NAMING AND NORMING THE SAFEGUARD OF ICH: AT THE CROSSROADS OF CULTURAL RIGHTS AND HERITAGE LAW

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Abstract

The authors of this article explore the true normative scope of safeguarding Intangible Cultural Heritage (ICH), responding to critiques stating that the 2003 UNESCO Convention is ineffective in protecting vulnerable communities such as the Roma or Rohingya. Commonly asked questions – e.g., "How does the Convention safeguard their heritage?" – prompt a broader legal reflection. The authors argue that ICH is not governed solely by the 2003 Convention but also by cultural rights enshrined in human rights law. The interplay and divergence between these two frameworks is examined: the horizontal, diplomatic nature of the UNESCO Convention versus the vertical, authoritative dynamic of cultural rights. Despite differing regulatory approaches and terminologies, both fields show growing normative overlap. After 20 years of the 2003 Convention and 60 years of cultural rights development, the authors call for a more integrated legal approach, highlighting the need to connect cultural heritage law and human rights law more explicitly to strengthen the safeguarding of ICH through a rights-based lens.

Keywords: *intangible cultural heritage, cultural rights, participation, UNESCO.*

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Introduction

In the context of implementing the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003 Convention), legal analysis almost inevitably raises the complex issue of social groups subjected to discrimination, marginalization, forced assimilation policies, or persecution. A student might ask, for example: "How does the Convention for the Safeguarding of the Intangible Cultural Heritage protect the heritage of the Roma[1] or the Rohingya[2] people?" The answer to this question is especially complex, as it requires a nuanced answer to a black and white issue.

To avoid going down a rabbit hole of legal instruments and international fora during a class, one can be tempted to call upon the 4th recital of the 2003 Convention, which mentions "the phenomenon of intolerance" as a threat of destruction of ICH, the procedure for accelerated inscription in cases of extreme urgency (Art. 17.3), or the *Operational principles and modalities for safeguarding of ICH in emergencies*, adopted in 2019 by the Intergovernmental Committee for the Safeguarding of the ICH (IGC). The latter could benefit to communities forcefully displaced or suffering from an armed conflict. Still, all of these provisions lack teeth and would only apply to certain specific cases. These shortcomings precisely reveal the complex issue of defining the effective normative scope of the protection of ICH under the 2003 Convention, its evolution and growing sophistication and its relationship to the rest of international law.

Any answer to this relevant and sometimes irreverent question requires us to examine the articulation of two legal fields in international law: that of heritage law on the one hand; that of human rights law, and more specifically, a specific sub-category of human rights, i.e., cultural rights, on the other hand. To conduct such an analysis, the authors of this article suggest that one has to enter into an "**intra**-disciplinary" relationship between different branches of law, in addition to an **inter**-disciplinary one (1). Although these two fields fall under the broader category of legal sources, and therefore benefit from the enforceability of law, their interaction in naming and creating normative categories for the safeguarding of intangible cultural heritage is in fact not obvious and evolutive (2).

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1 For a presentation of the situation of Roma worldwide, see Izsák, R. (2015). *Comprehensive study of the human rights situation of Roma worldwide, with a particular focus on the phenomenon of anti-Gypsyism*. Human Rights Council, A/HRC/29/24.

2 For a presentation of the situation of Rohingya Muslims in Myanmar see, for instance, UNGA (2023). *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*. Report of the Secretary-General, A/78/278. In this instance, the International Criminal Court is investigating crimes since 2019 and Gambia has brought a case against Myanmar in front of the International Court of Justice.

1. Cultural heritage law and cultural rights: An intra-disciplinary perspective

The concept of ICH is intrinsically linked to cultural rights. The 2003 Convention opens with a triple reference to human rights:

Referring to existing international human rights instruments, in particular to *Universal Declaration on Human Rights* (UDHR) of 1948, *International Covenant on Economic, Social and Cultural Rights* (ICESCR) of 1966, and *International Covenant on Civil and Political Rights* (ICCPR) of 1966 (preamble 1st recital).

Prof. Janet Blake states that this recital has two main implications: human rights instruments establish "the essential context within which the 2003 Convention operates, and that it should be interpreted and applied with reference to international human rights standards" [Blake 2020: 24]. Although ICH is rooted in human rights, a close study of these legal fields reveals a form of dissociation influenced by their foundational (1) and structural differences (2).

1.1. A shared subject matter approached through different lenses

More than five decades separate the first inception of cultural rights and the international recognition of ICH, which were born in substantially different contexts. Cultural rights emerged in the aftermath of the Second World War. They were acknowledged first in 1948 by the UDHR, which was adopted as a response to the "barbarous acts" of war [preamble]. Under this angle, human rights and fundamental freedoms were construed as a means to achieve a peaceful world, social progress, and better standards of life. In contrast, the 2003 Convention was adopted at the turn of the 21st century, a period marked by evolutions inducing major social transformations, notably the building of knowledge societies with the expansion of the Internet, and the intensification of the process of globalization following the establishment of the World Trade Organization (1994) going hand in hand with a growing concern for the preservation of cultural diversity. In addition, the acceptance of a cultural dimension of development was fostered by the World Decade for Cultural Development (1988–1997) and the Millennium Development Goals (2000) [Bortolotto, Skounti 2024: 2–3]. ICH was also understood as a remedy to fill a gap in the international framework by providing a more inclusive approach to cultural heritage [Blake 2023: 30] grounded in an anthropological meaning of culture departing from the dominant European-centric definition favouring "the arts and letters", aesthetic values and historical tangible cultural expressions (monuments, buildings, sites).

Still, cultural rights and ICH policy may apply to the same subject matter. Article 27 para.1 of the UDHR provides that "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits". Among these rights, the right of everyone to take part in cultural life, which is present in numerous international and regional instruments, is central to ICH safeguarding. According to Prof. Janet Blake, it constitutes "the over-arching human right governing" the 2003 Convention [Blake 2020: 25]. The right of participation in cultural life, not only provides the foundation for a right to access and enjoyment of cultural heritage but also for the affirmation and protection of a cultural identity. It has been construed more loosely, at the end of the 20th century, to also encompass particular ways of life, including traditional economic activities such as fishing, reindeer herding, raising lamas and alpacas, or traditional use of land and sea resources [UNHRC 1994; 1984; 1985; 2009; 2023]. These activities also fall under the scope of the definition of ICH. Several elements linked to animal herding were indeed inscribed on the Representative List of the ICH of Humanity. Under a cultural rights lens, these practices could be considered as a traditional activity and use of land. Consequently, the safeguarding of ICH may amount, in certain cases, to the exercise of the right of participation in cultural life. Furthermore, they share another contact point, which is that they both concur towards the protection and promotion of cultural diversity by supporting a plurality of cultural identities. Cultural diversity may be understood as a keystone between both of these legal fields.

Despite, this phenomenon of convergence, the notion of ICH struggles to cross over into other legal fields, including cultural rights. ICH terminology is also seldom used in the realm of cultural rights, despite sharing a common subject matter[3]. Human rights instruments, case law, and documentation, such as reports, prefer to refer to specific "traditional" practices or ways of life, i.e. farming or cultural ceremonies [HRC 2023: 8.14]. Petitioners fail to invest the notion of ICH in framing their claims. This disjunction in naming tends to separate these legal fields and isolate them, which calls the question: why cultural rights and ICH are unable to fully resonate with each other?

1.2. Irreconcilable structural differences?

ICH law and cultural rights differ radically at a structural level. Cultural rights require that States guarantee positively that everyone can exercise their right and that it is fully implemented through positive action (e.g., facilitating access to cultural

[3] A noteworthy exception is the *Report of the Independent Expert in the Field of Cultural Rights,* (21 March 2011, A/HRC/17/38).

institutions and protecting cultural heritage). The right of everyone to take part in cultural life also has a negative character, which acts as a defensive protection against discrimination, forced assimilation, persecution, and, more generally, any measure violating a community's cultural identity [UNHRC: 1994]. Obligations are imposed on States to ensure that the exercise of these rights is protected. Implementation of the right of everyone to take part in cultural life is rendered complex by its one-of-a-kind nature, as it is an individual right that is exercised collectively or communally. In other words, an individual holds the right but expresses it in association with others or in relationship with a group or a community. Individuals are therefore recognized as holders of the substantive right of everyone to take part in cultural life. This distinction flows from the overarching logic of international law, which focuses on relations between States [Urbinati 2015].

Although the 2003 Convention presents itself as the first binding multilateral instrument safeguarding ICH (recital 8), it is composed mainly of soft law apart from the obligation of drawing up an inventory, or several inventories of the ICH present on its territory (Art. 12.1) and contributing to the fund of the safeguarding of ICH (Art. 25). The normativity of the 2003 Convention is therefore far weaker than the normativity of cultural rights. The architecture of the 2003 Convention relies quasi-exclusively on inter-State reciprocal relationships. Implementation obligations are owed to other States. Monitoring is undertaken by periodic reports drafted by States and examined by organs also comprising State parties (Art. 5 and 29). As perfectly summed up by Prof. Yvonne Donders, "Cultural heritage conventions have a mainly horizontal character as agreement between States parties, whereas human rights conventions have a triangular character, composed of a horizontal relationship between States parties, as well as a vertical relationship with the subjects of the rights" [Donders 2018: 62].

Moreover, in cultural rights instruments, individuals may have stood, and enforce their rights against a State in national courts, regional human rights courts (the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights), and quasi-judicial bodies, such as the Human Rights Committee. Judicial procedures confer a strong justiciability to cultural rights. Under the 2003 Convention, although they are recognized as central actors in the safeguarding of ICH, communities and groups are unable to intervene directly. They are not considered as right holders, but rather as stakeholders, which are only owed the procedural obligation of participation. The 2003 Convention provides that communities, groups, and, in some cases, individuals should participate the most widely possible to safeguarding activities affecting their ICH (Art. 15). Still, participation is mediated through the State at the national and international level [Stefano 2022:40].

The only mechanism, setting aside accredited non-governmental organizations (NGOs), that enables individuals, community members, or civil society, to voice concerns directly within the international scope of the Convention is the treatment of correspondence. This mechanism was born by practice. In the infancy of the 2003 Convention, the Secretariat received several correspondences concerning nominations. A procedure was set up to take them into account. In 2012, the IGC adopted *Guidelines for the treatment of correspondence from the public or other concerned parties with regard to nominations* [IGC 2012: 7.COM 15] and in 2015, another set of guidelines in respect of periodic reports [IGC 2015: 10.COM 15.B]. Correspondences may concern elements not yet nominated, ongoing nominations, elements already inscribed or periodic reports. They are transmitted to the State, who can provide comments. The Secretariat also informs the Intergovernmental Committee for the safeguarding of ICH by compiling a summary of the information received in a table [IGC 2019: 14.COM 14]. Correspondence and comments pertaining to nominations and periodic reports are only published temporarily on the website of the Convention providing only partial and transient transparency.

Although limited in its reach and scope, this mechanism provides an interstitial space to question a State's discourse and may improve collaboration between governmental authorities and communities by involving a third party [IGC 2018]. It has notoriously led, in conjunction, with media coverage to the removal of two elements from the Representative List of the [ICH] of Humanity: the Aalst carnival in 2019 [IGC 2019b: 14.COM 12] and the "Ducasse of Ath" of the element "Processional giants and dragons in Belgium and France" (Belgium and France) [IGC 2022: 17.COM 8.a]. These cases are exceptional in regard to the nature of the allegations made concerning the promotion of stereotypes, racism, and discrimination. Correspondences could also trigger the placement of an inscribed element under enhanced follow-up [Operational Directives 2022: 40.1 ff]. They may also raise issues of measures restricting the practice of an element, a lack of community involvement, or a decrease in the viability of an element [IGC 2019c: 314 ff]. In the case of the evaluation of the nomination of the Pilgrimage to Wirikuta, an annual ritual by the Huichol community in Mexico, two letters sent by an NGO based in Mexico, demonstrated "a significant division within the community". The letters led the Consultative Body to conclude that the nomination did not meet the requirement of the participation of the community as a whole and that its free, prior, and informed consent could not be established. Nonetheless, correspondences are devoid of legal effect. They need to reach a critical threshold and address critical issues to be taken into account by the organs of the 2003 Convention. Furthermore, a form of screening takes place, which is understandable to distinguish substantial issues from a subjective opinion. Anonymous letters are excluded from this mechanism, even though anonymity may be used by individuals as a shield against retaliation[4].

Hence, because these legal fields reflect two different approaches to international regulation – respectively, a horizontal and diplomatic dynamic embodied by the 2003 UNESCO Convention, and a more vertical and authoritative dynamic associated with cultural rights – their normative trajectories may seem at first sight to belong to two distinct spheres and their objects of regulations separate. Nevertheless, after 20 years of the adoption of the 2003 UNESCO Convention and 60 years of cultural rights implementation, it is worth examining more deeply the normative processes at play, which highlight the need to recognize the progressive crossovers between the two branches of law, beyond their differences, as they offer complementary layers of regulation in the safeguarding of ICH.

2. Unpacking the normative dynamics of cultural heritage law and cultural rights: Beyond the differences in naming

This section provides a broad overview of cultural rights case law, illustrating how it regulates ICH even when not explicitly named (2.1). It then moves beyond a convention-centred approach to examine the more complex normative dynamics at play, considering additional normative mechanisms through which international bodies shape safeguarding practices (2.2).

2.1. Case law on cultural rights: Heritage holders as claimants, ICH as a right

At the international level, as mentioned above, case law on cultural rights has primarily developed through the Human Rights Committee's jurisdiction over individual claims against State parties concerning the implementation of Article 27 of the ICCPR. The ICESCR only acquired a comparable jurisdictional competence in 2008, following the entry into force of its Optional Protocol. Consequently, case law on Article 15 of the ICESCR remains limited. Given this context, our focus will be on the Human Rights Committee's jurisprudence to illustrate how these decisions help shape a legal framework applicable to the safeguarding of ICH. While an exhaustive analysis of all communications brought before the Committee is beyond the scope of this study, a selection of key decisions will illustrate three major areas of normative influence directly affecting key issues also present in the 2003 UNESCO Convention system.

First, the Human Rights Committee's jurisprudence influences how cultural communities are legally approached, particularly by attributing a normative density

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[4] LHE/19/14.COM/4 – page 59.

to this concept independently of national legal systems. The Committee emphasizes that the definition of a "member of a cultural minority" under Article 27 of the ICCPR is autonomous from national classifications. For example, an individual who does not meet national legal criteria to be officially recognized as a member of a First Nation may still qualify as a minority member under Article 27 of the ICCPR [UNHRC 1977: § 14]. Furthermore, the Committee has recognized self-identified communities as minorities under this provision, in this instance rejecting the Australian State's argument that the claimant, a member of the Wunna Nyiyaparli Tribe, did not have standing because the latter was not an official tribe according to the "national system determining native title claims" [UNHRC 2019: § 4.6 and 6.1]. The Committee noted that

> [...] *the Wunna Nyiyaparli self-identify as Indigenous, and that their laws, culture, language and traditions are intimately linked to their care and control of and access to their traditional lands [...] [and therefore] considers that the claim under article 27 is sufficiently substantiated for the purposes of admissibility* [UNHRC 2019b: § 7.5].

Although Article 27 of the ICCPR protects an individual right, meaning that a community itself – such as a Native Tribe – cannot be a claimant, the Committee's case law recognizes that a collective harm at the community level can amount to an individual prejudice. As a result, any threat to a community's cultural identity generally constitutes an individual claim:

> *The Committee therefore considers that decisions taken by institutions of the Finnish State that have an impact on the composition of the Sami Parliament and the equal representation of the Sami can impact the right of individual members of the Sami community to enjoy their culture and to use their language in community with the other members* [UNHRC 2015: §8.8 ; see also, UNHRC 1984].

This recognition of individual standing through collective cultural threats is particularly significant, as it highlights the interrelated nature of individual and collective dimensions in ensuring the viability of cultural heritage without artificially separating them. Moreover, the Committee's approach circumvents the legal challenges posed by the recognition of collective rights, while still attributing genuine legal significance to the collective dimension of cultural identity. Finally, this interpretation transcends State-defined biases regarding what constitutes a minority within a given territory. In this context, the cultural heritage of certain communities – which could be excluded from national cultural policies due to their marginal position in official cultural narratives – could nonetheless receive protection under Article 27 of the ICCPR.

Secondly, the Committee's jurisprudence also shapes State obligations to safeguard cultural practices at different levels. Some duties pertain to the protection of a specific practice. For example, States have an obligation to address, modify, reform, or regulate harmful activities that destroy heritage holders' capacity to maintain their traditional practices. In *Poma Poma v. Peru*, the Committee found that polluting activities that compromised traditional llama farming violated Article 27 of the ICCPR [UNHRC 2006]. Other State obligations relate to ensuring access to and the preservation of conditions necessary for the continuation of heritage. For instance, members of the Torres Strait Islands' Indigenous community successfully argued that Australia's failure to take adequate preservation measures against foreseeable climate change – which threatened their ecosystem and the practice of their traditional culture – constituted a violation of Article 27 of the ICCPR [UNHRC 2019: § 8.14]. Finally, States may be responsible for preserving the integrity of institutions essential to the safeguarding and transmission of traditional culture. In *Käkkäläjärvi et al. v. Finland*, the Committee found that Finland's failure to prevent a legal evolution that altered the criteria for membership on the voting roll for the Sámi Parliament violated Article 27 of the ICCPR. This change weakened the Sámi Parliament's capacity to fulfil its mandate, thereby threatening the long-term viability of Sámi culture [UNHRC 2017: § 9.11]. Whereas the UNESCO ICH system, as established by the 2003 Convention, does not appear to impose binding obligations on State parties, it is clear that States are nonetheless subject to strict and practical obligations under the ICCPR with regard to heritage amounting to ICH.

Finally, the Human Rights Committee has clarified the notion of "participation", notably in the context of programs affecting the cultural life of minorities. For example, the Committee found that New Zealand did not violate Article 27 of the ICCPR when adopting legislation modifying the fishing rights of the Māori people, as the legislative process ensured a complex participatory dynamic. This included the active participation of Māori representatives at the national level and multiple consultations at the local level. The State's willingness to accommodate Māori concerns was further reflected in legislative amendments incorporating certain Māori claims, ultimately adopting provisions favourable to them [UNHRC 1993]. Moreover, the Committee emphasized that article 27 of the ICCPR imposes a State obligation to ensure effective participation, including the requirement to secure free, prior, and informed consent when adopting measures affecting a community's cultural life. In *Ailsa Roy v. Australia*, the Committee found that Australia breached article 27 when it modified the demarcation and registration of lands without securing the free, prior, and informed consent of the Wunna Nyiyaparli Indigenous People, despite the land being central to their sacred sites, language, culture, and religious identity [UNHRC 2019: § 8.7]. Thus, participation is not merely a rhetorical concept but a substantive requirement that the Committee actively scrutinizes. States must fully engage with heritage holders as key stakeholders in programs affecting their cultural heritage.

This overview of the Committee's jurisprudence confirms that cultural rights apply to situation involving elements tantamount to ICH. It thus provides a complementary legal framework, offering binding tools to regulate aspects that remain ambiguously regulated within the soft-law UNESCO ICH system. However, the soft nature of the latter regulatory tool should not obscure the true normative impact of the UNESCO ICH system when implemented through other legal instruments beyond the Convention itself. This is also true for the cultural rights framework, which should be explored beyond the Covenants and the Case law (The HRC, the ICESCR and other regional courts as mentioned above). Examining these mechanisms will reveal another dimension of their normative capacity – one that, although gradual, proves effective over time.

2.2. Exploring the normative reality at play in cultural heritage law and cultural rights legal structures

The scope of any convention – such as the 2003 UNESCO Convention and cultural rights as enshrined in both the ICCPR and ICESCR – extends far beyond its textual formulation and the moment of its adoption. A convention must be understood over time as a living instrument, taking into account how its implementation and interpretation have evolved. These legal developments are crucial, as they reveal additional normative mechanisms that have effectively influenced safeguarding practices of ICH over the past two decades. These mechanisms emerge through evolving standards that respond to broader societal shifts, including decolonization and the recognition of cultural diversity.

To fully grasp the normative potential of the 2003 UNESCO Convention, it is essential to consider the regulations produced by the governing institutions responsible for overseeing its implementation, particularly the IGC and the General Assembly of States Parties as well as other actors, such as commission of experts, the subsidiary body, etc. These organs play a crucial role in shaping the Convention's normative impact. By conducting their mandate, they necessarily generate a normative system, and over the years, a form of jurisprudence has emerged. However, this normative framework can be difficult to access, as it is fragmented across various documents and reports and diluted over time. Despite this, several key programs have consolidated these sporadic evolutions into more comprehensive rules that give substance to the "spirit" of the 2003 UNESCO Convention [IGC 2022: 5.EXT.COM 4 §5] and therefore help increase its normative effectivity.

Firstly, in 2006, the IGC began developing the Operational Directives for the implementation of the 2003 Convention, which were adopted by the General Assembly in 2008. These directives have been updated eight times since their inception, or, in other words, "fine-tuned"[5] in reaction to reporting and inscription practices. These Guidelines are necessary to "[...] enable the effective implementation of the [2003 UNESCO] Convention" [IGC 2007: 1.EXT.COM §4] by developing practical rules giving to the Convention an operational existence. Secondly, in 2012, the IGC, under the leadership of the Belgian delegation and in line with §103 of the 2010 Operational Directives, initiated discussions on developing a "Model Code of Ethics" to address the "[...] growing threats to [ICH] – including commercialization, commodification, and decontextualization" [IGC 2015: ITH/15/10.COM/15.a §6]. This initiative was launched six years after the Convention's entry into force in reaction to the second reporting cycle on its implementation which reflected some discrepancies between national implementation of the Convention and international expectations[6]. Notably, it was chosen to develop an ethical program at the international level, even though the Operational Directives only encouraged State parties to adopt ethical documents at the national level. This move toward international consensus significantly enhances the normative framework of the Convention. This initiative was concluded with an expert meeting held in 2015, which led to the adoption of the *Ethical Principles for Safeguarding Intangible Cultural Heritage* [IGC: 10.COM § 15.a], identifying twelve ethical principles to guide the development of safeguarding programs in accordance with the "spirit" of the 2003 UNESCO Convention.

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[5] An expression quoted from the Belgium delegation, "The delegation of Belgium emphasized the link between the report and the evolution of the Operational Directives, concluding that several sections of the Operational Directives could be fine-tuned accordingly. For example, the issue mentioned in paragraph 102 (also in paragraph 103 of the Operational Directives) highlighted the need for guidelines or a code of ethics, which had not yet been sufficiently addressed" [ITH/13/8.COM/4, §66].

[6] The IGC relates these discrepancies in its overview of the 2011 Reports [IGC 2011: ITH/11/6.COM/CONF.206/6 Rev.] and 2012 reports [IGC 2012: ITH/12/7.COM/6]: which cover for example the misunderstanding of State parties on the extent of participation of heritage holders or the misconsideration of ICH as a "national identity" [IGC: ITH/11/6.COM/CONF.206/6 Rev § 66 and 71], as well as the disproportionate focus on safeguarding measures on festivals and performances disregarding other types of measures [IGC: ITH/12/7.COM/6 §106].

Thirdly, the *Aide-mémoire for completing a nomination to the Representative List of the Intangible Cultural Heritage of Humanity*,[7] adopted in 2014 and regularly updated since, further strengthens this normative framework. The Aide-mémoire provides "[...] guidelines on ethical approaches to the safeguarding of ICH to support the implementation of the [2003 UNESCO Convention]" [EXP 2015: ITH/15/EXP/1 § 1]. This document has a clear normative impact as it influences how State parties approach ICH safeguarding at the national level when submitting an application for nomination, which must align closely with these guidelines to ensure that the application forms meet international standards. It is not far-fetched to think that these guidelines can also influence broader safeguarding policies and frameworks at the national level through progressive integration of these standards by national authorities and actors.

Finally, the progressive reform of the reporting system on the implementation of the Convention by State parties which integrated the Overall results framework for the Convention, beginning in 2017 and becoming operational in 2021, represents another initiative that reflects a concerted effort to consolidate the most recent standards of implementation. It has also further expanded the normative scope of the UNESCO-ICH system. In general, reporting is a procedure by which the IGC "assesses the general implementation of the Convention by States Parties and evaluates their capacities for safeguarding [ICH]" [IGC 2012: ITH/12/7.COM/6 annex §2]. However, the impact of this assessment varies depending on how it is organized. Initially, the reporting system was more "open-ended". Even though States had to fill a form with a preestablished template, the latter did not specify in detail the types of information the States needed to provide. This granted the IGC a more reactive role, with its main task being to comment on the safeguarding approaches chosen by States. This system lacked clear guidelines, according to which the IGC could really compare national implementations of the Convention with overall expectations at the international level. The reform introduced a more "closed-in" and critical reporting system, promoting a proactive role for the IGC. This was achieved by implementing a more structured framework with eight thematic areas, each characterized by specific indicators, baselines, and targets that States must evaluate, with guidance notes explaining the expectations for each indicator. The reform not only provides clearer guidance for how States should report on the implementation of the 2003 UNESCO Convention but also highlights the expectations for effective implementation. Year after year, these indicators help shape national practices,

[7] The aide-memoire is no longer available on the UNESCO website. The most recent version accessible dates back to 2016 and reflects the evaluations and reports of the former consultative bodies, namely, the Subsidiary Body and the Consultative Body. These have since been merged into a single entity: the Evaluation Body.

making reporting an effective space for scrutiny. It enables UNESCO to monitor how States comply with the "spirit" of the Convention.

Taken together, these programs form a comprehensive normative framework that covers the various contexts of the Convention's implementation, both at the national level (such as the identification of ICH, the listing application process, the development of national cultural policies, and regulations to safeguard ICH) and the international level (including inscription, the reporting system, etc.). Furthermore, they shift the focus from the "visible moments" of implementation, such as the adoption of the Convention or the nomination of ICH to the Lists, to more "invisible moments"– the continuous actions, reforms, and tools (like the reporting system) that progressively drive the normative momentum of the Convention. This ensures a steady, if slow, effectiveness with regard to the safeguarding of ICH.

Similar to the UNESCO 2003 Convention framework, cultural rights are not confined to the wording of the three articles mentioned above (Article 27 of the ICCPR, Article 27 of the UDHR, and Article 15 of the ICESCR). In practice, they extend to significant doctrinal evolutions that reflect a broadening of the normative scope of cultural rights at the international level. This evolution can be overlooked due to its complex chronology and fragmented structure. However, a clearer understanding of this normative progression helps us appreciate the impact of cultural rights on the safeguarding of ICH. This progression is rooted in a structural evolution within the UN Human Rights system, which has transitioned from a rudimentary institutional framework to a complex network of specialized institutions that produce detailed doctrines supporting the implementation of cultural rights.

In 1945, with the adoption of the UN Charter and the UDHR, the Economic and Social Council (ECOSOC) was the primary UN body competent in the field of human rights, and thus cultural rights, primarily through the work of its Commission on Human Rights. The adoption of the two binding Covenants aforementioned (ICCPR and ICESCR) along with their additional protocols in 1966, which entered into force in 1976 – marked a significant shift towards a more effective trajectory for human rights/cultural rights through a more legally binding and institutionalized system. However, this evolution remained slow for several decades. While the UN established the Human Rights Committee in 1977 to monitor the implementation of the ICCPR, it was not until 1985 that the Committee on Economic, Social and Cultural Rights (CESCR) was created. Another key step in the consolidation of the UN Human Rights system was the establishment of the Human Rights Council in 2006, which replaced and upgraded the previous Human Rights Commission (a part of ECOSOC). This also led to the creation of the mandate of the Special Rapporteur on Cultural Rights in 2009. The establishment of the Human Rights

Council thus clarified the mandate and jurisdiction for human rights within the UN system, and the creation of the Special Rapporteur on Cultural Rights granted independent recognition to this area within the UN human rights framework.

These temporal gaps and institutional complexity, i.e., the time of adoption of the Covenants (1966) and their entry into force (1977–2008 for the ICESCR additional protocol), the date of establishment of the Human Rights Committee (1977) and the CESCR (1985), the Human Rights Commission (1946), the Human Rights Council (2006), and the Special Rapporteur (2009), may have contributed to the gradual development of an international doctrine on human rights and cultural rights. Nevertheless, they also signify the acceleration of the development of an important body of work, which over time has provided clear legal content and direction for the implementation of cultural rights, thereby impacting the legal framework for safeguarding of cultural practices. Notably, both Committees have now adopted well-known and foundational General Comments providing interpretations of the two Covenants: chronologically, the *General Comment No. 23: The Rights of Minorities (Art. 27 ICCPR)* produced by the HRC [1994], and the *General Comment No. 21, Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)* by the CESCR [2009]. Both Committees explicitly considered that all three cultural rights contained in the UDHR and both Covenants must be considered in relation to one another, and thus that the notion of cultural life covers the same anthropological concept of culture in all articles [CESCR 2009: § 3]. Therefore, all articles apply to the protection of cultural traditions of cultural communities. This understanding of cultural life explicitly opened up the human rights system to issues of the preservation of cultural heritage.

Since 2009, the effectiveness of cultural rights has been considerably increased thanks to the work of the Special Rapporteurs, whose mandate encompasses a variety of actions: publishing reports to better understand the content of cultural rights in general, undertaking country visits leading to reports on the implementation of cultural rights in specific territories, and issuing communications to countries after receiving complaints regarding alleged violations of cultural rights. While these actions and publications do not have a binding dimension, the jurisprudence developed through this special mandate – both in terms of the doctrinal understanding of cultural rights through the reports, as well as the recording of specific types of violations by countries – undeniably increases the normative potential of cultural rights.

Finally, the reporting obligation on the implementation of the Covenants (art. 40 ICCPR, art. 16 ICESCR), together with the Committees' observations and recommendations in reaction to these reports, also increases the normative impact of these international instruments. The evolution of the six periodic reports of France (1982–2022) with regard to the implementation of Article 27 ICCPR is a good example of how the interplay between the CCPR and a State Party reflects an increase attention to cultural rights at the national level. France's position on Article 27 ICCPR is *prima facie* one of rejection, as it has adopted a reservation excluding the application of this article to France because it violates the indivisibility of the French Republic (Art. 1 of the Constitution of the French Republic – former Art. 2). France's first three reports reflect this position, limiting themselves to restating the inapplicability of this article, considering that "As the fundamental principles of public law prohibit distinctions between citizens based on their origin, race, or religion, France is a country where minorities do not exist" [UNHRC 1984b: 47; UNHRC 1992; UNHRC 2002: §8]. The confusion between political and legal recognition and social-cultural reality is astounding, and the Human Rights Committee has repeatedly underlined the fact that such an approach is problematic, stating that "The Committee wishes to recall in this respect that the mere fact that equal rights are granted to all individuals and all individuals are equal before the law does not exclude the existence in fact of minorities in a country and their entitlement to the enjoyment of their culture, the practice of their religion or the use of their language in community with other members of their group" [UNHRC 1983: §411]. The Committee, expressed its bafflement at France's position denying the existence of minorities, stating that "[the members of the Committee] wondered how that position could be justified in view of the existence in France of several French and foreign communities of various ethnic, religious, and linguistic origins, which were entitled to have their right to enjoy their own culture and to use their own language respected and ensured by law and practice" [UNHRC 1983: §315]. This reservation has also led to the dismissal of six communications brought by individuals of Breton origin, notably on the grounds of a violation of Article 27 ICCPR [UNHRC 1987; UNHRC 1988; UNHRC 1988b; UNHRC 1989; UNHRC 1989b; UNHRC 1990]. The Human Rights Committee recalled in those cases that "France's 'declaration' made in respect of [Article 27] is tantamount to a reservation and therefore precludes the Committee from considering complaints against France alleging violations of Article 27 of the Covenant" [HRC 1988: § 5.3]. In this context, the possibilities of claims to participate in cultural life in France seem very limited.

Nevertheless, although France has not yet overturned its reservation, a shift in its approach to reporting is evident in its fourth and fifth reports. "In order to meet the expectations expressed by the Committee" [UNHRC 2015: §33], France undertakes a precarious exercise of explaining how its legal system respects minority rights without official recognition. Through this exercise, the presence of communities in France emerge in these reports, as well as specific legal regimes "designed to assert France's cultural diversity and support individual choices in this field" [UNHRC 2015: §31]. To name a few, the reports mention religious minorities such as Jews, Muslims, and Armenians, which have legislations accommodating their culinary traditions and celebrations [UNHRC 2007: §372], language communities in different Regions which have special policies to offer language courses in public schools, such as the 75 languages of France referred to in section L3110, paragraph 1, of the educational code [UNHRC 2007: §374; UNHRC 2015: §44], the Roma and Travelers communities [UNHRC 2007: §378], the communities constituted by the cultural specificities of the overseas departments and territories (French Guiana, French Polynesia, New Caledonia, Mayotte, and Wallis and Futuna), where "the Civil Code and local customs based on oral tradition coexist" [UNHRC 2007: §389; see also UNHRC 2015: §§59 s.], as well as the Indigenous People of France: the Amerindians in French Guiana, Polynesians in French Polynesia, Kanaks in New Caledonia, Mahorais in Mayotte, and Wallis and Futuna Islanders in Wallis and Futuna, all of whom enjoy special legal status and policies [UNHRC 2007: §388; UNHRC 2015: §§59 s.].

This is one example that reflects the normative dynamics that can unfold over time, beyond the mere implementation of a binding norm. Here, we observe how France is reshaping its interpretation of existing national laws to incorporate them into a normative framework it initially excluded. This example, along with the normative dynamics described in relation to the 2003 UNESCO Convention, highlights invisible regulatory processes continuously occurring through the monitoring of the instruments. These processes compel us to broaden our perspectives and consider the full regulatory scope in the field of safeguarding ICH.

Conclusion

To sum up, this analysis underscores the essential interplay between cultural heritage law and human rights law, more precisely cultural rights, in safeguarding ICH. While the 2003 UNESCO Convention and cultural rights frameworks operate within distinct legal structures – one fostering a diplomatic, consensus-based approach, and the other enforcing state accountability – their true potential lies in their complementarity rather than their separation. This analysis demonstrates that the safeguarding of ICH operates within a complex regulatory framework that merges cultural heritage law and human rights law sometimes in an implicitly way, encompassing both their codified norms and the evolving legal dynamics shaped by continuous monitoring and interpretation. However, the absence of a clear bridge between these legal dimensions weakens the effectiveness of ICH protection, particularly for marginalized communities such as the Roma and Rohingya mentioned at the beginning of this article.

By integrating cultural rights considerations more explicitly into the UNESCO system – such as reinforcing NGO participation to better mitigate state biases – the safeguarding of ICH could become more inclusive and equitable. Conversely, human rights mechanisms could draw from the voluntary and participatory dynamics of the UNESCO system to strengthen legal recognition of cultural diversity as a public interest weighing in the balance when considering the violation of cultural rights. Furthermore, cross-referencing the jurisprudence developed within both legal frameworks notably on the types of cultural communities and the notion of participation could benefit both fields.

Ultimately, a more holistic legal framework can better address the legal issues raised by the safeguarding of ICH, which should not be minimized and limited to "heritagization issues". Recognizing Roma and Rohingya cultural life as falling under the protective scope of cultural rights affirms the need for reform in UNESCO's approach, particularly through independent reporting and the acknowledgment of invisibilized heritages. A case brought before the Human Rights Committee challenging the exclusion of a cultural practice from national ICH list would exemplify the potential of this integrative approach, reinforcing the idea that cultural heritage law and human rights law must function as interdependent tools within a unified legal system. One could also imagine that a form of reparation imposed on a State for the violation of a cultural right, might involve the recognition of a community's cultural practice on an ICH list – provided that the community itself consents to such recognition. This gesture could represent a further step toward an explicit interaction between legal frameworks, linking heritage recognition with broader principles of justice and reparation.

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