ROLE OF INTERDISCIPLINARY RESEARCH IN DEVELOPMENT OF CONVENTION AND IDENTIFICATION OF ITS CONCEPTS

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Abstract

International treaties and policy are often responsive to developments in scientific knowledge in predominantly non-legal disciplines, such as environmental protection, trade and investment. This involvement of non-legal expertise is mainly at the stage of policy-setting and aims to provide tools for implementing these instruments. The author of this chapter proposes that the degree of involvement of non-legal specialists, particularly those of cultural anthropology and ethnology, has been more profound than is normally the case, and has exercised a continuing influence over the process of the initial development, subsequent policy-setting and implementation of UNESCO's 2003 Convention, which is unusual. This is not surprising in view of the strong human (cultural) rights orientation of the 2003 Convention and influence of the discipline of anthropology on development of that field of law and the subsequent jurisprudence of treaty bodies. Placing the discussion within broader framework of mutual interaction between and influence of the fields of law and anthropology, the current chapter traces the role of anthropological, ethnological and related social science expertise from before and during the treaty's drafting and its subsequent implementation up until today, concluding that this relationship, whilst presenting challenges, has overall been positive and continues to map the future orientations for the 2003 Convention.

Keywords: *anthropology, legal and non-legal, intangible cultural heritage, UNESCO 2003 Convention.*

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Introduction – changing the discourse

Forasmuch as other authors will address the question of developing new terminologies, this section will not consider this topic in depth.[1] However, it is impossible to forgo a discussion of some of the key concepts that emerged in the process of developing this treaty, which were considerably informed by the engagement with non-legal expertise in this process.

Since the 1960s and 1970s, UNESCO had programmes relating to various aspects of intangible cultural heritage (e.g., indigenous languages in Africa), and these addressed such elements as social customs and beliefs, ceremonies and rituals, musical traditions, theatre, oral traditions, cosmogonies, skills and know-how [Aikawa-Faure 2009]. From the 1980s, there had been a growing awareness of the need to employ a broader and more anthropological notion of "culture" in the international protection of heritage (see below) [Mondicault Declaration 1982]. Such an extended notion encompasses the intangibles (such as language, oral traditions and local know-how) associated with material culture. It will further be observed, how closely the definition of intangible cultural heritage (ICH) for Convention for the Safeguarding of the Intangible Cultural Heritage mirrors the content crafted in 1982 in the Mexico City Declaration on Cultural Policies [Van Zanten 2004].[2]

The first attempt to protect this aspect of heritage internationally was the *UNESCO Recommendation on Safeguarding Traditional Culture and Folklore* (1989), more of which later. A key step towards developing the 2003 Convention was a conference co-organized by UNESCO and the Smithsonian Institution in 1999 to review the 1989 Recommendation after 10 years [UNESCO 1999]. Given that the Smithsonian hosted the conference, it was not surprising that a large proportion of the delegates was from non-legal backgrounds, many anthropologists, and the background documents were drafted jointly by staff of the Smithsonian and UNESCO (who were mostly cultural specialists, not legal experts). One group, which included the author of the current chapter, specifically addressed legal issues. It included four non-lawyers out of eight participants, and most of the lawyers were intellectual property specialists, the significance of which will be explained later.

The inter-disciplinary character of regulating ICH

Of course, international treaty-making in several areas has flowed from intellectual developments occurring in predominantly non-legal disciplines, e.g., environmental protection, trade, investment law. This intervention is most

[1] See the contribution of Rieks Smeets in the present issue.

[2] In Art. 2(1) and (2), respectively, as discussed in greater detail below.

commonly at the stage of policy-setting and in the development of strategies for implementation: in environmental conservation treaties, for example, the legal approach of setting catch limits for fishing can only be accomplished in close cooperation with biologists and ecologists who have the required information on the conservation status of the species in question.

Meanwhile, the degree to which non-legal specialists – particularly, but not exclusively cultural anthropologists – have influenced (and continue to do so) the development and implementation of this Convention, is rather notable. For instance, they have played a central role in a number of expert meetings held before preparation of the preliminary draft treaty text, itself drafted by a small group comprising non-lawyers and lawyers [Blake 2006]. Equally, the teams of governmental representatives during the inter-governmental stage of negotiation[3] included several cultural experts (and this practice continues today in the intergovernmental committee). This can have its pitfalls, as the abundant literature on the Convention in the field of critical anthropology illustrates at times: first of all, it displays a strong tendency to focus on the ICH elements indicated on the Representative List (RL), while ignoring the legal techniques upon which this model relies and Part III of the Convention that sets out national safeguarding measures (the heart of the Convention). It also tends to fail to appreciate the basic realities of international law, including the principle of the sovereign equality of States, and the consequent limitations imposed by any international treaty framework.

It is, of course, very healthy for the law (and lawyers) to be criticised from outside the discipline, but the criticism should be better informed and targeted [Lixinski 2014]. At the same time, despite gradual improvements, there has been a conspicuous lack of legal specialists in cross-over journals writing about this and other heritage treaties. Anthropology and law have enjoyed an extremely close and mutually influential relationship since the inception of anthropology as an academic discipline. Indeed, it has been posited that anthropology is "something of a child of comparative law" [Mundy 2002: xv] Although this is probably over-stating the case, as Nafziger [2017: 1–16 and 2] puts it, "[l]egal anthropology (or the anthropology of law) necessarily engages the perspectives if not techniques of comparative law" and "[a]nthropological insights can be instrumental in helping define the relationship between law and custom". Initially bound to the study of the laws and customs of colonized peoples, anthropological legal study has later developed a more subtle understanding of law as process or as language to mediate social knowledge and power [Falk Moore 2019: 16–27]. Anthropologists, for

[3] Three sessions of the intergovernmental negotiations were held at UNESCO Headquarters in Paris between September 2002 and June 2033.

example, seek to understand the origins and development of rules and procedures, how and why they persist institutionally or otherwise, and what consequences result thereof. Malinowski's work in Trobriand society in the 1920s and his conclusions on the role of reciprocity have given us a much broader understanding of law in society [Malinsowski 1926], while Max Gluckman [1955] not only studied the Barotse way of life and values, but also tried to follow the reasoning and logic of Barotse judges.

Another area of the law – deeply interconnected in the example provided here with the 2003 Convention – in which anthropologists play a central role, is as expert witnesses in (national and regional) court cases with human and cultural rights dimensions. In the *Mayagna (Sumo) Awas Tingni Community* case [IACtHR 2001], the Inter-American Court of Human Rights heard expert testimony from Rodolfo Stavenhagen Gruenbaum, an anthropologist and sociologist who was the UN Special Rapporteur on the situation of the human rights of Indigenous peoples (20008). In his testimony, he stated: "All anthropological, ethnographic studies, all documentation which the indigenous peoples themselves have presented in recent years, demonstrate that the relationship between indigenous peoples and the land is an essential tie which provides and maintains the cultural identity of those peoples" and "the land is not a mere instrument of agricultural production, but part of a geographic and social, symbolic and religious space of Indigenous populations". Here appears the point where anthropological and ethnographic studies meet international human rights in the form of Article 25 of the *UN Declaration on the Rights of Indigenous Peoples* [2007[4]] that reads:

> *Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard*.

A paradigm shift, or why inter-disciplinary cooperation was necessary

Up to the 1970s, normative activity in UNESCO had been almost exclusively oriented towards material elements of what often represented a "Eurocentric" conception of a monumental and prestigious culture: This was felt by many Member States of Africa and Latin America to ignore important parts of their heritage, much of which consisted of the cultural practices of local and indigenous communities.[5]

[4] *UN Declaration on the Rights of Indigenous Peoples* (September 13, 2007).

[5] In response, the World Heritage Committee (of the 1972 World Heritage Convention) launched its Global Strategy in the mid-1990s with the objective of achieving a greater "geographic representation" of sites on the World Heritage List.

Between 1992 and 2005, the *Operational Guidelines to the 1972 World Heritage Convention* underwent several revisions, which increasingly allowed for non-material associated elements to be used as inscription criteria, as well as for greater input from local communities in the design and implementation of management plans [Deacon and Beazley 2007]. At the same time, there was a growing effort in the World Heritage Committee to ensure better geographic representation among properties on the List.[6]

With the adoption of the 2003 Convention, this shift towards greater recognition of the intangible aspects of heritage led to something more profound: A shift in the cultural heritage protection paradigm that was heavily influenced by the wider international policy context (in culture, development and rights) and, hence, by a number of non-legal disciplines. Some important components of this paradigm are the following:

- It places human values much more firmly at the centre of safeguarding through its human rights approach, accompanied by valuing cultural diversity;
- It takes a participatory approach towards heritage safeguarding, from identification to management;
- It accentuates the role of safeguarding ICH in ensuring sustainability;
- It articulates the importance of the value of cultural diversity much more clearly than previous heritage treaties; and
- It firmly places this area of legal protection in a cultural framework as opposed to intellectual property rules.

I will address these issues in the following sections, examining how they have influenced or have been influenced by the inescapably inter-disciplinary legal/non-legal character of much of the work of this treaty.

A human rights context

A primary context within which the 2003 Convention was developed (as the first recital of the Preamble makes clear) was that of human rights. Although human rights law is firmly established as a discipline within international law, it is also regarded as one of the "inter-disciplinary" fields of law, which inevitably involves other fields, such as political science, philosophy, sociology, anthropology, medicine, psychology, and others.

[6] In 1994, the World Heritage Committee launched the *Global Strategy for a Representative, Balanced and Credible World Heritage List*. Its aim is to ensure that the list reflects the world's cultural and natural diversity of outstanding universal value.

It is fair to state that, other than the foundational roles played by ethics and political philosophy, the non-legal discipline which has had the most profound impact on the development of modern human rights law is that of anthropology: *The Statement on Human Rights* (1947) of the American Anthropological Association (AAA) was influential in drafting of the 1948 Universal Declaration of Human Rights, even if its culturally relativistic approach remains controversial today in human rights theory. The AAA has continued to be active in informing human rights understandings through its Human Rights Committee issuing, for example, *Declaration on Anthropology and Human Rights* (1999).[7] Considering this Declaration, we can see the strong relevance that it has for some of the ways in which this human rights context of the 2003 Convention has been understood:

> *Anthropology as a profession is committed to the promotion and protection of the right of people and peoples everywhere to* ***the full realization of their humanity, which is to say their capacity for culture...*** *This implies starting from the base line of the Universal Declaration of Human Rights and associated implementing international legislation, but also* ***expanding the definition of human rights to include areas not necessarily addressed by international law.*** *These areas include collective as well as individual rights, cultural, social, and economic development, and a clean and safe environment [emphasis added].* (Preamble, recital 2)

The effect of choosing a human rights framework for the 2003 Convention is to place human values firmly at the centre of safeguarding: indeed, the choice of this terminology (in 1989 and 2003) was important, since it signalled that an all-encompassing approach was being taken, that went beyond simply identifying threats and seeking to protect against them. Safeguarding also includes providing the conditions within which ICH can continue to be created, maintained and transmitted. In this way, safeguarding (of ICH) is a more context-dependent approach that takes account of the wider human, social and cultural contexts, in which the enactment of ICH occurs. The measures (to be taken by governments) to achieve this include upholding the economic, social and cultural rights of the communities (groups and individuals) that allow them to create, maintain and transmit ICH [Kurin 2004, Arantes 2020].

[7] Both the 1947 Statement and 1999 Declaration can be found online at https://humanrights.americananthro.org/194statement-on-human-rights/ (viewed 06.05.2022).

Taking a participatory approach

A second important shift in the heritage protection paradigm introduced in the 2003 Convention relates to the role it envisages for the State *vis-à-vis* other actors (bearer and local communities, civil society groups and non-governmental organisations, local authorities, the private sector, etc.) *as a facilitator rather than the primary actor*. This central safeguarding role given to communities (groups and, at times, individuals) is a key aspect of the 2003 Convention[8] that sets it apart from other cultural heritage treaties.

Importantly, this notion of community participation is not limited to communities being passive interviewees for experts conducting ethnographic fieldwork to identify national ICH (as the 1989 recommendation seems to have put forwards).[9] It assumes that communities will be involved in designing safeguarding strategies, conducting fieldwork themselves (in some cases) and managing safeguarding action plans in cooperation with state actors. For example, local resource persons, who may be community members, are trained in inventorying ICH elements in their community or area.

It is hard to overestimate both the challenges that this shift has presented to governments used to operating in a top-down manner (e.g., the ICH expert committees in some countries that do not include non-governmental members), but also what a profound change it will introduce over time in how "heritage" itself is perceived – no longer simply expressing the cultural identity of the State, but also valuing cultural identities of diverse cultural communities and social groups, including ethnic minorities, within States.

Valuing cultural diversity through the notion of representativeness

The 2003 Convention firmly has the preservation of cultural diversity as a main objective.[10] This is primarily expressed through the notion of representativeness. It is also a profound departure in cultural heritage law and, again, reflects the extent to which anthropological and human rights perspectives are implicated. As much as safeguarding all ICH elements contributes towards cultural diversity worldwide

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[8] As required by Arts. 11(b) and 15 of the Convention. Art. 15 reads: "*Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.*"

[9] This is very much the view taken in the 1989 *Recommendation on Traditional Culture and Folklore*, adopted in Paris, France on 15 November 1989, available online at https://en.unesco.org/about-us/legal-affairs/recommendation-safeguarding-traditional-culture-and-folklore (viewed 06.05.2022).

[10] Second recital of the preamble.

(as well as the country and local levels), the notion of representativeness has been introduced for the ICH elements to be given international recognition through inscription on the *Representative List of Intangible Heritage of Humanity*.

This *representative character* of inscribed ICH elements is intended to celebrate the diversity of ICH worldwide. As such, an element that fulfils the listing criteria [UNESCO 2008] is not regarded as being of special or outstanding global significance but rather as being a representative type of this heritage, the totality of which constitutes global diversity of ICH. The significance of each element remains predominantly a matter for the bearer community and the wider national society. Hence, the system of national and international cooperation designed for its safeguarding, is based on the imperative of the common interest of States in preserving the diversity of ICH elements worldwide. This notion of representativeness is, of course, a major departure from the idea of outstanding importance and unique character fundamental to international inscription under the 1972 World Heritage Convention; this is predicated on a notion of *a* heritage of such kind that it transcends its local significance, rendering it a "common heritage of mankind", for the protection of which international cooperation is required [Cameron 2005].

The development context

Here, we see the influence of development experts and others, predominantly social scientists working in the development field, on the concepts underpinning the 2003 Convention. One of these contributions concerns the ways how participatory processes are conceived of and managed.

Extending the idea of the cultural heritage protected on the international level to include "intangibles" by elaborating the 2003 Convention ran hand-in-hand with an increased recognition of the relationship between culture and development [Munjeri 2004]. For example, the World Commission on Culture and Development noted in its report [1995] the contribution that intangible heritage can make to social and economic development in marginalized communities and societies. This was an important factor in considering strengthening the international safeguarding of this heritage, as reflected in the Preamble.

Up until the 1970s, development had generally been conceived as a purely economic phenomenon with GDP growth as the main, if not the sole, indicator of success; culture was often viewed as a break on development, particularly the traditional cultures of the poorer countries. At this time, Africa and Latin America moved towards the concept of endogenous development, in which local and ethnic cultures (and languages) began to be accorded greater value than previously in the development model, and traditional ways of life were emphasized [Arizpe 2007: 25–42: 29]. The late 1980s and early to mid-1990s saw the introduction of

the notions of human development [UNESCO 2000] and sustainable development [World Commission on Environment and Development 1987],[11] the latter including the (often neglected) third pillar comprising socio-cultural factors. It also gave a central role to participatory approaches and formal recognition to the value and importance of indigenous and local communities [*UN Convention on Biological Diversity* 1992[12]].[13]

The publication of the Report of UNESCO's World Commission on Culture and Development [1995] was also an important step whereby culture was formally accepted as a constitutive element of development, not simply contingent upon it or even a break on it. This report also made direct reference to the role ICH can play in the development process, and it presented an understanding of the importance of respecting cultural rights and diversity as a basis upon which truly sustainable development policies can be built. *The Final Communiqué of the Third Round Table of Ministers of Culture* [2002] set out the connection, as follows:

> *Laying the foundations of true sustainable development requires the emergence of an integrated vision of development based on the enhancement of values and practices involved in the intangible cultural heritage. Alike (sic) cultural diversity, which stems from it, intangible cultural heritage is a guarantee for sustainable development and peace.*

One of the ways, then, in which governments can ensure that their development policies are sustainable and fulfil the objectives of *Rio Declaration* (1992) and the current Agenda 2030 is by safeguarding intangible cultural heritage and employing those elements of traditional knowledge, practices and innovations that contribute to achieving sustainability.

A cultural, not an intellectual property approach – safeguarding over protection

A continuing debate before and during the process of considering a new treaty for safeguarding what became known as ICH was the question as to what type of legal approach should be taken. This was essentially a choice between: (i) applying

[11] First formally articulated in World Commission on Environment and Development (1987) *Our Common Future*, Oxford University Press, 1987 (known as the "Brundtland Report"). One of three pillars of sustainable development is understood to be the socio-cultural aspects.

[12] *Convention on Biological Diversity* (Rio: UN, 1760 UNTS 79; 31 ILM 818 (1992), 1992).

[13] *UN Convention on Biological Diversity* at the same time gave a prominent position to "local and indigenous knowledge, practices and innovations" in ensuring environmental sustainability (Art. 8(j)).

the limited and rather technical framework of intellectual property (IP) protection which was strongly favoured at the time by the legal section of the Cultural Heritage Division (in tandem with the, then, Copyright Division); or (ii) following the broader cultural approach espoused by the 1989 *Recommendation on the Safeguarding of Traditional Culture and Folklore*. In addition to international co-operation for safeguarding, the 1989 Recommendation had set out five measures to be taken on the national level, namely, the identification, conservation, preservation, dissemination and protection of this heritage.

The last-named action (protection) is the only reference to IP-based regulation and is placed here within a package of measures which signals that a much more *holistic and inter-disciplinary approach* is being taken in this text than a purely IP-based one. This is reflected in the definition of "safeguarding" provided in the 2003 Convention (Article 2(3)), where protection, that we can understand as an indirect reference to IP protection approaches as a form of the protection of personal rights, is again mentioned as one amongst a number of measures. This strategic choice was a significant one, since UNESCO had been involved with the World Intellectual Property Organization (WIPO) since the 1950s in the area of copyright, and they continued to cooperate in this field: it resulted in the adoption of the *UNESCO/WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Forms of Prejudicial Action* [1982[14]] and a draft treaty[15] on the same subject [1984] (that was never formally adopted by either organization).

Hence, the decision to follow a broader, cultural approach in safeguarding "traditional culture and folklore" in 1989 and, subsequently, ICH in 2003 was a significant endorsement of an inter-disciplinary approach that eschewed taking the more restricted legal approach that is classically applied towards protection of "intangibles". This decision was clearly influenced by the anthropologists and ethnographers who were prominent in the elaboration of the 1989 Recommendation. Indeed, one of the strongest criticisms made against this instrument when it was reviewed at the Washington conference in 1999 was a heavy bias towards the interests of researchers and experts over the bearer communities themselves. Despite these criticisms, however, the 1989 Recommendation represented a significant conceptual development, since it was the first time that non-material aspects of cultural heritage were explicitly the subject matter of an international standard-setting instrument.

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[14] UNESCO/WIPO, *Model provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Model provisions)* (Geneva, 1982), http://www.wipo.int/wipolex/en/text.jsp?file_id=186459.

[15] *Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (UNESCO/WIPO, 1984).

Intellectual property-based protection can and does, however, play an important role in safeguarding ICH elements, and has been pursued particularly by Indigenous peoples and by the countries of the Pacific, which have found the use of *patents* (for safeguarding traditional knowledge about plants, for example), *industrial design* (for protecting traditional symbols, artistic motifs, tribal names, etc.), and *trade secrets* (for protecting secret knowledge and know how) of particular use. Moral rights can also prove helpful in protecting, for example, the integrity of traditional forms, while copyright can also be used, but it faces many challenges.[16] Hence, the discussion is not about a black-and-white dichotomy between an IP-based or a non-IP-based approach but, rather, where the balance between the two is to be struck. Consequently, a lot of work has been done to develop *sui generis* IP approaches that respond better to the needs of ICH. Such endeavours have generally involved a close cooperation between cultural experts (within and without bearer communities) and IP specialists – yet another example of how inter-disciplinary approaches have been constantly underlying the development of the 2003 Convention and its later implementation. This is an ongoing process which has recently been enriched by WIPO's adoption of a Treaty on on Intellectual Property, Genetic Resources and Associated Traditional Knowledge in May 2024.

From "traditional culture and folklore" to "intangible cultural heritage"

Although the matters relating to terminology cannot be discussed in detail here, the choice to move from "traditional culture and folklore" of the 1989 Recommendation to "intangible cultural heritage" of the 2003 Convention must be noted. One of the common criticisms made of the Recommendation at the Washington conference [UNESCO 1999] was the inappropriateness of using the term "folklore" to describe the range of cultural heritage intended for safeguarding. Many cultural communities, particularly Indigenous peoples, regard this term as demeaning them and their cultures [Tora 2001: 222].[17]

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[16] Such as the need for an identifiable "author", the application of time limits, the requirement for the work in question to be "fixed", the exclusive nature of the rights granted and the notion of ownership upon which this is predicated; in addition, the fair use exception that allows for the "re-interpretation" of copyrighted works (e.g., as parodies or pastiches) would leave sacred symbols, for example, open to such re-interpretation in ways that are inimical to the primary cultural significance thereof.

[17] Sivia Tora stated: "*Our [Indigenous] culture is not "folklore" but our sacred norms intertwined with our traditional way of life and where these norms set the legal, moral and cultural values of our traditional societies. They are our cultural identity. Of course, 'folklore' and 'folklife' are accepted terms in other regions, such as in Eastern Europe for the former and the United States for the latter.*"

Here, it is worth to revisit the discussion that took place in UNESCO in the years preceding the selection of "intangible cultural heritage" as the term of art for the future treaty, in order to get a flavour of the thought processes that were going on. The initial challenge, of course, stemmed from the fact that culture itself is a very unclear term when used in an international law context, since it can have a myriad of different meanings, depending on the discourse of specific disciplines. Thus, the international community chose to use the notion of culture that was set out in the 1982 Mexico City Declaration (MONDIACULT), provided a useful basis for its work and this has remained the case until today.[18] This defined culture as:

> [...] *the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs* [Mondicault Declaration 1982: para. 4]

Again, it is notable how much this definition can be characterised as an anthropological one that adopts a very broad conception of what is comprised by culture. Furthermore, it is striking how closely this aligns with the content of the definition of ICH contained in Article 2(1) of the 2003 Convention.

There were several candidates at the time of drafting the preliminary study that preceded the decision to develop a new treaty for the term to be used to identify this area of heritage [Blake 2001]. These included traditional culture, popular culture, living heritage, oral heritage and intangible cultural heritage, as well as cultural and intellectual property.[19] Most of these terms were perceived to be problematic in some way, having both positive and negative connotations. Hence, the idea of tradition in the term "traditional culture" is frequently (although inaccurately) regarded as referring to a static unchanging culture that does not evolve and has no dynamism. It is through the operation of the 2003 Convention that the connection between the idea of tradition and inter-generational transmission is now much better understood. "Popular culture", a term favoured by some Latin American countries,

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[18] The decision by UNESCO to revisit this discussion in MONDIACULT 2022 is an interesting one that shows recognition of the fundamental importance of this meeting and its Final Report for the Organization's work in the field of culture while also that it requires updating and new reflections after 40 years. The UNESCO-MONDIACULT 2022 World Conference will be hosted from 28 to 30 September 2022 by the Government of Mexico and further information is available online at https://www.unesco.org/en/mondiacult2022?hub=758 (viewed 06.05.2022).

[19] This last term had been employed in several Declarations issued by Indigenous organizations, particularly in the Pacific region.

has the advantage of underlining that the culture in question is not an elite form of culture but tends to suggest a contemporary, urban culture, and so could exclude older and/or rural forms of culture. Although much of the heritage in question takes a primarily oral form, and its transmission is also commonly by oral modes, the term "oral heritage" does not encompass all of what we now understand to be ICH.[20] However, it is noteworthy that the first domain of ICH in Article 2(2) refers to oral expressions, and that safeguarding modes of transmission, which are often oral, are accorded a central place in the 2003 Convention. The term "cultural and intellectual property" clearly connects the cultural and IP aspects of safeguarding/protection which, as the discussion above has suggested, was seen at the time as problematic; moreover, use of the term "property" has its own substantial problems when applied to cultural heritage, and, particularly, to intangible heritage [Prott and O'Keefe 1992; Blake 2015: 1–12]. Interestingly, the term "living heritage" was discounted at the time as failing to express a sufficient number of characteristics to identify this heritage, although containing the extremely important idea of the dynamism of this heritage. Today, quite possibly, as a result of experience with the 2003 Convention's operation, the respective section in UNESCO that houses its Secretariat is now known as the Living Heritage Entity. By the time of drafting the 2003 Convention, "intangible cultural heritage" had become a term of art for UNESCO in relation to non-physical heritage[21] and had been used by anthropologists for some time.[22] Its use signalled a shift from most of the pre-existing UNESCO heritage instruments, whose main focus had been the protection of the material heritage, even if the associated intangible elements may also have been implicitly recognized.[23] Moreover, it pointed to the fact that the type of required safeguarding measures would largely be quite distinct from those traditionally employed in heritage treaties.

It also set up a new dichotomy between the "tangible" (material) and "intangible" elements of cultural heritage and thus created something of a false category in

[20] A fact recognized in the naming of the programme *Masterpieces of the Oral and Intangible Heritage of Humanity* (1998) that preceded the drafting of the Convention and whose proclaimed "masterpieces" were subsequently incorporated into the *Representative List of the Convention*.

[21] The programme on Masterpieces of Oral and Intangible Heritage cited above reflects this approach.

[22] Communication by William Logan with the author.

[23] As early as 1956, the *Recommendation on International Principles Applicable to Archaeological Excavations* (New Delhi, 5 Dec. 1956) noted in the Preamble "the feelings aroused by the contemplation and study of works of the past," a recognition of the intangible element of the cultural heritage enshrined in its meaning to people(s) beyond the object, monument or site itself.

the sense that all material elements of cultural heritage have important intangible values associated with them that are generally the reason for their protection. This distinction is also meaningless to many of the Indigenous cultures which hold, maintain and transmit much of this heritage, since it does not reflect their holistic view of culture and heritage [Daes 1997].[24] Since the concept of something intangible is very difficult to grasp, it was thought at the time (1999–2001) that identifying legal measures for its safeguarding would be extremely challenging [Blake 2001: note 40]. Hence, beyond selecting the appropriate terminology to describe this aspect of heritage drafting the definition of "intangible cultural heritage" was crucial, since it would define the scope of the subject-matter and, to some degree, the safeguarding measures to be applied [Francioni 2020: 48–57]. An initial draft definition was crafted at an expert meeting in Turin [UNESCO and Fondazione Premio Grinzane Cavour 2001: Article 2(1) and (2)] comprising a general definition followed by a non-exhaustive list of domains (Art. 2(1) and (2), respectively) (a form that was retained in the final version of the treaty). This meeting was again notable for the presence of non-legal experts;[25] it is likely due to this inter-disciplinary approach that, generally speaking, the current definition is effective in setting out important characteristics of this heritage such as the self-identification of bearers, its evolution in response to external factors and the centrality of inter-generational transmission. A further key meeting in the run-up to drafting the treaty held in Rio de Janeiro was co-hosted by the Brazilian heritage authority (IPHAN) and it again featured leading anthropological and other non-legal experts.[26] The following paragraph in its Final Report is of interest here:

> *The future convention should integrate a mechanism to enable national and international communities to reach a better understanding of various aspects of intangible cultural heritage, identifying these aspects on the basis of internal criteria (importance of the heritage to the identity-making of a social group) and external criteria (its compliance with human rights and its capacity to foster intercultural dialogue)* [International Experts for the 2003 UNESCO Convention 2002: para. 10 (vi)]

[24] The breadth of the definition of Indigenous heritage provided by Erica-Irene Daes in her study *The Protection of the Heritage of Indigenous People,* United Nations, 1997, shows that even the broader category of cultural heritage is too narrow, since it does not encompass, for instance, natural elements.

[25] Including the Mexican anthropologist and ex-Assistant Director-general for Culture Lourdes Arizpe, and James Early and Peter Seitel from the Smithsonian Institute.

[26] They included Antonio Arantes, a leading Brazilian anthropologist.

Finally, the expert drafting group that produced the preliminary draft of the Convention which was submitted to the governmental negotiators, comprised a mix of lawyers and non-lawyers, and the lawyers included those who were fairly inter-disciplinary in their outlook.[27]

Conclusion

This close collaboration between non-legal specialists – cultural experts from a number of disciplines, though predominantly from anthropology, ethnography and linguistics – has been challenging but extremely positive. Both sides learned a lot from each other by entering each other's "universes of discourse"[28] [Prott 1998: 161], and gaining a greater understanding of both the possibilities various disciplinary outlooks can offer, as well as the limitations of each. The experience has yielded a much greater sensitivity over choice and use of language, and the attitudes the author of this article brings to a number of cultural questions during this long and interesting journey.

This journey has by no means reached its terminus. The continued development of implementation strategies for the Convention (as set out in the Operational directives (ODs)) and the creation of twelve Ethical Principles for Safeguarding ICH that were developed within this treaty's framework are the examples of this process. Similarly, discussions held in Barcelona in Autumn 2025 at the Mondiacult 2025 diplomatic summit organized by UNESCO have pointed to the myriad connections between safeguarding ICH and sustainable development. The influence of and continued input from a variety of disciplines in these key instruments of the Convention should not be underestimated. They have, for example, led to the adoption of detailed Directives on awareness raising and the participation of communities, groups and individuals in safeguarding ICH [General Assembly 2010: chapter III] and on the role of safeguarding ICH in achieving sustainable development, including the gender dimension, as well as social and economic aspects of inclusivity [General Assembly 2016: Chapter VI]. Such instruments could not have been drafted without a deep involvement of experts from a variety of non-legal disciplines.

In terms of treaty bodies, this has increasingly emerged over time: since 2012, there has been an Evaluation Body (EB) to assess nomination files for international inscription under the 2003 Convention. The membership of the

[27] Including the author, and Paul Kuruk who had completed extensive work on Indigenous rights.

[28] This term is employed effectively in Lyndel V. Prott, Understanding One Another on Cultural Rights, in Halina Niec (1998) *Cultural Rights and Wrongs (Human Rights Perspective)*, UNESCO Publishing/Institute of Art Law, 161.

EB comprises six governmental experts and six experts from NGOs accredited to the Convention and, in most cases, the experts chosen to sit on the EB have been selected on the basis of their specialist knowledge of ICH.[29] The creation of this EB by the intergovernmental Committee gives the author of this article a particular satisfaction, since she was the member of the Restricted Drafting Group who formulated Article 10bis (of the preliminary (expert) draft treaty) in 2002 on establishing a non-governmental expert body within the treaty's framework. This draft Article was removed by the intergovernmental negotiators in 2002–3, but it has now come full circle.

Lastly, the specialist NGOs must be remembered, which may request accreditation to provide advisory services to the Committee if they meet the criteria for accreditation.[30] By summer 2022, there will be around 200 such NGOs which are active in various areas of ICH safeguarding, whose membership often comprises persons with expertise in a number of related (legal and non-legal) disciplines. They are grouped under the umbrella of the ICH NGO Forum which has had the right to present a statement to the meetings of the intergovernmental Committee since 2009 and, as well as networking with and supporting member NGOs, has also held a number of thematic symposia.[31] Their formal presence at the statutory meetings of the Convention and other related intergovernmental meetings, as well as the engagement between non-governmental actors and the States Parties that this makes possible should not to be underestimated. Again, this also feeds into the continuing inter-disciplinary character of the implementation of the 2003 Convention and its development.

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[29] They are not simply legal experts sent from the Foreign Ministry of the home country, as is often the case in intergovernmental fora.

[30] As set down in para. 91 of the OD and governed by Article 9 of the Convention.

[31] More information on the Forum can be found at its webpage. Available: http://www.ichngoforum.org/ (viewed 06.05.2022).

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