International Instruments on Cultural Heritage: Tales of Fragmentation

Alexandra Xanthaki

On 30 September 2016, the UN Human Rights Council adopted Resolution A/HRC/33/L.21 on 'Cultural rights and the protection of cultural heritage'. This development highlights the attention that cultural heritage is currently attracting at the international level. The resolution notes the detrimental impact that the loss of cultural heritage has for the enjoyment of cultural rights and calls for action. The resolution does not once refer to sub-national groups. Yet, in calling for international co-operation in restoring 'the stolen, looted or trafficked cultural property to its countries of origin' (para. 4), it puts the issue of cultural heritage firmly within the human rights agenda of the United Nations. This was not the case until rather recently.

The recent attention that cultural heritage has attracted by the international human rights law system is of course very welcoming. Talking in specific about tangible heritage, Roger O'Keefe notes: 'The framing of the conservation of tangible cultural heritage as a human right reminds us that we seek to preserve and protect such heritage not for its own sake but as an indispensable element of human flourishing'.[1] Indeed, the cultural heritage of individuals as well as of sub-national groups is essential for the protection and development of their identity. Unfortunately, in far too many parts of the world, cultural heritage is under threat. Indigenous art is widely misappropriated and indigenous traditional knowledge is ignored or used without the consent of the groups. Historical injustices, such as the brutal removal of indigenous children from their families have cut their bond of indigenous peoples with their heritage, especially the intangible parts. The unruly development of projects by transnational corporations continuously disregard indigenous spiritual sites and indigenous communities of their natural heritage. Also, tourism, often encouraged by the state as an important means of resources, lacks the necessary cultural sensitivity and commodifies important indigenous sites. And who can ignore the destruction of cultural artefacts as a means of retaliation in situations of ethnic conflict; and the stealing of such artefacts from indigenous

1 R. O'Keefe, 'Tangible cultural heritage and international human rights law' in L.V. Prott, R. Redmint-Cooper and S. Urice (eds.), *Realising Cultural Heritage Law, Festschrift for Patrick O'Keefe* (Institute of Art and Law, 2013), 87 at 95.

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lands. There is an urgent need to protect the cultural heritage of individuals and groups; and such protection cannot take place without the involvement and implementation of a strong human rights system.

For a long time, heritage was seen as falling outside the domain of human rights and more into UNESCO's domain. It is still widely seen as a matter of concern for the states, rather than any sub-national group. Similarly, a 'right to cultural heritage' as such was not included in any human rights instrument. Recently, there has been recognition of 'the right to access to cultural heritage' and 'the right to enjoying the benefits of cultural heritage'. The Faro Convention (2011), for example, recognizes the right of everyone 'to benefit from cultural heritage'. The UN Independent Expert in the Field of Cultural Rights referred for the first time in 2011 to a right to cultural heritage. 'Considering access to and enjoyment of cultural heritage as a human right', she noted, 'is a necessary and complementary approach to the preservation/safeguard of cultural heritage.'[2] In a similar way, *indigenous* cultural heritage was not on the radar of international bodies.

One reason why cultural heritage was not explicitly discussed within the context of human rights was that it was part of cultural rights. But then again, cultural rights were a neglected area of international law until very recently. Several United Nations bodies have been pivotal in clarifying the scope of cultural rights in general, which has had a direct impact on a better understanding of indigenous cultural rights. Notable is *General Comment 25 (50)* of the Human Rights Committee which refers to the broad nature of indigenous culture; it observes that 'culture manifests itself in various forms' and mentions indigenous traditional activities such as fishing or hunting and the right to live in reserves protected by law. The jurisprudence of the UN Human Rights Committee also made a difference with the *Kitok* and *Lubicon Lake Band* cases reaffirming an understanding of indigenous culture consistent with the indigenous views. The *International Convention on the Elimination of All Forms of Racial Discrimination* has also used the rather generic prohibition of discrimination in religion, cultural rights, education and participation in cultural activities to promote indigenous cultural rights. Apart from the frequent references to indigenous cultural rights in its Concluding Observations, the Committee has issued *General Recommendation XXIII (51)* that calls for the recognition and respect of indigenous distinct cultures, histories, languages and ways of life as an enrichment of the State's cultural identity. The Committee on Economic, Social and Cultural Rights has in 2009 discussed in depth the meaning of cul-

2 United Nations, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, UN Doc A/HRC/17/38 of 21 March 2011, para. 2.

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ture. In 2012, the United Nations turned its attention to indigenous languages and cultures and published a report on this topic by the UN Expert Mechanism on the Rights of Indigenous peoples (EMRIP). In 2016, EMRIP published a report on indigenous cultural heritage. This volume is based on submissions and discussions that took place in a conference in Rovaniemi, co-organised by the University of Lapland and the Office of the High Commissioner for Human Rights.

PART A: THE MEANING OF CULTURAL HERITAGE

From Cultural Property to Cultural Heritage

Indigenous rights scholars have welcomed the attention on cultural heritage. The term 'cultural heritage' has been seen as a good substitute of the term 'cultural property' which prevailed in earlier documents of international law. 'Cultural property' was associated with the understanding of culture as capital and ownership. The (1954) UNESCO *Convention for the Protection of Cultural Property in the event of Armed Conflict* defines cultural property as: 'irrespective of origin or ownership… movable or immovable property of great importance to the cultural heritage of every people'. The restrictiveness of this definition is maintained in the (1999) *Second Protocol* to the Convention, even though its preamble emphasises that rules in this area should reflect developments in international law.[3] The (1970) UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property* is more detailed: cultural property is defined as 'property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science'. The Convention also includes a very detailed account of objects of cultural property. The (1972) UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage* is the exception to these early instruments, as it refers to cultural heritage, instead of cultural property.

Indigenous perceptions of culture are quite alien to the concept of culture as capital and the link of culture with ownership. Indigenous peoples have always viewed culture as part of the community:

3 See para. 4 of the Preamble and article 1.b. of the (1999) *Second Protocol to the Hague Convention of the 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (1999) 38 *International Legal Materials* 769-782 at 769.

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> No person 'owns' or holds as 'property' living things. Our Mother Earth and our plant and animal relatives are respected sovereign living beings with rights of their own in addition to playing an essential role in our survival.[4]

For them, culture signifies the continuous relationship between human beings, animals, plants and places with which culture is connected. In this relationship, economic rights have no place. Indigenous peoples have noted:

> culture as 'property' (therefore commodities to be exploited freely and bought and sold at will) has resulted to disharmony between human beings and the natural world, as well as the current environmental crisis threatening all life. This concept is totally incompatible with a traditional Indigenous world view.[5]

Even since the early 90s, the United Nations Special Rapporteur on Indigenous Cultural and Intellectual Property has urged the use of the term 'indigenous cultural heritage', rather than 'cultural property'. She has defined 'cultural heritage' as:

> everything that belongs to the distinct identity of a people and is therefore theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected.[6]

During the elaboration of the UN *Declaration on the Rights of Indigenous Peoples*, a similar change of terminology was initiated by the UN Secretariat: it was

4 See International Indian Treaty Council (IITC), IITC Discussion Paper on Biological Diversity and Biological Ethics, 30 August 1996, p. 5 (on file with author).

5 See International Indian Treaty Council (IITC), IITC Discussion Paper on Biological Diversity and Biological Ethics, 30 August 1996, p. 5 (on file with author).

6 Working paper on the question of the ownership and control of the cultural property of indigenous peoples prepared by E.-I. Daes, UN Doc. E/CN.4/Sub.2/1991/34, para. 6.

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suggested that the term cultural, intellectual, religious and spiritual 'property' be replaced by the term 'heritage'.[7]

'Cultural heritage' is also the term used in the Faro Convention, adopted in 2005 and put into force in 2009. The convention is very clear about the value of heritage. The Preamble emphasises 'the value and potential of cultural heritage' as 'a resource for sustainable development and quality of life in a constantly evolving society'. Article 1d also links cultural heritage to the 'construction of a peaceful and democratic society' and 'cultural diversity'.[8] The Convention defines cultural heritage as '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 includes all aspects of the environment resulting from the interaction between people and places through time'.

Although the term 'cultural heritage' is gaining quite a momentum in international human rights fora, including a 2015 UN Study on indigenous cultural heritage, a 2016 UN Study on the right to cultural heritage and the HRC Resolution A/HRC/33/L.21 mentioned above, academic scholarship is not united in promoting the concept. Some writers have even been negative about the use of this term. For example, McCrone has suggested that the start of the heritage concept is placed at the post-Fordist economic climate of the US and argues that heritage 'has its roots in the reconstructing of the world economy – a process which began in the 1970s'.[9] Hence, McCrone links the concept of cultural heritage to the marketplace. Harvey responds that irrespective of when its protection started, heritage 'is a product of wider social, cultural, political and economic transitions'.[10]

7 See Technical review of the United Nations draft declaration on the rights of indigenous peoples, E/CN.4/Sub.2/1994/2, para. 16.

8 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005).

9 D. McCrone, A. Morris and R. Kiely, *Scotland – The Brand. The Making of Scottish Heritage*, Edinburgh: Polygon, 1995, p. 2.

10 D. Harvey, 'Heritage Pasts and Presents, Temporality, meaning and the scope of heritage studies' (2001) 7(4) *International Journal of Heritage Studies* 319-338 at 324.

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Cultural Heritage and Culture

Certainly, cultural heritage is a vague concept.[11] Larkham warns us that heritage seems to be 'all things to all people',[12] while Johnson and Thomas maintain that heritage is 'virtually anything by which some kind of link, however tenuous or false, may be forged with the past'.[13] In her seminal article, Blake noted already in 2000 the problems of defining cultural heritage for lawyers. In particular, the distinction between culture and cultural heritage is not clear at all.[14] Is this distinction based on time? Is it based on the nature of the elements to be protected?

'Past'

The time element is one widely identified as an important criterion that distinguishes culture to cultural heritage. If indeed cultural heritage is 'everything that is considered to be worthy of preserving in culture and that one wants to leave to subsequent generations',[15] then what is culture? And if culture is not what deserves to be preserved, then why does international law protect culture? Maybe culture should not be protected but cultural heritage should? Or is it that culture has some meaning in the present, whereas cultural heritage has more meaning in the past? Yet, this distinction does not seem very precise either. Konsa, like Harvey, notes that 'heritage is far from a fixed or objectively defined phenomenon'.[16] But, if cultural heritage is not a fixed concept, it is then a concept that relates to the present too. Thus, the distinction between culture and cultural heritage on the basis of time crumbles.

Maybe cultural heritage is different to culture because the former signifies the artefacts that need to be protected for future generations. Although this was the understanding some decades ago, the inclusion of intangible and natural elements into the meaning of cultural heritage as protected in inter-

11 B. Graham, P. Howard, 'Introduction: Heritage and Identity' in B. Graham, P. Howard (eds.), *The Ashgate Research Companion to Heritage and Identity* (Aldershot, Burlington: Ashgate, 2008), 1-15.

12 P.J. Larkham 'heritage as planned and conserved' in D.T. Herbert (ed.), *Heritage, Tourism and Society* (London: Mansel, 1995), 85.

13 P. Johnson and B. Thomas, 'Heritage as Business' in D.T. Herbert (ed.), *Heritage, Tourism and Society* (London: Mansell, 1995) 170.

14 J. Blake, 'On defining the Cultural Heritage; 49 (2000) *International and Comparative Law Quarterly* 61 at 68.

15 K. Konsa, 'Heritage as a socio-cultural construct: problems of definition' 12 (2013) *Baltic Journal of Art History* 125 at 126.

16 K. Konsa, 'Heritage as a socio-cultural construct: problems of definition' 12 (2013) *Baltic Journal of Art History* 125 at 125.

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national law makes this distinction blurred. Since the early 2000s, intangible heritage has rightly become an accepted part of cultural heritage. The 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* has played an important role in this.[17] Even though this is a positive development, the maintenance of such heritage must be subject to the evolution of the contemporary societal processes'.[18] In other words, illiberal practices cannot be preserved in the name of cultural heritage.

Choice

In addition to the lack of clarity on what is included in 'cultural heritage', critics also put forward the choice that is involved in the elements that will be viewed as cultural heritage. 'The political aspect of the decision as to what is to be preserved for future generations'.[19] Charlesworth notes that 'the definition of 'culture' is a highly political and contentious one – who defines 'culture', and who benefits from it?'[20]

It is true that usually these choices are being left to the elites of each section of the population, either the elites of the community itself or of the elite in the state structure. Very often, it is the 'experts' who decide what needs to be preserved and what not, at times without even consulting and getting the agreement of the community. Hortloff warns us against the recent emphasis on preservation and conservation of cultural heritage. He notes that 'destruction and loss are not the opposite of heritage but part of its very substance'.[21] According to him, 'it is not the acts of vandals and iconoclasts that are challenging sustainable notions of heritage, but the inability of both academic and political observers to understand and theorize what heritage does, and what is done to it, within the different realities that together make up our one world.'[22] He joins other scholars warning against preserving just for the sake of preservation. The preserved item becomes heritage not because the group thought it needed preserving but because it so happened that it was preserved. In any case, it has to be recognised that such process, benign as it may be, relates to

17 J. Blake, 'Seven Years of Implementing UNESCO's 2003 Intangible Heritage Convention – Honeymoon Period or the "Seven-Year Itch"?' (2014) 21 *International Journal of Cultural Property,* 291-304.

18 K. Konsa, 125.

19 J. Blake, *International and Comparative Law Quarterly,* at 69.

20 H. Charlesworth, 'Cultural Diversity in International Law' in *Human Rights, Faith and Culture,* pp. 35-45 at 35.

21 C. Hortloff, 'Can less be more? Heritage in the age of terrorism' 5 (2006) *Public Archaeology,* 101-109.

22 C. Hortloff, Public Heritage at 108.

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the formation of identity, but also relates to power and authority. In this sense, it maintains the centres of power and the powerlessness of the peripheries. It maintains the exclusion of the vulnerable communities from deciding on their heritage as well as the exclusion of the vulnerable individuals within the communities that have no say in the formation of cultural heritage. Seen in this light, the protection of cultural heritage does not lead to the protection of the individual's identity but to the maintenance of inequality and exclusion.

PART B: COHERENCE

1 Fragmentation of 'Cultural Heritage' Research

It becomes obvious from the discussion above that although international lawyers have been pushing rather uncritically for the adoption of the term 'cultural heritage' in international human rights and in particular on indigenous rights, scholars in humanities have been problematizing about the concept. Indeed, international law debates on the rights of indigenous peoples to their heritage are to a large degree focused in legal interpretations of relevant provisions with little discussion of the consequences of such rights for global art and artists. At the same time, the discourse of cultural heritage in the humanities has tended to over-emphasise the authority of knowledge, which is not followed anymore by recent standards in international human rights law, that prioritize indigenous communities over experts. Clearly, the various disciplines have not been 'listening' to one another, nor have they been bouncing ideas off each other. A closer look within the various disciplines, namely international human rights, humanities, ethnography and history, reveals considerable variations in the understanding, the evaluation and the priorities on cultural heritage.

Indeed, one can sense the limited interaction of disciplines in this respect: International law has focused on the fragmentation that exists among its different parts, but the multi-disciplinary fragmentation in the study of specific areas, such as cultural heritage, needs also to be addressed.[23] One can clearly see the downsides of such fragmentation: responses of international law to the challenges posed currently in cultural heritage cannot be comprehensive unless they consider the politics and history of cultural heritage and acknowl-

23 However, look at A. Jakubowski, 'A constitutionalised legal order – exploring the role of the World Heritage Convention (1972)' in A. Jakubowski and K. Wierczyńska (eds.), *Fragmentation vs the Constitutionalisation of International Law* (London: Routledge, 2016), p. 182 at 187.

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edge the tensions between archaeological knowledge and community claims. International lawyers can only reach an accurate interpretation of the existing law and suggest helpful ways forward, if they take into account the possible downsides of every such suggestion.

In all this discussion, indigenous peoples have been mere observers for a long time, while experts from various disciplines have been deciding on their behalf how to protect their heritage. Their participation in interpreting and exposing their heritage has been minimal, even though as Jody Joy (2004) has explained, 'historic objects are not innately meaningful but become meaningful only when they are socially constituted in a particular way'.[24] Yet, recently one can see evidence of a change. Indigenous peoples are taking initiatives to be in control of their heritage. For example, Lanauze, Forbes and Solomon have recorded the struggle of Moriori, an indigenous group living in Rekoku (the Moriori name for Chatham Islands) to retain and control their heritage.[25] After centuries of having items of their cultural heritage stolen from their island, the Moriori have created 'a comprehensive cultural database that involves re-recording archaeological evidence in a way that combines elder knowledge and experience, oral traditions and recollections of past land use and events'.[26] Also important are community-level strategies for protecting indigenous heritage, such as ethical guidelines and cultural protocols.[27] These initiatives are a realisation of the indigenous right to self-determination and are in sync with the current approaches of the humanities as well as the current standards of international law on indigenous rights.

24 C. Hortloff, 'Can less be more? Heritage in the age of terrorism' (2006) 5 *Public Archaeology* 101-109 at 103.

25 T. Lanauze, S. Forbes and M. Solomon, 'A practical approach to traditional knowledge and indigenous heritage management: A case study of Moriori heritage management practice' in S, Subramanian and B. Pisupati (eds.), *Traditional knowledge in Policy and Practice* (United Nations University Press, 2010), p. 327.

26 Ibid., 330.

27 K. Barrister, 'Non-Legal instruments for the protection of intangible cultural heritage: Key roles for ethical code and community protocols' in C. Bell and R. Paterson (eds.), *Protection of First Nations Cultural Heritage, Laws, Policy and Reform* (University of British Columbia, 2009) p. 278.

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2 Fragmentation of International Law Relevant to Indigenous Cultural Heritage

Fragmentation specifically within international law also affects indigenous rights to their cultural heritage. Fragmentation in international law has been defined as 'the profound systemic rupture in the structure of international law, reflected in the lack of well-developed and established hierarchies or other techniques to deal with normative conflicts and tensions between general international law norms and its specialized regimes, as well as between those regimes *inter se*.'[28] It has been widely argued that the expansion of international law 'has created problems of harmony between its different branches, institutions and norm-systems'.[29] Such developments have led to a lack of coherence of the various regulatory contexts in international law, which prevent the formation and application of shared principles and interpretations across international law.[30] This compartmentalization and specialization is very obvious in the study of indigenous cultural heritage with detrimental effects to a coherent development of the law.

International Human Rights Law

There are three main international law systems related to indigenous cultural heritage. The most recent one is the international human rights law system. The level of protection evolved quite considerably in the last few years. Paramount in this system is the UN *Declaration on the Rights of Indigenous Peoples* as a tool that clarifies how general human rights standards apply on indigenous cultural heritage. Article 31 UNDRIP explicitly recognises the right of indigenous peoples to 'maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.' The article specifically includes the following in the manifestations of cultural heritage, knowledge and expressions to be protected: 'human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, lit-

28 A. Jakubowski and K. Wierczyńska (eds.), *Fragmentation vs the Constitutionalisation of International Law* (London: Routledge, 2016), p. 1.

29 Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report Finalized by M. Koskenniemi, UN Doc. A/CN.4/L.682.

30 A. Jakubowski and K. Wierczyńska, above, p. 2, also citing M.A. Young (ed.), *Regime Interaction in International Law Facing Fragmentation* (CUP 2012); N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (OUP 2010).

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eratures, designs, sports and traditional games and visual and performing arts.' One can see that the text does not make a clear distinction between tangible, intangible and natural heritage, a positive element and different to the approach of the older UNESCO documents on cultural heritage. Rights related to cultural heritage are also recognised in several other parts of the Declaration. Article 11 UNDRIP recognises the intangible aspects of cultural heritage: indigenous peoples have the right to 'practice and revitalize their cultural traditions and customs', which includes 'past, present and future manifestations of their cultures'. The text also includes tangible elements: 'archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.' Article 12 follows the same pattern: it protects the right of indigenous peoples 'to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains'. Interesting is the recognition of the right to access in privacy to sacred sites, as will be discussed below. Article 13 recognises indigenous rights to histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

The above-mentioned provisions in UNDRIP do not create new law. They interpret existing binding human rights treaties. They interpret how article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[31] and article 27 ICCPR apply to indigenous peoples' cultural heritage.[32] The content of UNDRIP on indigenous cultural heritage is also an expression of cross-fertilisation of ideas and standards among the various bodies of international human rights law. The provisions reflect comments made by international human rights bodies and feed back as the basis to comments by United Nations bodies. For example, CERD has recently asked questions on the effect of relocation on indigenous cultural heritage,[33] whereas the Human Rights Committee had talked about protection of sites of religious or cultural

31 United Nations International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

32 A. Xanthaki, 'Indigenous Rights to Culture' in M. Weller and J. Hofmann (eds.), *Commentary on the UN Declaration on the Rights of Indigenous Peoples* (Oxford University Press, 2017), (forthcoming).

33 UN Doc. CERD/C/LAO/CO/15, para. 18.

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significance.[34] In its concluding observations for New Zealand, the Committee has used language very similar to the UNDRIP. The Committee recognised 'Māori's right to conserve, promote and develop their own culture, language and cultural heritage, traditional knowledge and traditional cultural expressions, and the manifestations of their sciences and cultures.'[35] The HR Committee's comments in its concluding observations followed discussions on indigenous cultural rights in the case-law, including *Apirana Mahuika et al. v. New Zealand,*[36] *Ominayak v. Canada, Lansman et al. v. Finland* in 1994[37] and 1996,[38] *Francis Hopu and Tepoaitu Bessert v. France,*[39] *Lovelace v. Canada*[40] *and Kitok v. Sweden*.[41] These comments of the Human Rights Committee have been important in convincing the States of the validity of the UNDRIP related to cultural rights. Cross-fertilisation has also been possible between the universal human rights system and the Inter-American system of human rights. Even as far back as 1993, the Inter-American Court took into account the customary marriage practices of the Saramacan people.[42] In 2004, the Court found in the *Massacre of Plan de Sánchez* case that the deaths of the women and elderly, who were traditionally the oral transmitters of the Mayan Achí culture, interrupted the passage of cultural knowledge to future generations and the militarization and repression after the massacre resulted in the indigenous peoples' loss of faith in their traditions.[43] The prohibition of the indigenous group to practice their traditional burial ceremonies because of their relocation was deemed a violation of their rights,[44] which Guatemala accepted as a violation of 'the freedom to manifest their religious, spiritual, and cultural beliefs'.[45] In the *Bámaca Velásquez* case, the court also noted that the funeral ceremonies of the Mam ethnic group were 'something that is traditional in the indigenous

34 For example UN A/55/40, para. 510 regarding Australia.

35 UN International Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of New Zealand, UN Doc. E/C12/NZL/CO/3 (2012) para. 26.

36 A/56/40, Volume I, Annex X, A (Communication No. l 547/1993).

37 CCPR/C/52/D/511/1992, Case No. 511/1992.

38 CCPR/C/58/D/671/1995, Case No. 671/1995.

39 CCPR/C/60/D/549/1993/Rev.1, Communication No. 549/1993.

40 A/36/40, Annex 7(G) (1998).

41 A/43/40, Annex 7(G) (1988).

42 *Aloeboetoe et al. v Suriname* (*Reparations*) IACtHR Series C 15 (1993); 1-2 IHRR 208 (1993).

43 *Plan de Sánchez Massacre v. Guatemala* (Reparations) IACtHR Series C 116 (2004).

44 *Plan de Sánchez Massacre v. Guatemala* (Merits), IACtHR Series C 105 (2004), para. 42(30).

45 Ibid., para. 36(4).

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culture',[46] whereas in the *Case of Moiwana Community v. Suriname* the Court ordered Suriname to take all measures 'to recover promptly the remains of the Moiwana community members killed' by the national army in 1886.[47] Therefore, in fulfilling indigenous peoples' cultural rights, states are now under the obligation to act in positive and precise ways in order to recover the remains of indigenous members.

UNESCO Law

Unfortunately, the human rights standards are not reflected in the UNESCO conventions. Even though Article 5 of the *Universal Declaration on Cultural Diversity* (2001) noted that the flourishing of cultural diversity requires 'the full implementation of cultural rights as defined in Article 27 of the *Universal Declaration of Human Rights* and in Articles 13 and 15 of the *International Covenant on Economic, Social and Cultural Rights*', the link between the *Convention on the Diversity of Cultural Expressions* and human rights is too generic and vague.[48]

One of the main challenges is that UNESCO documents still frame cultural heritage in a binary way, either belonging to the state or to the individual. So, for example, the (1970) UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property* protects:

> (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; (b) cultural property found within the national territory.

All these earlier provisions have to be interpreted in the light of UNDRIP. The Convention for the Safeguarding of the Intangible Cultural Heritage (2003) does ensure respect for the intangible cultural heritage of groups; individuals are almost an exception to the protection of the convention.[49] Also, ac-

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46 *Bámaca Velásquez v. Guatemala* (Reparations), IACtHR Series C 91 (2002), para. 82.

47 *Case of Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations and Costs), IACHR, Judgment of 15 June 2005, Series C No 124, para. 208.

48 Y. Donders, 'Cultural Rights and the Convention on the Diversity of Cultural Expressions, Included or Ignored?' in T. Kono and S. van Uytsel (eds.), *The UNESCO Convention on the Diversity of Cultural Expressions* (Intersentia, 2012), p. 165 at 177 onwards.

49 A. Meijknecht, 'The Convention on the Diversity of Cultural Expressions, What is its Added Value for Minorities and Indigenous Peoples' in T. Kono and S. van Uytsel (eds.),

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cording to article 11 of the convention, each State Party shall '(b) identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups, and relevant non-governmental organisations.'[50] Nevertheless, currently communities continue to have very little input in identifying the elements constituting cultural heritage. For example, it is the state party to the *World Heritage Convention* (WHC) that nominates potential heritage sites.[51] In this respect, States rely heavily on the state narratives, rather the indigenous narratives about specific elements. So, often, indigenous peoples have to satisfy the entities that have been undermining their cultural heritage that it is worthy enough to be nominated for international protection. Also, in other cases, the indigenous heritage is being pushed to be presented and perceived as part of national heritage. In addition, indigenous peoples have had minimum input in the conservation, exhibition and protection discussions relating to their own cultural heritage. Hence, although States can acquire UNESCO protection and recognition for the indigenous sites and elements that exist within their territories, yet they do not have any obligation from UNESCO to recognise and protect the link between the indigenous heritage and the community. The WHC convention does recognise the States' 'duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage' (Art. 4), but recognises no right of any group to such heritage. In other words, there is no strong link between the UNESCO protection, which goes mainly towards the state according to state requests and understandings, and the human rights obligations that such States have towards the actual owners of the cultural heritage, i.e. indigenous peoples. This has to change and relevant UNESCO documents need to be interpreted in the light of UNDRIP.

For example, the 1995 UNDROIT *Convention on Stolen or Illegally Exported Objects*, created to compliment the 1970 Convention, does recognise the heritage of tribal and indigenous communities living in a Contracting State. Although the 1995 Convention puts the State where such heritage comes from in charge of such claims against another state and is of no use for heritage taken

The UNESCO Convention on the Diversity of Cultural Expressions (Intersentia, 2012), p. 201 at 214.

50 Article 11 of the Convention for the Safeguarding of the Intangible Cultural Heritage (2003).

51 R. Coombe and J. Turcotte, 'Indigenous cultural heritage in development and trade: perspectives from the dynamics of cultural heritage law and policy' in C.B. Graber, K. Kuprecht and J.C. Lai (eds.), *International Trade in Indigenous Cultural heritage: Legal and policy issues* (Edward Elgar, 2012), 272-305.

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by the state without the consent of the indigenous community, nevertheless it explicitly proclaims that the missing object 'will be returned' to the tribal or indigenous community to which it belongs. Provisions like this have to take a more central stage within UNESCO and have to be implemented.

There are also other areas where the compartmentalisation of the UNESCO protection of cultural heritage and the human rights protection to indigenous cultural heritage differ. One such area is the distinction in UNESCO documents between tangible and intangible culture, something that is alien to indigenous peoples and is avoided in the UNDRIP. Notable is the (2003) UNESCO *Convention for the Safeguarding of Intangible Cultural Heritage*, a convention adopted while the UNDRIP was at the end of its elaboration and several discussions were taking place in the UN on indigenous cultural heritage. In contrast, the WHC has been trying to incorporate cultural and natural elements in heritage. This is a big step forward and although there are still issues in the degree to which natural heritage is identified and protected, it is a positive development.

Another such area where fragmentation is obvious and detrimental to indigenous cultural heritage is the UNESCO concept of 'objects of outstanding value', which goes against the trend of associating heritage to everyday life but which also raises further issues about the entity that makes such judgments (and it is usually not the indigenous community who is the owner of such heritage). The (1972) Convention specifically protects objects of outstanding or monumental value, and thus excludes large parts of indigenous cultural heritage. Even the (1972) UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage* which uses cultural heritage, defines cultural heritage as 'individual artistic works, artefacts and handicrafts; objects of religious significance; music, folklore and design; archaeology and human remains; sacred and historical sites'. So, for example, it is debatable whether human skeletons could be included in the 'products of archaeological excavations and discoveries'. Also doubtful is the inclusion of oral history in the Convention; arguably, it can be protected as part of 'sound, photographic and cinematographic archives'. More generally, both the 1972 UNESCO Convention and the 1970 UNESCO Convention make no reference to spiritual or religious criteria that might apply in identifying areas of cultural heritage, although these are the main criteria for indigenous heritage. These omissions by the Convention leave many cultural objects open to the possibility of uncontrollable use and abuse. An illustrative example is unauthorised filmings of indigenous religious ceremonies and secret recordings of songs and rituals: the Convention protects photographs, films and sound recordings that have a historical value (hence the use of the term 'archive'), but it is arguable whether indigenous peoples have any protection against all unauthorised filmings and recordings.

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Intellectual Property Rights

In addition, the human rights standards on indigenous cultural heritage have not yet penetrated the international regime on intellectual property rights. The *Convention on Biological Diversity* (CBD), enforced in 1993, and the TRIPs agreement, enforced in 1995, take a very different approach to the human rights system outlined above, as they encourage the commercialisation of cultural heritage and traditional knowledge. Even though the CBD was the first convention that recognised the value of traditional knowledge, it also promoted the wider application of cultural heritage and traditional knowledge and made indigenous IP rights subject to national law. CBD, article 8j, reads

> Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices

Article 8j attracted invested commercial interests. Further, the TRIPs Agreement promoted a universal scheme that broadened the scope of intellectual property commercially understood that includes cultural heritage such as genetic resources, plant varieties and pharmaceuticals.[52]

Essentially the Intellectual Property Rights system views intellectual property rights, including indigenous peoples' cultural heritage rights, as individual rights and focuses on the financial benefits resulting from protecting such individual interests.[53] WIPO has so far encouraged the commercialisation of heritage, has promoted the individualistic understanding of heritage, and has adopted a way of looking at cultural heritage which is alien and detrimental to indigenous peoples.[54] This system clearly collides with the human rights standards recognised on indigenous cultural heritage. Unfortunately, the IP system has a much clearer enforcement mechanism than the human rights system. The conflict between the intellectual property system and the human rights

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52 Helfer 2004, Dutfield 2003.

53 J. Morijn, 'The place of cultural rights in the WTO system' in F. Francioni and M. Scheinin (eds.), *Cultural Human Rights* (Leiden: Martinus Nijhoff, 2007), p. 285.

54 R. Fan, 'Evolution of indigenous peoples' rights and indigenous knowledge debate' in C. Lennox and D. Short (eds.), *Handbook of Indigenous Peoples Rights* (Routledge, 2016) p. 237.

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standards has been identified by the then Sub-Commission on the Promotion and Protection of Human Rights even since 2000. In its resolution 2000/7, the Sub-Commission identified that the IPR system violates the right of everyone to enjoy the benefits of scientific progress, the right to food, to health and to self-determination. In 2001, the UN Committee on Economic, Social and Cultural Rights specifically recognised the conflict and noted that all parties are required to observe the human-rights based approach that 'focuses particularly on the needs of the most disadvantaged and marginalised individuals and communities' including indigenous peoples.[55] The Committee, but also subsequently the UN Special Rapporteur in the field of cultural rights, called upon all member states, UN organs and specialised agencies as well as international organisations to take effective measures to implement article 15 ICESCR. WIPO has not formally adopted the UNDRIP, which represents an interpretative tool of article 15 on the right to culture specifically for indigenous peoples. However, they are in the process of elaborating three draft treaties on genetic resources, traditional knowledge and folklore and traditional cultural expressions. These treaties, if adopted, will have a deep impact on bringing together the human rights standards on indigenous cultural heritage and IP rights.

3 Fragmentation within Human Rights Law

A third place where one can talk about fragmentation is within the international human rights law system, where traditional liberals emphasise the importance of individual rights to cultural expression, whereas scholars working on indigenous rights emphasise the importance of collective rights related to heritage. A major underpinning in the rights of artists is the protection of their right to seek inspiration from anywhere as well as the protection of the final product as one belonging to them. McRobie talks about the 'symbiotic relationship' between the author and the society/societies'[56] and notes that literature may 'occup[y] a peculiar position of both belonging to a particular group, and belonging to humanity as a whole'.[57] A lot of artists would say the same for other expressions. Article 15 of the *International Covenant on Economic, Social and Cultural Rights* protects the right of everyone to enjoy the benefits of scientific progress and its applications and to benefit from the moral and material interests resulting from scientific production. In the 1950 *Agreement*

55 UN CESCR 2006, para. 8.

56 H.K. McRobie, *Literary Freedom, A Cultural Right to Literature* (zero books, 2011), p. 50.

57 Ibid., 51.

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on the Importance of Educational, Scientific and Cultural Materials (*the Florence Agreement*), the Contracting States undertook 'that they will as far as possible 'contribute their common efforts to promote by every means the free circulation of educational, scientific and cultural material, and abolish or reduce any restrictions to that free circulation…'.[58] Yet, both these rights are at times in contrast with indigenous cultural heritage which does not have one creator, neither does it allow access to every single aspect of it.

The right to the common heritage of mankind is also one that is in conflict with the indigenous claims for respect to their specific hidden/sacred heritage. There is this widespread understanding that protecting the common heritage of mankind is way beyond any individual right or even group right. This does not sit well with indigenous claims for respect of their hidden/secret cultural sites. For example, in the Finnish side of Saamiland, there are documented sacred sites, with specific rules about who should approach the sites and how. There are sites used by the whole community, common and shared sacrificing places of multiple households or more personal sites that belonged to the families and individuals.[59] Yet, for some, complete control of indigenous peoples over their artefacts will result in a renewed tribalism and a further alienation of indigenous peoples from the mainstream as lack of access will mean lack of understanding and respect of non-indigenous populations towards the indigenous knowledge system and cultural heritage. Therefore, several authors have defended the need for openness, which exhibitions of indigenous heritage in international museums allegedly encourage. In contrast, Macmillan condemns the insistence of museums to keep indigenous artefacts in the name of the right to the common culture of mankind as 'a kind of appropriation of cultural heritage through a discourse that claims their heritage as the patrimony of humankind – some sort of global patrimony'.[60]

Certainly, such claims, claims of individual artists for the protection of their rights, claims of indigenous peoples and claims for access to the common heritage of mankind have to be developed consistently and coherently; and discussed together rather than in parallel ways. Blake rightly notes that 'much

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58 A. Vrdoljak, 'Self-Determination and Cultural Rights' in F. Francioni and M. Scheinin (eds.), *Cultural Human Rights* (Leiden: Martinus Nijhoff, 2008), 41.

59 A. Xanthaki, L. Heinämäki, A.-M. Magga, 'Indigenous Peoples' Customary Rights and Sacred Sites of Sámi' in L. Heinämäki and T. Herrmann (eds.), *Sacred Artic: Experiencing and Protecting Sacred Sites of Sámi and other Arctic Indigenous Peoples* (Springer, 2017), 65-82.

60 F. Macmillan, 'The Protection of Cultural Heritage: Common Heritage of Humankind, National Cultural "Patrimony" or Private Property?' (2013) 64(3) *Northern Ireland Legal Quarterly* 351.

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work is also needed to understand better the content and nature of these rights and the need to consider several distinct areas of international law if we wish to resolve these questions'.[61]

Conclusions

This chapter argues that the current recognition of indigenous cultural heritage must penetrate all areas of international law. Therefore, UNESCO documents must be interpreted in line with the provisions of the UN Declaration on the Rights of Indigenous Peoples. WIPO instruments must find a way to be in sync with the standards on indigenous cultural heritage as recently developed. It is imperative that the standards of the UN Declaration on the Rights of Indigenous Peoples are recognised and implemented by international law bodies. This will ensure a coherent development of the law but also, and most importantly, the effective protection of indigenous peoples and their cultural heritage.

This chapter also argues that the debate on indigenous cultural heritage needs to break the existing fragmentation in order to encourage looking at issues holistically. Discussions on the role of the elites, both state and community ones, in deciding which parts of the indigenous past are cultural heritage; and on the limited role of indigenous women and youth in the decision-making; as well as on the effects of complete control of communities over their heritage can only be welcome. The methodologies of the humanities on the concept, history and politics of cultural heritage are invaluable in adding context and depth when balancing conflicting rights and interests, but all discussions need to support and follow the indigenous viewpoints and voices on the issues.

61 J. Blake, *Exploring cultural rights and cultural diversity* (Institute of Art and the Law, 2014) 99-100.

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