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Food as Culture: Framing, Legal Harmonization, and Transnational Law as a Regulatory Gateway

Lucas Lixinski*

1. Introduction

There are myriad ways for law to regulate culture and cultural heritage. Oftentimes, the law regulates culture directly, by creating rules, for instance, on the management of sites, or regulating archaeological exhibitions. Harmonizing these rules has long been on the agenda of international organizations, to facilitate cultural exchanges that can lead to better mutual appreciation of our shared humanity. These harmonizing efforts have happened through the International Institute for the Harmonization of Private Law (UNIDROIT),¹ and, less directly, via the United Nations Educational, Scientific, and Cultural Organization (UNESCO).

Despite its prominence in the field of regulating culture, UNESCO has seldom engaged directly with domestic law. It has adopted Model Laws only in a few areas, often in association with other organizations like the World Intellectual Property Organization (WIPO).² Or it has had indirect influence on domestic law via the implementation of international standards contained in its treaties, most of which require specific domestic legislation. Using this indirect route, UNESCO has been able to put in place a rather uniform language of cultural heritage management and practice around the world.³

Besides this direct way of regulating culture, there are other forms in which the law interacts with culture. Culture, and cultural heritage, intersects with multiple areas of the law, eliciting questions about framing or classification⁴ and the different values⁵ that each legal frameworks brings to the fore. One of these is food law.⁶ Food law is a relatively young area, which in most countries brings together a wide range of regulatory fields to influence the ways we produce, store, prepare and consume food. International organizations have, as we will discuss below, for decades attempted to harmonize food law, with limited success. Within food law, perhaps one of its outer frontiers is the idea of food as heritage, which

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¹ UNIDROIT, Convention on Stolen or Illegally Exported Cultural Objects [1995] 34 I.L.M. 1322.

² Tunis Model Law on Copyright for Developing Countries [UNESCO/WIPO, 1976].

³ L. Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination*, Oxford University Press, Oxford 2019, pp. 233–34.

⁴ N. Augustinos, 'Legal Classification Within and Beyond Heritage Law' in L. Lixinski and L. Morisset (eds), *Routledge Handbook of Heritage and the Law*, Routledge, forthcoming 2023.

⁵ D. Machado, 'What is Heritage For? Law, Heritage, and Value' in L. Lixinski and L. Morisset (eds), *Routledge Handbook of Heritage and the Law*, Routledge, forthcoming 2023.

⁶ I have rehearsed some of this argument, and the discussion in this piece, elsewhere. The present text updates the empirical data, and uses it to pursue an argument about harmonization of the law on culture that, even if somewhat related to the original article, pushes it in significant directions, since the original article was more of a mapping of the international landscape with an eye to framing effects, whereas here framing is pushed further as an entryway to a conversation about the possibilities of harmonization in domestic and transnational law. See, for the original article, L. Lixinski, 'Food as Heritage and Multi-Level International Legal Governance' (2018) 25 *International Journal of Cultural Property* 469.

implies its description and framing as a cultural phenomenon, rather than a merely biological one.

In other words, the majority of encounters between food and the legal system think of food through its biological existence, and it being necessary for human biological existence. In international law, food as biology invokes regimes like international environmental law, international transport law, international human rights law, international trade law, and international intellectual property law.⁷ They focus on matters like biodiversity, biosafety, the right to adequate standards of living, phytosanitary standards for food imports and exports, and the protection of plant varieties and genetically modified organisms, respectively, and to name but a few aspects. In these interactions, much like in other areas of international legal governance, humanity's biological existence (and the requirements thereto) take precedence over cultural dimensions.⁸

Among these multiple regimes and ways of legally framing food, and our relationship with it, cultural heritage law fits uncomfortably (if at all), as it has relatively little to say about food as biology, rather focusing on food as a cultural human experience. The connection between food and heritage is thus less than self-evident, and one must query why it might be worth focusing on food in a collection of papers focused on the harmonization of law on culture. There are three reasons, in my view, for this connection.

First, considering that these are two areas in which there are pushes for increased harmonization, it seems worthwhile to examine this intersection. Admittedly, harmonization is still fairly incipient in both fields, but it is more advanced in food law, meaning there may be useful lessons to be drawn for the field of culture more generally. Second, thinking about this intersection allows us to imagine the effects of framing from multiple perspectives. As further discussed below, food law is a field in which food gets regulated by multiple different legal fields, from different perspectives. Cultural heritage law, despite being a more consolidated field, has thus far failed to make as many incursions in the area of harmonization. Therefore, it may be that thinking about different framings of the law of culture, like what happens to food law, might be advantageous to advance the harmonization of the law of culture. Lastly, both food law and cultural heritage law are fields in which international or transnational dimensions are prominent not only in how to imagine legal possibilities, but also in driving domestic law. Therefore, they share this key feature which makes lessons more easily transplantable from one area to the other, despite the apparent incongruity of the relationship.

On the basis of this connection, it is also worth appreciating that the body of international heritage law has engaged with food, and increasingly so. The early experiences of cultural heritage with food have to do with the 'Globally Important

⁷ See e.g. T. Broude, 'A Diet Too Far? Intangible Cultural Heritage, Cultural Diversity, and Culinary Practices' in I. Calboli and S. Radavan (eds), *Protecting and Promoting Diversity with Intellectual Property Law*, Cambridge University Press, Cambridge 2015, pp. 472–93.

⁸ A notable parallel is the international law of genocide, which has excluded cultural aspects in the drafting of the 1948 Genocide Convention. The stakes are significantly lower when speaking of food, but the idea is the same. For a discussion of how genocide law tends to exclude culture, see E. Novic, *The Concept of Cultural Genocide: An International Law Perspective*, Oxford University Press, Oxford 2016.

Agricultural Heritage Systems' (GIAHS) initiative, discussed in more detail below. For now, suffices to say that this initiative focused primarily on agricultural landscapes as tangible heritage worth protecting, in their convergence between culture and nature. Here, like in the other international legal regimes, the connection to nature and biology was key.

But food has also been framed as a primarily cultural phenomenon. Under the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (ICHC),⁹ a number of food manifestations have been listed as representative of the intangible heritage of humanity. Under this treaty, food is entirely a cultural phenomenon, and it warrants rethinking the possible relationships between law and food. I argue that food as Intangible Cultural Heritage (ICH) opens important conversations about the limits of the law on culture, and triggers us to think creatively about harmonization strategies. These harmonization strategies are most apparent through the different regulatory frames within which food appears, and the different values that each frame foregrounds.

In order to support this thesis, I show below how multiple regimes for food, because they pursue multiple different goals and differently tailored regulatory means, create the possibility of conflicting outcomes when it comes to safeguarding food and practices around it. In practice, though, no major clashes arise, in no small part because cultural heritage legal regimes are insulated from other regulatory engagements with food. In other words, the lesson is that harmonization efforts can more boldly rely on multiple regulatory frames.

Methodologically, in order to make my case I will focus on the Mexican Cuisine, added to the Representative List of the Intangible Heritage of Humanity under the ICHC.¹⁰ I chose the Mexican cuisine because it is one of the early inscriptions of food in the ICHC lists. Further, the inscription's emphasis on best food safeguarding practices (discussed below) helps unpack the way food connects to broader cultural contexts. Finally, there is a strong element of Indigenous heritage in this manifestation, which adds another layer of thinking about multilevel food governance and food as a cultural manifestation, both of which are relevant in considering the possibilities of harmonization. The Indigenous connection particularly adds another possible meaning of the relationship between law and culture, one that is much more directly grounded on the core of identity than heritage law often allows.

In what follows, I will first briefly introduce food as intangible heritage more generally, and the governance system under the ICHC, with a particular focus on the food heritage in the ICHC Representative List, and the Mexican cuisine in particular. After that, I will focus on the possibilities of harmonizing food law as a pathway to discuss the different ways in which food is framed as a regulatory object. This discussion will also underscore the importance of thinking about food law in transnational terms, which sets up the following section, where I consider a number of other international bodies who have regulated elements of Mexican

⁹ Convention for Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (ICHC).

¹⁰ UNESCO Intangible Cultural Heritage, *Traditional Mexican cuisine - ancestral, ongoing community culture, the Michoacán paradigm*, Nomination file No. 00400, <https://ich.unesco.org/en/RL/traditional-mexican-cuisine-ancestral-ongoing-community-culture-the-michoacan-paradigm-00400>.

cuisine highlighted by the nomination file, like the United Nations Food and Agricultural Organization (FAO), the Convention on Biological Diversity (CBD),¹¹ and the international human rights law angle. The discussion on human rights will cover the two covenants, the International Covenant on Civil and Political Rights (ICCPR)¹² and the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹³ as well as the Indigenous Peoples' rights perspective through the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹⁴ Despite the much more powerful possibilities of regional human rights law applicable to Mexico (the American Declaration on the Rights of Indigenous Peoples¹⁵ and the American Convention on Human Rights,¹⁶ in particular the latter with its provision requiring domestic law to be enacted to comply with the rights in the treaty and as interpreted by the Inter-American Commission and Court),¹⁷ I will focus on international frames of broader application so as to make a broader case about the possibilities of bringing food into the conversation about the harmonization of the law of culture and cultural heritage.

2. Food as Culture

Seeing food as connected to culture reminds us that its regulation is not just a matter of biological survival, it is also a matter of safeguarding social structures that allow for the optimal production, circulation, and consumption of food. Further, what the connection to food does for culture is remind us that culture, and its safeguarding, is not just about the exceptional, the unique, and the high culture; it is also about the beauty of the everyday, the mundane that is essential, the low culture that we live and breathe and makes us living and thriving societies. Living culture is the quintessential definition of intangible heritage, and the regime for safeguarding intangible heritage, particularly in relation to food, deserves closer attention.

The ICHC is the key international instrument for the safeguarding of intangible heritage. While a full examination of its mechanisms is outside the scope of this

¹¹ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 69.

¹² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3. Parties as of September 2014: 162.

¹⁴ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), A/61/295 (adopted 13 December 2007).

¹⁵ American Declaration on the Rights of Indigenous Peoples (ADRIP), AG/RES. 2888 (XLVI-O/16) (adopted at the third plenary session, held on 15 June 2016).

¹⁶ American Convention on Human Rights, 22 November 1969, S. Treaty Doc. No. 95-21; 1144 UNTS 123; OASTS No. 36; 9 ILM. 99 (1970).

¹⁷ *Ibid.*, Art. 2. The doctrine that requires the jurisprudence of the organs of the system to be taken into account in implementing international human rights obligations is known as conventionality control ('control de convencionalidad'). For an in-depth discussion, see E.N.R. Vázquez, *La Doctrina del Control de Convencionalidad: Del Pluralismo Normativo a la Trascendencia de las Decisiones de la Corte Interamericana de Derechos Humanos*, Porrúa, 2021.

piece,¹⁸ it is worthwhile stressing the status of the ICHC vis-à-vis the rest of international heritage law, before discussing food as heritage under the ICHC.

The relationship between the ICHC and the rest of international law operates both on a legal-formalistic level, and on a substantive/heritage management level. With respect to the latter, the ICHC, alongside the very notion of ICH, is meant to overhaul the way we think about heritage, what it is, why it needs safeguarding, and for whom. ICH is meant to be a holistic concept, in which the material remnants of the past matter less as ends in themselves, and the key to heritage is people's connections to culture, and their practice thereof. In other words, ICH is living culture. Food is in this sense a perfect candidate, as it is lived and experienced every day. Further, the ICHC promotes heritage, at least nominally, for the benefit of communities, rather than States.¹⁹ Promoting heritage for communities means relinquishing control over heritage and its meanings, which allows for ICH to be 'constantly recreated', a requirement in its legal definition in Article 2.1 of the ICHC.

The ICHC, in addition to defining ICH, also sets out the basic parameters of the legal-formalistic relationship between the ICHC and the rest of international heritage law, as well as other parts of international law. Article 3 determines that:

Article 3 – Relationship to other international instruments

Nothing in this Convention may be interpreted as:

(a) altering the status or diminishing the level of protection under the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage of **World Heritage properties with which an item of the intangible cultural heritage is directly associated**; or

(b) affecting the rights and obligations of States Parties deriving from any international instrument relating to **intellectual property rights** or to the **use of biological and ecological resources** to which they are parties. (emphasis added)

From a broader perspective, the relationship to the 1972 Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention or WHC) in Article 3(a) means allowing intangible elements to be taken into account in the definition of World Heritage Sites, which in the food context is key when thinking about the GIAHS initiative.²⁰ But more important for our purposes is Article 3(b), which sets out the relationship between the ICHC and other domains of international law, which are particularly important to the international regulation of food (at least if defined as nature).²¹ Therefore, thinking about food as heritage does not in any way preclude the regulatory action of other instruments. But food as heritage has specific content, which deserves some scrutiny before getting to the specific case of the Mexican cuisine.

¹⁸ But see L. Lixinski, *Intangible Cultural Heritage in International Law*, Oxford University Press, Oxford 2013.

¹⁹ Even if it falls short in actuality; see *ibid.*

²⁰ For a commentary, see L. Lixinski, 'Article 3(a): Relationship to Other International Heritage Instruments' in J. Blake and L. Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, Oxford University Press, Oxford 2020, pp. 100–16.

²¹ For a commentary, see *ibid.*, pp. 117–33.

When thinking about food as intangible cultural heritage, a number of food practices have been added to the Representative List of the Intangible Cultural Heritage of Humanity (Article 16 ICHC),²² and one has been added as an example of best safeguarding practice (Article 18 ICHC).²³ These food practices, importantly, cover different domains of ICH, which are described thus in Article 2.2 of the ICHC:²⁴

2. The ‘intangible cultural heritage’ ... is manifested inter alia in the following domains:
 - (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
 - (b) performing arts;
 - (c) social practices, rituals and festive events;
 - (d) knowledge and practices concerning nature and the universe;
 - (e) traditional craftsmanship.

There are at least twenty-one culinary practices listed as ICH, with over two-thirds of those having been listed since 2016, and the table below summarizes their fit with the domains of intangible heritage:

[Insert Table 1]

The table above shows that food practices are nearly always listed as ‘social practices, rituals and festive events’, emphasizing the fact that, more than crops, food matters as a means of bringing communities together. The emphasis on social rituals seems to be more open-ended in terms of how food is practiced, as opposed to craftsmanship (discussed below) that may refer just to preparation. Social rituals (collective) are emphasized instead of craftsmanship (more individualized) across most nominations. It is also worth noting that craftsmanship, sparsely used in the early nominations, is now almost a *de rigueur* domain for food heritage, which can be read as initially de-emphasizing the role of the people preparing the food, and rather focus on the act of eating. Not noting craftsmanship is at odds with both nominations of Kimchi, considering both countries have domestic law on ICH that emphasizes the role of master craftspeople, and their status as ‘living human treasures.’

Further, food practices are very often also listed as ‘knowledge and practices concerning **nature** and the universe’ (emphasis added), even if other domains are also mentioned in most cases. The fact that nature is part of this domain shows the relationship between the cultural and biological elements of food, which is consistent with other engagements between food and international instruments.

²² For a commentary, see F. Lenzerini, ‘Articles 16-17: Listing Intangible Cultural Heritage’ in J. Blake and L. Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, Oxford University Press, Oxford 2020, pp. 306–28.

²³ For a commentary, see H. Schreiber, ‘Article 18: Programmes, Projects and Activities for the Safeguarding of the Intangible Cultural Heritage’ in J. Blake and L. Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, Oxford University Press, Oxford 2020, pp. 329–48.

²⁴ For a commentary, see B. Ubertazzi, ‘Art.2(2) Manifesting Intangible Cultural Heritage’ in J. Blake and L. Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, Oxford University Press, Oxford 2020, pp. 58–80.

It is also worth noting that one of the latest nominations, the Singaporean Hawker culture, is the only one to try and render ‘food heritage’ an autonomous domain, instead of relying on the pre-existing domains. This move may indicate more comfort with the idea of food now being a normalized form of intangible heritage, and worth of distinctive recognition as such, given the growth of nominations in this area.

The importance of recognition of the culinary practice as ICH is acknowledged in all of the nominations. The French gastronomic meal speaks more of the importance of the listing for the recognition of the category of ICH in France, as opposed to built or World heritage (therefore, food helps the ICHC), but the other nominations speak of the benefits that the ICHC can bring to the safeguarding of the food practices themselves (thus, the ICHC helps food).

Importantly, many of the nominations of food heritage frame food as a cultural phenomenon, and nothing else. The Mediterranean diet, the Mexican cuisine, and North Korea’s Kimchi nomination are notable exceptions within the representative list, in acknowledging the engagement of food as ICH and other domains. The Mediterranean diet interacts with health regimes, where the Mediterranean diet first received international attention,²⁵ as well as biodiversity. In fact, the attention given to the Mediterranean diet by the World Health Organization (WHO) and the FAO is a badge of honor in the nomination file. The Mexican cuisine, in turn, puts emphasis on the importance of this ICH for biodiversity and environmentalism more generally, including Mexico’s status as a mega-biodiverse nation, from where the rich culinary tradition stems. North Korea’s Kimchi nomination also stresses the engagement of food safety and other scientific bodies related to food in the ICH process.

Further, much stress is laid on agricultural practices in the Kenyan best safeguarding practices nomination, which discusses extensively the work of food as heritage in enabling food security in the country by emphasizing the importance of local crops not as ‘backwards’ foods, but rather as points of local pride, and important pieces in the food sovereignty of the nation.²⁶

In its 2020 iteration (unchanged since at least 2016), the Operational Directives for the Implementation of the ICHC considers food security to be part of ‘inclusive social development’ under the ICHC.²⁷ More specifically, the Directives urge states to

ensure the recognition of, respect for and enhancement of those farming, fishing, hunting, pastoral, food-gathering, food preparation and food preservation knowledge and practices, including their related rituals and beliefs, that contribute to food security and adequate nutrition and that

²⁵ A.J.M. Silva, *Diaita Nostra: Patrimoines Alimentaires, Identité et Gouvernamentalité en Méditerranée*, Universidade de Évora, Évora 2016.

²⁶ On the discussion of the multiple political charges of the terms ‘food security’ and ‘food sovereignty’, in a transnational legal context, see M. Canfield, ‘Transnational Food Law’ in P. Zumbansen (ed), *The Oxford Handbook of Transnational Law*, Oxford University Press, 2021.

²⁷ UNESCO, Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage, 2020, para. 177.

are recognized by communities, groups and, in some cases, individuals as part of their intangible cultural heritage.²⁸

In so doing, the Directives engage with legal measures in other areas related to food security, and, while they do not specifically mention international law, the connection may be implied.²⁹ Thus, the ICHC's perspective on food can be adjusted to other legal norms also affecting food, which are discussed below.

In these nominations, and therefore in the ICHC system, food is emphasized as a means of thinking about the universe, and as a social ritual and practice around nature. At least in theory, the ICHC regime allows communities themselves to speak on behalf of food, even if their views are filtered by states. The law of these States comes first in defining and authorizing food. Regulatorily, thus, food can be heritage, but only inasmuch as it serves some broader social and cultural context. Food is thus not the central element of the regime. A closer analysis of the Mexican cuisine can help unpack some of these ideas, and bring others to the fore, to set up the analysis of the place of food in other international legal frameworks.

2.1. Mexican Cuisine at UNESCO

As indicated above, traditional Mexican cuisine was added to the Representative List of ICH in 2010. This section engages in a thick description of the element, based on a close reading of the nomination file and associated materials, so as to place Mexican cuisine in the context of food heritage, and to tease out other regulatory tensions arising from the different interests and objectives articulated on the basis of the nomination.

The nomination focuses primarily on '[c]ollectives of cooks and other practitioners devoted to raising crops and rescuing traditional cuisine.' Specifically, the nomination focuses on the Mexican cuisine in Michoacán, one of the states in the Mexican federation, or at least the official title of the nomination refers to the 'Michoacán paradigm', even if a number of other states in Mexico are also mentioned.

In many respects, the nomination file focuses more on the safeguarding of traditional cuisine than on the cuisine itself, which is in line with the idea of ICH not as the product of a cultural process, but the cultural process itself. That said, the emphasis on the 'safeguarding paradigm based on the participation of groups of collectives of cooks, producers and other practitioners', which is to be applied throughout the country, makes the nomination feel more like a candidate for the inventory of best safeguarding practices (Article 18 ICHC), than one for the Representative List.³⁰ The element is in fact characterized as 'the rescue model', in the sense of being the model to revitalize traditional Mexican cuisine around the country, based on a pilot in certain pockets in the state of Michoacán.

Traditional cuisine is identified as falling in the domain of practices about nature and the universe, as indicated above, on the basis of a 'symbiosis among cookery, cosmogony and environment', highlighting the ritualization and

²⁸ *Ibid.*, para. 178.

²⁹ *Ibid.*, para. 178.a-c.

³⁰ Noting that, as discussed above, only in 2021 was the first food heritage (from Kenya) added to the best safeguarding practices inventory.

Indigenous aspects of the cultural practice. But the cuisine is also described as being based on certain staples (corn, beans and chili), in addition to being highly ritualized across Mexican history (starting from Mesoamerican civilizations). The connection to Indigenous peoples is important in articulating the historical continuity of the practice, as well as the connection to a sense of community that is important under the definition of intangible heritage in the ICHC.

The entire food chain is emphasized here, ‘from planting and harvesting to cooking and eating’, as well as the collective participation of peoples. Importantly, here, food is culturally displayed as a collective endeavor of the community, rather than the individual accomplishment of certain persons. In this respect, it also falls squarely within the normative preferences of the ICHC. A tension in this collectivization is the appeal to the ‘authenticity’ of methods of preparation of traditional Mexican cuisine. The notion of authenticity is foreign to the ICHC system, but has been imported through other heritage management practices. Authenticity, while attributing value to heritage, is essentially a means of controlling it, and one that can be easily manipulated against other stakeholders. In the context of ICH, which is conceptually living heritage, authenticity can also have the effect of freezing it in time and preventing its evolution.³¹ In the context of the Mexican cuisine, authenticity is meant to establish historical roots, and thus attribute value to the heritage. But overtly relying on it can bring about negative consequences in separating communities from their own heritage.³²

Beyond the preparation methods, equally important (if not more so) is the environmental and biodiversity dimension of Mexican cuisine. The focus on biological diversity, in the form of ‘autochthonous ingredients domesticated thousands of years ago’, makes the food similarly ‘authentic’, while showcasing the unifying threads of the food practices and their connection to Mexican cultural identity. Importantly, it also reflects Mexico’s status as a mega biodiverse country, and its connection to Indigenous peoples. Indigenous peoples in Mexico in fact connect corn, one of the basic staples, to the origins of humankind, and consider it ‘the vehicle for interaction between people and the deities, as well as with the rest of the community.’ Therefore, the staple is both biologically and culturally significant, the latter through its symbolism.

In terms of the purposes of the nomination, it seems that one of the key objectives is developmental. Using heritage as a tool to promote development is not an uncommon practice, particularly in the Americas.³³ And here different types of development are involved in the safeguarding process of traditional Mexican cuisine. On a more superficial level, the nomination speaks of economic development through the reactivation of production chains, which create more jobs, improve training, lead to growth in cultural tourism through inclusion of traditional cuisine in tourism routes, ‘and, on the whole, better quality of life to the communities.’ The idea of promoting greater tourism and economic input from

³¹ For a critique, see L. Lixinski, ‘A Tale of Two Heritages: Claims of Ownership over Intangible Cultural Heritage and the Myth of “Authenticity”’ (2014) 2 *Transnational Dispute Management* 11.

³² For this critique, see L. Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination*, Oxford University Press, Oxford 2019, pp. 20–21.

³³ L. Lixinski, ‘Central and South America’ in F. Francioni and A.F. Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, 2020, pp. 878–907.

the outside is also common to the Mediterranean diet nomination, which in many respects has been taken over by tourism industry interests.³⁴

Additionally, the nomination file also speaks of food security for Mexico, deeply anchored in its ancestral history, and environmental sustainability. Thus, at least in this respect, the international process of heritage listing is used as an anti-globalization move, promoting domestic products and outputs against foreign influences. The same can be said of the French gastronomic meal, and the Japanese Washoku, the latter stressing the importance of relying on traditional culinary traditions for public health reasons as well (growing obesity among the population).

The safeguarding of traditional Mexican cuisine is proposed principally through education in the processes of production of food, through courses and demonstrations around the country. After cementing safeguarding in Michoacán, safeguarding plans include establishing other ‘culinary hubs’ around the country, as well as the valuing of local cuisines in specific states where identity values are more at risk of disappearing. Cook-centered initiatives are key, particularly locally-based cooks in the multiple communities. Here, women are the focus, and that is the main gendered dimension of this heritage. Women are essential participants in the preparation of food, and in the transmission of the knowledge across generations. They are the principal individuals whose free, prior, and informed consent is offered to support the nomination.

Mexican cuisine emphasizes the connection between food governance and Indigeneity, environmentalism, nationalism, and development. The developmental dimension is particularly acute in the Mexican nomination, unlike in other food ICH manifestations. Food is decidedly, and quintessentially, a way of thinking about the universe now and historically. Communities are the key practitioners, but as selected and filtered by the state.

The connection to agriculture is also central in the nomination of Mexican cuisine, more so than in most other food manifestations of ICH on the Representative List. Traditional Mexican cuisine also shows how issues of control over food are articulated, particularly through the language of food security. The language of food security is central to many of the international regulatory efforts around food, even if they focus more on biological elements, rather than cultural ones. It has been central to articulating transnational efforts around food law, and particularly the harmonization of legal frameworks.

3. Harmonization of Food Law

As indicated above, there have been pushes to harmonize food law around the world, on the basis of transnational and public international legal structures in particular. The FAO has been a welcoming institutional umbrella within which to develop many of these ideas, which can be helpful to think about how to harmonize the law of culture as well. Further, there are useful insights to be gained from how food is leveraged primarily as an international or transnational concern in harmonization efforts.

³⁴ A.J.M. Silva, *Diaita Nostra: Patrimoines Alimentaires, Identité et Gouvernamentalité en Méditerranée*, Universidade de Évora, Évora 2016.

The FAO has long been concerned with the legal regulation of food, and routinely collects domestic statutes on several aspects of food law.³⁵ Food law is a growing field of analysis,³⁶ and the FAO has been interested in its harmonization since at least the mid-1970s.³⁷ While these efforts have initially happened at the behest of European nations, and therefore are intertwined with the European integration process, the FAO has also proceeded to investigate general principles, adding broader foreign law and international law perspectives.³⁸ Throughout these efforts, the framing of food law as intersecting with criminal law, civil liability law, consumer protection law, administrative law, intellectual property law, and trade law, among other fields, has constantly been considered a source of strength for the subject, but also a reminder of the pervasiveness of food and the challenges of coherent regulatory action.³⁹

The same tone is largely repeated in FAO's efforts to not only map the field, but progress the mapping to suggest the harmonization of food law through model laws.⁴⁰ This study, it is worth noting, makes sparse references to culture, and, when they do happen, food is connected to culture mostly in relation to the right to food in the ICESCR, as a means to discuss culturally appropriate nutrition.⁴¹ Food as culture is not really factored into harmonization efforts. Nonetheless, the effort of harmonizing food law gives us some insight into how to think about harmonization of areas that, like the law of culture, also connect with multiple established legal fields.

Food law, in the FAO's view, intersects with fields as diverse as areas of regulation specifically addressing food, including legislation on particular kinds of food such as foods of animal origin, novel foods, 'functional' foods, street foods and 'organic' foods. Also falling into this category is legislation regulating harmful substances in food and feed including food additives, residues of pesticides and veterinary drugs and contaminants. Next [are] rules on how food is prepared, treated and sold, including legislation on food hygiene, food irradiation and food labelling. Finally, [there are] legal provisions that are not directly targeted at food but that nonetheless affect the food sector, such as consumer protection, public health, water, land and environment.⁴²

³⁵ FAO, FAOLex Database, <https://www.fao.org/faolex/en/>.

³⁶ See, e.g., G. Steier and K.K. Patel (eds), *International Food Law and Policy*, Springer, Cham 2016, (collecting case studies on domestic law from a wide range of countries, in addition to European Union law and general topics, across 54 chapters).

³⁷ FAO, *Normes Alimentaires et Droits Nationaux – Actes du Premier Congrès International de l'Association Européenne pour le Droit de l'Alimentation tenu à Parme (Italie) les 26 et 27 septembre 1975*, FAO, Rome 1976.

³⁸ A. Gérard, *An Outline of Food Law (Structure, Principles, Main Provisions) – FAO Legislative Study no. 7*, FAO, 1975, 2nd printing 1983.

³⁹ *Ibid.*

⁴⁰ J. Vapnek and M. Spreij, *Perspectives and Guidelines on Food Legislation, With a New Model Food Law – FAO Legislative Study no. 87*, FAO, Rome 2005.

⁴¹ *Ibid.*, p. 124.

⁴² *Ibid.*, p. 69.

This short paragraph gives a sense of the range of legal interests at stake in relation to food, and the intersections with multiple regulatory frameworks. It also underscores how food as culture does not often factor into the conversation with FAO, making UNESCO and the ICHC regime somewhat of an outlier. One possible exception could have been the regulation of street foods, which intersects with the idea of food as a social practice and ritual that pervades heritage listings of food (and particularly practices like the Singaporean Hawker culture and Mexican cuisine). Nonetheless, the FAO's efforts focus instead on health and safety concerns, control of ingredients, licensing of activity, and patchy regulation mostly by very local laws (usually excluded from national legislative frameworks). Further, street food is framed as largely an urban phenomenon, which under-appreciates the role of food in connecting growers, cooks, and consumers through the food value chain.⁴³

Despite this disconnect, the FAO's report on harmonization is still useful in acknowledging the effects of framing, and background norms, in affecting the regulation of food.⁴⁴ And it acknowledges the importance of the local level in enacting, implementing, and enforcing food law.⁴⁵ This nod towards subsidiarity is also important in the regulation of culture, where the normal assumption is that local levels of government are best placed to regulate heritage (an assumption not always borne out empirically, however).⁴⁶ Decentralization serves many useful purposes:

many countries have embraced the decentralization of government responsibilities and the devolution of powers to provincial or lower levels of government. The purpose is to ensure public participation in decision-making and to promote more effective management of resources, since local authorities are generally more familiar with their regulatory needs and staffing and other resource constraints. In practice, the existence of a decentralization policy or decentralization law might mean that in any new legislative framework for food, local authorities might be given the power to regulate on certain defined issues, to carry out some inspections and to issue licences to street food vendors or other food businesses, while the central authority might retain only a broad policymaking role. The decentralization policy might also mean that in new legislation, the regulating power remains with the central administration while enforcement of the food legislation is entrusted to local authorities.⁴⁷

Therefore, the local level is important for how regulatory frameworks can reconcile different values and priorities. National legislative practices and

⁴³ Ibid., pp. 76–78.

⁴⁴ Ibid., p. 105.

⁴⁵ Ibid., p. 159.

⁴⁶ L. Lixinski, 'Culture' in R. Grote, F. Lachenmann and R. Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford University Press, Oxford 2019.

⁴⁷ J. Vapnek and M. Spreij, *Perspectives and Guidelines on Food Legislation, With a New Model Food Law – FAO Legislative Study no. 87*, FAO, Rome 2005, p.159.

traditions are also relevant in harmonization efforts, with the assumption that national law should be ‘kept as basic as possible, with the details and specific requirements confined to the subsidiary instruments, including regulations, rules, schedules and forms.’⁴⁸

The key lessons for harmonizing the law of culture and cultural heritage are, therefore: to engage local authorities and decentralized power, particularly as a pathway to engage communities and other actors, a growing call within cultural heritage law;⁴⁹ and to acknowledge the intersection of multiple fields of the law and the framing effects of these different fields. The remainder of this contribution will examine this latter lesson in further depth and in how it plays out in practice, but, before getting to it, it is useful to make a case for thinking about framing effects for harmonization purposes on the basis of international or transnational law, as opposed to more traditional comparative techniques.

The FAO itself has long acknowledged the importance of international law to frame harmonization efforts, as discussed above. A focus on international and transnational frameworks allows us to better investigate the ways in which overarching paradigms inform regulatory efforts. In the case of food law, as Canfield has argued, ‘two paradigms can be identified as antagonistic poles along which the range of regulatory projects can be plotted: a “productivist” paradigm and a “food sovereignty” paradigm.’⁵⁰ Fragmented regulatory spaces where multiple paradigms compete for dominance are important spaces for the political struggle of global governance,⁵¹ and remind us that these struggles, unless resolved, render any harmonization efforts futile.

The productivist paradigm focuses on the idea that more food needs to be produced to meet the needs of the population, focusing primarily therefore on the biological aspects of food production, largely exempt from social and cultural forces. It is also a liberal-internationalist paradigm, focusing on the interests of ‘powerful actors including traditional agro-exporting states, multinational corporations, powerful global philanthropies (such as the Gates Foundation), and networks of large-scale commercial farmers.’⁵² It echoes in many respects the myopic ‘internationalist’ approach to cultural heritage law, which tends to exclude the relationships that render culture and cultural heritage in fact worth safeguarding.⁵³ The effect of this approach, from a harmonization perspective, is to separate that which is regulated from the population that creates and keeps that regulatory object alive and relevant.

The second paradigm in food law is challenged by social movements on the basis of food sovereignty, arguing that the challenges associated with food are not about its production, but rather its distribution. Therefore, what is needed is a

⁴⁸ Ibid., p. 180.

⁴⁹ L. Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination*, Oxford University Press, Oxford 2019.

⁵⁰ M. Canfield, ‘Transnational Food Law’ in P. Zumbansen (ed), *The Oxford Handbook of Transnational Law*, Oxford University Press, 2021, p. 282.

⁵¹ Ibid., p. 281.

⁵² Ibid., p. 282.

⁵³ This approach is famously espoused by John Henry Merryman’s seminal article. J.H. Merryman, ‘Two Ways of Thinking About Cultural Property’ (1986) 80(4) *American Journal of International Law* 831. For a critique, see L. Lixinski, ‘A Third Way of Thinking About Cultural Property’ (2019) 44(2) *Brooklyn Journal of International Law* 563.

closer connection to social actors on the ground, promoting ‘secure land tenure systems and equitable access to land, and democratic processes based on human rights norms like participation, accountability, nondiscrimination, and transparency.’⁵⁴ This paradigm echoes discussions about the centrality of communities in the regulation of cultural heritage, and the importance of understanding heritage as a set of relationships, rather than simply a thing. It is an important lesson when thinking about harmonization, and one that would not be available unless international and transnational legal frameworks were scrutinized.

Therefore, bringing together an international or transnational outlook with insights on framing effects helps us better understand the potentials and pitfalls of regulating food as heritage across different legal frameworks. We move next to this discussion in further detail.

4. Transnational and International Legal Frames of Food as Culture

Having established the importance of different transnational and international legal ways of imagining the relationships between food and culture, it is worth focusing on the different effects of existing frames for how we imagine the possibilities of regulating culture more broadly. This section will investigate multiple frames from the perspective of the institutional umbrellas within which they develop, starting with the FAO in some more detail, before adding biodiversity and human rights elements to our discussion of food as culture.

4.1. FAO: Food as a Regulatory Object

The FAO was created in 1945 as a UN specialized agency. Its key objective is ‘achieving food security for all.’⁵⁵ According to the FAO Constitution, which predates the food security terminology, this key objective translates as:

- raising levels of nutrition and standards of living of the peoples under their respective jurisdictions;
- securing improvements in the efficiency of the production and distribution of all food and agricultural products;
- bettering the condition of rural populations;
- and thus contributing towards an expanding world economy and ensuring humanity's freedom from hunger.⁵⁶

These objectives translate into a series of functions related to science and technology related to nutrition, food, and agriculture (Article I FAO Constitution). The term ‘culture’ is not mentioned at all in any of the FAO constitutive instruments, defining the organization as one concerned with the scientific, technological, and economic aspects of food and agriculture.

That said, the GIAHS Initiative (now called a Program), started in 2002, brings heritage into the vocabulary of the FAO. The ‘GIAHS Programme promotes public understanding, awareness, national and international recognition of Agricultural Heritage systems.’⁵⁷ The GIAHS is not a program specifically on

⁵⁴ M. Canfield, ‘Transnational Food Law’ in P. Zumbansen (ed), *The Oxford Handbook of Transnational Law*, Oxford University Press, 2021, p. 282.

⁵⁵ FAO Website, <http://www.fao.org/about/en/>.

⁵⁶ FAO, *Basic Texts of the Food and Agriculture Organization of the United Nations*, FAO, Rome 2015.

⁵⁷ GIAHS Website, <http://www.fao.org/giahs/en/>.

food, rather focusing on agricultural practices more broadly. As such, it can allow itself to be divorced from much of the cultural context around food preparation and consumption, and focus only on the production of staples, and their relationship to cultural diversity and heritage protection systems.⁵⁸

By privileging nature, the GIAHS interacts more with tangible heritage under the World Heritage Convention than it does with other UNESCO instruments (in fact, the World Heritage Center is one of the key partners in the GIAHS program).⁵⁹ But that focus does not necessarily mean that it interacts with natural heritage. Rather, it interacts with the separate category of ‘cultural landscapes’, which can be found in Article 1 of the World Heritage Convention as ‘combined works of nature and man [sic]’, even if landscapes are usually treated as a separate category, to the extent they mean nature as modified by human action, thus blending culture and nature.⁶⁰ As such, the possible engagement between the GIAHS and food as intangible cultural heritage is somewhat limited.

Nevertheless, the recognition of agricultural heritage systems is an important regulatory step in acknowledging the cultural influence on food processes, just on a different part of the food cycle. The GIAHS seeks to ‘safeguard the social, cultural, economic and environmental goods and services these [agricultural heritage systems] provide to family farmers, smallholders, [I]ndigenous peoples and local communities’,⁶¹ and in doing so integrating sustainable development approaches. Indigenous peoples, local populations and ethnic groups are key to the success of the program,⁶² since they cultivate the more unique agricultural landscapes, and are thus more likely to be represented in those landscapes listed for their uniqueness (or, to use WHC terminology, their ‘outstanding universal value’).

GIAHS examples include: rice terraces; multiple cropping systems; understory farming systems; nomadic or semi-nomadic pastoral systems; ancient irrigation, soil and water management systems; complex multi-layered home gardens; below sea level systems; tribal agricultural heritage systems; high-value crop and spice systems; and hunting-gathering systems.⁶³ What is key to the GIAHS program is the engagement of local communities and other local stakeholders, which in many respects aligns with the key principles of the ICHC, thus sharing this commonality with food heritage under the ICHC lists.

Another commonality is that a listing mechanism is available under the GIAHS program. FAO member countries or other stakeholders (including communities themselves and other non-state actors) can develop a proposal to nominate GIAHS sites, as long as there is participation of the relevant communities, and their prior

⁵⁸ P. Koohafkan and M.A. Altieri, *Globally Important Agricultural Heritage Systems – A Legacy for the Future*, FAO, Rome 2011.

⁵⁹ Ibid.

⁶⁰ For a commentary, see K. Whitby-Last, ‘Article I Cultural Landscapes’ in F. Francioni and F. Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary*, Oxford University Press, Oxford 2008, pp. 51–62.

⁶¹ GIAHS Website, <http://www.fao.org/giahs/en/>.

⁶² P. Koohafkan and M.A. Altieri, *Globally Important Agricultural Heritage Systems – A Legacy for the Future*, FAO, Rome 2011.

⁶³ Ibid.

and informed consent.⁶⁴ The following are the categories in which sites can be considered for inscription:

- i) Food and livelihood security;
- ii) Agro-biodiversity;
- iii) Local and Traditional Knowledge systems;
- iv) Cultures, Value systems and Social Organizations; and
- v) Landscapes and Seascapes features.⁶⁵

In addition to articulating the characteristics of the specific site within one or more of those categories, a management plan needs to be presented, setting out the actions needed to ensure the sustainability of the relevant agricultural system.⁶⁶

It is important to note that, much like the ICHC, the GIAHS Program relies on listing as a means to value and give visibility to heritage practices. The FAO thus replicates a heritage mechanism as a useful tool to promote food security-related objectives. An important difference between the GIAHS list and the ICHC lists is that in the GIAHS program communities themselves can directly access the mechanism, without needing to be filtered by the state and / or expert organizations.⁶⁷

Related to the GIAHS, and the traditional Mexican cuisine in particular, the FAO also engages often with Indigenous peoples directly and indirectly. The FAO in fact has a specific policy on Indigenous Peoples,⁶⁸ which focuses on promoting ‘biological and cultural diversity as the underpinnings of food and livelihood security as well as quality of life.’⁶⁹

In a relevant section, the FAO policy specifies that:

Greater participation in development processes is a cornerstone of [I]ndigenous peoples’ rights. For projects that involve or affect [I]ndigenous peoples, FAO will facilitate the inclusion of representatives of [I]ndigenous peoples in its consultations and programming cycles, in accordance with the principle of ‘free, prior and informed consent’.⁷⁰

Therefore, the FAO policy on Indigenous peoples also shares the requirement of community involvement. And, combined with the GIAHS program, it seems that, despite its original mandate which did not include cultural considerations, the FAO’s governance has come a long way in thinking about the need to involve local stakeholders in decision-making, at least with respect to agriculture.

Overall, the FAO activity in this area emphasizes food as a means to promote the livelihoods of people (human rights approach), and connection to food

⁶⁴ GIAHS Website, <http://www.fao.org/giahs/en/>.

⁶⁵ For a full explanation of the criteria, see FAO, *GIAHS Guidelines*, at http://www.fao.org/fileadmin/templates/giahs_assets/GIAHS_test/07_News/News/Criteria_and_Acti on_Plan_for_home_page_for_Home_Page.pdf

⁶⁶ *Ibid.*

⁶⁷ For a critique of expertise in this context, see L. Lixinski, ‘International Cultural Heritage Regimes, International Law and the Politics of Expertise’ (2013) 20(4) *International Journal of Cultural Property* 407.

⁶⁸ FAO, *FAO Policy on Indigenous and Tribal Peoples*, FAO, Rome 2010, <http://www.fao.org/docrep/013/i1857e/i1857e00.htm>.

⁶⁹ FAO Website. *Indigenous Peoples*, <http://www.fao.org/indigenous-peoples/en/>.

⁷⁰ FAO, *FAO Policy on Indigenous and Tribal Peoples*, FAO, Rome 2010, <http://www.fao.org/docrep/013/i1857e/i1857e00.htm>.

security, nutrition, and health, with a particular focus on staples or agricultural processes. While this approach might suggest a scientific take on food, the FAO is in fact more open to some of its cultural dimensions, particularly with respect to Indigenous peoples, which becomes relevant in the context of food ICH like the traditional Mexican cuisine. In the FAO, particularly in the GIAHS context, communities get to speak on their own behalf, without being filtered by states (which can be a result of the less politicized nature of the FAO, compared to UNESCO). Traditional systems are emphasized as the rules governing the food cycle, over domestic law of the member states. Regulatorily, thus heritage systems are subordinated to the objective of feeding the world in a sustainable way, as opposed to being an end in themselves.

A similar approach of seeing heritage or cultural objectives as secondary to a biological survival can be observed in many other fora where food is regulated in international law. Some of them even take it a step further away from putting human benefits front and center, by rather focusing on the staples as end in themselves. One key example is the Convention on Biological Diversity, the object of the next section.

4.2. CBD: Food as Biodiversity

The Convention on Biological Diversity is one of the outcomes of the United Nations Conference on Environment and Development of 1992, also known as the Rio Earth Summit. The CBD was drafted between 1988 and 1992 under the stewardship of the United Nations Environment Programme (UNEP).⁷¹ The main driver of the treaty is sustainable development, and the need to fit the use of biological resources into the framework of sustainable development.⁷² At the time of writing, the CBD has 196 States Parties, making it one of the most widely ratified treaties in the world.

The CBD creates a Conference of the Parties (COP, created by Article 23) and a Secretariat (SCBD, created by Article 24), which in combination are the international organization in charge of considering international legal governance of biological diversity for our purposes. Under Article 23.4.g, the COP can create any subsidiary bodies needed for the implementation of the CBD's objectives, which 'are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies ...'.⁷³

Related to the pursuance of these objectives, a Joint UNESCO-SCBD Program 'Linking Biological and Cultural Diversity' was established by the COP in 2010. The key objectives of the program are:

Build bridges between ongoing work on biodiversity and cultural diversity.

Promote synergies and information sharing among already existing programmes, projects and activities.

⁷¹ CBD History Website, <https://www.cbd.int/history/>.

⁷² Ibid.

⁷³ CBD, Art. 1.

Further explore conceptual and methodological issues related to the links between biological and cultural diversity and the role of [I]ndigenous peoples and local communities in enhancing those links.

Promote the collection, compilation and analysis of information from on-the ground activities linking biological and cultural diversity from, among others, biosphere reserves and World Heritage sites, and from the experiences provided by [I]ndigenous peoples and local communities.

Support and foster learning networks on bio-cultural approaches, linking grassroots and community initiatives with local, national, regional and global policy processes.

Raise awareness about the importance of biological and cultural diversity in resource management and decision-making processes as well as for the resilience of socioecological systems.⁷⁴

Much like the GIAHS program examine above, here the connection between biodiversity and heritage is done primarily through cultural landscapes and the World Heritage System. More than the GIAHS program, though, the UNESCO-SCBD program acknowledges the importance of intangible elements of heritage as central.⁷⁵ At least part of the reason for this closer engagement with ICH is the fact that the CBD, unlike FAO instruments, has a specific provision on Indigenous peoples (Article 8.j), thus merging cultural and natural to a much greater extent in its key normative instrument than the FAO does. This provision, having to do with Indigenous Traditional Knowledge (TK), speaks of the importance of maintaining Indigenous knowledge systems (in addition to benefit sharing and free, prior, and informed consent). Therefore, particular for food ICH manifestations like the traditional Mexican cuisine, grounded on indigeneity, the appeal of the CBD is obvious.

The activity of the CBD also intersects with nutrition, importantly. Even before the program linking biological and cultural diversity, the COP approved a decision creating a ‘Cross-cutting initiative on biodiversity for food and nutrition’.⁷⁶ This decision urges governments ‘to integrate biodiversity, food and nutrition considerations into their national biodiversity strategies and action plans’,⁷⁷ while at the same time invoking cooperation among several other international bodies, most notably the WHO.⁷⁸

Some of the elements of this initiative include involvement of cultural agents, most notably Indigenous peoples and local communities. In the documentation of relevant knowledge, for instance, Article 8.j of the CBD is expressly mentioned (even if not UNESCO). Likewise, in the element of the initiative on conservation and promotion of wider use of biodiversity, the importance of Indigenous and local communities, as well as the preservation of their ‘local socio-cultural traditions

⁷⁴ UNESCO-SCBD Program website, <https://www.cbd.int/lbcd/about>.

⁷⁵ Ibid.

⁷⁶ CBD COP, Decision VIII/23. Agricultural Biodiversity [2006] UNEP/CBD/COP/DEC/VIII/23.

⁷⁷ Ibid., para. 5.

⁷⁸ Ibid., para. 6.

and knowledge', is said to play a critical role. There is, therefore, a definite space for food ICH manifestations to be considered in this realm, and contribute to biological diversity. But the linkages need to be made more explicitly.

The last section of the initiative's framework document outlines key partners, and it includes a plethora of international organizations, such as the FAO, WHO, the UN Standing Committee on Nutrition, the World Food Programme, the United Nations Children's Fund (UNICEF), among others. But no mention of UNESCO appears in this context. Granted, this initiative predates the formal UNESCO-SCBD cooperation, but it still serves as a reminder of the need to promote explicit linkages between nature and culture, particularly in the domain of intangible cultural heritage.

The CBD's treatment of food frames governance in this area by focusing on food as staples, species that deserve conservation. That is a worthwhile angle, but, except for Article 8.j of the CBD, there is limited inclusion of intangible cultural elements. Hence, the cooperation with UNESCO, and the ICH organs in particular, is essential. Here, experts get to speak on behalf of food, and international law seems to prevail in dictating how food is governed (probably as a consequence of expert rule).⁷⁹ The dimension of food that is more clearly emphasized is that of food practices as vehicles to maintain cultivation of a diversity of species, and in this sense cultural heritage can be used to help nature. So far, in the CBD practice it seems that cultural heritage means primarily Indigenous TK, which suits the traditional Mexican cuisine well, but other forms of ICH can equally help promoting diversity. While the CBD is tied to Article 8.j's reference to Indigenous and local communities, cooperation with other bodies may expand its mandate.

The CBD's engagement with Indigenous peoples can perhaps be broadened with the assistance of international human rights instruments. The right to food is enshrined in the ICESCR, as well as the right to participate in cultural life. The merger of these two rights, alongside minority protections in the ICCPR, could be a helpful way of bringing food as culture closer to food as nature in international legal governance.

4.3. International Human Rights Law: Food as a Human Right

International human rights law, in addressing food, usually refers to it in terms of the right to food, and tying food to survival. Because the purpose of this article is to examine food as a cultural manifestation, the right to cultural identity is also important for our purposes.

The two major general instruments in international human rights law are the ICESCR (171 parties at the time of writing) and the ICCPR (173 parties at the time of writing). While drafted under the auspices of the United Nations, they also create their own implementing bodies, the Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Committee (HRC), respectively.

⁷⁹ For a discussion of expertise in international law, see D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy*, Princeton University Press, Princeton 2016. Specifically with respect to expert rule in international heritage law, see L. Lixinski, 'International Cultural Heritage Regimes, International Law and the Politics of Expertise' (2013) 20(4) *International Journal of Cultural Property* 407.

More directly relevant for our purposes, the ICESCR protects the right to food in Article 11:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, **including adequate food** ...
 2. The States Parties to the present Covenant, recognizing **the fundamental right of everyone to be free from hunger**, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - (a) To improve methods of **production, conservation and distribution of food** by making full use of **technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources**;
 - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an **equitable distribution of world food supplies** in relation to need.
- (emphases added)

This provision mandates engagement with food as a matter of biological survival, a basic human need. In a human rights instrument, that is to be expected. The CESCR's General Comment 12, on 'The Right to Adequate Food',⁸⁰ starts by de-gendering the language 'himself and his family', and saying the right applies to everyone.⁸¹ It is noteworthy that the drafters of the 1966 Covenant envisioned male-headed households, whereas current practice of food as ICH recognizes, in multiple listings, the importance of women in cultural practices surrounding food.

More importantly, the General Comment mentions the connection between the adequacy of food and food security, on the one hand, and the need to determine 'adequacy' against cultural conditions, among others.⁸² Similarly, cultural acceptability of food (or the 'non nutrient-based [sic] values attached to food and food consumption') is to be taken into account when interpreting the basic normative content of Article 11 of the ICESCR.⁸³ Therefore, and unsurprisingly, the human right to food is more inclined to consider culture as part of food than most other international legal governance strategies. That said, this connection seems to have eluded the practice on the right to food, if authoritative commentary is to be used as a guide.⁸⁴ In other words, the connection between food and culture remains elusive in the human right to food as well. Likewise, Article 15 ICESCR, the single provision on cultural rights in the Covenant, has been interpreted in

⁸⁰ CESCR, General Comment 12: The Right to Adequate Food (Art. 11) [1999] E/C.12/1999/5.

⁸¹ *Ibid.*, para. 1.

⁸² *Ibid.*, para. 7.

⁸³ *Ibid.*, para. 11.

⁸⁴ B. Saul, D. Kinley and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials*, Oxford University Press, Oxford 2014.

relation to food practices only in rather general terms.⁸⁵ These largely unexplored relationships have the effect of weakening the possibilities of human rights law's contribution to food governance, at least in a cultural context.

The ICCPR's Article 27, a provision on minority rights, may be of some assistance in this realm, at least inasmuch as it creates a more easily enforceable right for at least some cultural groups to have their own culture protected. There is in fact some limited practice considering food as part of the culture of minorities that needs to be protected.⁸⁶ However, much like the rights under the ICESCR, these rights too are subject to limitations in the name of the rights of others or other concerns, including public health and the environment, which can be problematic particularly in the case of migrant communities who wish to engage in culinary practices that sit uneasily with concerns of the receiving society (which is not the case for listed ICH, which is authorized as the ICH of the nominating state). The same logic can be applied to minorities whose culture is not entirely recognized by the state, including Indigenous peoples.⁸⁷ That said, the lining up of health, biological and cultural priorities with respect to food may in fact assist cultural food practices. In other words, food ICH manifestations would do well to align themselves, in their nomination files and safeguarding processes, with other interests for the conservation of the specific food heritage, since, in the event of a conflict, the cultural aspects are unlikely to prevail over other interests.

Food, in international human rights law, is emphasized as a human right. But international human rights, with its individualistic angle, allows individuals to speak on behalf of food far more successfully than communities.⁸⁸ The voices of communities can still be heard, but only as filtered through individuals. Even if some concessions are made to food as a cultural process in international human rights law, they remain under-articulated, and food is primarily seen as an element of biological survival. Regulatorily, it means that cultural aspects of food do not particularly matter, except to the extent that they facilitate the production of food and nutrition standards. One notable exception in this realm is the protection of food as an interest of minorities, but, even then, the connections still require more development. This connection is particularly worth exploring further in the context of the traditional Mexican cuisine, given its ties to Indigenous rights. The next subsection examines the framework of Indigenous human rights in the context of food.

4.3.1. UNDRIP: Food as Indigenous identity

The UNDRIP was adopted in 2007, with the purpose of recognizing and advancing the rights of Indigenous peoples. It states in Article 1 that Indigenous

⁸⁵ M.C. Maffei, 'Food as a Cultural Choice: A Human Rights to be Protected?' in S. Borelli and F. Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, Martinus Nijhoff Publishers, Leiden 2012, pp. 83–106.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ L. Lixinski, 'Heritage for Whom? Individuals' and Communities' Roles in International Cultural Heritage Law' in F. Lenzerini and A.F. Vrdoljak (eds), *International Law for Common Goods - Normative Perspectives on Human Rights, Culture and Nature*, Hart Publishing, Oxford 2014, pp. 193–213.

peoples are entitled to the full gamut of rights under international human rights law, both individually and collectively.

The right to food is not directly mentioned in the UNDRIP. That said, Article 21 talks about the right to the improvement of the economic and social conditions of Indigenous peoples, without discrimination, and including several specified dimensions, ‘inter alia’. The open-ended nature of this provision, and its purpose with respect to economic and social conditions, would allow for the right to food to be found there. Particularly important are also the right of Indigenous peoples ‘to be secure in the enjoyment of their own means of subsistence and development’, which includes the right to engage in traditional and other economic activities (Article 20), and the right to land tenure in Article 26.⁸⁹ The UNDRIP also protects Indigenous peoples’ right to development (Article 26), and their right to control their traditional knowledge and heritage (Article 31).

Those provisions, taken together, can be interpreted as protecting not only the right to food in its most fundamental sense (the provision of food for biological survival), but also the control of food processes and the cultural dimensions associated with food practices, and food as heritage. That said, the rights in the UNDRIP, as only a Declaration, are not directly binding upon states, and food dimensions of Indigenous peoples’ rights are still to be tested, to the best of my knowledge. Further, the connection of Indigenous rights to culture, and particularly cultural heritage, has been criticized as eroding other possibilities for Indigenous emancipation,⁹⁰ and one must be wary of relying too much on the language of international human rights in this context.

Indigenous human rights under the UNDRIP emphasize food as development or livelihood, even in the absence of an express provision on this right. This absence of the right to food seems to imply that, in the Indigenous context, no one is speaking on behalf of food, from a regulatory perspective. Food is just a fact of life, needed for (cultural) survival. The cultural dimensions of food, even though they can be seen as permeating the entirety of Indigenous peoples’ rights, are not central to thinking about food; rather, food is thought of as traditional knowledge and resources, which are not necessarily cultural, but rather proprietary, at its strongest.

These different regulatory frames examined in this section, looking at the connection between food and culture, allow us to distil a few further lessons to guide harmonization efforts in the law of culture. First, they underscore the importance of acknowledging the regulatory object’s intersection with multiple legal frames, each of which will bring about different values. Secondly, these frames highlight the limits of any one language, however emancipatory on the surface, to promote optimal regulatory objectives. Third, they recall the need not just to acknowledge different framing effects, but to exploit intersections of frames in productive ways as well. Bearing those lessons in mind makes us imagine a law of food, and a law of culture, that is more plural, attuned to the needs of the

⁸⁹ L. Knuth, *The Right to Adequate Food and Indigenous Peoples: How Can the Right to Food Benefit Indigenous Peoples?*, FAO, Rome 2009.

⁹⁰ K. Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*, Duke University Press, Chapel Hill 2010.

populations served by the law (especially as expressed by democratic processes), and that overarching ideals like environmental protection, however well-intentioned, are less likely to succeed if they isolate human connections from the law's design and implementation.

5. Concluding Remarks

The examples of food as heritage can start important conversations about the possibilities and limits of harmonization in the field of the law of culture. The listing of food as intangible cultural heritage opens a gateway to learn from the experiences of food regimes, which remind us of the need to connect communities that create and live with regulatory objects to any harmonization effort. While food as heritage is only one (fairly limited) of the regulatory regimes around food, it emphasizes different aspects of food from other instruments, showing the limitations of legal frameworks. At the same time, this connection showcases how disparate frameworks generally can work harmoniously, and drive harmonization efforts across disparate legal regimes.

That said, these harmonious intersections should not be taken for granted, and we would do well, whether harmonizing food law or the law of culture, to engage with multiple international bodies more directly in our law-making efforts. Transnational and international frameworks are essential to understanding the deeper stakes of how we safeguard our public goods and promote legal strategies that best advance human concerns, which, in the domain of culture in particular, means connecting different human groups to each other in productive and peaceful ways.

The traditional Mexican cuisine is an important example of the possibilities of rallying communities together around their own identities with a view to promoting their own emancipation in their own terms, freeing themselves from undue external pressures, and not competing with or berating other people's accomplishments or needs. It is an important example to be followed: be mindful of the possible impacts of regulatory efforts outside your immediate purview, but fundamentally promote regulation for the benefit of human populations, not at their expense.