sup>19</sup>. It was among the first elements to be inscribed in the Representative List of the Convention through emphasizing the relevance of embodiment of the tradition and fostering community participation as means of understanding and managing the traditional heritage. Akagawa says “in 1954 the Cultural Properties Law was revised, and extended to include ‘holders of important intangible cultural heritage’, or ‘living human treasures’ (*ningen kokuhō*), to protect the crafts skills unique to Japan” (Akagawa 2016: 76). Interestingly, under this same dynamic<sup>20</sup>, establishing an important precedent to the ICH and highlighting the importance of the relationship between traditional knowledge and copyright, UNESCO launched in 1993 the Living Human Treasures program (UNESCO 2002). On the other hand, by relying on the sovereignty of states and their respective ability to abide by international law jurisdiction, the ICH has shaped and harnessed the notion of cultural mobility without disregarding the possibility of innovation. This has happened while keeping sight of the possibilities for transitional justice in the aftermath of conflict or as a strategy when dealing with a difficult past, which is problematic to commemorate or celebrate.

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<sup>19</sup> “Members of the *nō* establishment, who believed their plays to be among the purest representations of the ‘Japanese spirit’ *nihon seishin* (日本精神) had longstanding connections with Japan’s military and the imperial family. The *nō* theatre grew to maturity in the fourteenth and fifteenth centuries under the patronage of the Ashikaga shoguns. From at least the time that Prince Iwakura Tomomi returned from Europe in 1873 determined to make *nō* Japan’s opera” (Smethurst and Smethurst 2008: 31).

<sup>20</sup> In other countries, we find a similar variety of titles such as: Master of Art (France); Bearer of Popular Craft Tradition (Czech Republic); National Living Treasure (Republic of Korea & Japan). See UNESCO 2002.



Figura 1. *Genshigumo's chorus nōmen* – carved by Udaka Michishige.

Photo: Fabio Massimo Fioravanti.

In fact, new dramaturgies of *nō* deal with the Hiroshima and Nagasaki atrocity, as atomic weapons were deliberately used on civilians in those cities. *Genshigumo*, a *shinsakunō* written and performed by Udaka Michishige, was first staged in Kyoto in 2003, followed by productions in Tokyo and Kyoto in 2004. Retitled *Inori-Prayer*, it was also performed in Paris, Dresden and Berlin in 2007 and finally in Hiroshima in 2010<sup>21</sup>. Again, it acted as a vehicle of transitional justice, broadly defined as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes” (Teitel 2003: 69).

In short, intangible cultural heritage functions as an asset when exhuming an uneasy past difficult to come to terms with. This is the case of Japan with the Ainu community<sup>22</sup>; the traditional Ainu dance was at last included in 2009 on the Representative List.

<sup>21</sup> *Drifting fires* is another example, choreographed by Umewaka Naohiko in 1985, an English *nō* in English by Janine Beichman (1986). Interestingly, *nō* plays in English language have continued to be written and performed ever since within academic circles, in Japan and overseas. Another example is *Emily: An English language Noh* by Ashley Thorpe (2022).

<sup>22</sup> As noted by Hasegawa “The adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the UN General Assembly in 2007 which accelerated the recognition inof Ainu as indigenous peoples by the Japanese government. On 6 June 2008,





*Figura 2. Featuring Udaka Michishige in the kagaminoma (mirror room).*

*Photo: Fabio Massimo Fioravanti.*



*Figura 3. Featuring Kongo Hisanori in Miwa.*

*Photo: Fabio Massimo Fioravanti.*

the DIET passed a resolution calling for the recognition of the Ainu people as indigenous peoples. On the same day, the Chief Cabinet Secretary made a statement recognizing that Ainu people are indigenous to the northern part of Japan, especially Hokkaido, and as an indigenous people, possess a unique language, religion and culture” (Hasegawa 2010: 223).

Through this lens, either under conflict scenarios or social tissue disintegration, the 2003 ICH has helped to determine a reading of culture that invokes safeguarding as means of respect of its social function. In addition, the Convention has revealed the ambiguities that cultural heritage bears with international jurisdiction along the different intricacies, such as primal production of economic benefits or the commoditization of the past and heritage elements to the development of projects to ensure that economic gain does not interfere with sustainability, responsible development or respect for human rights. The importance of recentering indigenous and local communities as pivotal in the dissemination, management and safeguarding of their heritage is crucial. As the concept of cultural heritage lays on a constant mutating state, to emancipate beyond a state-centric international law dimension anchored on the idea of territorial jurisdiction must be challenged, not only by reluctance or inability of states to adopt certain standards, but in consonance with cultural diversity values and human rights, which are increasingly pertinent not just to parties of the Convention but also to international organizations, individuals and non-state actors.

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