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# INTANGIBLE CULTURAL HERITAGE IN INTERNATIONAL LAW

Lucas Lixinski



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## Intangible Cultural Heritage in International Law

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# Intangible Cultural Heritage in International Law

LUCAS LIXINSKI

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To  
Antoine, Jannis, Martin, Mats, and Pablo,  
brothers in arms.  
And to  
Carolina, Mariana, and Matheus,  
the indestructible core.

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# *Table of Contents*

<i>Table of Cases</i>	xi
<i>Table of Legislation</i>	xv
<i>List of Abbreviations</i>	xix

<b>1. Introduction</b>	<b>1</b>
1.1 ‘Cultural Property’ versus ‘Cultural Heritage’	5
1.2 Definition of Intangible Cultural Heritage	7
1.3 Nationalist versus Cosmopolitan Approaches to ICH Protection	10
1.4 The Challenge of Commodification	14
1.5 Tangible versus Intangible Heritage	18
1.6 Western versus Non-Western Heritage	22
1.7 Book Structure	25

## PART I—INSTITUTIONAL RESPONSES

<b>2. International Framework</b>	<b>29</b>
2.1 UNESCO	29
2.2 WIPO	56
2.3 International Trade and Intangible Cultural Heritage	58
2.4 The Convention on Biological Diversity and Traditional Knowledge	63
<b>3. Regional Responses</b>	<b>67</b>
3.1 Political Regionalism	67
3.2 Economic Regionalism	86
<b>4. National Responses</b>	<b>105</b>
4.1 Constitutional Responses	106
4.2 Intellectual Property Responses	120
4.3 <i>Sui Generis</i> Regimes	122
4.4 Policy-level Responses	126
4.5 Fragmented/Plural/Non-specific Responses	133
4.6 Multiplicity in National, Regional, and International (Institutional) Responses	141

## PART II—SUBSTANTIVE MEASURES TO SAFEGUARD INTANGIBLE HERITAGE

<b>5. International Human Rights and Intangible Cultural Heritage</b>	<b>145</b>
5.1 Bridging Intangible Cultural Heritage and Human Rights	146
5.2 Using Human Rights to Protect Intangible Cultural Heritage	152

<b>6. Intellectual Property and Intangible Heritage</b>	175
6.1 IP Tools and Intangible Heritage	176
6.2 The Public Domain and 'Cultural Commons'	197
<b>7. Contractual Approaches</b>	205
7.1 Creating a Structure for Contracting Out the Commons	206
7.2 Agency and Representation	210
7.3 Free, Prior, and Informed Consent	223
7.4 Financial Issues	229
<b>8. Conclusions</b>	233
<i>Appendix—The Flowchart of Living Heritage</i>	243
<i>References</i>	247
<i>Index</i>	271

# *Table of Cases*

## **African Commission on Human and Peoples' Rights**

Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001), 2001 AHRLR 60 .....	212
---	-----

## **Australia**

George Milpururru, Banduk Marika, Tim Payunka and the Public Trustee of the Northern Territory v Indofurn Pty Ltd, Brian Alexander Bethune, Raymond King and Robert James Rylands [1994] 54 FCR 240 .....	6, 96, 121, 187
John Bulun Bulun v R & T Textiles Pty Ltd (1998) 41 IPR 513 .....	121, 188
Mabo v Queensland (1992) .....	121

## **Brazil**

Civil Appeal No 70001422948 .....	134
-----------------------------------	-----

## **European Court of Human Rights**

Arrowsmith v United Kingdom (Application No 7050/75), Comm Rep 1978, 19 DR 5 .....	166–167, 168
Anheuser-Busch Inc v Portugal (Application No 73049/01), judgment of 11 January 2007 ....	192
Cha'Are Shalom ve Tsedek v France (Application No 27417/95), judgment 27 June 2000 .....	166–168
Ireland v United Kingdom (Application No 5310/71), judgment of 18 January 1978 .....	171
Lee v United Kingdom (Application No 25289/1994), judgment of 18 January 2001 ....	164–165
Leyla Şahin v Turkey (Grand Chamber) (Application No 44774/98), judgment of 10 November 2005 .....	167
López Ostra v Spain (Application No 16798/90), judgment of 9 December 1994 .....	147, 163

## **European Court of Justice**

Case C-350/92, Spain v Council [1995] ECR I-1985 .....	94
--	----

## **Human Rights Committee**

A B et al v Italy, Communication No 413/1990, UN Doc CCPR/C/40/D/413/1990, 5 November 1990 .....	149
Apirana Mahuika et al v New Zealand, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993, 15 November 2000 .....	148, 149
Carl Henrik Blom v Sweden, Communication No 191/1985, UN Doc CCPR/C/32/D/191/1985, 4 April 1988 .....	161
CLD v France, Communication No 228/1987, UN Doc CCPR/C/33/D/228/1987, 26 July 1988 .....	155, 163
FH Zwaan-De Vries v The Netherlands, Communication No 182/1984, UN Doc CCPR/C/29/D/182/1984, 9 April 1987 .....	160, 161
Francis Hopu and Tepoaitu Bessert v France, Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev/1, 29 December 1997 .....	164
George Howard v Canada, Communication No 879/1999, UN Doc CCPR/C/84/D/ 879/1999, 4 August 2005 .....	155, 157, 158
HK v France, Communication No 222/1987, UN Doc CCPR/C/37/D/222/1987, 8 December 1989 .....	155, 163

Ibrahima Gueye et al v France, Communication No 196/1985, UN Doc CCPR/C/35/ D/196/1985, 6 April 1989 .....	161
Ilmari Länsman et al v Finland, Communication No 511/1992, UN Doc CCPR/C/52/ D/511/1992, 8 November 1994 .....	155, 156, 157
Ivan Kitok v Sweden, Communication No 197/1985, UN Doc CCPR/C/33/ D/197/1985, 10 August 1988 .....	155, 156
Jarle Jonassen v Norway, Communication No 942/2000, UN Doc CCPR/C/76/ D/942/2000, 12 November 2002 .....	155, 159
JB and HK v France, Communication Nos 324 and 325/1988, UN Doc CCPR/ C/34/D/324/1988, 26 October 1988 .....	155, 163
Jouni E Länsman et al v Finland, Communication No 671/1995, UN Doc CCPR/C/ 58/D/671/1995, 22 November 1976 .....	155, 156, 157
Jouni Länsman, Eino Länsman and the Muotkatunturi Herdsmen's Committee v Finland, Communication No 1023/2001, UN Doc CCPR/C/83/D/1023/2001, 15 April 2005 .....	155, 156, 157
Lubicon Lake Band v Canada, Communication No 167/1984, UN Doc CCPR/C38/ D/167/1984, 10 May 1990 .....	149, 155, 156
O Sara et al v Finland, Communication No 431/1990, UN Doc CCPR/C/50/ D/431/1990, 24 March 1994 .....	155
RL et al v Canada, Communication No 359/1989, UN Doc CCPR/C/43/D/358/1989, 28 November 1990 .....	155
RT v France, Communication No 262/1987, UN Doc CCPR/C/35/D/262/1987, 3 April 1989 .....	155, 163
Sandra Lovelace v Canada, Communication No 24/1977, UN Doc CCPR/C/13/ D/24/1977, 30 July 1981 .....	155, 156
Shirin Aumeeruddy-Cziffra et al v Mauritius, Communication No 35/1978, UN Doc CCPR/C/12/D/35/1978, 9 April 1981 .....	160
SR v France, Communication No 243/1987, UN Doc CCPR/C/31/D/243/1987, 5 November 1987 .....	155, 163
TK v France, Communication No 220/1987, UN Doc CCPR/C/37/D/220/1987, 8 December 1989 .....	155, 163
X v Australia, Communication No 555/1993, UN Doc CCPR/C/57/D/557/1993, 1 August 1996 .....	155

### **Inter-American Commission on Human Rights**

Case 9.615, 5 March 1985 .....	114
--------------------------------	-----

### **Inter-American Court of Human Rights**

Caballero-Delgado and Santana v Colombia. Merits. Judgment of 8 December 1995. Series C No 22 .....	171
Cesti-Hurtado v Peru. Merits. Judgment of 29 September 1999. Series C No 56 .....	171
Fermín Ramírez v Guatemala. Merits, Reparations, and Costs. Judgment of 20 June 2005. Series C No 126 .....	171
Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No 18 .....	158
López Álvarez v Honduras. Merits, Reparations, and Costs. Judgment of 1 February 2006. Series C No 141 .....	148, 162
'Mapiripán Massacre' v Columbia. Merits, Reparations, and Costs. Judgment of 15 September 2005. Series C No 134 .....	148
Mayagna (Sumo) Awas Tingni Community v Nicaragua. Merits, Reparations, and Costs. Judgment of 31 August 2001. Series C No 79 .....	169
Moiwana Community v Suriname. Preliminary Objections. Merits, Reparations, and Costs. Judgment of 15 June 2005. Series C No 124 .....	169, 171

Myrna Mack-Chang v Guatemala. Merits, Reparations, and Costs. Judgment of 25 November 2003. Series C No 101 .....	148
Plan de Sánchez Massacre v Guatemala. Merits. Judgment of 29 April 2004. Series C No 105 .....	148
Saramaka People v Suriname. Preliminary Objection. Merits, Reparations, and Costs. Judgment of 28 November 2007. Series C No 172 .....	169, 215
Sawhoyamaxa Indigenous Community v Paraguay. Merits, Reparations, and Costs. Judgment of 29 March 2006. Series C No 146 .....	169
Suárez-Rosero v Ecuador. Merits. Judgment of 12 November 1997. Series C No 35 .....	171
'The Last Temptation of Christ' (Olmedo-Bustos et al) v Chile. Merits, Reparations, and Costs. Judgment of 5 February 2001. Series C No 73 .....	148
Yakye Axa Indigenous Community v Paraguay. Merits, Reparations, and Costs. Judgment of 17 June 2005. Series C No 125 .....	158, 159, 162, 169
Yatama v Nicaragua. Preliminary Objections. Merits, Reparations, and Costs. Judgment of 23 June 2005. Series C No 127 .....	169
<b>United States</b>	
Eldred v Ashcroft, Supreme Court of the United States, 537 US 1 (2003) .....	178
Penn Central Transportation Co v New York City, Supreme Court of the United States, 238 US 106 (1978) .....	138
<b>World Trade Organization</b>	
GATT Dispute Panel Report on U.S. Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) (1993) .....	62
WTO Appellate Body Report on U.S.—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (12 October 1998) .....	62
WTO Dispute Panel Report on Dispute DS291—European Communities—Measures Affecting the Approval and Marketing of Biotech Products (29 September 2006) .....	62
<b>Other</b>	
Czechoslovak Language of Minorities Case, 3 Ann Dig of Pub Intl L Cas 314 (1925–26) .....	162

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# Table of Legislation

## NATIONAL LEGISLATION

### Bolivia

Bolivia Constitution 2009 ..... 110, 117, 118,  
119, 120

Bolivia, Decreto Supremo No 12626 del 9  
de junio de 1977—Normas sobre  
Patrimonio Etnográfico, Música  
Folklorica, Danzas Folkloricas,  
Literatura Folklorica y Arte  
Popular ..... 122  
Jurisdictional Division Act ..... 119, 120

### Brazil

Brazil Constitution 1988 ..... 112, 113, 114,  
134, 135  
Decree 3.551, of August 2000 ..... 135, 136  
Federal Law No 9.610, of 1998 ..... 136  
Brazilian Civil Code 1916 ..... 112  
Brazilian Civil Code 2002 ..... 112  
Brazilian Indian Rights Act, Statute 6.001,  
of December 1973 ... 112, 113, 114, 115  
Statute 5.371, of 5 December 1967,  
authorizing the institution of the  
'National Indian Foundation' ..... 113

### China

Intangible Cultural Heritage  
Law of the People's Republic  
of China ..... 128, 129

### Ecuador

Ecuador Constitution 1998 ..... 117  
Ecuador Constitution 2008 ..... 110, 117

### Germany

German Civil Code (BGB) ..... 197

### Guatemala

Guatemala Constitution 1945 ..... 109

### Laos

Laos Constitution ..... 130

### Mexico

General Law on Linguistic Rights of  
Indigenous Peoples ..... 111

### Panama

Executive Decree no 12 of 20 March  
2001 ..... 123  
Law on the special intellectual property  
regime upon collective rights of  
indigenous communities, for the  
protection of their cultural identities  
and traditional knowledge, Law No 20  
of 26 June 2000 ..... 123, 124, 125, 126

### Philippines

Indigenous Peoples Rights Act of 1997 .... 140  
Philippines Constitution ..... 140

### Romania

Ordinance No 19 of 31 January 2007 on  
the immaterial cultural heritage  
protection ..... 127, 128

### United States

American Folklife Preservation Act ..... 139  
Endangered Species Act ..... 139  
Executive Order 12898 ..... 139  
Federal Records Act ..... 139  
National Environment Policy Act ..... 139  
National Historic Preservation Act ..... 139  
Religious Freedom Restoration Act ..... 139  
United States Constitution ..... 106, 138  
Visual Artists Rights Act (VARA) ..... 182

### Uruguay

Uruguay Constitution ..... 110

### Viet Nam

Implementing decree for the Law on  
Cultural Heritage ..... 131  
Law on Cultural Heritage 2001 ..... 131

## INTERNATIONAL INSTRUMENTS

### African Union

African (Banjul) Charter on Human and  
Peoples' Rights (1981) ..... 85, 159, 170  
African Union, Assembly of Heads of State  
and Government, Resolution on the  
Return of the Pillaged African  
Monument the Obelisk of Axum.



AHG/Dec. 184 (XXVIII), 8 July 2002 .....	82	Council of Europe, European Convention for the Protection of the Archaeological Heritage (Revised). Valetta, 16 January 1992. ETS no 143. Entry into force: 25 May 1995. Parties as of November 2012: 42 .....	78
African Union, Charter for African Cultural Renaissance, adopted by the Sixth Ordinary Session of the Assembly, in Khartoum, Sudan, 24 January 2006 .....	83, 84, 85, 86	Council of Europe, European Landscape Convention, Florence, 20 October 2000. ETS no 176. Entry into force: 1 March 2004. Parties as of November 2012: 37 .....	78
African Union, Executive Council, Decision on the Formulation and Establishment of an International Convention on Cultural Diversity and an International Convention on the Safeguarding of Intangible Cultural Heritage, Third Ordinary Session, 4–8 July 2003, Maputo (Mozambique), EX/CL/Dec.67(III) .....	83	Council of Europe, Framework Convention on the Value of Cultural Heritage for Society, Signed in Faro on 27 October 2005. ETS no 199. Entry into force: 1 June 2011. Parties as of November 2012: 13 .....	76, 78, 79, 80, 81
Constitutive Act of the African Union (2000) .....	81	Council of Europe, Summit on Heritage and Communication, Declaration of Opatija on Intercultural Dialogue and Conflict Prevention, Adopted at the Regional Summit Forum on Communication of Heritage on 1 June 2006 .....	80
Organization of African Unity, Cultural Charter for Africa, concluded during the Thirteenth Ordinary Session of the Organization of African Unity in Port Louis, Mauritius, 5 July 1976, Entry into force: 19 September 1990. Number of Parties as of January 2006 (when it stopped being open for ratification): 34 .....	83, 84, 85	<b>European Union</b>	
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998) .....	170	Council Directive, 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State .....	92
<b>Andean Community of Nations</b>		Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Official Journal L248, 06/10/1993 P 0015-0021 .....	94
Decision 391 of the Andean Community (Common Regime on Access to Genetic Resources, July 1996) .....	100	Council Regulation (EEC) 3911/92 on the Export of Cultural Goods .....	92
Decision 486, 2000 .....	101	Decision 2228/97/EC of the European Parliament and of the Council of 13 October 1997 establishing a Community action programme in the field of cultural heritage (Raphael), OJ L 305, 8 November 1997, 31 .....	89
Decision 523, July 2002 .....	101	Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Official Journal L 077, 27/03/1996 P 0020-0028 .....	94
<b>Council of Europe</b>		Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related	
Convention for the Protection of Human Rights and Fundamental Freedoms, CETS 005, opened for signature on 4 November 1950. Entry into force: 3 September 1953. States Parties as of November 2012: 47 ....	147, 154, 159		
Council of Europe, Convention for the Protection of the Architectural Heritage of Europe. Granada, 3 October 1985. ETS no 121. Entry into force: 1 December 1987. Parties as of November 2012: 41 .....	78		

rights in the information society, Official Journal L 167, 22/6/2001 P 0010-0019 .....	94	Convention on Biological Diversity .....	29, 33, 63, 64, 65, 100, 101, 215, 217, 226
Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, Official Journal L 272 13/10/2001 P 0032-0036 .....	94	Kari-Oca Declaration .....	65
Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), Official Journal L 376, 27/12/2006 P 0028-0035 .....	94	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2010) .....	64, 65, 215, 216, 217, 228, 230
EU Charter of Fundamental Rights .....	97	UNESCO	
European Neighbourhood and Partnership Instrument (ENPI) .....	91	1989 <i>Recommendation on the Safeguarding of Traditional Cultures and Folklore</i> .....	30, 31, 32, 35, 51
'Television without Frontiers' Directive .....	61	Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) .....	5, 16, 29, 30, 34, 35, 36, 37, 40, 42, 50, 55, 56, 57, 85
Treaty Establishing the European Community ...	87, 88, 89, 90, 93, 94, 95	Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) .....	5, 16, 85, 86
Treaty of Lisbon ...	87, 88, 90, 93, 95, 96, 97	Convention for the Safeguarding of the Intangible Cultural Heritage (2003) .....	3, 8–10, 17, 19, 22, 29–59, 63–5, 80, 82, 83, 85–6, 93, 102, 126–9, 135, 146–7, 150–2, 162, 169, 172, 175–6, 181, 195, 209, 216, 221, 235–9
Treaty on the Functioning of the European Union .....	87, 90, 91, 95	Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) .....	16, 85
<b>Organization of American States (OAS)</b>		Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted by the UNESCO General Assembly on 20 October 2005. Entry into force: 18 March 2007 .....	58, 59, 60, 61, 62, 73, 85
American Convention on Human Rights 'Pact of San José, Costa Rica' (1969) .....	154, 158, 159	Convention on the Protection of the Underwater Cultural Heritage (2001) .....	16
Charter of the Organization of American States .....	68, 69	Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action (UNESCO/WIPO, 1984) .....	57
Declaración de México sobre Cultura y Desarrollo .....	71	General Assembly of State Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage, <i>Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage (June 2008)</i> .....	38, 39, 43, 45, 48, 50
Draft Declaration on the Rights of Indigenous Peoples .....	25, 69, 73, 74, 75	General Assembly of State Parties to the Convention for the Safeguarding of the	
<b>Secretariat of the Convention on Biological Diversity</b>			
<i>Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites, and on Lands and Waters Traditionally Occupied by Indigenous and Local Communities</i> (2004) ..	217, 218, 219, 220		
<i>Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization</i> (2002) .....	215, 216, 217, 227, 228, 230, 231		

Intangible Cultural Heritage, Third Session (UNESCO Headquarters, 22–24 June 2010) Resolutions, resolution 3.GA 5, Doc.ITH/10/3. GA/CONF.201/RESOLUTIONS, of 24 June 2010 .....	54, 55	Extraordinary Session of the World Heritage Committee, Doc. WHC-04/7 EXT.COM/ING.9, of 25 November 2004 .....	37
<b>United Nations</b>			
Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, First Extraordinary Session (Chengdu, China, 23–27 May 2007), Decision 1.EXT.COM 4 .....	39	International Covenant on Civil and Political Rights (1966) .....	111, 148, 149, 154, 155, 156, 157, 158, 159, 160, 161
Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Second Session (Tokyo, Japan, 3–7 September 2007), Decision 2. COM 5 .....	39, 40	International Covenant on Economic, Social and Cultural Rights (1966) .....	148, 153, 154, 170, 180, 181, 240
Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Second Extraordinary Session (Sofia, Bulgaria, 18–22 February 2008), Decision 2.EXT.COM 5 .....	39, 40	Optional Protocol to the International Covenant on Civil and Political Rights (1966) .....	154, 158
Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Second Extraordinary Session (Sofia, Bulgaria, 18–22 February 2008), Decision 2.EXT.COM 9 .....	50	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008) .....	153, 170
Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Second Extraordinary Session (Sofia, Bulgaria, 18–22 February 2008), Decision 2.EXT.COM 16 .....	39	United Nations Declaration on the Rights of Indigenous Peoples (2007) .....	73
Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Second Extraordinary Session (Sofia, Bulgaria, 18–22 February 2008), Decision 2.EXT.COM 17 .....	45	Universal Declaration of Human Rights (1948) .....	79, 153, 154
Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action (UNESCO/WIPO, 1982) .....	57	<b>WIPO</b>	
Tunis Model Law on Copyright for Developing Countries (UNESCO/WIPO, 1976) .....	57	Berne Convention for the Protection of Literary and Artistic Works .....	30, 184, 188, 189, 190
UNESCO Universal Declaration on Cultural Diversity (2001) .....	85	Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971) .....	184
Universal Copyright Convention .....	30, 180, 185, 198, 240	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) .....	184
World Heritage Committee, <i>The Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Heritage</i> , adopted during the Seventh		WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, <i>Decisions of the Nineteenth Session of the Committee</i> (July 2011) ....	57
		WIPO Performances and Phonograms Treaty (1996) .....	186
		<b>World Trade Organization</b>	
		General Agreement on Tariffs and Trade .....	62, 63
		General Agreement on Trade in Services ....	61
		TRIPS agreement .....	58, 190, 194

## *List of Abbreviations*

ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
AU	African Union
CBD	Convention on Biological Diversity
CH	Cultural Heritage
CoE	Council of Europe
CPR	Civil and Political Rights
EC	European Communities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESCR	Economic, Social and Cultural Rights
EU	European Union
FAO	United Nations Food and Agriculture Organization
FPIC	Free, Prior and Informed Consent
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
IACmHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICH	Intangible Cultural Heritage
IP	Intellectual Property
MFN	Most-Favored Nation
NAFTA	North American Free Trade Area
NEPA	National Environmental Policy Act
NGO	Non-Governmental Organization
NIAAA	National Indigenous Arts Advocacy Association
OAS	Organization of American States
OAU	Organization of African Unity
SIA	Social Impact Assessment
TK	Traditional Knowledge
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations Organization
UNCTAD	United Nations Commission on Trade and Development
UNEP	United Nations Environmental Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHC	World Heritage Convention
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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# 1

## Introduction

The protection of cultural heritage, especially of the intangible type, is of growing international concern. International legal instruments and policy initiatives on the protection of cultural heritage are multiplying worldwide, and we are experiencing 'heritage fever'.<sup>1</sup> This book is about mechanisms for safeguarding intangible cultural heritage (ICH), with special emphasis on international law. It tells a story about how the law works and ought to work towards protecting communities, as those from whom ICH stems, and to whom benefits of its exploitation must return. The concept of 'intangible cultural heritage' will be discussed in more depth shortly. For the time being, it suffices to say that 'intangible heritage' refers to traditional forms of cultural expression, passed from one generation to the next, and that constitute an important part of a given community or group's identity.

The central thesis of the book is that the mechanisms for safeguarding intangible heritage will vary depending on the instrumental use one hopes to make of heritage. I explore a wide range of these possible mechanisms and goals, highlighting their potential and pitfalls, in an attempt to map this somewhat under-explored and under-theorized legal field. I do this in a way that takes into account the surrounding theory but is focused primarily on the practical possibilities.

This book is thus more of a 'law book' than it is a 'book about the law'. While I am sensitive to and aware of much of the critique of the patches of law exposed here, and I myself join much of the critique, my chief concern is to create a critique-informed body of law from many fragments, as opposed to a critique-oriented analysis of a body of law that, I argue, does not quite exist.

The legal solutions to the safeguarding of intangible cultural heritage depend, to a large extent, on the interests at stake when protecting it. The objective that is to be promoted by legal regimes (at least as a matter of official rhetoric) decisively influences the tools that are to be used in the legal instrument. The use of human rights mechanisms, for instance, looks at the protection and promotion of cultural identity as the primary interest at stake. But the use of intellectual property (IP), or trade law mechanisms, for instance, will put the economic/development interest at the forefront. This is one of the central concerns of the book. While I do have some personal preferences of prioritizing some interests over others when it

<sup>1</sup> David Lowenthal, for example, opens the first chapter of his book with the following sentence: 'The world rejoices in a newly popular faith: the cult of heritage'. David Lowenthal, *The Heritage Crusade and the Spoils of History* (Cambridge University Press, 1998), 1.

comes to protecting intangible cultural heritage, I acknowledge the plurality of interests and the importance of that plurality. My argument is that the protection of intangible cultural heritage can be best achieved through multi-level protection. This is despite the fact that there are many risks involved, including specifically the risks of fragmentation and dispersion of protection. This multi-level protection happens not only at the substantive level, but also at the institutional level.

This introduction aims to discuss some of the theoretical aspects of the legal safeguarding of intangible cultural heritage. Many of these 'theoretical tensions', as I choose to call them, are more often than not framed in the form of dichotomies: 'property v. heritage', 'tangible v. intangible' and 'western v. non-western' are just a few of them. As I will try to demonstrate, many of these dichotomies do not hold up to close scrutiny. This debate concerning the theoretical tensions associated with intangible heritage plays out repeatedly throughout this whole book. What will be seen in this chapter, thus, must be considered as only a prelude, a first approximation of the nature of these issues, which will be successively reframed in the context of more concrete legal initiatives.

I suggest an approach that distinguishes between the tangible and the intangible that offers more comprehensive protection to cultural heritage. This approach, reflecting the normative overlap of different treaty regimes, may be summarized as follows. To the extent the regime for the protection of tangible cultural heritage does not cover manifestations of heritage that are not deemed worthy of protection based solely on their external aspects, the international regime for intangible heritage, more nuanced and culturally sensitive, should step in and undertake the task of offering protection. This should be so at least to the extent that manifestations of heritage can be considered to be intangible and to fall under the regime. As all manifestations of heritage have an intangible element, what is left is to see whether they should fall under the current regime for the safeguarding of intangible heritage. I argue that not all heritage should be treated as intangible in international regimes, even though intangible values and aspects of all heritage must be taken into account when devising schemes for the protection of cultural heritage. As following chapters will show, several organizations have adopted regimes that do not look at heritage in light of the 'intangible/tangible' dichotomy, but rather as a holistic subject-matter, in which tangible and intangible elements have an essential interplay.

Before getting to the tensions specific to intangible heritage, however, it is necessary to place the development of intangible cultural heritage law within the broader context of international cultural heritage law. A good part of this evolution can be seen in the discussion of the conceptual shift from 'property' to 'heritage', explained below, but there are also other elements that merit separate discussion. The protection of intangible cultural heritage marks an important conceptual shift in international cultural heritage law, especially when it comes to the role of the State in safeguarding this heritage.

Protection of cultural heritage in international law was traditionally made in favor of the State, often regarded as the guardian of the interests of the (present and future) population. The protection of intangible cultural heritage challenges this

view. Because it deals with living cultures (and as it is impossible to dissociate communities from their heritage), communities themselves—rather than objects and sites—are entitled to protection under the Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention). This ‘post-State’ posture is one that drew a lot of attention during the negotiations of the ICH Convention.<sup>2</sup> States tried to contain interest by erecting new walls of sovereignty around this heritage. However, at least in its conception, intangible heritage implicitly challenges traditional ideas about State sovereignty and State entitlement to cultural heritage, moving closer to communities and to the human dimension of cultural heritage.<sup>3</sup>

There are several rationales for protecting ICH, and they ultimately boil down to the importance given to heritage and the perspective from which one seeks a use for it. Heritage must be protected, according to one commentator, for two fundamental reasons: first, because heritage forms an essential part of humanity’s common past, and creates cultural identity; secondly, more often than not instances of heritage also represent important art forms that enrich people’s lives because of their aesthetic value.<sup>4</sup> These are important values which essentially justify the protection of cultural heritage.<sup>5</sup>

However, heritage has no intrinsic value,<sup>6</sup> especially intangible heritage, in the sense that it should not be valued for its own sake, but rather in reference to the way people relate to it (in a way that is much more apparent than in other property-like claims, in which what is owned generally has its own, autonomous value). The value of heritage arises from the meanings placed upon the material artefacts and other forms in the present, and also from the representations created from them.<sup>7</sup> Heritage’s value is therefore relational, rather than intrinsic. One notable exception is aesthetic value, but that is of relatively low importance in heritage (at least to the extent it is not what makes something ‘heritage’, it is what makes it ‘art’). This is particularly so in the context of intangible heritage, which strives to be more ‘representative’ of a certain culture than an aesthetically appealing manifestation of heritage. Any such appeal is only incidental.

<sup>2</sup> Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003. Entry into force: 20 April 2006. States parties as of November 2012: 146 (hereinafter ‘the 2003 UNESCO Convention’, or ‘ICH Convention’).

<sup>3</sup> Francesco Francioni, ‘La Protección del patrimonio cultural a la luz de los principios de Derecho Internacional Público’, in Carlos R. Fernández Liesa and Jesús Prieto de Pedro (eds), *La Protección Jurídico Internacional del Patrimonio Cultural: Especial Referencia a España* (COLEX, 2009), 13–34 at 31–2; and Francesco Francioni, ‘The Human Dimension of International Cultural Heritage Law: An Introduction’, *EJIL* 22(1) (2011), 9–16.

<sup>4</sup> John Henry Merryman, ‘Thinking about the Elgin Marbles’, *Mich L Rev*, 83 (1984–85), 1881–1923 at 1895. Merryman is actually speaking of three reasons why one should care about the Parthenon Marbles. The first two reasons are those pointed out above, and the third is the concern over the depletion of the collections of major western museums in case all property should be repatriated to their countries of origin.

<sup>5</sup> Sarah Harding, ‘Value, Obligation and Cultural Heritage’, *Ariz St LJ* 31 (1999), 291–354 at 340.

<sup>6</sup> Harding, ‘Value, Obligation and Cultural Heritage’; and a corroborating response by James W Nickel, ‘Intrinsic Value and Cultural Preservation’, *Ariz St LJ* 31 (1999), 355–61.

<sup>7</sup> GJ Ashworth, Brian Graham, and JE Tunbridge, *Pluralising Pasts: Heritage, Identity and Place in Multicultural Societies* (Pluto Press, 2007), 3.



Because heritage has no intrinsic value, other reasons for its protection that instrumentalize heritage and give it value, must therefore be sought. One of the most-often cited rationales for the protection of heritage is the preservation of cultural identity. Heritage in this sense is meant to provide a physical representation of the ephemeral concept of identity, and heritage is thus understood as a vehicle for promoting identity.<sup>8</sup> But at the same time one must bear in mind that communities, groups, and individuals often do not align themselves with one single identity, and individual identity is rather built upon several layers, leading to communities that are made up of several sub-communities.<sup>9</sup> So, a multiplicity of identities must be taken into account when considering identity as a goal to be protected through heritage, in order to avoid 'essentializing' culture and community perceptions of it.

Other compelling rationales include the creation or preservation of national identity (in the sense of political national identity);<sup>10</sup> the protection of a certain polity (minoritarian or majoritarian);<sup>11</sup> the enhancement of tourism;<sup>12</sup> the discovery of someone's values, social practices, and even legal rules (pertaining particularly to anthropology);<sup>13</sup> the strengthening of worldviews and political agendas of people not belonging to that heritage originally (that is, to 'bring the past into the

<sup>8</sup> Laurajane Smith, *The Uses of Heritage* (Routledge, 2006), 48.

<sup>9</sup> Smith, *The Uses of Heritage*, 53.

<sup>10</sup> A particularly interesting case study is the declaration of Macao religious figure carving as intangible heritage. This type of woodwork creates religious figures related to the Chinese ancestry, and their promotion through a recent exhibition in the Macao Museum can be constructed as promoting a perennial intangible heritage that survived in Macao despite the Portuguese control of the peninsula. As Macao has been reincorporated into China, there is obviously an interest in promoting a surviving political national identity that can relate Macao to 'mainland China'. See *Trabalhos com Engenho: Escultura de Idolos Sagrados de Macau* (Museu de Macau, 2008) (book of the exhibition of the same title, which is proclaimed as national intangible heritage. The exhibition has run from December 2008 through April 2009).

<sup>11</sup> On the importance of heritage for minority protection, see Lowenthal, *The Heritage Crusade*, 81–7.

<sup>12</sup> Derek Gillman, *The Idea of Cultural Heritage* (Institute for Art and Law, 2006), 1. For a critique of how tourism homogenizes heritage, being in the long run harmful to it, see Brian Graham, Gregory John Ashworth, and John E Tunbridge, 'The Uses and Abuses of Heritage', in Gerard Corsane (ed), *Heritage Museums and Galleries: An Introductory Reader* (Routledge, 2005), 26–37 at 31 (arguing that 'tourism is parasitic upon culture, to which it may contribute nothing'). Laurajane Smith, on the other hand, presents a more nuanced view. Cf Smith, *The Uses of Heritage*, 71 (adding a more balanced perspective, by saying that '[w]hile the sense of experience often created in tourism has been criticized for its tendency to commodify or Disneyfy the past, or for its tendency to transform identities "through pernicious vogue storylines" [...] it nonetheless demonstrates the importance of "doing" and "being" at a "place"').

<sup>13</sup> For examples of how cultural practices and folklore can be used as a means to determine legal practices, see the collection of essays Alison Dundes Rentel and Alan Dundes (eds), *Folk Law: Essays on the Theory and Practice of Lex Non Scripta* (University of Wisconsin Press, 1995). See particularly Hermann Baldt, 'Folklore Research and Legal History in the German Language Area', in Dundes Rentel and Dundes (eds), *Folk Law: Essays on the Theory and Practice of Lex Non Scripta*, 397–407; Paul G Brewster, 'Traces of Ancient Germanic Law in a German Game-Song', in Dundes Rentel and Dundes (eds), *Folk Law: Essays on the Theory and Practice of Lex Non Scripta*, 407–16; John C Messenger, Jr, 'The Role of Proverbs in a Nigerian Judicial System', *Southwestern Journal of Anthropology* 15(1) (1959), 64–73; and Durica Krstić, 'Symbols in Customary Law', in Dundes Rentel and Dundes (eds), *Folk Law: Essays on the Theory and Practice of Lex Non Scripta*, 439–54.

present’);<sup>14</sup> social inclusion;<sup>15</sup> education;<sup>16</sup> or even protecting heritage just for the sake of its aesthetic importance (even if this latter reason is of secondary significance).<sup>17</sup> When these justifications are translated into legal regimes, one can see that identity prevails as a rationale for protecting intangible heritage, and that other reasons become accessory, even if they are the formal justifications for triggering certain mechanisms within certain normative environments (for instance, using the enhancement of tourism, therefore an economic justification, to trigger economic integration processes and their machinery to protect intangible heritage).

### 1.1 ‘Cultural Property’ versus ‘Cultural Heritage’<sup>18</sup>

To better understand the object of this study, it is important to highlight the origins and reach of the term ‘cultural heritage’. Early international legal instruments protecting projections of culture came about through international humanitarian law (particularly the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict), protecting cultural goods in times of conflict, and referring to them as ‘cultural property’.<sup>19</sup> However, developments in the field reached a point at which the values attached to property needed to be modified in order for other social goals to be secured. While ‘property’ as a legal category offers interesting advantages, as it is often viewed as a near-absolute bundle of rights once conferred, its use implied the setting up of a social policy to protect the possessor of the cultural object. This approach, however, came into conflict with the fundamental goal of heritage protection, as there was a shift from protecting individual interests to protecting the interests of society in the preservation of cultural goods.<sup>20</sup>

<sup>14</sup> In this sense, David Lowenthal tells the story of how Chief Seattle’s famous ‘*Brother Eagle, Sister Sky*’ letter, which spurred the environmentalist movement in the United States by announcing the deep connection between the indigenous person and nature (a model of cooperation and respect that was taken to serve as an example to the whole of society) was actually never written by Chief Seattle, but rather by a Hollywood scriptwriter. Lowenthal, *The Heritage Crusade*, 150–1. See also Sally Yerkovich, ‘Linking the Present with the Past through Intangible Heritage in History Museums’, *Intl J of Intangible Heritage* 1 (2006), 44–52.

<sup>15</sup> See eg Viv Golding, ‘*Inspiration Africa!* Using Tangible and Intangible Heritage to Promote Social Inclusion Amongst Young People with Disabilities’, *Intl J of Intangible Heritage* 1 (2006), 84–93.

<sup>16</sup> See eg Maria Vlachaki, ‘Crossing Cultures through the Intangible Heritage: an Education Programme about Migration in Greece’, *Intl J of Intangible Heritage* 2 (2007), 94–102.

<sup>17</sup> Gillman, *The Idea of Cultural Heritage*, 12.

<sup>18</sup> This section is partly extracted from Lucas Lixinski, ‘World Heritage and the Heritage of the World—Review of The 1972 World Heritage Convention: A Commentary’, ed Francesco Francioni and Federico Lenzerini, *Eur J of Legal Studies* 2 (2008), 371–86.

<sup>19</sup> This development is outlined by Janet Blake, ‘On Defining the Cultural Heritage’, *ICLQ* 49 (2000), 61–85 at 61–2. For a pre-World War II evolution of the idea of cultural property in international law, see generally Ana Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press, 2006).

<sup>20</sup> Lyndel V Prott and Patrick J O’Keefe, ‘“Cultural Heritage” or “Cultural Property”?’, *Intl J of Cultural Property* 1 (1992), 307–20 at 309.

The law had evolved to deem the value to be protected by norms to be present and future generations, or society as a whole, rather than the particular possessor of a certain object.<sup>21</sup> This idea of protecting the interests of future generations gradually led to a change in terminology, and the term 'cultural heritage' began to be used in the English-language literature.

A critique of the use of the term 'property' goes beyond criticizing the ultimate value to be protected. After all, in one way or another, the protection of objects is one of the aims of property law, with the difference that property law does not question who is to benefit from such protection. It protects the interests of the possessor. For the purposes of the critique outlined above, it may well be said that the owner (of heritage as property) is society as a whole, and thus 'cultural property' would still work as a concept.

Several scholars, particularly in the field of legal anthropology, have raised the point that 'property' is a 'Western' concept, which does not necessarily address the needs of all peoples. There are several examples of societies that do not recognize 'property' as a social possibility; rather than owning something, individuals belonging to these societies believe that they are owned by the environment around them, which is in certain cases nothing short of the embodiment of the deities that they worship. It seems natural that a religion does not allow one to own one's object of worship, lest the reason for it (namely, that you worship some entity mightier than you) would cease to exist. If everything around me is a deity, and I cannot own a deity, I do not own anything.<sup>22</sup> This argument is closely related to the critique that using the term 'property' implies a commodification of cultural aspects of life, which should not be treated as goods in the marketplace.<sup>23</sup> Further, the use of the term 'property' also reinforces the idea that cultural values can be captured and frozen.<sup>24</sup>

The use of the term 'property' in the context of the protection of cultural heritage is thus misleading, to the extent that it is, in the end, associated with things whose value transcends their physical existence. One compelling example of this is that one of the fundamental aspects of property as a right, *ius abutendi*, cannot be exercised when dealing with cultural goods. *Ius abutendi* is the faculty that the owner of a thing has to destroy the object; this is rather difficult to accept when speaking of cultural heritage.<sup>25</sup>

Likewise, the use of 'cultural heritage' as a legal concept is not free from difficulties. One of the problems that the use of the concept poses derives from it having been imported from other disciplines without incorporating the necessary theoretical background of these disciplines, such as anthropology or cultural studies. This has led to 'cultural heritage' being one of the most problematic legal

<sup>21</sup> Prott and O'Keefe, 'Cultural Heritage', 309.

<sup>22</sup> A real-life example is given by Prott and O'Keefe, 'Cultural Heritage', 310 (mentioning a famous Australian case, *Milirrpum v Nabalco Pty Ltd*, to which I return in Ch 6).

<sup>23</sup> Blake, 'On Defining the Cultural Heritage', 65–6.

<sup>24</sup> Smith, *The Uses of Heritage*, 101.

<sup>25</sup> Prott and O'Keefe, 'Cultural Heritage', 310. See also Joseph L. Sax, *Playing Darts with a Rembrandt: Public and Private Interests in Cultural Treasures* (University of Michigan Press, 1999).

concepts dealt with today.<sup>26</sup> In addition, the fact that ‘heritage’ as a legal concept tries to embrace features such as national patrimony, regional and ethnic legacies, and a commonly shared global heritage is also part of the challenge, as these features often translate into incompatible aims.<sup>27</sup>

All things considered, the concept of ‘heritage’ is most important for our purposes precisely because of its capacity to include notions beyond economics and ownership that are typical of property. But, more importantly for the present purposes, one must highlight the meaning of the shift in international legal discourse from ‘property’ to ‘heritage’.<sup>28</sup> This shift means an acceptance that the protection of heritage goes beyond the protection of the actual sites, objects, and artifacts; instead, what is to be protected is the relationship between these sites, objects, and artifacts and human beings.<sup>29</sup> In this sense, what is protected is precisely the element of intangibility behind all heritage. This focus on the relationships implies the articulation of the idea that cultural heritage belongs to the whole of humankind, and must be protected to favour those communities more connected to it, as opposed to the individuals in possession of the items.

## 1.2 Definition of Intangible Cultural Heritage

Defining ‘cultural heritage’ implies defining ‘culture’. Definitions of culture are broad, which makes it difficult to give them legal force. The ‘relevant type of culture’, for the purposes of protecting cultural heritage, is the one that contributes to the formation of identity. ‘Heritage’ as a qualifier to ‘culture’ implies that the type of culture identified will be the one that is relevant for the perpetuation of a given social group. It is this symbolic relationship between cultural heritage and culture-as-society that is important for understanding the concept of cultural heritage.<sup>30</sup> It is very difficult to define heritage in definite terms, and it has been stated that defining it is as difficult as defining beauty or art; heritage appeals to people’s senses and emotions, and is therefore unfathomable.<sup>31</sup>

Despite all the complexity in defining cultural heritage, a working definition is needed. Cultural heritage can thus be defined as the elements necessary for the

<sup>26</sup> Blake, ‘On Defining the Cultural Heritage’, 63.

<sup>27</sup> Blake, ‘On Defining the Cultural Heritage’, 64 (citing Lowenthal, *The Heritage Crusade*, 227).

<sup>28</sup> Regina Bendix, ‘Héritage et patrimoine: de leurs proximités sémantiques et de leurs implications’, in Chiara Bortolotto (ed), *Le patrimoine culturel immatériel: Enjeux d’une nouvelle catégorie* (Éditions de la Maison des sciences de l’homme, 2011), 99–121.

<sup>29</sup> This shift was also mirrored in general debates about property law. Property has shifted from being a legal protection of an object (or the exclusive rights of the owner to its property towards non-owners) to the relationship between non-owners and the property, to the extent some rights can also be granted to non-owners. For a discussion and reconceptualization of property law, see generally David Kennedy, ‘Some Caution about Property Rights as a Recipe for Economic Development’, *Accounting, Economics and Law* 1 (2011), 1–62.

<sup>30</sup> Blake, ‘On Defining the Cultural Heritage’, 68.

<sup>31</sup> Robert Lumley, ‘The Debate on Heritage Reviewed’, in Gerard Corsane (ed), *Heritage Museums and Galleries: An Introductory Reader* (Routledge, 2005), 15–25 at 16.

maintenance over time of a certain cultural identity, important for the survival of a social group.

Cultural heritage may be tangible or intangible, the latter being the type in which I am most interested. Tangible cultural heritage refers to statues, monuments, architectural works, and other materialized forms of cultural expression. Intangible cultural heritage, by contrast, can be defined in two different ways. On the one hand, as a concept that is *dependent* on tangible cultural heritage, it acts as the underlying culture to any given expression, encompassing the processes, skills, and beliefs leading to the creation of tangible works. In a way, the term expresses the relationship of a people with their tangible cultural heritage. On the other hand, as an *independent* type of heritage, the term encompasses story-telling, songs, dances, among other forms of expression that cannot be ordinarily fixated in material ways.

During the drafting of the 2003 UNESCO ICH Convention, Francesco Francioni, Chair of the drafting meeting held in Turin (2001), presented a comprehensive report on issues that should be taken into account when drafting a definition of ICH. The report outlined the possibility of legally protecting 'non-material' goods using the example of IP rights (to be analysed in comparison with ICH in Chapter 6), but also drawing a line distinguishing between ICH and IP, in that IP focuses on the end product of the creative process, whereas ICH is the process itself. The report then outlined definitions of cultural heritage in existing international instruments, concluding that elements could be drawn from all these definitions that would be relevant for the formulation of a legal definition of intangible heritage, such as its significance, the importance of a broad definition with a non-exclusive typology, criteria that could be operationalized by the organ eventually in charge of administering the Convention, and the fact that intangible heritage should focus on the 'internal' cultural manifestations, and not on the products of it. A definition was proposed, and much of it made it to the final instrument.<sup>32</sup>

The 2003 UNESCO Convention thus defines intangible cultural heritage as follows:

**Article 2—Definitions.** For the purposes of this Convention, 1. The 'intangible cultural heritage' means 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. [...]

Intangible heritage, like indigenous heritage, must be seen as holistic.<sup>33</sup> This holistic understanding is both dependent on and independent from tangible

<sup>32</sup> UNESCO, *International Round Table: 'Intangible Cultural Heritage—Working Definitions'*, meeting held in Turin Piedmont (Italy) on 14–17 March 2001.

<sup>33</sup> Amanda Kearney, 'Intangible Cultural Heritage: Global Awareness and Local Interest', in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge, 2009), 209–26 at 217.

heritage. To be more accurate, the Convention makes several tangible elements dependent on the intangible expressions from which they derive, and not the other way around. In other words, it protects objects because they derive from a larger cultural practice, and not the other way around, which would be the traditional response of museums, for instance, in protecting the objects themselves and hoping, perhaps, to indirectly protect the culture behind them.

Other important elements of the UNESCO definition include the precedence of group rights in the context of intangible heritage (since the rights belong primarily to the community, and only 'in some cases' to individuals), and the importance given to universalist conceptions of human rights, by affirming that those cultural practices that are incompatible with internationally recognized human rights do not fall within the scope of application of the Convention. The UNESCO definition is very broad, but this is necessary in such a comprehensive area of law, which tries to bring together interests which can at times be incompatible.

It is also interesting to notice that the definition of intangible heritage is 'forward-looking', in the sense that it protects manifestations of heritage necessary for the continuation of a certain community. Heritage studies have traditionally looked at heritage as escapist and 'backward-looking',<sup>34</sup> primarily because of their connection to tangible heritage and archaeology, where the object necessarily predated its discovery, turning these objects into sites for the exploration of 'lost' history. However, it is important to notice the shift in discourse when it comes to the protection of intangible heritage, which aims at defending living cultures.

The definition of the UNESCO Convention stresses that '[t]his intangible cultural heritage [...] provides [the communities] with a sense of identity [...]'. It is precisely *because* intangible cultural heritage provides a sense of identity that it is worthy of protection. Heritage connects each person to the community they stem from, and creates a sense of shared experience, and thus identity. Protecting this shared identity, and, ultimately, a shared humanity, is perhaps the most important goal behind heritage safeguarding. Thus, by protecting identity in general, one is also indirectly protecting intangible cultural heritage. Identity and culture can be protected by international human rights mechanisms, which are one of the possible tools for remedying misappropriation of intangible heritage, as I will argue in Chapter 5.

Further, heritage here is seen as the cultural processes behind certain objects, and not the objects themselves (which are a commodified version of these processes, as discussed below). In this sense, any attempt to indirectly protect intangible heritage through protecting the end-results of these cultural and social processes must necessarily take into account that they are protecting mummified manifestations of heritage, and not heritage itself, and necessarily fall short of fully protecting heritage.<sup>35</sup>

I will return to the issue of the definition of intangible heritage in Chapter 2, when analysing the relevant UNESCO Convention and the controversies

<sup>34</sup> Lumley, 'The Debate on Heritage Reviewed', 17.

<sup>35</sup> Smith, *The Uses of Heritage*, 54.