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Intangible cultural heritage

1. Introduction

The primary focus of this marvelous conference was on tangible or material cultural heritage and the range of contributions from both the Italian and American perspectives, while broad, stuck close to traditional cultural heritage concepts. Even the introductory 'roundtable' that this paper was a part of centered on tangible cultural heritage, although the general theoretical frames for each contribution were broad enough to address anything considered cultural heritage, whether tangible or intangible. And indeed, many of the other presentations briefly mentioned intangible cultural heritage, but generally limited their remarks to tangible heritage and the institutions tasked with its protection. The focus of this contribution is intangible cultural heritage (ICH) and as such it is an outlier. There are, of course, many issues and concerns that tangible and intangible heritage share, not the least of which the fact that it is difficult to discuss tangible heritage without referencing and understanding its intangible meaning. For example, an Etruscan terracotta vase can be appreciated for its age, and its representation of a past culture, but why we admire and preserve such an ancient artifact can only be answered by exploring cultural norms and traditions. In short, while the subject of this paper is an outlier in this conference and indeed is something of an afterthought in both Italian and American cultural heritage protection, intangible elements of our culture are at the foundation of all heritage protection.

In the spirit of this conference and the roundtable, my comments on ICH will be very general. In the interest of comparative dialogue, I will also include some occasional remarks on the status of protections for ICH in Italy and the United States. To that end, it is worth noting here at the very start that neither the United States nor Italy are trail blazers in this area. Neither have specific national organic laws focused on the protection of ICH, although Italy has adopted the 2003 Paris UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention), a convention the United States has not even signed. Italy also boasts a variety of ICH regulations at the regional level[1]. But Italy's primary focus has always been on material or tangible cultural heritage as made clear in the 2004 Code of Culture Properties[2], which makes almost no mention of ICH. In the United States the paucity of formal regulation reflects a general lack of concern for cultural heritage in any form, and more broadly cultural or collective rights.

The point of this paper is to simply bring ICH into the conversation, not to break any new scholarly ground. Accordingly, it will focus on three broad areas of discussion.

At the start I will provide a quick overview of law and policy in this area at the international level. The overarching legal narrative here is that ICH protections came second, falling on the heels of laws and policies regulating tangible cultural heritage. Dedicated attention to ICH as an area of regulatory concern is relatively new. The ICH Convention was the product of many earlier UNESCO discussions going back to the 1960s and an array of more discrete international statements and legal agreements, but it was only finalized in 2003. It continues to be the single most important formal statement of rights, interests, and processes in the field of ICH. A brief discussion of the approaches in Italy and the United States will follow.

The second area of consideration will be the relationship between ICH and intellectual property. It is difficult to talk about ICH without some discussion of this topic. Scholarship in the US comes primarily from the fields of intellectual property. The work of Harvard Professor Ruth Okediji which sits at the center of intellectual property, human rights, and global economic development is a case in point[3]. The work of Professor Sonia Katyal, one of the contributors to this conference is another prime example[4].

1. Petrillo P.L., *Intangible Cultural heritage and Comparative Law: Towards a Global Legal Protection of the Intangible Cultural Heritage*, in Petrillo P.J. ed., *The Legal Protection of the Intangible Cultural Heritage*, Switzerland: Springer, 2019, pp. 231-248.
2. Editors' note: professor Harding uses this expression '*Code of Culture Properties*' to describe what we in the Glossary call '*The Code of Cultural Heritage and Landscape*'. Although professor Harding's formula is not a translation of *Codice dei beni culturali e del paesaggio*, we felt that her solution was an interesting one and wanted to preserve it for the readers.
3. Okediji R., *Traditional Knowledge and the Public Domain in Intellectual Property*, in Correa C., Seuba X. eds., *Intellectual Property and Development: Understanding the Interfaces*, Singapore: Springer, 2019, pp. 249-275; and Okediji R., *Grafting Traditional Knowledge onto a Common Law System*, Georgetown Law Journal 110, 2021, pp. 75-124.
4. Katyal S., *Technoheritage*, California Law Review 105, 2017, pp. 1111-1172.

Even those coming at ICH from outside the law, for example anthropology, tend to find themselves immersed in the world of intellectual property. In the United States cultural anthropologist Michael Brown was one of the earliest scholars in this area and his book, *Who Owns Native Culture?*, which touches on the relevance of intellectual property rights, is a classic in the field[5].

The final area of inquiry will focus on the relationship between ICH and broader cultural rights. There are many ways to view this connection, but what is important for the purposes of this roundtable is the simple realization that once we understand ICH as part of a broader collection of cultural rights, it expands our view of how and where ICH protections can be found, particularly in those nations with indigenous communities and deep historic cultural diversity.

This is an ambitious amount to cover in a short paper. I do not expect to do more than point out a few interesting elements of ICH as a discrete area of policy and legal protection. But I hope and expect that these points of discussion will be echoed and deepened in other papers from the conference.

2. Brief history of the development of ICH legal regulations

2.1 International

Protections for tangible cultural heritage have been a feature of international agreements and treaties since the end of the 19th century. The early agreements up to and including the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict focused on the protection of cultural objects and monuments during times of war. Only in the second half of the twentieth century with the passage of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was there a shift away from wartime protections to regulations on the movement of tangible cultural heritage. It is not surprising that with this shift towards thinking of cultural heritage as not just something to protect from destruction but also something that belongs to a place and people, needing protection from illicit movement, that concerns about the status of ICH also emerged.

UNESCO began to focus on safeguarding ICH in the 1970s. One of the more significant factors driving this shift in focus was dissatisfaction with 1972 UNESCO Convention Concerning the Protection of Natural and Cultural Heritage. In particular, indigenous groups and developing nations expressed deep concern about the lack of protection for cultural expressions, pushing UNESCO to start working on a legal instrument for the protection of folklore[6]. In 1989 UNESCO adopted a Recommendation on the Safeguarding of Traditional Folklore, a soft-law instrument with no binding standards, and in 1997 the Proclamation of the Masterpieces of Intangible Cultural Heritage was adopted, «as a means of filling the gap and balancing the still excessive geographic disproportion in the world heritage list»[7].

Finally, in 2003 UNESCO adopted a more binding and expansive agreement on ICH, the Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention). Within the agreement, categories or «domains» of ICH are defined as «oral traditions and expressions», «performing arts», «social practices, rituals and festive events», «knowledge and practices concerning nature and the universe» and «traditional craftmanship» (sec. 2). The distinctive features of ICH within these domains stress practice, fluidity, and collective or shared production, rather than authenticity and preservation. According to the official UNESCO website dedicated to the ICH Convention, ICH is «traditional, contemporary and living at the same time». In other words, it is both inherited traditions and currently evolving collective practices. It is 'inclusive' in that it builds social cohesion locally and globally, stressing shared experiences are more important than limiting heritage to a specific culture. It is 'representative,' valued not just as a cultural good but as a representation of local knowledge, skills and customs shared and passed within and between communities. And it is 'community-based': it must be broadly recognized within and self-identified by a group or community as a practice reflecting their heritage[8].

The most important thing to note about the ICH Convention is that it marks a radical shift in thinking about heritage, a shift from what is occasionally referred to as an archival approach, to one based more on process and community[9]. The archival or historical approach creates heritage «from an abstract process of scientific reconstruction and legitimization, with authenticity understood as an important quality in the perpetuation of a sense of historical

5. Brown M., *Who Owns Native Culture?*, Cambridge (MA): Harvard, 2003.

6. Bortolotto C., *From Objects to Processes: UNESCO's Intangible Cultural Heritage*, Journal of Museum Ethnography 19, 2007, pp. 21-33; Smith L., *The Uses of Heritage*, Abingdon (UK): Routledge, 2006.

7. Bortolotto, 2007, p. 25.

8. See ich.unesco.org/en/what-is-intangible-heritage-00003 (last accessed 20 Sept. 2023).

9. *Ibid.*

continuity and cultural ancestry»[10]. It reifies «heritage as objects to be preserved either in museum cabinets, or for intangible forms in archival files and catalogues»[11]. The process approach, on the other hand, as embodied in the ICH Convention, stresses «the importance of reproduction and transmission of practices for elaboration and adaptation by future generations»[12]. In essence, the ICH Convention marks a shift in understanding heritage from products to be preserved and protected to human activity to be experienced and shared. Professor Federico Lenzerini captures this perfectly by noting that «ICH is by definition a living entity»[13].

The 2005 Council of Europe Convention on the Value of Cultural Heritage for Society (Faro Convention) takes a similar approach. It stresses the fluid and relational elements of all heritage, tangible, and intangible. Art 2(a) states «cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions». It is worth noting here that within the Faro Convention a more process-based definition of heritage is being used for tangible heritage as well as ICH.

The approach of the ICH Convention differs from other international treatments of ICH which view it as linked to intellectual property. The connections or intersection of ICH and intellectual property will be addressed in more detail in the next section, but it is important to note here that the World Intellectual Property Organization (WIPO) has been trying to develop standards and principles for dealing with ICH, defined as Traditional Cultural Expression (TCE) and Traditional Knowledge (TK), since the early 2000s. In addition, the 2001 Doha Declaration which has been instrumental in establishing a development agenda within the World Trade Organization (WTO), instructed the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) to explore the relationship between the TRIPS Agreement and protection of traditional knowledge and folklore. While there are no definitive agreements from either WIPO or the WTO regarding TK or TCE, the approaches taken attempt to reconcile the precise protection-based approach of intellectual property rights and the more fluid safeguarding approach of the ICH Convention.

2.2 *Italy*

As noted in the introduction, recognition of ICH in Italy is still a bit of an afterthought. As was discussed in many of the presentations at this conference, the history of both the recognition and protection of tangible cultural heritage is very rich and robust in Italy, perhaps more so than any other place in the world. This makes sense for a nation with a long and continuous material cultural history, reaching back to before the Roman Empire. But Italian ICH is equally strong. In fact, it may be the strength of Italian traditions, whether in food, music, festivals, or craftmanship, compared to the inherent fragility of material culture, that has made preservation of the latter such a high priority while there is relative complacency with respect to the former.

It is worth noting that article 9 of the Italian Constitution, which addresses the importance of cultural heritage, is not limited to material or tangible culture. It stipulates the Italian Republic is responsible for promoting and protecting Italian historic and artistic heritage, in addition to the landscape – a very broad mandate. Nonetheless Italian legislators have «preferred to limit the protection of cultural heritage to its mere tangible dimension, intending it as a complex of cultural things bearing material witness of the civilization of the Nation»[14]. Nowhere is this more evident than in the 2004 Code of Cultural Properties whose very title with its focus on 'properties' seems to exclude any consideration of ICH. As noted in an article by Petrillo, Scovazzi and Ubertazzi discussing ICH in Italy, «[t]he reading of the Code is disheartening for the study of intangible cultural heritage. In fact, out of its 190 articles, only one added in 2008 is dedicated to intangible culture, namely art. 7-bis entitled "*Expressions of Collective Cultural Identity*"». But even with respect to this provision, protections extend only so far as the expressions in question are «represented by material testimony» (Code of Cultural Properties art. 7-bis). In short, «intangible heritage is protected by the Italian legal system only and exclusively in its tangible dimension»[15].

Despite what appears to be a singular lack of interest in ICH within the Italian legislature, the 2003 Convention was ratified in 2007 and the Italian legislature has been supportive of the Convention's mandate[16]. In addition, as of August 2022, Italy has successfully nominated fifteen elements of Italian ICH for inclusion on the Representative List of the Intangible Cultural Heritage of Humanity[17]. In keeping with the emphasis in the ICH Convention on shared traditions, almost half of the fifteen Italian elements listed are shared with other nations. For

10. *Ibid.*
11. *Ibid.*
12. *Ibid.*
13. Lenzerini F., *Intangible Cultural Heritage: The Living Culture of Peoples*, European Journal of International Law 22, 2011, p. 108.
14. Petrillo P.J., Scovazzi T., Ubertazzi B., *The Legal Protection of Intangible Cultural Heritage in Italy*, in Petrillo P.J. ed., *The Legal Protection of the Intangible Cultural Heritage.* Switzerland: Springer, 2019, p. 193.
15. Ivi, p. 194.
16. Ivi, pp. 188-189.
17. See ich.unesco.org/en/lists?text=&country[]=00110&multinational=3&display1=inscriptionID#tabs (last accessed 20 Sept. 2023).

Fig. 1 – Nuoro, Sardinia. Men dressed in traditional costumes, intent on polyphonic folk singing (*cantu a tenore*) in a 1903 photograph (Creative Commons, https://it.m.wikipedia.org/wiki/File:Tenore_Nuorese_1903.jpg).

example, «Falconry, a living human heritage» is shared with twenty-three other nations.

In addition, while there appears to be a less than ideal or cohesive approach to ICH at the national level, by contrast many regions have adopted robust regulations, most patterned after the safeguarding mechanisms found within the ICH Convention. Tuscany is at the forefront of ICH protection with dedicated laws to promote and support the «knowledge, identification, preservation and enhancement of ethno-anthropological and intangible cultural heritage»[18].

Finally, it is worth mentioning the role of Geographical Indications (GIs) in discussions about ICH. GIs are generally considered a branch of intellectual property. They have been mandated internationally through articles 22-24 of the TRIPS Agreement and EU Regulation No. 1151/2012 on quality schemes for agricultural products and food stuffs. In addition, earlier this year the European Commission submitted a proposed regulation extending GI protection to craft products[19].

GIs are different from ICH as defined in the ICH Convention for many reasons, but particularly because of their geographical limitations and the required evidence of heavily specified and controlled production processes. But GIs and ICH share some common ground. This is not the place to go into a deep comparison of GIs and ICH[20] but there is clear overlap in their shared reliance on tradition and communal, cultural, and craft-based components. And I mention them here within this brief look at ICH in Italy because GIs and their domestic counterpart, *denominazione di origine controllata,* are widely recognized and doggedly protected in Italy, as they are throughout most of Europe.

2.3 *United States*

I began the section above noting that ICH is more an afterthought in Italian heritage law. In the United States, it could be argued that ICH is not even a thought within legal circles, at least outside of academia. The United States has not joined the ICH Convention, nor does it have any national laws dedicated more broadly to the recognition or protection of ICH. Given the paucity of laws, particularly at the federal level, protecting any kind of heritage, it is not a surprise that there is very little regarding ICH.

The protections that do exist primarily focus on the heritage of Native Americans. The 1990 Native American Grave Protection and Repatriation Act (NAGPRA) primarily focuses on cultural objects, but in doing so, particularly with respect to sacred religious objects, recognizes the importance of protecting and fostering the traditions and religions of Native American cultures. The 1990 Indian Arts and Crafts Act (IACA) protects 'authentic' Indian crafts through the application of a certification mark and in doing so encourages and supports traditional Native American craft culture. But given its focus on material objects and 'authenticity,' the IACA is a far cry from the more fluid, process-focused approach of the ICH Convention. In addition, the IACA is explicitly as much about protecting consumers against fraud as supporting Indian craft enterprises. Finally, the National Historic Preservation Act of 1966, while focusing primarily on

18. Petrillo *et al.,* 2019, pp. 198, 197-204.
19. See European Commission website ec.europa.eu/commission/presscorner/detail/en/IP_22_2406 (last accessed 20 Sept. 2023).
20. For a discussion of GIs and ICH see Gangjee D.S., *Geographical Indications and Cultural Heritage*, WIPO Journal 4, 2012, pp. 92-102; and Id., *Geographical Indications and Cultural Rights: The Intangible Cultural Heritage Connection?*, in Geiger C ed., *Research Handbook on Human Rights and Intellectual Property*, London: Elgar, 2015, pp. 544-559.

preserving structures and places, also entails a process that seeks to ensure federal projects do not unduly interfere with Native American practices. Section 106 of the National Historic Preservation Act requires consultation with local tribes whenever a federal undertaking has a potential impact on «historic properties to which a Tribe attaches religious or cultural significance»[21]. These three pieces of legislation provide support for Native American ICH, but only indirectly.

There are other protections for Native American culture and tradition at the state level but as with the Italian Code of Cultural Properties, protection is almost always associated with or channeled through cultural objects. In other words, ICH is protected, if at all, primarily through its tangible or material manifestations.

Even with respect to the international mandates to protect GIs as discussed above, the United States has preferred to leave them under existing trademark law, in particular the categories of certification and collective marks indicating regional origin, emphasizing more clearly the economic nature of these rights rather than the cultural or communal elements[22].

3. ICH and intellectual property

It is difficult to discuss the legal regulation of ICH, whether at the international or state level, without at least touching on intellectual property rights. Let me start with an obvious point: ICH is, by definition, not 'fixed.' Of course, it can be 'fixed.' For example, a song can be put to paper, or folklore can be recorded and circulated in book form, as copyrightable material. But the essence or core of ICH is the creative expression itself – it is what you hear as a song, what you experience at a ritual or festival, or what you witness at the telling of a creation story, not whatever tangible form these experiences might take.

As an intangible and unfixed form of cultural expression, ICH is also easily shared. It can be enjoyed or experienced by many simultaneously; use and enjoyment by one group does not necessarily interfere with or limit the use or enjoyment by others. This is a core feature of ICH in the ICH Convention. Article 15, focusing on «participation of communities, groups and individuals», states that «each State Party shall endeavour to ensure the widest possible participation of communities […] that create, maintain and transmit such heritage […]» And images of ICH on the «Dive Into Living Heritage» section of the UNESCO website devoted to ICH makes clear the relevance, even centrality, of connections and shared experiences rather than exclusive ownership[23]. As noted in the prior discussion of the ICH Convention, while local communities are at the heart of the identification, recognition and safeguarding process, authenticity and geographic limitations, which are frequently utilized to limit use and access, are not part of the ICH Convention approach.

As non-exclusive, non-rivalrous goods, ICH is similar to the subject matter of intellectual property. Songs, oral histories and stories, traditions, rituals, designs, medicinal knowledge, craft methods and expertise are all in theory capable of being protected by intellectual property rights – copyrights, patents, and trademarks. But in practice ICH and intellectual property rights are a mismatch. Many of the key requirements of copyrights and patents do not fit the basic nature and core components of ICH. For example, copyrights and patents are both temporally limited and rights are vested in individual authors or inventors, whereas ICH is generally shared through generations into the future and is communal in both its creation and enjoyment. The concepts of originality and novelty, essential components of copyright and patent, are also a poor match for most of ICH which builds on communal experiences over time.

Furthermore, the underlying purposes of intellectual property generally do not fit ICH. Intellectual property law relies on the coercive authority of the state to protect exclusive rights encouraging publication, dissemination, and ongoing creation by guaranteeing financial benefits for a limited period of time. In brief, intellectual property rights turn non-exclusive, easily shared goods into temporally limited private property. Those interested in safeguarding and protecting ICH generally are not interested in financial gain, and exclusive rights are not necessary to ensure ongoing communal engagement. As many scholars have observed private property rights just do not fit and in many ways are anathema to cultural heritage, specifically ICH[24].

To be clear, there are some communities that see value in a more exclusive and protective approach to their ICH. Indigenous peoples and marginalized cultures that struggle to maintain their traditions and ways of life are eager to find ways to adapt the principles of intellectual

21. Consultation with Indian Tribes in the Section 106 Review Process: A Handbook, available at www.achp.gov/sites/default/files/2021-06/ConsultationwithIndianTribesHandbook6-11-21Final.pdf (last accessed 20 Sept. 2023).

22. *See* United States Patent and Trademark Office information regarding "Geographical Indications" available at www.uspto.gov/ip-policy/trademark-policy/geographical-indications (last accessed 20 Sept. 2023).

23. UNESCO Dive into Intangible Cultural Heritage? available at ich.unesco.org/en/dive (last accessed 20 Sept. 2023).

24. Brown, 2003; Scovazzi T., *The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. General Remarks*, in Petrillo P.J. ed., *The Legal Protection of the Intangible Cultural Heritage*, Switzerland: Springer, 2019, pp. 3-16.

property law to protect against misappropriation[25]. Indeed, since intellectual property rights have frequently been the means by which others have misappropriated and monetized the knowledge and cultures of indigenous people and developing nations[26], many of these groups are eager to find effective ways to fence off their cultures. Thus, it is not surprising that both WIPO and the WTO TRIPS Council have been struggling with the relationship between intellectual property law and the protection of ICH.

As previously noted, WIPO divides ICH into two broad categories, traditional knowledge (TK) and traditional cultural expression (TCE). The division stems primarily from the fact these two categories generate different issues and thus different legal protections or tools from an intellectual property standpoint. Unlike the ICH Convention, the WIPO discussions on TK and TCE are focused very specifically on protection, in particular «defensive protection» or the «application of IP law, values and principles to prevent misuse, misappropriation, copying, adaptation or other kinds of illicit exploitation»[27]. This is markedly different from UNESCO's emphasis in the ICH Convention on safeguarding through recognition, education, and promotion. As WIPO notes in an explanatory publication, «protection is different than 'preservation' or 'safeguarding,' which are the identification, documentation, transmission, revitalization and promotion of knowledge and cultural heritage in order to ensure its maintenance or viability»[28]. Protection through IP-related concepts, on the other hand, is designed to limit exposure and access to ICH to ensure only appropriate and culturally sensitive usage by those most closely associated with the heritage.

Putting this another way, the ICH Convention, and other international documents like the Faro Convention, approach ICH as part of the public domain where it is valued as a public good. WIPO, on the other hand, is focused on partially pulling the ICH of indigenous peoples from the public domain, limiting access, and providing something akin to private property protections. This tension between heritage as a public good or as a private resource was a significant theme of the conference. It is interesting to see that very same tension playing out in the different international approaches to ICH, driven by the needs of different communities.

4. Cultural diversity, cultural rights, and the new heritage discourse

All protections related to cultural heritage can be, and perhaps even should be, understood as forms of cultural rights. Returning to the Faro Convention, it defines all cultural heritage in terms of active cultural engagement: «cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions» (art. 2.a). This is a notable shift from the early days of cultural heritage protection when it was viewed not as uniquely connected to specific cultures and peoples, but as the heritage of all mankind, capable of identification through universal objective criteria. This was the approach of all the early international conventions including the 1954 Hague Convention and the 1972 World Heritage Convention which focus on artistic, aesthetic, architectural, visual, scientific, and economic value. Even the international agreements that began to shift towards more local or culturally driven conceptions of heritage recognizing that cultural heritage belongs to a specific group or nation[29], still tended to privilege the largely Western idea of heritage as material high culture.

This approach to heritage, which «promotes a certain set of Western elite cultural values as being universally applicable» is what heritage scholar Laurajane Smith refers to as the «authorized heritage discourse»[30]. This privileges not only materiality but a way of understanding heritage that places it securely in the past and requires certain expert driven practices of management and conservation[31]. Diana Taylor, in her marvelous book, The Archive and the Repertoire, focuses on the concept of the archive or written knowledge to describe a Western approach to understanding and processing the past: «When the friars arrived in the New World in the fifteenth and sixteenth centuries […] they claimed that the indigenous peoples' past – and the 'lives they lived' – had disappeared because they had no writing»[32].

The ICH Convention came about partly because of deep and persistent criticism by non-Western nations of this historically dominant approach[33]. As noted above in the discussion of the evolution of the ICH Convention, developing nations and indigenous peoples spurred on by dissatisfaction with the World Heritage Convention and prior heritage agreements, pushed for a broader more

25. Carpenter K.A., Katyal S.K., Riley A. R., *In Defense of Property*, Yale Law Journal 118, 2009, pp. 1022-1125.
26. Drahos P., Braithwaite J., *Information Feudalism: Who Owns the Knowledge Economy?*, London: Earthscan, 2002.
27. WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expression*, Geneva: WIPO, 2020, p. 20.
28. Ivi, p. 21
29. See, *e.g*, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
30. Smith, 2006, pp. 11, 29-34.
31. Ivi, p. 12.
32. Taylor D., *The Archive and the Repertoire*, Durham: Duke, 2003, p. 16.
33. Smith, 2006, p. 28.

Fig. 2 – Falconery, here in an old representation, is inscribed in the Representative List of the Intangible Cultural Heritage of Humanity (Stockholm, Livrustkammern Museum. Painting of Icelandic hunting falcon, male, Germany 1759(?), unknown artist. Creative Commons, https://www.europeana.eu/it/item/2064105/Museu_ProvidedCHO_Livrustkammaren_48171).

culturally relevant approach embracing intangibles. The 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore, the 1993 Living Human Treasures Programme and the 1998 Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity were attempts to embrace intangibles but were criticized for their lack of breadth and weak, unenforceable standards. But more critically, with the use of terms like «folklore» that carry «considerable colonial baggage»[34], and «masterpiece» which is a term and concept drawn from western cultures that suggests a hierarchy of cultural importance, these earlier agreements continued to reflect the «authorized heritage discourse».

The ICH Convention, while in no way perfect, moves toward recognition of a «subaltern heritage discourse»[35], one which reflects broader community participation, greater concerns for cultural practice and a sense of heritage which is untethered from material culture. Returning to the work of Diana Taylor, it reflects a more 'performative' and 'embodied' understanding of culture. «Social knowledge, memory, and identity» are transmitted through «embodied expression» rather than written, archival documents or historicized relics[36]. Put more simply and pragmatically, the Convention provides greater opportunity for communities, particularly those traditionally marginalized in international conversations, to broaden our collective conception of cultural heritage and to assume greater control over their collective memory and cultural identity[37].

Inherent in this shift towards understanding heritage as process or embodied practice is an acceptance of the inevitability of cultural change and the value of cultural diversity. The Preamble to the Convention explicitly recognizes «the importance of the intangible cultural heritage as a mainspring of cultural diversity». This notable shift, explicitly tethering cultural heritage protections to the value of cultural diversity, has to be seen in light of, or placed in the context of, other international developments, in particular the 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions (Convention on Diversity) and the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

The Convention on Diversity is less about heritage and more about contemporary cultural expression and the creative economy, nonetheless it stems from the core idea that «cultural diversity forms a common heritage of humanity» (Preamble). It embraces the notion that respect for diversity is essential «to create the condition for cultures to flourish […]» (art. 1b). While the Convention is broad in its application and expansive in its embrace of cultural diversity, it specifically calls out the need to protect and promote «the cultures of persons belonging to minorities and indigenous peoples» (art. 2, principle 3). It embraces the idea that freedom to create, control and distribute cultural expressions and traditional knowledge is essential to the vitality of culture and to economic development.

UNDRIP is a broader declaration of rights focused on remedying many of the past injustices experienced by indigenous peoples, including cultural genocide. Article 11 of the Declaration states that «Indigenous Peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature».

34. Ivi, p. 107.
35. *Ibid.*
36. Taylor, 2003, p. 16.
37. Vaivade A., *ICH as a source of identity: international law and deontology*, in Waelde C., Cummings C., Pavis M., Enright H. eds., *Research Handbook on Contemporary Intangible Cultural Heritage*, London: Elgar, 2018, pp. 165-193.

The point of bringing these two additional international agreements into conversation with the ICH Convention is that when all three of the documents which emerged about the same time are viewed together it is clear that a shift towards recognition of intangible cultural heritage is part of a more expansive international approach to the recognition of and support for cultural rights. There are other important agreements in this area, but we might consider these three fundamental agreements as collectively the three-legged stool supporting the cultural identity and cultural rights of indigenous groups and previously marginalized peoples.

If safeguarding ICH is understood as deeply connected to broader cultural rights, then it becomes apparent that ICH protections can be found in places other than agreements and laws dedicated to cultural heritage. As noted in the introduction, Canada is not a party to the ICH Convention, but there is explicit recognition of Aboriginal Rights in the Constitution Act, 1982. Section 35 affirms the existing treaty rights, both historic and modern, of the Aboriginal peoples of Canada, recognizing that such rights incorporate cultural and social rights. This Constitutional provision has been the subject of many Supreme Court cases, covering cultural practices ranging from traditional fishing and hunting rights to respect for oral histories in the interpretation of land and treaty rights[38]. Section 28 of the Human Rights Act 2019 from Queensland in Australia is another example of the specific recognition of ICH rights embedded within broader cultural rights, rather than a heritage, framework. Following the lead of the UNDRIP, the Queensland Human Rights Act specifically recognizes the cultural rights of Aboriginal and Torres Strait Islander Peoples, including the right to «enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings […]» (sec. 28, 2a).

There are three primary interrelated points in this brief discussion of ICH and cultural rights. The first is that the expansion of both our understanding of and protections for heritage into the realm of ICH reflects the steady and growing influence of developing nations and indigenous peoples on the direction of international agreements and conversations about heritage. The second point is that this has led to broader respect for cultural diversity as a foundational concept in the rights of historically marginalized peoples. And finally, both the influence of these previously marginalized voices and greater appreciation for cultural diversity has expanded our conversations about the nature of cultural heritage beyond a discourse focused on objects, museums, and expert-driven knowledge to a discourse that embraces grassroots practices, process, and experience.

38. For a complete list of these cases see www.lib.sfu.ca/help/research-assistance/subject/criminology/legal-information/indigenous-scc-cases (last accessed 20 Sept. 2023).

5. Conclusion

All of this has taken us very far afield from the core presentations and concerns in this conference, which for the most part reflect traditional approaches to and definitions of cultural heritage. But maybe that is the most important reason for incorporating ICH into the conference. ICH as an increasing concern both internationally and domestically pushes the narrative and our understanding of cultural heritage out of museums, into the ways we live and experience culture on a daily basis. In this way ICH serves as a portal to broader conversations about cultural change and cultural diversity. It forces discourse about heritage to be more expansive and inclusive and ultimately radically shifts the meaning of 'cultural heritage.' This shift is not limited to ICH. It challenges even those working with traditional tangible cultural heritage to reconceptualize their work and the meaning of cultural objects. It forces out into the open the recognition that while intangible heritage can stand on its own without any material, tangible anchors, and thrive simply through practice and collective commitment, the meaning of tangible heritage is contextual and deeply dependent on intangible cultural experiences. In short, while the history of cultural heritage protection has focused on tangibles, it is really ICH that is more foundational, more essential to cultural diversity and at the heart of the vitality of all heritage.