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Indigenous Peoples, Intangible Cultural Heritage and Environmental Sustainability

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Abstract

This paper looks at what the concept of intangible cultural heritage means for indigenous peoples. It will consider how that heritage has been and continues to be appropriated, used without consent, commoditised or profaned. It will review some of the actions taken internationally and nationally to protect indigenous peoples' intangible cultural heritage and their effectiveness. By drawing on examples for Asia, it will argue that measures designed to protect the ICH of indigenous peoples contribute to the wider protection of the environment and to sustainability.

Keywords: Intangible cultural heritage, Indigenous peoples, Appropriation, Commodification, Environmental sustainability.

The UNESCO Convention for the safeguarding of the intangible cultural heritage defines intangible cultural heritage (ICH) as "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage".[1] The Convention identifies, among others, the following areas: oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; the performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship.

The UNESCO Convention was adopted in 2003 to protect intangible cultural heritage as part of an international commitment to maintain cultural diversity and distinctive forms of creative expression. It provides protection through a listing of oral and intangible heritage thereby recognizing its provenance and cultural value as well as by requiring member states to take measures to safeguard its intangible cultural heritage. The Convention

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1 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Art.2.

recognizes as ICH many hundreds of examples of oral and intangible heritage such as the “Frevo”, a traditional dance from Brazil’s north-east, carpet weaving in parts of Iran or the craft of pizza-making in Naples, Italy.

The international treaty was elaborated in the context of a globalization that is penetrating every part of the planet bringing with it uniformity and cultural homogeneity. The globalization of culture is aided by the increased economic penetration of corporations, the rapid expansion of a globalized social media as well as the movement of peoples across the world due to mass tourism, the search for economic and educational opportunities or to escape conflict, poverty or environmental breakdown. This globalized and globalizing culture is commercially successful and highly protected by intellectual property laws. It can also be hegemonic, absorbing, assimilating, ignoring, pushing aside or even eliminating the artistic expressions, languages, arts and social practices and other expressions of ICH of traditional producers. The UNESCO Convention addresses this imbalance and offers a means of protection for these traditional forms of ICH.

The protection of indigenous peoples’ cultures, cultural heritage, intangible cultural heritage, traditional knowledge and other manifestations of their culture is central to the political struggle that indigenous peoples have undertaken internationally over the last decades, culminating in 2007 with the adoption by the General Assembly of the United Nations of the Declaration on the Rights of Indigenous Peoples (UNDRIP). Indigenous peoples historically have been subjected to genocide, forced assimilation and loss of their lands and resources which is the basis of their culture and identity. The act of colonization served to destroy their self-determination and self-reliance as a people, dismantling their laws and practices and imposing alien languages, laws, practices and beliefs. Over time, these policies have led to the disappearance of countless cultures and a diverse cultural heritage. The legacy of these policies remains very present among many indigenous peoples today. For example, it was only in 2017 that the Prime Minister of Canada and the Catholic Church made a formal apology for the residential schools that were responsible for forcibly removing 150,000 indigenous children from their families and communities. The effect of this policy, which still taints the lives of countless indigenous peoples now, was aimed at preventing the transmission of ICH (language, traditions, songs, dances, etc) to future generations.

The issues related to ICH for indigenous peoples are not only related to the past, of course, but are part of present-day concerns. These issues include the commodification of indigenous culture, the theft of indigenous knowledge, science and know-how such as the medicinal properties of plants, the copying of arts, the lack of acknowledgement or benefit-sharing for ICH and the continuing language loss due to the imposition of a single national language. An important part of the efforts internationally to establish, recognize and

implement indigenous peoples' rights is to bring to a stop the appropriation of their cultural heritage (CH) and/or ICH by outsiders.

But what is distinct about indigenous peoples' understanding of cultural heritage? The UN Expert Mechanism on the Rights of Indigenous Peoples defines indigenous peoples' culture as follows: "Indigenous peoples' cultures include tangible and intangible manifestations of their ways of life, achievements and creativity, are an expression of their self-determination and of their spiritual and physical relationships with their lands, territories and resources. Indigenous culture is a holistic concept based on common material and spiritual values and includes distinctive manifestations in language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, festive events, music, sports and traditional games, behaviour, habits, tools, shelter, clothing, economic activities, morals, value systems, cosmovisions, laws, and activities such as hunting, fishing, trapping and gathering."

There are a number of points to note regarding this explanation of indigenous peoples' CH/ICH. The first concerns indigenous peoples' relationship to their ancestral lands and resources and the notion that culture and identity are rooted in their living spaces. This relationship is recognized in Article 25 of the UNDRIP.[2] To remove indigenous peoples from their ancestral lands is to separate them from the environments which provide cultural references and identity. Cultural heritage is also understood as an expression of the right to self-determination, a right also recognized in the UNDRIP.[3] From an indigenous perspective, tangible and intangible heritage are not separable from an indigenous people's capacity to determine its future development within a specific territory, its law and practices and the ways it organizes itself socially and politically.

In seeking to explain cultural heritage, Maori in New Zealand use the word *Taonga* which translates as "treasured things". *Taonga*, Maori explain, include "intangibles like spiritual values as well as tangible objects. They include the land, sea fronts, forests, lakes and rivers; also places and things associated with life and death. Although the degree of *tapu* (something sacred) varies, all these taonga touch the "heart", the Manawa pā (desires) and the ngakau pā (ends of the people)."[4]

Many indigenous cultures have shared understandings about the nature of the world they live in. The concept of "cosmovision" is common among indigenous peoples in Latin America and provides an overarching

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2 Article 25 reads: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

3 Article 3 reads: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

4 Briefing paper of the New Zealand Human Rights Commission to the UN Expert Mechanism on the Rights of Indigenous Peoples, March 2015 available at http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/CulturalHeritage/NewZealandHRC.pdf

understanding of the earth, nature and the cosmos. It recognizes the interconnectedness of the human world, nature and the spirit universe. Similarly, the concept of *pachamama* (literally "mother Earth") found also among indigenous peoples in the Andes region acknowledges that the earth is the birth place of all nature and needs to be treated with reverence. Traditions in different forms throughout the Andean region express themselves through rituals and practices that show respect for this natural benefactor. Two states, Bolivia and Ecuador, have even included concepts of indigenous cosmovision in their constitutions which seek harmony between man and nature.[5] The Saami of Finland describe cultural landscapes not as built landscapes like the Finish cultural landscape but coming across "first and foremost, in values, myths, place names and history related to the landscape as well as land use visible in the landscape".[6]

Maori in New Zealand, also have a world vision captured by the word *Matauranga* which is "the unique Māori way of viewing the world, encompassing both traditional knowledge and culture." The term encompasses "language, science and technology, laws, history, systems of property and value exchange and rituals and ceremonies. It includes forms of expression and art such as weaving, carving, tā moko (tattoos), haka (ancestral war cry) and whaikōrerero (formal speeches). More fundamentally, the term Mātauranga Māori was found to inherently encompass the Māori values of whanaungatanga (kinship) and kaitiakitanga (guardianship) - indigenous legal principles by which cultural heritage should be administered through iwi (Maori tribe) and hapū (extended family) who are obliged to nurture and care for taonga."[7] Notions of guardianship towards the nature are to be found among indigenous peoples around the world and constitute a central element of indigenous peoples' cultural heritage.

Generally cultural heritage is not seen as a property as such but rather a knowledge, practice or tradition held in trust by the community. This does not easily adapt itself to existing international legal instruments devised to protect intellectual property which seek to bring benefits – normally financial – to the inventors or creators of knowledge. Indigenous peoples' knowledge and practices are passed on through the generations with no distinct individual owner, a fact that characterises many of the traditional skills, creativity and intangible cultural heritage products. In indigenous societies ICH and traditional knowledge (TK) are considered a living body of knowledge and form a part of the people's cultural and spiritual identity. Furthermore, most indigenous

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5 For example, the 2008 Constitution of Ecuador includes in the preamble the wording: "Celebrating nature, the Pacha Mama (Mother Earth), of which we are a part and which is vital to our existence…"

6 Reply of the Saami Parliament of Finland to the request for information concerning the cultural heritage of indigenous people and their participation in political and public life, paper presented to the Expert Mechanism on the Rights of Indigenous Peoples, February 2015 available at http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/CulturalHeritage/SaamiParliamentFinland.pdf

7 Briefing paper cited n.4.

peoples do not have written forms or records of their CH/TK although many peoples have their own protocols and internal arrangements for their use within the community.

Indigenous peoples' cultures, practices, traditions, arts and sciences are unprotected and deemed to be in the public domain and free for all to use and add value to. One indigenous author compares the logic of the appropriation of indigenous peoples' cultures and cultural products to the colonial legal concept of *terra nullius*[8] determining indigenous peoples' lands as empty and unused because they were not managed and being made profitable.[9] As noted in a report by Finnish Saami, "[t]he Saami handicraft tradition is entirely unprotected from misuse. The tradition is exploited, and products, manufactured in countries of cheap imports, are sold as genuine Saami handicrafts. The Saami costume, which is the symbol of the Saami people's ethnicity, a part of the cultural heritage of all Saami people, a certain area and a certain family, is misused in many ways. Products resembling the Saami costume are manufactured in countries of cheap imports and are sold as souvenirs and in fancy costume stores."[10]

Notwithstanding the difficulties of protecting indigenous peoples' tangible and intangible cultural heritage, there exist a number of legal instruments that acknowledge their rights and interests. Apart from the 2003 UNESCO Convention, the rights of indigenous peoples to their CH/ICH are recognized in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[11] and ILO Convention 169 on tribal and indigenous peoples' rights.[12] The Convention on Biological Diversity refers specifically to the right of indigenous peoples to share the benefits of their traditional knowledge.[13] Other international legal instruments of relevance to indigenous peoples' CH/ICH include the World Trade Organization TRIPS agreement (Article 27.3 (b)) enabling patenting of seeds, plants and genetic materials and the FAO's International Treaty on Plant Genetic Resources for Food and Agriculture.[14] The Intergovernmental Committee of the World Intellectual Property Organization (WIPO) on traditional knowledge, genetic resources and folklore which is drafting a new legally binding instrument covers issues of indigenous peoples' CH/ICH. Although the available forms of protection – brands, copyright and patents - do not lend themselves to societies that do not traditionally extract profit from their

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8 Meaning 'land which is not susceptible to occupation or control (by States)'.

9 Mattias Ahren, "Indigenous creativity and the public domain – terra nullius revisited?" in Alexandra Xanthaki, Sanna Valkonen, Leena Heinamaki and Piia Nuorgam (eds), Indigenous cultural heritage: rights, debates and challenges, Brill Nijhoff 2017

10 Ibid note 6

11 UN Declaration on the Rights of Indigenous Peoples, articles 11 and 12

12 ILO Convention 169 on indigenous and tribal peoples, 1989, article 5

13 Convention on Biological Diversity particularly art 8 (j)

14 See for example article 9.1.

culture and knowledge. As noted by various authors, the protection of indigenous peoples' cultural heritage falls within a multitude of legal instruments.[15]

In addition to these legal instruments, the UN has also established specific mechanisms for addressing indigenous peoples' issues. These include the UN Special Rapporteur on the rights of indigenous peoples and the Expert Mechanism on the Rights of Indigenous Peoples both of which report to and advise the Human Rights Council, the UN's highest intergovernmental body on human rights. In addition, covering development, environment, culture and other areas, the Permanent Forum on Indigenous Issues advises the ECOSOC and through that body the UN system as a whole on ensuring coordination and cooperation on indigenous peoples. EMRIP has undertaken a study on indigenous peoples' cultural heritage.[16] The Permanent Forum on Indigenous Issues has undertaken a number of studies related to CH/ICH, most recently on indigenous peoples' languages, some of which are threatened with extinction.[17]

With global attention on maintaining environmental sustainability and combating the impacts of climate change, what role are indigenous peoples playing? Indigenous peoples are among the most affected by the impacts of climate change, over-exploitation of renewable and non-renewable resources, and environmental degradation. They live in regions particularly affected by climate change. Peoples of the Far North and Pacific Islanders are impacted by climate change threatening traditional economic activities. Forest-dwelling indigenous peoples have lost access to ancestral forests as a result of commercial logging, ranching and even conservation programmes. Indigenous peoples are also among those who have least contributed to environmental degradation, greenhouse gases and unsustainable consumption.

However, indigenous peoples are well placed to contribute to solutions associated with climate change and other environmental challenges. The traditional knowledge and practices of self-sustainability of these peoples have made them particularly resilient to outside changes to their environment. The contribution of indigenous peoples to environmental challenges is recognized internationally.[18] Although in practice, it is a continuing struggle to get governments to recognize the rights of indigenous peoples to their lands and resources which is increasingly recognized by expert opinion as an effective means of maintaining biodiversity, self-sustaining forest and other fragile eco-systems. As noted by UNESCO "traditional systems of governance and social

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[15] See for example the articles in Alexandra Xanthaki, Sanna Valkonen, Leena Heinamaki and Piia Nuorgam (eds), Indigenous cultural heritage: rights, debates and challenges, Brill Nijhoff 2017

[16] A/HRC/30/53

[17] In 2016, the PFII held an expert meeting on indigenous peoples lanuages – for the report see E/C.19/2016/10

[18] The Outcome Document of the World Conference on Indigenous Peoples, for example, recognizes "that the traditional knowledge, innovations and practices of indigenous peoples and local communities make an important contribution to the conservation and sustainable use of biodiversity". See UN document A/Res/69/2 of 25 September 2014

networks contribute to the ability to collectively respond to environmental change and thus heighten resilience".[19]

The potential contribution by indigenous peoples to addressing the challenge of climate change is nowhere as illustrative as in the management of tropical forests. These areas are vital as they store 20% of above-ground carbon. According to a study for the United Nations Framework Convention on Climate Change (UNFCC), over a third is in forests that are traditionally occupied by indigenous peoples, making their role in management critical. The report notes that for indigenous peoples to maintain tropical forests, prevent deforestation and the emission of massive amounts of CO2, it is necessary to recognize land titles and support efforts to mitigate the effects of climate change.[20] An estimated one-tenth of the total carbon found aboveground in the world's tropical forests is located in collective forestlands lacking formal recognition. This puts at risk a significant quantity of stored CO2 at risk from external deforestation and/or degradation pressures. [21]

Indigenous peoples do and can contribute to environmental sustainability through their knowledge and practices. To strengthen that capacity to contribute to environmental protection it is essential to recognize indigenous peoples' rights to self-determination and over their lands and resources. Environmental sustainability requires cooperation between mainstream science and technology and indigenous science, know-how and practice. Above all it requires a fundamental change in our relationship with nature.

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[19] Nakashima, D.J., Galloway McLean, K., Thulstrup, H.D., Ramos Castillo, A. and Rubis, J.T, Weathering Uncertainty: Traditional Knowledge for Climate Change Assessment and Adaptation, Paris, UNESCO, and Darwin, UNU, 2012, p.8

[20] "Tropical forests and indigenous peoples", a report prepared for the UN Framework Convention on Climate Change, Alianza Mesoamericana de Pueblos y Bosques, December 2015

[21] "Carbon Storage in Collective Lands**:** an updates analysis of indigenous peoples' and local communities contributions to climate change mitigation", Rights and Resources, November 2016