

PROVIDING ADVISORY SERVICES FOR POLICY DEVELOPMENT IN THE FIELD OF INTANGIBLE CULTURAL HERITAGE

UNESCO GUIDANCE NOTE¹

TABLE OF CONTENTS

PROVIDING ADVISORY SERVICES FOR POLICY DEVELOPMENT IN THE FIELD OF INTANGIBLE CULTURAL HERITAGE	1
<i>Why this note?</i>	3
<i>Introduction</i>	3
<i>Policy making in the context of the Convention and its Operational Directives</i>	4
<i>Policy making in the context of other international instruments relating to ICH</i>	6
<i>National contexts for policy making for ICH safeguarding</i>	7
<i>The development of ICH-related policy in States</i>	8
<i>The role of advising experts in providing effective policy support</i>	10
<i>Key issues that arise in ICH-related policy making</i>	11
<i>Possible steps in a needs assessment</i>	12
ANNEXES TO THE GUIDANCE NOTE	14
<i>Abbreviations</i>	14
ANNEX 1: SYNTHESIS OF KEY ISSUES IN DEVELOPING LEGISLATION AND POLICIES WITHIN STATES PARTIES TO THE CONVENTION	15
<i>Introduction</i>	15
Creating an infrastructure for ICH safeguarding	15
ICH policy development within states	16
A diversity of approaches	16
A hierarchy of policies and laws	18
<i>Constitutional provisions</i>	20
<i>Human rights, gender equality and ICH policies</i>	21
Human rights issues and ICH: raising awareness	21
ICH that is non-compliant with human rights: policy approaches	22
ICH practice as a human right	23
<i>Indigenous peoples or minority groups</i>	24
<i>Devolved policy making and plural legal systems</i>	26
<i>Policy frameworks in the culture sector</i>	28

1. This guidance note was prepared by the Intangible Cultural Heritage Section thanks to the contribution of Harriet Deacon and comments by Riëks Smeets as well as Janet Blake, Stephen Chifunyise, Kristin Kuutma and Lucas Lixinski. The synthesis of Annex 1, in particular, benefitted from the inputs and advice of these experts.

Culture policies.....	29
Heritage policies.....	30
Language policies	31
Examples of policy frameworks in the culture sector.....	33
<i>Stand-alone ICH policies</i>	33
Defining communities and their ICH.....	34
Engaging with communities concerned.....	35
Identification and inventorying.....	36
Specific provisions for ICH practitioners and ICH elements	38
<i>Areas of policy and legislation outside the culture sector</i>	39
Education policies	40
Health policies.....	41
Policies for sustainable development	42
Policies for intellectual property rights protection	46
ANNEX 2: REPORTING TEMPLATE	53
Name of the State Party.....	53
Background information on the state.....	53
Scope and methodology of the needs assessment.....	53
Current provisions for ICH safeguarding in state policies and institutional mandates	53
Key problems in ICH safeguarding.....	54
Policy gaps in ICH safeguarding	54
The policy process	54
Capacity-building needs.....	54
ANNEX 3: DETAILED QUESTIONS.....	55
Culture and heritage policies in general	55
Stand-alone ICH policies.....	55
Constitutional provisions	56
Human rights issues.....	56
Indigenous peoples or minority groups	56
Devolved policy making and plural legal systems	57
Language.....	57
Education	57
Health.....	58
Sustainable development.....	58
Intellectual property protection	59
ANNEX 4: CHECKLIST	60

WHY THIS NOTE?

This note is a guide for experts engaged by UNESCO² to provide advisory services to national counterparts in order to support them in analysing their needs and making recommendations for policy and legal development in the field of intangible cultural heritage within the global capacity-building strategy for implementing the Convention.

The global strategy had identified policy revision early on as one of the five most urgent capacity-building tasks, and by late 2012, the ICH Section of UNESCO started integrating provisions for policy advice in the design and budgets of capacity-building projects.³ In 2013, UNESCO undertook an evaluation of the implementation of the Convention (hereafter, the IOS report),⁴ which concluded that there was a need for support in the development of legislative and policy environments for ICH safeguarding:

Recommendation 4. Support State Parties with the development of legislation and policy as part of the ongoing 2003 Convention capacity-building programme and design appropriate capacity-building formats to do so.⁵

In 2013 the Intergovernmental Committee of the Convention requested the Secretariat to implement this Recommendation.⁶ On 25 June 2014 the Intangible Cultural Heritage Section held a one-day Policy Advice workshop at UNESCO Headquarters in Paris to ‘learn from the experience of other Sectors and agencies to refine UNESCO’s approach of providing support to policy and legal development within the capacity-building strategy for safeguarding intangible cultural heritage’. The meeting decided that needs assessments for support to policy and legal development should be integrated into capacity-building projects. A guidance note advising experts doing the needs assessment for policy support would be drafted (i.e., the current document), and a specific workshop on policy and legal development would also be developed for key policy makers and stakeholders at the national level.

INTRODUCTION

Under the Convention for the Safeguarding of the Intangible Cultural Heritage (hereafter, the Convention), States Parties are encouraged to develop or modify intangible cultural heritage (ICH)-related policy and legislation, to assist them in implementing the Convention (Article 13; ODs 103–105). States Parties need to create an enabling environment at the national level within which (a) ICH is valued and respected, (b) communities, groups and individuals concerned⁷ can be assisted where necessary in safeguarding⁸ their ICH, and (c) community stewardship over that ICH can be recognized and protected.

Many States have already developed ICH-related policies to assist them in implementing the Convention. This may include modifying existing policy and legislation, expanding the mandates of existing institutions, or developing new policies and laws, and establishing new institutions and initiatives. Indeed, it may sometimes be more important to identify where existing regulations may impede the continued transmission and practice of ICH and then take action accordingly, rather

2. Advising experts would be either UNESCO Culture Programme Staff or external experts hired by UNESCO for this purpose.
3. UNESCO ICH Section, Workshop report, How to provide policy advice effectively? Learning from others to refine UNESCO’s approach in the field of safeguarding intangible cultural heritage, Paris, UNESCO Headquarters, 25 June 2014. Available at <http://www.unesco.org/culture/ich/doc/src/27703-EN.doc>
4. The Internal Oversight Service (IOS) evaluated UNESCO’s standard-setting work of the Culture Sector. Part I focused on the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), document IOS/EVS/PI/129 REV. (October 2013), hereafter IOS Report.
5. IOS Report, Chapter 8.
6. UNESCO, Intergovernmental Committee of the Intangible Heritage Convention, Decision 8.COM.5.c.1, Document ITH/13/8.COM/Decisions.
7. Hereafter, communities concerned.
8. Article 2.3 of the Convention defines safeguarding as ‘measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.’

than focus on new regulations. Some States are still in the process of deciding what modifications or additions to legal and policy frameworks, if any, might be appropriate to support the implementation of the Convention. UNESCO is therefore sometimes approached for advice about policy and legislation relating to the implementation of the Convention. Hence, the development of this Guidance note.

The term 'policy' can have many meanings but it is used here to describe a system of courses of action, guiding principles and procedures considered beneficial for a specific purpose (like in this case safeguarding intangible cultural heritage) and used by a governmental entity or its representatives. Policies are commonly expressed in constitutions, legislative acts and judicial decisions, but can also include regulatory measures, decision-making procedures, institution building, laws and funding priorities. Policymaking is consequently a complex internally driven process in a State and about much more than drafting a document.

ICH is a relatively new area for policy development on which the Convention and its ODs give no detailed suggestions; and it is not easy for advising experts to give helpful guidance to States based on a brief review process. This guidance note and its Annexes 1-4, therefore provide some practical but necessarily general advice to experts undertaking country needs assessments regarding policy and legal frameworks for ICH safeguarding in the context of the Convention. The needs assessments will identify challenges and needs in the relevant State and suggest areas where capacity could be further developed. Those doing the needs assessments may also, with the help of Annex 1, explore experiences of policy making in other countries relevant to the development or modification of policy and legislation in that State.

The guidance note draws on documents relating to the work of the Organs of the Convention, on Periodic Reports of States Parties to the Convention, papers commissioned for this project by the Capacity Building Unit of the ICH Section at UNESCO Headquarters in Paris, and on other relevant literature.

POLICY MAKING IN THE CONTEXT OF THE CONVENTION AND ITS OPERATIONAL DIRECTIVES

The two main obligations of States Parties under the Convention are to take the 'necessary measures' to safeguard the ICH present in their territory (Article 11(a)); and to identify and inventory the ICH present in their territory, with the full involvement of the communities concerned, and to update these inventories regularly (Articles 11(b) and 12.1).⁹ The Convention imposes few clearly binding obligations on States Parties, and although Article 13 encourages the development of policy and legislation for ICH safeguarding, it does not impose an explicit obligation to do so.¹⁰ In the spirit of the Convention, the general role of States Parties, and other stakeholders in ICH safeguarding (such as researchers and NGOs), is to assist communities in safeguarding their ICH, either by providing specific practical assistance in safeguarding an element, or by contributing to more general measures that create an enabling environment for safeguarding.

The Convention and its ODs thus encourage States to create an infrastructure for safeguarding by, for example:

- Developing ICH-related policy, regulations and legislation or modifying existing policies (Article 13; ODs 103–105);
- Establishing or designating bodies to assist in safeguarding the ICH (Article 13(b); OD 109);

9. States Parties also have to make contributions to the ICH Fund (Article 26.1) and periodically report on their activities under the Convention (Article 29).

10. Article 13 uses encouraging but non-obligatory language: 'each State Party shall endeavour to' develop policies.

- Creating or strengthening documentation centres for management of, and enabling appropriate access to, information about the ICH (Article 13(d); OD 109), sharing expertise and information internationally (Articles 1(d) and 19; ODs 86–88);
- Building capacity for safeguarding among all stakeholders, including communities concerned (Article 13(d)(i), 14; OD 82, 86 and 107(k));
- Setting up financial measures to assist in ICH safeguarding (Article 13(d)) and creating tax incentives for contributions to the ICH Fund (OD 78);
- Creating consultative bodies or coordination mechanisms for the identification of ICH, inventorying, implementing programmes, etc. (OD 80); and
- Encouraging cooperation and networking between communities, experts, centres of expertise and research institutes and international networks of ICH-related institutions and Category II centres (ODs 79–80, 86 and 88).

When working towards creating an infrastructure to support safeguarding activities, the Convention also strongly encourages, and under article 11(b) in fact requires, that States Parties should take the interests and rights of the communities concerned into account.¹¹

The Convention, and its ODs, promote the widest possible participation of communities concerned in all activities relating to their ICH (Articles 11(b) and 15), including developing and implementing safeguarding plans/measures for their ICH (Article 15; ODs 1–2, 7 and 29); and preparing nomination files concerning their ICH to the Lists and Register of the Convention (ODs 1–2 and 7). In encouraging community involvement and consent for activities concerning their ICH, the Convention specifically wishes to avoid the misappropriation and decontextualization of ICH (OD 102). Intangible heritage should not become a property of the State (or of other stakeholders such as research institutions) through inventorying, nomination or safeguarding processes (see also Article 3(b)). The State should try to ensure that the rights of the communities concerned over their ICH are protected (OD 104). Community control over access to their ICH should be protected as far as possible (Article 13(d)(ii)).

In the spirit of the Convention, ICH policy can play an active role in promoting the principles of peace, human rights (including gender equality), sustainable development and international cooperation, as well as respect for cultural diversity. This could help address the concern expressed in the IOS report that in the implementation of the Convention, insufficient attention is being paid to ICH and gender equality in a context of human rights, and the relationship between ICH safeguarding and sustainable development.¹² In 2012, the Committee called on the Secretariat to ‘initiate work on a model code of ethics’, recalling OD 103,¹³ to encompass all aspects of safeguarding ICH including awareness-raising, research and inventorying.¹⁴ A model code of ethics may raise awareness about some of the key principles underlying safeguarding approaches in the spirit of the Convention, and in accordance with the aims of UNESCO.

In the spirit of the Convention, ICH policy development should generally be aimed at:

- Assisting communities concerned (where required) in safeguarding their ICH, for example through capacity building, rather than giving this task to external experts or state agencies (Articles 1, 3, 13, 15; OD 80);
- Promoting awareness about, respect for, and recognition of the diversity and value of ICH in the territory of the State (Article 1, Preamble), rather than focusing on the ICH of only one group or introducing hierarchies between different elements of ICH;

11. Because it is an agreement between States, the Convention imposes no obligations on communities, or other stakeholders.

12. IOS report, para 194.

13. UNESCO, Intergovernmental Committee Intangible Heritage Convention, DECISION 7.COM 6/11.

14. UNESCO, Intergovernmental Committee Intangible Heritage Convention, ITH/13/8.COM/4, paras 64, 66, 113.

- Promoting continued community involvement in the management of their ICH and ensuring their rights are protected (Article 15), rather than enabling appropriation of it by others (OD 104);
- Ensuring active participation of a diversity of voices in policy making processes and in ICH safeguarding policies (Article 15, Article 11(b)), rather than leaving this task to a few community members, outside experts or state agencies (OD 79-99);
- Promoting ways to foster the principles of human rights (including gender equality), sustainable development and mutual respect in the safeguarding of ICH (Article 2.1), rather than promoting disrespectful, discriminatory or environmentally damaging traditions and customs (OD 102); and
- Promoting ways in which States can cooperate with other States and develop intercultural understanding through safeguarding cross-border ICH (Articles 19-20), rather than promoting 'ownership' of ICH practices by specific communities or territories (OD 104).¹⁵

POLICY MAKING IN THE CONTEXT OF OTHER INTERNATIONAL INSTRUMENTS RELATING TO ICH

The aims and objectives of ICH safeguarding under the Convention are closely related to those of a number of other international and regional legal instruments.¹⁶ These include:

- Other UNESCO Conventions in the field of culture, including the Convention concerning the Protection of the World Cultural and Natural Heritage (1972)¹⁷ and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005),¹⁸ as well as the UNESCO Declaration on Cultural Diversity of 2001;¹⁹
- International human rights treaties such as the Universal Declaration of Human Rights of 1948,²⁰ and the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) of 1966;²¹
- International instruments relating to minority and indigenous rights such as the United Nations Declaration on the Rights of Indigenous Peoples (2007), and the International Labour Organization (ILO) Convention No.169 (1989);²²
- International instruments relating to gender equality, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) and its Optional Protocol (2000);²³
- International instruments for the protection of community rights over their ICH. The Convention for Biological Diversity (CBD) article 8(j) recognized community rights over their traditional knowledge and the need for them to enjoy benefits from its commercial exploitation,²⁴ and the Nagoya Protocol set out guidelines for the fair and equitable sharing of benefits arising out of

15. See for example, Background Paper for UNESCO Meeting, 'Intangible Heritage Beyond Borders: Safeguarding Through International Cooperation', Bangkok, 20 and 21 July 2010, <http://www.unesco.org/culture/ich/doc/src/07384-EN.pdf>

16. For an explanation of the differences between conventions, treaties, declarations and other international legal instruments see https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml

17. Convention concerning the Protection of the World Cultural and Natural Heritage, http://portal.unesco.org/en/ev.php-URL_ID=13055&URL_DO=DO_TOPIC&URL_SECTION=201.html

18. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html

19. UNESCO Universal Declaration on Cultural Diversity, http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html

20. Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/>

21. International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/cescr.aspx>

22. United Nations Declaration on the Rights of Indigenous Peoples, www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf; International Labour Organization (ILO) Convention No.169, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

23. See Convention on the Elimination of All Forms of Discrimination Against Women and other instruments at <http://www.unesco.org/new/en/unesco/themes/gender-equality/resources/conventions-and-declarations/>

24. The Convention for Biological Diversity (CBD), article 8(j), <http://www.cbd.int/traditional/>

the utilization of genetic resources.²⁵ See also the World Intellectual Property Organization (WIPO)'s Draft Articles for the Protection of Traditional Knowledge and those for the Protection of Traditional Cultural Expressions;²⁶

- Regional instruments relating to culture and heritage such as the Framework Convention on the Value of Cultural Heritage for Society (Faro, 2005) and the Framework Convention for the Protection of National Minorities (Council of Europe 157),²⁷ the Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002)²⁸ and the ASEAN Declaration on Cultural Heritage (2000),²⁹ the Cultural Charter for Africa (1976)³⁰ and the Charter for African Cultural Renaissance (African Renaissance Charter),³¹ the Draft American Declaration on the Rights of Indigenous Peoples.³²
- International policy statements on the link between culture and sustainable development including Resolutions on Culture and Development adopted by the UN General Assembly in 2010 and 2013.³³

In conducting a needs assessment for policy making it is important to consider these international and regional instruments and discussions because, even where States have not formally ratified such instruments, they can affect how ICH and its safeguarding is perceived and undertaken. It should be noted that policy environments inspired by different international instruments can also be in tension with one another.³⁴ This presents both constraints and opportunities for policy making relating to its safeguarding and to other areas of government activity affecting ICH.

NATIONAL CONTEXTS FOR POLICY MAKING FOR ICH SAFEGUARDING

Policy making about ICH can be a useful tool in helping states to create a general enabling environment for ICH safeguarding in the spirit of the Convention. It can justify, establish, coordinate and ensure funding for efforts to support ICH safeguarding in a State. It can also clarify and deepen the relationship between ICH safeguarding and other policy objectives (e.g. education, health, development), and between the implementation of the Convention and other international or regional legal instruments that affect ICH safeguarding. It also can be important to assess and prevent existing legislation to impede on the practice and safeguarding of ICH.

Many States Parties have developed policies and laws to support the implementation of the Convention and ensure the safeguarding of the ICH on their territory. There are also many examples of ICH-related safeguarding activities that have taken place in States that have not (yet)

-
25. The Nagoya Protocol, <http://www.cbd.int/abs/text/default.shtml>
26. WIPO, Draft Articles for the Protection of Traditional Knowledge, Rev. 2, March 28, 2014. Available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=238182. See also WIPO, Draft Articles for the Protection of Traditional Cultural Expressions, Rev.2, July 7-9 2014, http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_28/wipo_grtkf_ic_28_6.pdf
27. Framework Convention on the Value of Cultural Heritage for Society, http://www.coe.int/t/dg4/cultureheritage/heritage/Identities/default_en.asp; Framework Convention for the Protection of National Minorities, <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>;
28. Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture <http://www.forumsec.org.fj/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprsnsofCulture20021.pdf>; See also 'Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law 2002' at <http://www.wipo.int/edocs/lexdocs/laws/en/spc/spc001en.pdf>
29. <http://cultureandinformation.asean.org/wp-content/uploads/2013/11/ASEAN-Declaration-on-Cultural-Heritage.pdf>
30. Cultural Charter for Africa, http://www.au.int/en/sites/default/files/CULTURAL_CHARTER_AFRICA.pdf
31. Charter for African Cultural Renaissance (African Renaissance Charter). See <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Dakar/pdf/CharterAfricanCulturalRenaissance.PDF> In regard to African regional instruments see also Máté Kovács, 2009. Cultural Policies in Africa, a Compendium of reference documents (OCPA, Madrid).
32. On the Draft American Declaration on the Rights of Indigenous Peoples see http://www.oas.org/dil/indigenous_peoples_supporting_preparation_draft_declaration.htm
33. For these documents and other relevant texts see the UNESCO website on the MDGs: <http://www.unesco.org/new/en/culture/achieving-the-millennium-development-goals/resources/culture-and-development-resources/#c326924>
34. M. Forsyth, 2012, 'Lifting the Lid on 'the Community': Who has the Right to Control Access to Traditional Knowledge and Expressions of Culture?' International Journal of Cultural Property, 19, pp.1-31.

ratified the Convention. However, States Parties to the Convention are not obliged to develop laws and policies relating to ICH safeguarding, nor, in encouraging them to do so, do the Convention (Article 13) or its ODs prescribe the form such legal or administrative frameworks might take. Formal legal and policy frameworks are also not always required to support ICH safeguarding: sometimes communities can proceed with safeguarding strategies perfectly well without them. Some States (such as Norway and Switzerland) do not feel the need to develop specific legislation for supporting ICH safeguarding.

The literature on ICH-related policy making³⁵ and reviews of the Periodic Reports suggest that there is considerable diversity in existing legal and administrative provisions for ICH safeguarding both between States and also, where federal or devolved governance systems are in place, in different administrative regions within a State.³⁶ This is not just because ICH elements or cultures are diverse, but also because their function and value, and the potential benefits from safeguarding them, may be perceived differently. Cultural policy making in general shows similar diversity. ICH safeguarding is affected by, and can contribute to, activities in other areas such as development, health, intellectual property, tourism and education. The ways in which approaches to ICH safeguarding intersect with these other areas of policy making also varies widely between States.

Policy goals and reasons for community engagement affect how ICH and communities are identified, and how support for safeguarding is envisaged and resourced. Cultural policy can, for example, be identified with policy goals such as:

- development, tourism and innovation;
- diversity, identity and intercultural dialogue;
- social cohesion and nation-building;
- public participation and democracy; and
- international relations and cooperation.³⁷

Regarding ICH, similar policy goals are often mentioned. For example, some States prioritize the role of ICH in fostering social cohesion, or the recognition and protection of minorities or indigenous groups; others prioritize its role in the promotion of development goals.³⁸ Communities also have widely varying reasons for seeking to protect their ICH as heritage, including the promotion of group identity or cohesion, recognition, development, and claims for resources like intellectual property, or land rights.

THE DEVELOPMENT OF ICH-RELATED POLICY IN STATES

Specific ICH-related policy making should be understood within the broader context of culture-related policy in a State, and in the context of policy about other issues. Policy approaches relating to ICH safeguarding can include, for example:

- constitutional provisions or other broad principles of governance relating to human rights, provisions for indigenous and minority groups, cultural diversity, etc.;

-
35. See for example Lixinski, L., *Intangible Cultural Heritage in International Law* (Oxford University Press 2013); Miyata, S. 2013. *Intangible Cultural Heritage Policy in Japan*. In L. Arizpe & C. Amescua (Eds.), *Anthropological Perspectives on Intangible Cultural Heritage* (Berlin, Heidelberg: Springer Verlag, Springer Briefs in Environment, Security, Development and Peace (ESDP) Vol. 46); Carvalho, A. 2008. Portuguese legislation on intangible cultural heritage and inventories. In *El patrimonio cultural inmaterial. Definición y sistemas de catalogación: actas del seminario internacional, Murcia, 15 -16 Feb. 2007*, ed. Inma García Simo, pp.173-184. Murcia: Comunidad Autónoma de la Región de Murcia. Deacon, H.J. et al., 2004. *The subtle power of intangible heritage: Legal and financial instruments for safeguarding intangible heritage*, Human Sciences Research Council. Available at <http://www.hsrcpress.ac.za/product.php?productid=2044>.
36. IOS report, para 94-101; Lixinski, *Intangible Cultural Heritage in International Law*, p.122.
37. See Division of Cultural Policies and Intercultural Dialogue UNESCO Culture Sector, 2011 'Operational processes for the formulation and implementation of cultural policies: some basic principles' (prepared by Patricio Jeretic and David Rosello Cerezuela). <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Operational%20Processes%20for%20the%20Formulation%20of%20Cultural%20Policies.pdf>
38. Lixinski, 'Intangible Cultural Heritage in International Law'.

- inclusion of ICH-related provisions into overall culture policies and heritage legislation;
- specific ICH-related policies and legislation, either focused on safeguarding the ICH in general, or tailored to the specific needs of a certain ICH element or community.³⁹
- intellectual property (IP) protection that explicitly covers ICH (in that context known as Traditional Knowledge (TK) or Traditional Cultural Expressions (TCEs)), or the use of existing IP regimes to safeguard community rights over their ICH; and
- provisions affecting ICH in policies and legislation for other areas of government intervention, such as development, health, tourism and education.

However, as stated above, policy development is not just about the writing of good policy documents and laws. Effective policy making requires a combination of research, consultation, dialogue and training with communities concerned, practitioners and other key stakeholders to ensure effective implementation and ownership and buy-in at country level. The development of policy and legislation within a State is a complex process that can be assisted by:⁴⁰

- strong political will to drive the process forward and overcome any obstacles;
- open and broad consultation with relevant stakeholders, including communities concerned, the public, NGOs, political parties, government agencies and ministries to ensure buy-in for the policy;
- clear identification of the local situation, with the assistance of technical and legal advice and reflection on other country experiences, to focus policy making appropriately on areas of greatest need and opportunity in accordance with the identified goals of policy making; and
- strong capacities in communities and institutions and other resources to implement policies.

Specific challenges can be experienced in policy making (and in modification of existing policies) in the field of culture, such as:⁴¹

- low political priority given to culture (and correspondingly low budgets);
- poor communication between ministries and/or other agencies;
- weak communication and collaboration between central government and decentralized administrative levels (if such exist), and between these decentralized administrative levels on cultural matters;
- insufficient consultation of communities and their representatives, and more generally, poor communication between institutions, communities and other stakeholders; and
- weak institutional and human resource capacities.

Policy making to support ICH safeguarding or the implementation of policies may encounter some specific challenges, including:

- misunderstandings about the purpose and principles of the Convention, illustrated for example by some States making claims to 'ownership' of specific ICH elements inscribed or to be inscribed on the Representative List;⁴²
- methodological, organizational and financial difficulties integrating approaches to ICH safeguarding within the field of culture, for example where the focus historically has been on conserving tangible heritage (such as World Heritage sites under the UNESCO 1972

39. IOS report, para 100.

40. See for example UNESCO Section on the Diversity of Cultural Expressions, Methodological Guide: Technical Assistance Missions, Expert Facility - Technical Assistance project to Strengthen the System of Governance for Culture in Developing Countries, February 2012, pp.4-5. <https://en.unesco.org/creativity/sites/creativity/files/digital-library/Methodological%20guide%20ENG.pdf>

41. UNESCO ICH Section, Workshop report, 'How to provide policy advice effectively?' and UNESCO Section on the Diversity of Cultural Expressions, 'Methodological Guide for technical assistance missions'.

42. IOS report, para 62.

Convention), or where new policies are developed to promote cultural products (informed by the work of the UNESCO Convention on the Diversity of Cultural Expressions [2005]);⁴³

- difficulties integrating ICH-related policy into non-cultural legislation and policies (where appropriate), illustrated for example by insufficient synergy between national policies regarding ICH safeguarding, and those relating to intellectual property and policies to promote sustainable development;⁴⁴
- weak public and community consultation mechanisms in ICH-related policy making;⁴⁵ and
- cases where devolution of ICH-related policy making to sub-national levels of administration within a country,⁴⁶ which typically creates opportunities to cater to local needs and situations, affects negatively coordination and synergy between policies within a State.

Such challenges are not limited to developing countries, although these contexts will be the focus of needs assessment projects. Non-developing countries often devolve policymaking initiatives to different administrative levels. They also face challenges in formulating new approaches for ICH-related policies in contexts where institutional arrangements for heritage conservation or archival documentation are very well established and not always focused on enabling maximum community participation.

THE ROLE OF ADVISING EXPERTS IN PROVIDING EFFECTIVE POLICY SUPPORT

How can UNESCO effectively provide support to States Parties to the Convention who request policy-related advice? What is the role of experts appointed to assist in this process, and what are the limitations of this role?

The role of advising experts is to assist country counterparts in States to make locally-appropriate, informed choices about how best to support ICH safeguarding in the spirit of the Convention through policy making. An analysis of the country context, policy challenges, existing human and institutional resources and ICH safeguarding needs would inform suggestions on capacity-building interventions. The intervention aims to help country counterparts to determine to what extent, and in what ways policies and legislation, or institutional provisions, can support ICH safeguarding activities and the implementation of the Convention. If new policies and laws are drafted, they will need to be tailored to local situations, challenges and priorities. Existing policies, legislation and regulations can be modified or amended. In some situations, establishing formal institutions, or drafting specific legislation and policy for ICH, may not be optimal (or even possible), and other solutions may be required.

The policy environment for ICH safeguarding is complex and it is a relatively new field in the arena of culture and heritage policy making. The Convention entered fully into force only seven years ago, and most States Parties who have done so, have developed legislation and policies relating to ICH after ratification. There are no model laws drafted at the international level for ICH safeguarding,⁴⁷ perhaps in the same spirit that inventory making is left to States to pursue 'in a manner geared to its own situation' (Article 12.1). There is relatively little empirical research on country experiences of safeguarding, or ICH-related policy making. Advising experts doing needs assessments and providing policy advice should thus not aim to find ready-packaged solutions for policy making in the experiences of other States provided in Annex 1 to this guidance note, or elsewhere.

43. IOS report, executive summary, para 121-2.

44. IOS report, executive summary, para 121-2.

45. IOS report, para 124.

46. IOS report, para 100.

47. The UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Forms of Prejudicial Action, 1982, focused on intellectual property protection for artistic expressions of 'folklore'; this work has now been taken over by WIPO, whose Draft Articles (again for IP protection, see note above) come the closest to suggestions of model policy at the international level. See <http://www.wipo.int/wipolex/en/details.jsp?id=6714> for the 1982 Model Provisions.

UNESCO has had considerable experience in providing policy advice to States in the field of culture, and has also been reflecting on the opportunities and challenges faced in doing so. In 2011, the Division of Cultural Policies and Intercultural Dialogue in UNESCO discussed the principles and processes for the formulation and implementation of cultural policies.⁴⁸ In 2012 the UNESCO Section on the Diversity of Cultural Expressions set out some of the conditions for providing effective policy advice in their guide for technical assistance missions on cultural policy development.⁴⁹ The Policy Advice workshop in 2014 summarized the experiences of the ICH Section and various other UNESCO Sectors including the UNESCO Education Sector and UNESCO International Institute for Educational Planning (IIEP), and agencies like the United Nations Environment Programme (UNEP) in providing policy advice to States.⁵⁰

From these reports one can identify a number of favourable conditions under which support for policy development relating to ICH safeguarding could be most effective:

- policy support should only be provided on country request (an index of political will for policy making) and predicated on country commitments to take account of the process and its results;
- policy support should be based on a clear understanding of the general goal of the policy to be formulated, as identified by a range of country stakeholders, and aligned with the local governance system and country priorities;
- policy support should be focused on the local situation, based on an identification of ICH-related challenges, needs and priorities, and an analysis of possible solutions (including solutions that do not involve the development of policy and legislation); and
- policy support should not be focused on helping country counterparts to write a policy document as a stand-alone intervention: it needs to ensure that country counterparts take ownership of the process.⁵¹ It should be accompanied by human and financial resources for analysis, stakeholder involvement, and follow-up.

The role of the advising expert is thus not to suggest model solutions or write policy documents for States but, at their request, to provide analysis, information and other support for an endogenous and consultative process of policy development.⁵² The advising expert would be guided by consultations with local stakeholders and legal experts in the relevant State, and knowledgeable UNESCO Officers from a Field Office covering the State concerned. Much of the work of advising experts will be focused on facilitation and consensus building in engaging with country stakeholders,⁵³ and acting as a sounding board for ideas during their discussions. Advising experts should make every effort to address barriers to participation for individuals (e.g. women) and social groups (e.g. persons belonging to minorities and indigenous peoples) in this process.⁵⁴ UNESCO's approach aims at combining expertise in the field of cultural policies with expertise on ICH, which means that experts will work in pairs. The intention is to provide a more integrated analysis and recommendations.

KEY ISSUES THAT ARISE IN ICH-RELATED POLICY MAKING

States face some similar issues and experience some common challenges in developing ICH-related policy and legislation. These may include:

-
48. Division of Cultural Policies and Intercultural Dialogue UNESCO Culture Sector, 2011 'Operational processes for the formulation and implementation of cultural policies'.
49. UNESCO Section on the Diversity of Cultural Expressions, Methodological Guide for technical assistance missions.
50. UNESCO ICH Section, Workshop report, 'How to provide policy advice effectively?'
51. UNESCO Section on the Diversity of Cultural Expressions, Methodological Guide for technical assistance missions, p.7.
52. UNESCO Section on the Diversity of Cultural Expressions, Methodological Guide for technical assistance missions, p.5.
53. UNESCO ICH Section, Workshop report, 'How to provide policy advice effectively?'
54. UNESCO Section on the Diversity of Cultural Expressions, Methodological Guide for technical assistance missions, p.9.

- how ICH-related policy making in the spirit of the Convention intersects with local contexts of ICH and communities concerned in the specific context of the State, and its broader principles of governance;
- whether ICH-related provisions could be incorporated into other policies and laws beyond the culture sector, and if so what kinds of provisions would be most beneficial to safeguarding the ICH;
- whether existing legislation impedes the practice and safeguarding of ICH and therefore be in conflict with the principles of the Convention; whether it is preferable to have a separate policy on ICH or to integrate provisions for ICH in heritage or general culture policies, or both;
- what subject matter should be covered in ICH-related policies and how it should be defined;
- how community participation in, and benefit from, ICH safeguarding can be supported and promoted through policy development; and
- in what ways specific institutions can support ICH safeguarding, and if so how their amended mandates should be incorporated into policies, laws or regulations.

Annex 1 provides some suggestions to guide policy advice in this regard, by discussing the experiences of a wide range of States in the following areas:

- identifying general principles of policy making in the spirit of the Convention;
- developing an approach to ICH safeguarding within the framework of general constitutional provisions and governance frameworks, human rights provisions and provisions for minorities or indigenous groups; and
- developing specific ICH-related policies and legislation and/or integrating them into broader cultural or heritage policies and legislation; and
- integrating ICH policies into other areas of policy and legislation outside the culture sector.

POSSIBLE STEPS IN A NEEDS ASSESSMENT

There are a number of possible steps that could be undertaken in consultation with national counterparts within a consultation process, and in the development of policy thereafter.⁵⁵ These steps are supported by the information in Annexes 2-4.

- Undertake a desk review of the country context relevant to ICH safeguarding, including:
 - the historical, current socio-economic, political and cultural context,
 - the demographic trends in the country, including recent migration and immigration, and the range of and relationship between different communities in the country,
 - the relevant national, regional and international legal and policy context that affects ICH safeguarding (not just in culture, but education, health, intellectual property, etc.), including the goals of policy making in the area of culture, and
 - the institutional framework and mandates.
- Identify diverse stakeholders (e.g. communities, NGOs, government ministries and agencies, institutions, and research centres) and set up consultations with their representatives, to:
 - identify the policy goals, issues and challenges relevant to ICH safeguarding in the country (whether in the field of culture or more generally),
 - evaluate existing interventions and policies that support ICH safeguarding,
 - review institutional capacities to fulfil their current mandates,
 - prioritize needs and opportunities relating to ICH safeguarding, and

55. The following documents contain some similar steps: UNESCO Section on the Diversity of Cultural Expressions, 'Methodological Guide for technical assistance missions'; Division of Cultural Policies and Intercultural Dialogue (UNESCO Culture Sector), 2011 'Operational processes for the formulation and implementation of cultural policies'.

- identify possible areas in which policy making or revision, and institutional support, may assist ICH safeguarding.
- Draft an initial analysis and needs assessment;
- Consult with relevant stakeholders about the initial analysis and needs assessment; and
- Write the final needs assessment report including a country assessment and suggestions for further advisory or capacity-building assistance.

ANNEXES TO THE GUIDANCE NOTE

ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Committee	Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage
Communities	Unless indicated otherwise this covers the terms communities, groups and individuals as understood in the Convention
Convention	Unless indicated otherwise, this refers to the UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage (2003), and any reference to 'Article' without other indications refers also to this Convention.
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICH	Intangible (cultural) heritage
IP	Intellectual property
IPR	Intellectual property rights
IOS report	The Internal Oversight Service (IOS) report on UNESCO's standard-setting work of the Culture Sector, document IOS/EVS/PI/129 REV. (October 2013).
LHT	Living Human Treasures
OAPI	African Intellectual Property Organization
OD(s)	Operational Directive(s) of the Convention
Ratification	This covers various terms denoting processes by which States can adhere to the Convention: ratification, acceptance, approval and accession
Ratify	This covers the terms ratify, accept, approve and accede
Register	Register of Best Safeguarding Practices
RL	Representative List
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	United Nations Human Rights Committee
UNTWO	World Tourism Organization
USL	Urgent Safeguarding List
WHC	World Heritage Convention
WIPO	World Intellectual Property Organization

ANNEX 1: SYNTHESIS OF KEY ISSUES IN DEVELOPING LEGISLATION AND POLICIES WITHIN STATES PARTIES TO THE INTANGIBLE HERITAGE CONVENTION

INTRODUCTION

This Annex will consider some key issues that have arisen, or may arise, in policy making for ICH safeguarding, drawing on some of the experiences of States Parties to the Convention. It is intended to be a synthesis of existing work on this topic, with some examples of policy making in different states; it does not pretend to provide an exhaustive analysis.

CREATING AN INFRASTRUCTURE FOR ICH SAFEGUARDING

As mentioned in the Guidance Note, States Parties to the Intangible Heritage Convention are obliged to take the ‘necessary measures’ to safeguard the ICH present in their territory (Article 11(a)), including the identification and inventorying of this ICH ‘in a manner geared to [their] own situation’ (Articles 11(b) and 12.1).⁵⁶ The Convention and its ODs encourage (but do not oblige) states to put in place financial, legal and administrative measures (Article 13; ODs 103–105) to support ICH safeguarding in their territory.

The kinds of activities envisaged within such an infrastructure include:

- Promoting awareness about, respect for, and recognition of, the diversity and value of ICH (Article 1; OD 100-123);
- Consultation and coordination within and between communities and other stakeholders (Article 13(b); OD 109, OD 79-99);
- Capacity building among communities concerned, and other stakeholders (where required) for safeguarding (Article 13(d)(i), 14; OD 82, 86 and 107(k));
- Identification and inventorying of the ICH within the territory of the state, with community participation and consent (Articles 11(b) and 12.1);
- Management of, and enabling appropriate access to, information about the ICH (Article 13(d); OD 109);
- Protection of the rights and well-being of the communities concerned while safeguarding the ICH, promoting sustainable development, helping communities (where requested) to ensure their ICH is not de-contextualized or over-commercialized, and that they are not misrepresented or abused (OD 102, 104);
- Sharing expertise and information across international borders (Articles 1(d) and 19; ODs 86–88), including cooperation and networking between communities, experts, centres of expertise and research institutes and international networks of ICH-related institutions and Category II centres (ODs 79–80, 86 and 88).

The approach taken in the Convention and its ODs is necessarily general, and states will of course identify the specific needs of communities and ICH safeguarding within their territories, and tailor their policies accordingly. As we observed in the Guidance Note, formal legal and policy frameworks are also not always required to support ICH safeguarding: sometimes communities can proceed with safeguarding strategies perfectly well without them. A number of states, including some that have not ratified the Convention, have nevertheless already developed ICH-related policies and legislation. Some states ask UNESCO for advice in developing such policies.

56. States Parties also have to make contributions to the ICH Fund (Article 26.1) and periodically report on their activities under the Convention (Article 29).

ICH POLICY DEVELOPMENT WITHIN STATES

Policies relating to ICH safeguarding are relatively new, although countries such as Japan and the Republic of Korea have had ICH-related laws for decades prior to the Convention coming into force. Reviewing 41 Periodic Reports received by the Committee from States Parties in 2011-13, the IOS report found that 14 of these states had developed specific ICH-related legislation or modified existing laws, and 5 were in the process of doing so.⁵⁷ The report also noted that 29 out of 41 states 'have put in place some kind of new ICH safeguarding policy, 24 of which can be regarded as demonstrating the integration of ICH safeguarding into other policy areas to some extent'.⁵⁸ A further 27 states submitted Periodic Reports that were examined by the Committee in 2014.⁵⁹

A majority of States Parties have not yet submitted Periodic Reports, and in many of these states policy development has been slower.⁶⁰ UNESCO hosts a database of national cultural heritage laws, which can be consulted for a broader range of ICH policies; 250 entries, according to the database classification system, are ICH-related laws.⁶¹ The World Intellectual Property Organization (WIPO) maintains a database of legislation that can be filtered for entries pertaining to Traditional Cultural Expressions (1,018 entries)⁶² and Traditional Knowledge (1,965 entries).⁶³ Although the WIPO database focuses on intellectual property (IP) law relating to what would be considered ICH under the Convention, it also includes many heritage-related laws.

Policy, law and administrative measures to support ICH safeguarding are thus not always to be found within specific ICH-related policies and legislation but located in, and profoundly affected by provisions in, constitutions, culture policies and heritage legislation, IP regimes, and in policies and legislation for other areas of government intervention, such as development, health, tourism and education. A patchwork of legislation can influence safeguarding activities. For example, in the United States (which happens to be a state non-party to the Convention), the American Folklife Center, under the American Folklife Preservation Act, 'recommended that ICH be taken into account in the implementation of all legislation on cultural resources and cultural heritage'. A range of laws, such as the National Environmental Policy Act, the Endangered Species Act, the Religious Freedom Restoration Act, Executive Order 12898 (on environmental justice concerning minority populations), the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act (NAGPRA), and the Federal Records Act all affect ICH safeguarding.⁶⁴

A DIVERSITY OF APPROACHES

Analysis of laws and policies in States Parties to the Convention reveals considerable diversity in legal and administrative provisions for ICH safeguarding:⁶⁵

- Some states have developed (or are developing) policies and legislation specifically for ICH safeguarding (e.g. Japan, China, Georgia, Niger), while others have integrated (or are integrating) ICH into their overall culture legislation (e.g. France, Morocco, Serbia, Viet Nam);
- In some states, policies and legislation regarding ICH are promulgated and enforced at the sub-national level (such as in provinces or counties in a federal structure) and may thus differ

57. IOS report, para 94.

58. IOS report, para 102.

59. Examination of the reports of States Parties on the implementation of the Convention, 2014, ITH/14/9.COM/5.a.

60. For the whole set of reports, see <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00460#reporting-on-the-implementation-of-the-convention-and-on-the-status-of-elements-inscribed-on-the-representative-list>

61. <http://www.unesco.org/culture/natlaws/index.php>

62. http://www.wipo.int/wipolex/en/results.jsp?countries=&cat_id=16

63. http://www.wipo.int/wipolex/en/results.jsp?countries=&cat_id=18

64. Lixinski, L. *Intangible Cultural Heritage in International Law* (Oxford University Press 2013), p.139.

65. IOS report, para 94-101.

between administrative regions within a country (e.g. Austria, Brazil, Belgium, India, Italy, Mongolia, Switzerland, Spain, UAE);

- Some states have established (or are establishing) new institutions or directorates responsible for ICH (e.g. the Dominican Republic, Gabon, India), others have expanded the mandates of existing institutions (e.g. Burkina Faso);
- Some states have legal instruments aimed at protecting particular ICH elements inscribed on their national ICH inventory/register and/or the Representative List (e.g. Portugal);
- A number of states make provision for support to key ICH practitioners, sometimes called Living Human Treasures (e.g. Cambodia, Morocco, Senegal);
- Some states link their ICH policies to provisions for specific communities, whether these are minority or indigenous groups, or majority groups.

These different approaches within states can partly be ascribed to different regional and international influences, different socio-political, historical and economic contexts in each state; and different interpretations of, and reasons for ratifying, the Convention.

Regional and international influences

International instruments such as the Convention can be very important in framing problems and solutions, and even providing concepts and definitions for ICH-related policy making. This can assist in the development of effective policy; consistency of terminology and approach can assist in fostering international cooperation. Nevertheless, states also have to tailor ICH policy to their own circumstances. In doing so, they are influenced by regional as well as international approaches and instruments. Lixinski suggests that regional instruments in the Americas such as the Draft American Declaration on the Rights of Indigenous Peoples conceive of ICH as a reservoir of the 'pure commonly-shared culture' of the continent (part of a project to emphasize a pan-American identity), and its safeguarding as part of a broader process of recognizing and protecting the rights of indigenous peoples.⁶⁶ In Europe, regional instruments such as the Faro Convention promote the role of cultural heritage in fostering a common European identity. They focus also on its developmental benefits, and the values of democracy, human rights and the rule of law in developing a strong civil society characterized by NGO and community engagement.⁶⁷ African regional instruments such as the Cultural Charter for Africa and its successor the African Renaissance Charter (which does take account of ICH, linking it strongly to African languages) focus on promoting African cultural heritage as a strategy of cultural decolonization and a means towards realizing the aims of human rights, social cohesion, and human development.⁶⁸ The ASEAN Declaration on Cultural Heritage (2000) creates a framework for regional cooperation on cultural heritage that recognizes the value of ICH and the need to protect local communities' IP rights over their ICH.⁶⁹

Socio-political, historical and economic contexts in the State

Whether one starts with ICH elements and then identifies associated communities, or starts with communities and then they identify their ICH, neither of these concepts are pre-defined entities within a state. They are actively framed, perceived, and valued, engaged with and redefined over time by communities concerned and other stakeholders, including state agencies. The socio-political, historical and economic context, and the perspectives of these different stakeholders, affects this process profoundly. ICH policies are thus often closely linked not just to the local or national context, but also to social perceptions and strategic interventions relating to governance

66. Lixinski, *Intangible Cultural Heritage in International Law*, p.76.

67. Lixinski, *Intangible Cultural Heritage in International Law*, p.80.

68. Lixinski, *Intangible Cultural Heritage in International Law*, p.85.

69. <http://cultureandinformation.asean.org/wp-content/uploads/2013/11/ASEAN-Declaration-on-Cultural-Heritage.pdf>

and accountability, relationships between the state and minority and indigenous groups, the role of culture in society, proposals for sustainable development, and so on.

Interpretations of, and reasons for ratifying, the Convention

States have different interpretations of, and reasons for ratifying, the Convention, which affects the development of policy and legislation to implement it. These differences will be discussed in detail below, but one issue which is particularly relevant to a general discussion is the interpretation of the relative roles and responsibilities of states and communities concerned in the safeguarding of ICH and the implementation of the Convention. Some states view ICH elements – or some of them – as national assets, in the same way as key cultural or historical sites are considered ‘national heritage resources’. Some states therefore place responsibility for stewardship, management and even IP ownership, for ICH in the hands of government, and thus effectively appropriate certain ICH elements.⁷⁰ The IOS evaluation found that some states placed ‘specific expressions of ICH at the centre of a country’s national heritage, with a view [to] building a national identity around them’ and others claimed ‘ownership’ over ‘specific ICH elements inscribed or to be inscribed on the Representative List’.⁷¹

Community involvement in safeguarding, and stewardship over it, is a key principle of the Convention, as discussed in the Guidance Note. This approach should be reflected in policies at the national level for implementing the Convention, where states wish to do so. However, because the Convention’s Organs necessarily interface with States Parties, and not directly with communities, there is the risk that policies and institutions put in place for implementing the Convention focus on this interface, rather than the interface with communities. It is therefore important for States to put in place safeguarding strategies and measures that firmly anchor the Convention at the national level.

For this reason, it is important that policy making within states reflects the delicate balance between recognizing the critical and essential role of communities in safeguarding their ICH, the role of states in creating an enabling environment for this to happen, and in interfacing with the Organs of the Convention. Communities and NGOs at the national level should also be empowered, consulted and made aware of the possibilities for engagement with the mechanisms of the Convention through for example consultative bodies as foreseen in OD 80, the NGO Forum, and opportunities for public comment on nominations to the Lists of the Convention.

A HIERARCHY OF POLICIES AND LAWS

Given the diversity of arrangements in states, it is difficult to provide an overview of policies and laws that would cover all systems. However, for the purposes of this Annex, we will make a few general comments about the relationship between different kinds of legal instruments.

Policies, laws and regulations exist in a hierarchical relationship to each other. As mentioned in the Guidance Note, the term ‘policy’ can have many meanings but it is used here to describe a system of courses of action, guiding principles and procedures considered beneficial for the specific purpose of safeguarding intangible cultural heritage. This includes policy documents drafted under the auspices of government that set out the broad aims, methods and principles that a government will use to guide actions including but not restricted to, the development of more specific legislation and regulations. Legislation is another term for statutory law enacted by a legislature or other competent authority in a country. Regulations are documents drafted by Ministries, state agencies or other authorized bodies explaining how a law will be implemented, for example explaining what various stakeholders should do to comply with the law.

70. See for example Antons, C. 2012. Geographies of knowledge: cultural diffusion and the regulation of heritage and traditional knowledge/cultural expressions in Southeast Asia, WIPO journal, vol. 4, no. 1, pp. 83-91, Thomson Reuters (Legal), London, England.

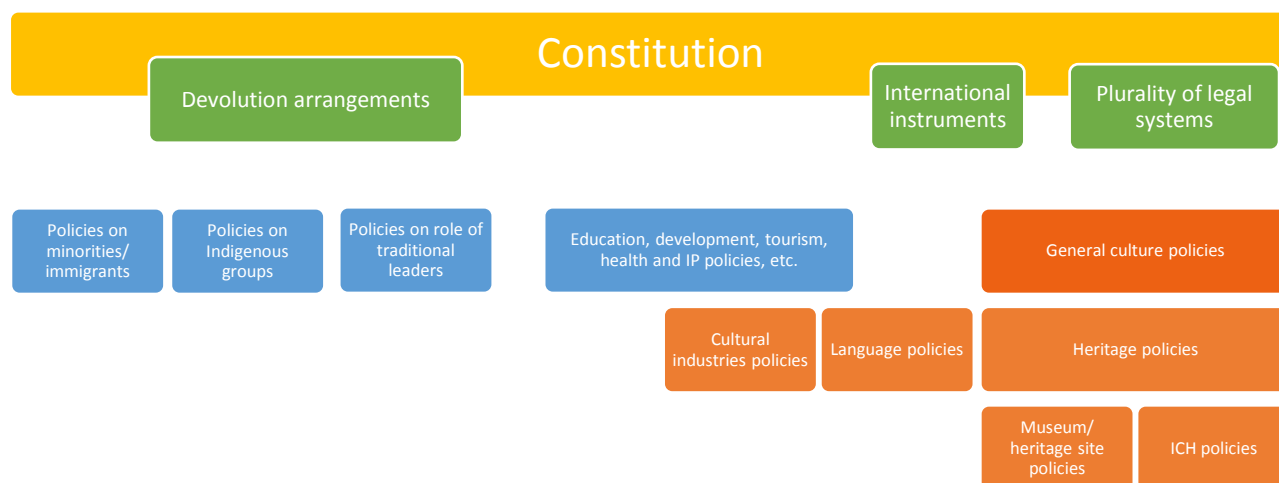
71. IOS report, para 62.

A constitution is generally at the top of the legal hierarchy in a state. Not all states have a written constitution, but most do.⁷² This text is an important starting point for understanding the place of culture and ICH within any state, their system of governance and law, and the relationship between the state and various different communities. Most constitutions are supreme law, which means that they override any contradictory provisions in other laws or regulations. Even so, any contradictory provisions in subsidiary legislation may need to go through a process of constitutional review before they are repealed or amended. If a constitution is not supreme law, legislation that contradicts the constitution can still be enforced. These factors will affect the implementation of constitutional provisions, and provide the framework within which ICH-related policy making and safeguarding can happen within a state.

States usually ratify hundreds of international instruments, including international human rights instruments and may be members of international bodies like the World Trade Organization that commit them to taking certain policy approaches. At the time of ratification of international instruments (or at some later date) states may be allowed to make declarations or reservations in respect of these instruments, stating that they do not accept some of the obligations or wordings in them. Once an international instrument is ratified, it does not automatically become law in a state. In so-called ‘dualist’⁷³ states, it is necessary for international instruments to be incorporated into national law to take effect even after they have been ratified, and states are sometimes slow to do this. In some states, little has happened since the ratification of the Intangible Heritage Convention.

As mentioned above, ICH-related provisions can be located in a variety of places within a legal system: a constitution, customary law, policy and legislation about a wide range of subjects, as well as in general culture policies, or subsidiary policies and legislation in the culture sector. Many states devolve policy making about culture to subordinate levels of administration or governance, and some have plural legal systems that accommodate certain forms of customary law, and thus have different provisions applicable to different communities in the state. ICH-related policy making does not always take the form of a stand-alone ICH policy in the culture sector. ICH-related provisions can be included in legislation on heritage management, institutional mandates, regulations and so on. Some policies explicitly mention ICH; others may simply affect its safeguarding indirectly.

Figure 1: Showing the hierarchical relationship between different legal instruments at the national level ('policies' below can refer to policy as well as legislation or regulations)



72. See the collection of national constitutions at the Constitute project <https://www.constituteproject.org/>

73. See http://en.wikipedia.org/wiki/Monism_and_dualism_in_international_law

CONSTITUTIONAL PROVISIONS

Most national constitutions do not mention ICH specifically. In a few constitutions, indications are given about how ICH is defined, how the state plans to ensure its safeguarding, and the roles of various stakeholders in doing so. They may also identify areas in which the state plans to make new policies and laws. Irrespective of whether it mentions ICH, and its value to society or specific communities, there are other factors in any constitution that will likely affect the nature and scope of policy making relating to ICH, especially where the constitution is supreme law.

A constitution tends to focus on general principles of governance and is therefore relatively abstract, high level and difficult to amend. Therefore, it may not be optimal (or possible) to include detailed provisions for ICH safeguarding in a constitution, unless there is a federal or otherwise devolved system of governance requiring the constitution to set out responsibilities for culture at different levels of government, or other compelling reasons. Where states are already going through a process of constitutional revision, it may be worth discussing with country counterparts whether amendments could be made to include mention of ICH as a part of the cultural heritage in the territory. This may make it easier, if required, to subsequently ensure the modification of culture policies and legislation, or other areas of policy, to include ICH.

Examples

Using the Constitute database as a guide, we find specific mention of ICH (or ‘immaterial’ cultural heritage) in the constitutions of Bolivia (2009), Brazil (1988, revised 2014), the Dominican Republic (2010), and Venezuela (1999, revised 2009). The Constitution of the Philippines also ‘acknowledges the importance of protecting traditional culture for the promotion of national identity, especially indigenous traditional culture, traditions, and institutions.’⁷⁴

The ICH is described as ‘manifestations of art and popular industries’ and ‘**intangible** aspects of places and activities’ in the Bolivian Constitution of 2009, article 101. This constitution gives communities (the broadly defined ‘nations and rural native indigenous peoples’) the right ‘to have their ICH ‘valued, respected and promoted’, and ‘collective ownership of the intellectual property’ in their ICH (Article 30).⁷⁵ The Venezuelan Constitution says that:

Cultural values are the unrenounceable property of the Venezuelan people and a fundamental right to be encouraged and guaranteed by the State, efforts being made to provide the necessary conditions, legal instruments, means and funding. The autonomy of the public administration of culture is recognized, on such terms as may be established by law. The State guarantees the protection and preservation, enrichment, conservation and restoration of the cultural tangible and intangible heritage and the historic memories of the nation (Article 99).⁷⁶

The Constitution of Brazil (Article 216)⁷⁷ is unusual in that it gives a fairly detailed definition of ICH and tangible cultural heritage, and some suggestions for its safeguarding, ‘with the collaboration of the community’:

Brazilian cultural heritage includes material and immaterial goods, taken either individually or as a whole, that refer to the identity, action and memory of the various groups that form Brazilian society, including:

- I. forms of expression;
- II. modes of creating, making and living;
- III. scientific, artistic and technological creations;

74. Lixinski, *Intangible Cultural Heritage in International Law*, p.138.

75. https://www.constituteproject.org/constitution/Bolivia_2009.pdf?lang=en

76. https://www.constituteproject.org/constitution/Venezuela_2009.pdf?lang=en

77. https://www.constituteproject.org/constitution/Brazil_2014#s4132

- IV. works, objects, documents, buildings and other spaces intended for artistic-cultural manifestations;
- V. urban complexes and sites with historical, landscape, artistic, archeological, paleontological, ecological and scientific value.

HUMAN RIGHTS, GENDER EQUALITY AND ICH POLICIES

UNESCO promotes human rights, and has made the promotion of gender equality a priority in its programmes, including the implementation of the Convention.⁷⁸ Under the Convention, only ICH that is 'compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals' (Article 2.1) will be taken into account. This provision in the Convention refers to actions at the international level (for example, nominations to the Lists of the Convention) and does not necessarily require that States Parties ignore ICH at the national level that fails to comply with human rights provisions. Nevertheless, discussions at the national level may, depending on the local context, address human rights issues (including gender equality) in developing ICH-related policies.

This section will discuss three main issues:

- Raising awareness about human rights issues in relation to ICH;
- Policy approaches regarding ICH that is not compliant with the requirements of international human rights instruments; and
- The use of human rights defences to safeguard the practice of ICH.

HUMAN RIGHTS ISSUES AND ICH: RAISING AWARENESS

Most states have adopted the principles of international human rights instruments such as the Universal Declaration of Human Rights (UDHR) of 1948, and ratified the subsequent International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) of 1966.⁷⁹ Since then, many further instruments have been adopted in this area, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007).

As said above, one of the key priorities within UNESCO is gender equality. Perhaps because of the idea that gender equality and 'tradition' are sometimes incompatible, there has been insufficient discussion about how non-discrimination provisions can be incorporated into ICH-related policies, legislation and more generally into safeguarding approaches under the Convention. Lack of attention to gender and human rights issues can distort the representation of ICH and exclude some communities (and some members of communities) in the safeguarding process and therefore also pose a threat to the continued practice and transmission of ICH.

The simple fact that an ICH practice is segregated by sex (or by age, status, ethnicity, etc.) does not make it discriminatory *per se*.⁸⁰ ICH practice is also not static: it is changing all the time, and in

78. See for example UNESCO 2011, Priority Gender Guidelines (http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/BSP/GENDER/GE%20Guidelines%20December%202020_FINAL.pdf); UNESCO Report 2014 'Gender Equality: Heritage and Creativity' (<http://unesdoc.unesco.org/images/0022/002294/229418e.pdf>); Section on Gender equality (paragraph 14) of the Draft Operational Directives on 'Safeguarding intangible cultural heritage and sustainable development at the national level' (Annex of Document ITH/14/9.COM/13.b, see English); ICH Intergovernmental Committee DECISION 9.COM 13.b; Section on 'Heterogeneity of communities' (paragraph 24) in Aide-mémoires for completing nominations: Urgent Safeguarding List (English) and Representative List (English).

79. Universal Declaration of Human Rights <http://www.un.org/en/documents/udhr/>; International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/cescr.aspx>

80. UNESCO ICH Section, Gender Workshop Unit, draft.

some cases adapting to provide greater scope for gender equality or the recognition of a range of different sexualities, for example.⁸¹ Nevertheless, in many situations,

- the contributions of women and marginalized groups to ICH practice are devalued and ignored in identifying and documenting ICH elements;
- the gender dynamics of ICH elements, including the development of gender-responsive approaches towards transmission of ICH, are not fully explored in the process of identification, inventorying and safeguarding; and
- the gender dimension of community consultation and capacity building is generally not adequately addressed by States Parties.⁸²

The international human rights framework provides guidance on how tensions between cultural diversity and human rights principles can be resolved, for example with reference to gender:

The UNESCO Universal Declaration on Cultural Diversity ... provides clear principles for addressing potential conflict between cultural diversity and human rights: 'No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor limit their scope'. It builds on the significant corpus of international human rights literature, recommendations and reports since the adoption in 1966 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). For example, as stressed by General Comment 21 of the right of everyone to take part in cultural life it is mandatory for States Parties to ensure equality between men and women with respect to the right to participate in cultural life by eliminating 'institutional and legal obstacles as well as those based on harmful practices, including those attributed to customs and traditions'.⁸³

It is thus very important that awareness about the relationship between human rights (including gender equality) and the practice, identification and safeguarding of ICH, should receive attention in the policy development process, as far as this is possible.

ICH THAT IS NON-COMPLIANT WITH HUMAN RIGHTS: POLICY APPROACHES

States take a variety of approaches to dealing with ICH that is not compliant with human rights. ICH practices that are not compliant with human rights can be prohibited by law. Practising or encouraging certain ICH elements, or practices, can be associated with human rights violations or other negative outcomes for health or social life, but many states face the problem that simply banning them can drive these practices underground and make them even more difficult to regulate and address.

ICH practices that are not compliant with human rights provisions can also be explicitly or implicitly permitted by the state in existing legislation and policy. Legislation and policies within a state are not necessarily consistent with the principles of international law, or the international human rights instruments that they have ratified. Constitutions, and legal frameworks at the national level, sometimes adopt the principles of human rights but then offer exemptions from compliance with these provisions. Even where a constitution formally prohibits gender discrimination, for example, it sometimes continues to be permitted on the grounds of 'tradition' or 'custom' in customary or religious laws. Many states have ratified instruments like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), but with reservations that seriously limit its effect.⁸⁴ Even without reservations like these, states can be slow to incorporate provisions for gender equality into national law, which may be necessary for them to take effect.

81. Examination of the reports of States Parties 2013, ITH/13/8.COM/6.a, para 62; see also <http://www.unesco.org/culture/ich/RL/00033>

82. UNESCO ICH Section, Gender Workshop Unit, draft.

83. UNESCO, Gender Equality: Heritage and Creativity (Paris, 2014), p.15-16.

84. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) reservations <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N50>

ICH PRACTICE AS A HUMAN RIGHT

In some states, certain ICH elements widely practised and accepted in society remain illegal because they were originally banned under colonial rule, but the law is not enforced. Many states have colonial-era bans on ‘witchcraft’ or ‘witchcraft-related allegations’, that cover a wide range of ritual practices – these may include some divining or fortune-telling practices with no harmful effects or human rights implications. Communities sometimes therefore challenge these bans as discriminatory, or on the grounds that they have the right to practice their culture if it is not contrary to human rights (if these rights are protected by the constitution). Of course, some aspects of ritual practice may still transgress human rights, and thus attract the attention of law enforcement. There may also be discriminatory aspects to ICH practice: for example, where witchcraft allegations are mainly directed at women.⁸⁵

There are some cases in which existing legislation impedes the practice and transmission of intangible cultural heritage, for example, Rastafarians ritual practices involve the use of marijuana which is illegal in many states. There has recently been considerable debate about whether it is better to legalize Marijuana, which is used also as medicinal herb, both in traditional healing practices and for contemporary medical and scientific purposes. In February 2015, Jamaica's Parliament approved an act decriminalizing small amounts of marijuana and establishing a licensing agency to regulate a lawful medical marijuana industry. This will enable the medicinal and ritual use of marijuana in Jamaica. Individuals and minority or indigenous communities also occasionally seek recourse to international human rights law for assistance in safeguarding their ICH once local remedies have been exhausted. For example, a few cases regarding the rights of individuals from minority and indigenous communities under Article 27 of the ICCPR⁸⁶ have been adjudicated by the United Nations Human Rights Committee (UNHRC). These cases mostly involved the rights of individual community members to practice traditional hunting or animal husbandry where national laws prohibited this under certain circumstances. The UNHRC took the position that where the purposes (e.g. economic and ecological) behind the national law prohibiting such acts were legitimate, certain limitations on cultural practice were not in violation of Article 27.⁸⁷ It took the view that the implementation of laws that have a ‘limited impact’ on the way of life of the individual members of a minority is not a ‘*de facto* denial’ of their traditional way of life and does not amount to a violation.⁸⁸ Individual members of communities have also been able in some cases to safeguard their ICH with reference to freedom of religion (e.g. traditional slaughtering techniques), freedom of association, the right to physical integrity, the right to property (e.g. retention of traditional land), and the right to enjoy culture and its benefits under the ICCPR and (to a lesser extent) the ICESCR.⁸⁹ With the entry into force of the optional protocol to the ICESCR allowing for individual petitions to the Committee, the number of international cases under Article 15(4) is likely to increase.⁹⁰

Most international human rights instruments focus on enforcing the rights of individuals, but communities may also seek redress at the international level on human rights grounds as a group, using regional instruments such as the African Charter on Human and Peoples’ Rights that permit this approach.

-
85. Forsyth, M. 2014. ‘A Pluralist Response to the Regulation of Sorcery and Witchcraft in Melanesia’, paper presented at the conference on Sorcery & Witchcraft-Related Killings in Melanesia, 5-7 June 2013, Australian National University, Canberra.
86. Article 27: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
87. Ivan Kitok v Sweden (a case about Sami reindeer breeding), in Lixinski, ‘Intangible Cultural Heritage in International Law’, p.156.
88. Länsman v Finland (the impact of tree logging licenses on reindeer breeders in Finland) and George Howard v Canada (First Nations members fishing out of season), in Lixinski, Intangible Cultural Heritage in International Law, p.156.
89. See Lixinski, Intangible Cultural Heritage in International Law, pp.169-70.
90. Lixinski, pers. comm.

Examples

- Removing legal sanctions against ICH practices: In Jamaica, amendments to the law in 2013 removed the sanction of whipping that used to be a punishment for those who practiced 'obeah', a folk religion with West African roots that is common in many Caribbean countries.⁹¹
- Retaining or reinstating sanctions against human rights abuses associated with ICH practice: In Tanzania, a ban on 'witchdoctors' has recently been put in place because of the role of their activities and beliefs in the murder of people with albinism for the trade in albino body parts, which lack pigment and are valued for their association with good luck and wealth.⁹²
- Prohibiting human rights abuses in the name of culture or tradition: Ghana's Constitution (1992, article 26) states that 'All customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited'.⁹³
- In Kenya's 2010 Constitution, which adopts international human rights instruments as part of national law, young people and children are expressly to be protected 'from harmful cultural practices' that transgress human rights (articles 53(d) and 55(d)), and legislation has been drafted to prohibit some of them. Individuals' choices about participating in cultural life are protected. Article 44.3, for example, states that a 'person shall not compel another person to perform, observe or undergo any cultural practice or rite'. Customary law is subject to the provisions in the Bill of Rights in the Constitution (article 2.4).⁹⁴
- Supporting community action to protect their cultural rights: In 2003, the African Commission on Human and People's Rights found that by evicting Endorois families from their land around the Lake Bogoria area in the Rift Valley to create a game reserve for tourism, and restricting their access to the land without compensation, the Kenyan government had prevented the community from practising their pastoralist way of life, using ceremonial and religious sites, and accessing traditional medicines.⁹⁵ 'The Commission found that the Kenyan government had violated the Endorois' rights to religious practice, to property, to culture, to the free disposition of natural resources, and to development, under the African Charter (Articles 8, 14, 17, 21 and 22, respectively). ... The Commission's decision was formally approved by the African Union at its January 2010 meeting.'⁹⁶
- Supporting community access to communal land on human rights grounds: Although France had made a reservation regarding Article 27 of the ICCPR on the grounds that it has no minorities, the UNHRC referred to the concept of protecting 'family life' (Article 17) to stop a hotel construction project on the traditional lands, including the traditional burial grounds, of a Polynesian community, arguing that their concept of the 'tribe' was equivalent to family.⁹⁷

INDIGENOUS PEOPLES OR MINORITY GROUPS

Although the provisions of the Convention and its Operational Directives apply to all communities, groups and individuals who identify with a specific ICH element, not just to indigenous communities and their ICH, in the Preamble the Convention mentions indigenous communities as requiring special consideration. Indigenous and minority communities often experience difficulties in

91. The Obeah (Amendment) Act, 2013 (Jamaica)

http://www.japarliament.gov.jm/attachments/341_The%20Obeah%20%28Amendment%29%20Act,%202013.pdf

92. BBC News Africa, 'Tanzania bans witchdoctors over albino attacks', <http://www.bbc.co.uk/news/world-africa-30794831>

93. Deacon, 'A comparative review of cultural rights provisions in the Kenyan constitution'.

94. Deacon, 'A comparative review of cultural rights provisions in the Kenyan constitution'.

95. Deacon, 'A comparative review of cultural rights provisions in the Kenyan constitution'.

96. See Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003 <http://www.escri-net.org/docs/i/1216218> Cited in Deacon, 'A comparative review of cultural rights provisions in the Kenyan constitution'.

97. Francis Hopu and Tepoaitu Bessert v France, in Lixinski, *Intangible Cultural Heritage in International Law*, p.164.

safeguarding their ICH; it may have been historically devalued by the government or broader society, and in some cases its practice may even have been constrained or prohibited.

International human rights instruments link the protection of human dignity to respect for culture, and thus protect freedom of expression, conscience and religion, and freedom to participate in cultural life.⁹⁸ However, it should be noted that the interpretation of these concepts has changed over time. While individual rights to choose what cultural groups they wish to join have not changed in scope, the focus has shifted from protecting the cultural rights of nations to the rights of minorities and other sub-national groups to practice their culture. The right to participate in cultural life (protected in the UDHR and ICESCR) was initially framed as the right of participation in the national culture and the right of 'peoples' to self-determination was interpreted largely in the sense of national sovereignty.⁹⁹ In the 1970s, many states stopped promoting assimilation as a strategy for managing cultural and ethnic diversity embraced strategies of multiculturalism instead, buttressed by human rights provisions for individuals.¹⁰⁰ After the end of the Cold War and the re-emergence of central and eastern European conflicts in the 1990s, the right to participate in cultural life was increasingly being reinterpreted as a recognition of cultural rights for minority groups.¹⁰¹

The General Assembly of the United Nations adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in September 2007, which has now been widely endorsed by states around the world. The Declaration recognizes that 'respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development'. It says that indigenous people have the 'right to practise and revitalize their cultural traditions and customs', and to 'the dignity and diversity of their cultures, traditions, histories and aspirations' including traditional medicines. They have the right to 'maintain, control, protect and develop their 'cultural heritage, traditional knowledge and traditional cultural expressions'. 'Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture'.¹⁰²

In line with the development of more international instruments for the protection of rights of indigenous groups and minorities, constitutional and other national provisions for minorities and indigenous groups have become much more common globally in the last few decades.¹⁰³ States take many different approaches to indigenous communities living within the borders of their territory, depending on the history and legal context of the relationship between indigenous communities and the state, and the attitude of the prevailing government.

Examples

- According to Venezuela's Constitution,

Native peoples have the right to maintain and develop their ethnical and cultural entity, world view, values, spirituality and holy places and places of cult. The State shall promote the appreciation and dissemination of the cultural manifestations of the native peoples, who have the right to their own education, and an education system of an intercultural and bilingual nature, taking into account their special social and cultural characteristics, values and traditions (Article 121).
- Devolution of responsibilities for ICH safeguarding to autonomous indigenous communities: The Bolivian Constitution of 2009 devolves some responsibilities for promoting and safeguarding

98. Francioni, F. 2008. 'Culture, Heritage and Human Rights: An Introduction' in Francioni and Scheinin (eds) *Cultural Human Rights*. Martinus Nijhoff Publishers, pp.8-9. Cited in Deacon, 'A comparative review of cultural rights provisions in the Kenyan constitution'.

99. Vrdoljak, A.F. 2008. 'Self-Determination and Cultural Rights' in F. Francioni and M. Scheinin (eds) *Cultural Human Rights*. Martinus Nijhoff Publishers, p.57. Cited in Deacon, 'A comparative review of cultural rights provisions in the Kenyan constitution'.

100. Such as Canada (1971), Australia (1973) and later the UK, US, South Africa and New Zealand: Harrison, R. 2013. *Heritage: Critical approaches*. Routledge, p.143. Cited in Deacon, 'A comparative review of cultural rights provisions in the Kenyan constitution'.

101. Vrdoljak, A.F. 'Self-Determination and Cultural Rights'.

102. See <http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>

103. Goderis and Versteeg 2014 cited in Deacon, 'A comparative review of cultural rights provisions in the Kenyan constitution'.

ICH to indigenous communities who exercise their authority through departmental and municipal levels of government:

The central level of the State has exclusive authority over ... Promotion of culture and the conservation of important cultural, historic, artistic, monumental, architectural, archeological, paleontological, scientific, tangible and intangible patrimony at the central level of the State (Article 298).

The autonomous departmental governments have exclusive authority over the following in their jurisdictions ... Promotion and conservation of culture, cultural, historic, artistic, monumental, architectural, archeological, paleontological, scientific, tangible and intangible departmental patrimony (Article 300).

The following are the exclusive authority of the autonomous municipal governments, within their jurisdiction ... Promotion and conservation of culture and municipal cultural, historic, artistic, monumental, architectural, archeological, paleontological, scientific, tangible and intangible municipal patrimony (Article 302).¹⁰⁴

DEVOLVED POLICY MAKING AND PLURAL LEGAL SYSTEMS

Many states have devolved systems of government, and in such cases, responsibilities for culture (and ICH) are likely candidates for devolution. Indigenous and minority communities may also have specific administrative and legal rights for land use, language provision, and so on, administered through state agencies or through separate administrative systems for these communities. We consider here two kinds of devolution: territorial devolution, where different parts of a state come under different authorities, and non-territorial devolution, where different ethno-linguistic communities (wherever they live) or other non-spatially defined entities are subject to different kinds of governance or devolved government authority. This is often associated with legal pluralism.

The most common kind of devolution (which we have called territorial devolution) can be found in a federal system of some kind. The second kind of devolution to consider – non-territorial devolution – can usually be ascribed to the existence of indigenous or minority groups in a state whose needs or governance systems are not limited to a specific area.

Even where traditional leaders, or other traditional community leadership structures, have no territorially-based administrative authority, central government may recognize their role in alternative dispute resolution processes, for example, or devolve some tasks to them through customary law.¹⁰⁵ Traditional authorities such as elders or chiefs, and traditional governance structures, may play a central role in representing communities, in transmitting, safeguarding and managing ICH and managing natural spaces and resources related to ICH practice. Traditional leadership structures have always of course changed over time and are sometimes contested by the community. State recognition of such structures can fluctuate depending on the political context. State recognition of certain kinds of leaders, appointment of traditional leaders and codification of customary law can completely reinvent traditional leadership structures, as in the case of British colonial rule in Africa.

Where a state chooses to devolve some authority to traditional leadership structures, it may make provision for a plural legal system. Plural legal systems are not all alike: it is possible to distinguish between ‘weak’ and ‘deep’ pluralism. In systems characterized by weak legal pluralism, customary law is subsumed within, and validated through, the dominant legal system: customary norms are ‘removed from their institutional context and applied by the state system’. In systems characterized by deep legal pluralism, the state takes the view that the principles underlying customary law may

104. https://www.constituteproject.org/constitution/Bolivia_2009.pdf?lang=en

105. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 11.

be incompatible with those underlying the dominant legal system, and the relevant customary institutions are thus given the space to operate independently from state structures.¹⁰⁶ Whether a state opts for 'weak' or 'deep' pluralism affects how much authority is given to traditional leaders, and what the scope of their power is. There is a close conceptual relationship between the principles underlying customary law, forms of traditional authority, social systems within communities and ICH practice.¹⁰⁷ In looking at the effects of non-territorial devolution on matters relating to ICH safeguarding, it is therefore important to consider the legal, administrative and conceptual relationship between state and traditional sources of authority and power, and the implications of this for ICH-related policy development.

The IOS report noted that where different levels of administration within a country make legislation and policy for ICH safeguarding there is a danger that this could result in duplication of activities, and/or 'patchy implementation of the Convention'.¹⁰⁸ However, this can be counterbalanced with the importance of subsidiarity, locating ICH safeguarding policies at the level of government closest to communities concerned.¹⁰⁹ Devolution of power may be aligned with local differences in ICH safeguarding approaches where administrative regions or authorities are determined by cultural differences, associated with specific communities or traditional administrative authorities. This is especially beneficial where, as in Brazil, for example, the federal level of government has 'promoted a comprehensive nation-wide agenda for ICH safeguarding, covering the largest possible number of stakeholders, and harmonizing different interests and concerns'.¹¹⁰ In some cases, therefore, devolution is focused more on implementation than policy making. From the perspective of ICH safeguarding, devolution may bring some advantages and disadvantages: it may be helpful to assess the risk and likely impact of possible duplication or dissonance between different levels of government, as against opportunities for increased flexibility in adapting ICH policies to local circumstances.

Examples

- Devolution of responsibilities in a federal system: In Argentina, the state is responsible for promoting federal policies on ICH, but each of the 24 autonomous provinces is responsible for implementing them within its own territory.¹¹¹
- Devolution of responsibilities in a federal system: In Spain, the federal state and the Autonomous Communities share responsibilities for culture, including inventory-making.
- Devolution of responsibilities in a federal system: The seven emirates of the United Arab Emirates are responsible for setting up their own ICH safeguarding systems, but Abu Dhabi provides advice and support to the others.¹¹²
- Devolution of responsibilities in a federal system: In Belgium, each of the three linguistic communities has its own government; so do the three regions whose territories to a large extent overlap with those of the communities. There also is an all-Belgian government which, however, has no ministry specifically responsible for culture. The governments of the communities have the highest responsibilities for culture, including ICH, and including international relations. Tangible heritage is dealt with by the regional governments.
- Devolution of responsibilities to counties or provinces: The Kenyan Constitution of 2010 devolves responsibility for '[c]ultural activities, public entertainment and public amenities',

106. Forsyth, M. 2012, 'Do You Want it Giftwrapped? Protecting Traditional Knowledge in the Pacific Island Countries', in Peter Drahos and Susy Frankel (ed.), *Indigenous peoples' innovation: Intellectual Property Pathways to Development*, ANU ePress, Canberra, pp. 189-214.

107. Forsyth, 'Do You Want it Giftwrapped?'

108. IOS report, para 100. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 16.

109. Lixinski, *Intangible Cultural Heritage in International Law*, p.141

110. Lixinski, *Intangible Cultural Heritage in International Law*, p.142

111. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 16.

112. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 16.

including libraries, museums and 'cultural activities and facilities' to county level (counties are often delineated in roughly ethnic terms), while language policy and promotion, IP rights and '[a]ncient and historical monuments of national importance' are allocated to national government.¹¹³ It is not quite clear from the Constitution at which level ICH policies would be drafted, but the Ministry of Culture retains responsibility for interfacing with the Convention on behalf of the state.

- Devolution of responsibilities to elders and chiefs: In some states (e.g. Namibia, Mali and Kenya) traditional authorities such as elders or chiefs play a central role in transmitting, safeguarding and managing ICH and conserving natural spaces and resources related to it.¹¹⁴
- Devolution of responsibilities to traditional courts: In the 1990s, Askar Akaev, the first president of Kyrgyzstan, set up newly appointed *aksakal* courts, or courts of elders (see Constitution of the Kyrgyz Republic 1993), to have jurisdiction over some local matters such as property and family law. *Aksakal* elders had held an important position, at least as individual leaders, in some areas of the country in pre-revolutionary Kyrgyz society, as well as during the Tsarist and Soviet time. The state thus saw the initiative as a revitalization of a traditional Kyrgyz institution. Some communities claimed that these traditional courts had never existed in, or had never disappeared from, their villages, however. The courts (which numbered approximately 1,000 across all municipalities by 2006) did not have a well-defined relationship with the formal legal system, and gradually developed their own ways of making decisions, often appealing to ideas about custom and tradition in deciding cases.¹¹⁵

POLICY FRAMEWORKS IN THE CULTURE SECTOR

Most ICH-related policy making will be focused in the cultural sector, where responsibility for implementing the Convention will also likely reside. In this sector, there may (or may not) be a close articulation between general policies for culture, heritage policies (including policies for tangible and intangible heritage), and policies around language, or other related issues. States may well also have legislation or regulations for cultural industries and tangible heritage management, viz. heritage sites, museums, archives, and/or collections of objects. In a few cases, states will not have cultural policies, or heritage policies and/or legislation, and may prefer to use regulations, institutions or other mechanisms to support ICH safeguarding more directly.

'Culture' in this context may be broadly defined, including the arts, creative industries, heritage (tangible and intangible), archives and libraries, language, sport, and even media. These functions are not always located under a single ministry or government agency, and may be devolved to different administrative levels of government, as discussed above. The ways in which the culture sector is organized varies widely between states. Where a state has a Ministry or Department of Culture, this function is sometimes also combined with education, media, sport, tourism or other areas of responsibility. Such a multi-dimensional structure may make integration of ICH-related issues into broader policies somewhat easier, because they all fall under the same Ministry (but this is not always the case, of course).

There is no recipe or model for including ICH-related provisions within existing or new policies and institutional infrastructure in the culture sector. In developing suggestions and discussing alternatives, careful attention should therefore be focused on understanding how ICH safeguarding in the spirit of the Convention might be aligned with:

- Existing and proposed reasons for promoting culture and safeguarding / conserving heritage;

113. Fourth Schedule of the 2010 Constitution (Article 185 (2), 186 (1) and 187 (2)).

114. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 11.

115. Beyer, J. 'Revitalisation, invention and continued existence of the Kyrgyz aksakal courts: Listening to pluralistic accounts of history.' *The Journal of Legal Pluralism and Unofficial Law* 38.53-54 (2006):141-176. <http://www.jlp.bham.ac.uk/volumes/53-54/beyer-art.pdf>. See also 'Tracing Legal Connections. Comparing interactional patterns between courts of elders and state courts across Northern Kyrgyzstan', http://www.eth.mpg.de/cms/en/people/d/beyer/projects/current_2.html

- The key challenges identified by communities concerned and other stakeholders regarding ICH safeguarding in the state;
- Existing and proposed infrastructural, administrative or institutional arrangements (if any), and what they can do (or intend to do); and
- Existing and proposed policies, regulations and legislation (if any), and what they already cover (or intend to cover).

CULTURE POLICIES

There has been some discussion within UNESCO about the development of cultural policies, as mentioned in the Guidance Note. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) has been active in this regard.¹¹⁶ The 2005 Convention and its Operational Guidelines (approved 2009) encourage States Parties to develop policies in the cultural field.¹¹⁷ There have been a number of regional initiatives, sometimes supported by UNESCO, to assist states in developing their cultural policies. A 1999 Council of Europe publication identified 21 strategic dilemmas that states consider in developing cultural policies.¹¹⁸ The Arterial Network has written a toolkit to assist African countries in drafting their cultural policies, which provides an overview of some of the questions states may consider in compiling such documents, and some of the interventions that might be made.¹¹⁹

It is important to consider how to include provision for ICH safeguarding within more general cultural policies, if at all, and how this will fit alongside, or within, the existing policy and institutional framework. General cultural policies set out information and broad principles regarding the nature, purpose and value of culture in the society, that inform the strategies of a state in the cultural sphere. General cultural policies may mandate institutional structures to realize the broad aims and principles it sets out. Subsidiary legislation may then be drafted to set up institutions, bodies or agencies, and to set out more detailed planning and principles in different fields of culture. Cultural policies do not always specifically mention ICH. Different issues may be addressed in a general cultural policy depending whether or not ICH has already been mentioned in the constitution or other instruments, where policy-making responsibilities for culture are located within a devolved administration, and whether or not a specific ICH policy or related legislation is envisaged as well.

It is relatively easy to see how general principles such as the promotion of cultural identity for social cohesion, recognition of the cultural heritage of communities and strong consultation with communities could be accommodated in broader cultural policies and also function as cornerstones of ICH-related policy. However, there can be tensions between policies for the promotion of cultural industries for their own sake, and a focus on sustainable development through ICH safeguarding. Forsyth illustrates tensions between the policy goals of the Cultural Diversity Convention and the Intangible Heritage Convention in the Pacific Islands, for example.¹²⁰

Where ICH is not mentioned at all in the cultural policy, there is a danger that provisions for culture and heritage in budget allocations will not be expanded, or available to support ICH safeguarding activities and infrastructure in the state. One of the barriers to including mention of ICH within a general cultural policy may be that such policies are not always very frequently updated. Where amendment of the cultural policy is not possible, alternative means (such as Ministerial speeches

116. The 2005 Convention aims to promote cultural diversity by strengthening the chain of creative endeavour, from production to distribution/dissemination, access and enjoyment of cultural expressions. By January 2015, 134 countries were States Parties to this Convention. See <http://www.unesco.org/eri/la/convention.asp?KO=31038&language=E> for a list of States Parties.

117. UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), Operational Guidelines 2009 http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Conv2005_DO_Art_7_8_17_EN.pdf

118. <http://www.artsmangement.net/downloads/cultural-strategy-dilemmas.pdf>

119. See for example, Adapting the wheel: cultural policies for Africa (Arterial Network, 2010). http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Conv2005_ArterialNetwork_AdaptingtheWheel.pdf

120. See for example Forsyth, M. 2012, 'Lifting the Lid on 'the Community': Who has the Right to Control Access to Traditional Knowledge and Expressions of Culture?' *International Journal of Cultural Property*, 19, pp.1-31.

and statements, and specific budget allocations) could ensure that ICH is understood as part of the culture and heritage landscape within the state, and given appropriate attention.

HERITAGE POLICIES

Heritage policies in most states focus on tangible heritage management, and in some states there are specific laws or provisions for the implementation of the World Heritage Convention, 1972. It may be possible to include provisions for ICH safeguarding in heritage policies but in doing so, it is worth considering the differences and similarities between the conservation of tangible heritage and the safeguarding of intangible heritage.

The Intangible Heritage Convention acknowledges its relationship to the World Heritage Convention, and the relation between tangible and intangible heritage, in the following ways:

- It mentions ‘the deep-seated interdependence between the ICH and the tangible cultural and natural heritage’ (Preamble);
- It states that ‘existing international agreements, recommendations and resolutions concerning the cultural and natural heritage need to be effectively enriched and supplemented by means of new provisions relating to the ICH’ (Preamble); and
- It warns that its implementation should not lead to ‘altering the status or diminishing the level of protection under the 1972 Convention ... of World Heritage properties with which an item of the ICH is directly associated’ (Article 3(a)).

The WHC does not, however, share the same aims or operate in exactly the same way as the Intangible Heritage Convention. The WHC aims at ‘establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods’ (see WHC Preamble). This is necessary, it says, because ‘the cultural and the natural heritage are increasingly threatened with destruction’ not only from ‘traditional causes of decay’, but from ‘changing social and economic conditions’ and ‘damage or destruction’. Under the WHC (Article 4, Operational Guidelines para 15) States Parties undertake to identify and conserve all the cultural and natural heritage on their territories that is considered to be of ‘outstanding universal value’ (as defined under WHC Articles 1-2), i.e. properties inscribed on the World Heritage List by the Committee. Although the Intangible Heritage Convention also introduces a listing system, its first objective is the safeguarding of the ICH present in the territories of the States Parties. This is not only, or primarily, ICH listed internationally, but all ICH that is recognized by the communities concerned as belonging to their cultural heritage. The Convention asks States Parties to implement both general and specific safeguarding measures (i.e. safeguarding measures for specific elements) at the national level, whether or not any of the ICH concerned is inscribed on the Lists of the Convention.¹²¹

Provisions for ICH safeguarding in the spirit of the Intangible Heritage Convention also tend to be based on somewhat different principles to the traditional model of tangible heritage management that is generally supported by the World Heritage Convention.¹²² A major criticism of cultural heritage management approaches in the field of tangible heritage has been that they are too top-down and expert-driven. Community involvement in identification and management of both tangible and intangible heritage is essential in safeguarding the local meaning and function thereof, encouraging the practice and transmission of heritage, and reinforcing local commitment to its conservation. This means that where provisions to support ICH safeguarding are included in heritage policies alongside existing provisions for tangible heritage management, careful attention should be paid to the ways in which community consent, consultation and participation in all

121. UNESCO ICH Section, Participants’ Materials for Workshop on Implementing the Convention.

122. See for example Deacon, H.J. and Smeets, R. ‘Authenticity, Value and Community Involvement in Heritage Management under the World Heritage and Intangible Heritage Conventions’, *Heritage and Society*, Vol. 6 No. 2, November 2013, 1–15.

decision-making around their ICH is enabled. This may require rethinking the roles of external agencies (including experts and the state) *vis a vis* communities in heritage management.

If ICH is to be integrated into heritage policies it may also be helpful to develop a way of conceptualising and implementing heritage management that does not privilege tangible over intangible heritage, but provides opportunities for mutual recognition and where appropriate, also for integrated management.

LANGUAGE POLICIES

Although the Intangible Heritage Convention is not the Convention for linguistic diversity and language and does not explicitly include language per se as a domain of ICH, it still is useful when doing a needs assessment to understand the way in which the state deals with the languages spoken on its territory. Since language is a vehicle of ICH in most if not all communities, and since a community's language and (other) ICH as a rule are intimately interrelated, the loss of linguistic diversity is a major reason for the homogenization of culture and ICH. Language policies have a great impact on the identification and safeguarding of ICH.

Given the number of states in the world, which is close to 200, and the number of languages of humanity, which may be as high as 6,000, it is not surprising that most states are linguistically diverse, and often very diverse. The highest numbers of local languages are found in Papua New Guinea (about 800), Indonesia (about 750) and Nigeria (about 500). On the low end of the scale one finds countries like Armenia, Iceland and Portugal with very dominant national languages and no, or few, other local languages. Due to migration and other forms of interaction between people, today there are no strictly monolingual states.

All states have language policies, but these are not always expressed in legislation. States often select one (France chose French) or a few languages (Ethiopia selected Amharic, Oromo and Tigrinya; Paraguay selected Guarani and Spanish) as their official or working languages. In federal states like Belgium or Canada several languages may have equal status in different areas of the country. States may have regulations promoting several local, regional or indigenous languages to a greater or lesser extent, alongside one (or a few) official languages.

In many states the official language, or one of them, is inherited from previous, often colonial rulers: this explains why one finds English as the only official language, or one of the official languages, in 58 sovereign states, French in 29 sovereign states, Spanish in 20 sovereign states, Portuguese in eight sovereign states and Russian in five sovereign states. The linguistic composition of many states is marked by recent actions by the state or other actors that aimed at homogenizing the demographics of a country, or parts thereof. Not all multi-lingual states are equally happy with their linguistic diversity and quite a number of them focus on one (or very few) official language(s) to the exclusion of other languages. Such states base nation-building on the principle 'one state, one people, one language'. States that assign different statuses to the languages in their territory may be reluctant to bring language into the orbit of a Convention that advocates the equality of communities and their ICH and that requires them to take appropriate measures aimed at the safeguarding of (in principle) all ICH present in their territory.

Although language is widely recognized as a key vehicle of cultural diversity and identity, the United Nations system has never developed a binding international legal instrument to specifically protect linguistic rights, linguistic diversity or multilingualism. Most international legal texts that do advocate linguistic rights or linguistic diversity do so in a non-binding and restrictive way. An example is article 27 of the *International Covenant on Civil and Political Rights*, adopted by the United Nations in 1966:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the members of their group,

to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Within the UNESCO context the Universal Declaration on Cultural Diversity of 2001 makes the most explicit statements on linguistic rights and diversity (Article 5):

The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.

All ICH is dependent for its transmission on language and gesture. ICH in UNESCO discourse was called 'oral and intangible heritage' until the adoption of the ICH Convention in 2003. While few will deny that language in and by itself satisfies the definition of ICH as given in article 2.1 of the Intangible Heritage Convention, language is not mentioned in its own right in the non-exhaustive enumeration of ICH domains that is given in article 2.2 of the Convention. Language is mentioned in a restrictive way in the first of the domains listed: 'oral traditions and expressions, including language as a vehicle of the intangible cultural heritage'.¹²³ This wording presents a compromise between the opinions of states that did not want to explicitly recognize language as a domain of ICH and other states who wanted it to be included as such in the list in article 2.2. It also presents a step back from the strong link made between language and cultural identity in the Cultural Diversity Declaration.

Since the list of ICH domains in article 2.2 of the Convention is non-exhaustive (it starts by saying: '*The ICH ...is manifested inter alia in the following domains: ...*'), they do not explicitly exclude language. But for the time being language is not yet mentioned anywhere in the Operational Directives. A number of States Parties to the Convention do, however, take language *per se* into consideration when implementing the Convention *at the national level*. Armenia's Law on Intangible Cultural Heritage includes language in its definition of ICH.¹²⁴ Some states, such as Peru and Lithuania, include languages in their inventories of ICH. This will be discussed in further detail under 'identification and inventorying' below.

When it is necessary to reinforce the knowledge or use of the ancestral language of a community to safeguard an ICH element, language-related safeguarding activities have been proposed in nomination files. Given the emphasis on language as a 'vehicle' of the ICH, proposed safeguarding measures are usually presented as serving the revitalization, protection or reinforcement of an element of ICH that is not primarily linguistic. For example, the safeguarding plan that China proposed in a nomination file to the USL for the Hezhen Yimakan story-telling tradition includes the revitalization of the Hezhen language. The plan was approved by the Intergovernmental Committee when it inscribed this story-telling tradition in 2011.

At present, only the elders can speak their native language, while the majority of adults and teenagers have lost their mother tongue and have increasingly become strangers to the legacy of their ancestors. The Hezhen language, as a significant vehicle for expressing and transmitting the Yimakan tradition, is on the brink of extinction. In section 3 of the file, which proposes safeguarding measures, it is stated that:

123. Interpretation of the expression 'language as a vehicle of the ICH' has not created any problems so far: while 'oral expressions and traditions' totally depend on language, most other domains of ICH, whether mentioned in the Convention or not, to some degree also depend on language, that is the language of the community concerned (think of theatre, songs, specialized lexicon that reflects knowledge about nature, or is used when practicing specific handicrafts).

124. Republic of Armenia, Law on Intangible Cultural Heritage (2009) article 3, accessed at http://www.unesco.org/culture/natlaws/media/pdf/armenia/arm_lawintangibleheritage_entof

To guide young people to appreciate and learn Yimakan, to promote Hezhen mother tongue fluency, and to improve the facilities of Yimakan training bases by means of the following actions: encouraging young generations to master their native language through Chinese-Hezhen bilingual teaching programs in elementary and secondary schools in compact Hezhen communities...

In 2009 the Intergovernmental Committee recognized as a best safeguarding practice a programme submitted by Bolivia, Chile and Peru, called 'Safeguarding intangible cultural heritage of Aymara communities in Bolivia, Chile and Peru.' The programme targets all domains of ICH and presents as one of its main areas: 'strengthening language as a vehicle for transmission of the intangible cultural heritage through formal and non-formal education'. For this purpose, the language concerned will be reinforced across the board.

EXAMPLES OF POLICY FRAMEWORKS IN THE CULTURE SECTOR

- Culture policies that mention ICH: In Burkina Faso, a new law related to medium and long term cultural policy was adopted in 2007 which took account of ICH as a driver for development, a resource for diversity and a basis for identity.¹²⁵
- Culture policies that mention ICH: The Draft Cultural Policy of Belize explicitly mentions ICH as part of the cultural heritage of the country.¹²⁶
- Cultural policies that mention ICH: Timor Leste's cultural policy (2009) aims at the stimulation of traditional culture, while recognizing its dynamic nature.¹²⁷
- Institutional frameworks: In Turkey, regional Intangible Cultural Heritage Boards and the Expert Commissions have been established in each of the 81 administrative units of the country to coordinate the safeguarding activities of stakeholders (NGOs, communities, university researchers, national and local government, etc.).¹²⁸
- Institutional frameworks: Senegal has set up Regional Cultural Centres (CCRs) situated in the country's 14 regions that serve as the interface with local communities.
- Institutional frameworks: Regional Directorates for Culture and Heritage in Madagascar are responsible for gathering data for inventorying ICH in cooperation with local communities.¹²⁹
- Heritage policies that mention ICH: In South Africa, the National Heritage Resources Act of 1999 includes ICH (or 'living heritage') within its definition of heritage, but limits the scope of actions under this law to those aspects of the living heritage that is associated with tangible heritage sites and objects.¹³⁰

STAND-ALONE ICH POLICIES

States may decide to include ICH provisions in related policy or legislation in the culture sector (or beyond) as well as have a stand-alone ICH policy. Some states wish to avoid creating IP rights over ICH, or having specific legislation to guide ICH safeguarding, and prefer to draft flexible, general policies to encourage ICH safeguarding instead.¹³¹ Many of the ICH policies developed in States Parties to the Convention to date broadly follow the principles of the Convention, although some emphasize state involvement in safeguarding, and even state ownership of ICH. Many include provisions for defining ICH, creating an infrastructural framework for identifying and

125. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 10.

126. Draft Cultural Policy of Belize (2013) <http://www.nichbelize.org/belize-resources/national-cultural-policy-working-document.html>

127. Timor Leste's cultural policy http://www.unesco.org/culture/natlaws/media/pdf/timorleste/ti_natpolcltentno

128. Examination of the reports of States Parties 2013, ITH/13/8.COM/6.a, para 14-15.

129. Examination of the reports of States Parties 2013, ITH/13/8.COM/6.a, para 14.

130. <http://www.wipo.int/wipolex/en/details.jsp?id=5766>

131. Lixinski, Intangible Cultural Heritage in International Law, p.126.

inventorying the ICH in the state, linking ICH safeguarding to development through tourism or IP protection, and possibly also assisting ICH practitioners or promoting specific elements.

Having a stand-alone ICH policy has several advantages for implementation of the Convention, since comprehensive coverage of all ICH-related issues in one place allows for:

- Coverage of ICH-related issues at a deeper level of detail than may be possible in more general instruments;
- Easier access and reference for communities and other stakeholders;
- Easier updating and review;
- Easier reporting to the Committee (in Periodic Reports); and
- A single point of reference to policies and legislation in other areas that pertain to ICH.

In some situations, developing a stand-alone policy on ICH is feasible, and in other cases it is not. Similar advantages could be sought through alternative strategies, where required, such as a chapter for ICH within a heritage or cultural policy, and/or the development of capacity-building and awareness-raising materials that provide a single source of comprehensive information for communities, government officials and other stakeholders. Where ICH is already dealt with in some detail in constitutions or cultural policies, it may be more difficult to develop detailed provisions at a lower level, and the development of regulations, the establishment of bodies or adjustments to institutional mandates may be a more appropriate way of providing a framework for safeguarding.

In the remaining part of this section, we will discuss specific aspects of ICH policies and legislation that may be discussed or considered in a policy development process. These do not necessarily need to be part of stand-alone ICH policies.

DEFINING COMMUNITIES AND THEIR ICH

Communities can identify a wide variety of practices as their ICH, and define themselves in different ways. The process of identifying cultural practices as heritage, and associated stewards of these practices, involves many open choices that are linked to broader strategic decisions about for example, the broader goals of specific communities within a state, the relationship between governments and their citizens, and the role of culture in promoting various goals of the state or communities themselves (such as development). It is therefore important that ICH-related policies are based on a careful consideration of the ways in which ICH and communities concerned are defined in those policies, ensuring that those definitions do not unintentionally exclude certain kinds of ICH, and certain communities (unless of course these communities themselves choose to have their ICH excluded).

It is also important to clarify the nature and status of definitions of ICH (and communities concerned) in the Convention, how this affects nominations to the Lists of the Convention at the international level, and how this relates to the wide variety of arrangements that are made for ICH safeguarding within States Parties. The Convention provides no fixed definition of communities, groups and individuals concerned (and it is a concept that is problematic to define in any case). In supporting safeguarding approaches and developing specific ICH-related policies under the Convention, States Parties do not have to adopt the definition of ICH given in the Convention. Also, the definition of ICH in Article 2 is broad, and covers a wide range of cultural practices. The list of domains provided in Article 2.2 is not exclusive, leaving much scope for expansion, as was seen in the inclusion of a number of culinary arts on the Lists of the Convention since 2010.

The Convention only takes into account ICH that is 'compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development' (Article 2.1). However, some communities (and states, in their policies) choose to take other forms of ICH into account at the national level. Communities (and states, in their policies) may also choose to recognize cultural practices that have ceased to be transmitted across generations in the identification and definition of their ICH.

The Convention's definition of ICH will however be applied when the Committee considers nominations to the Lists, proposals to the Register of Best Practices, and the Periodic Reports. As will be discussed further below, language *per se* was not included as a domain of ICH in the Convention, but after some debate, was included as a 'vehicle of ICH'. Nevertheless, languages *per se* figure in various ICH inventories, and may in some cases be accepted as candidates for nomination to the Lists of the Convention. Organized religions *per se* are unlikely to be considered as part of the definition of ICH, but religious practices have already been accepted as ICH in the Lists of the Convention.

Examples

- The Peruvian ICH inventory (based on the domains set out in Peruvian legislation), includes indigenous languages and oral traditions in its definition of ICH.¹³²
- In Romania, the ICH inventory includes both living elements and those kept only in the memory of their community.¹³³

ENGAGING WITH COMMUNITIES CONCERNED

Following Articles 11, 12 and 15, a state is strongly encouraged to ensure the widest possible participation of communities, and other stakeholders such as NGOs, in all activities concerning their ICH. The Convention and its ODs make various suggestions for ways of encouraging this through cooperation and networking, consultation and coordination, and capacity building (where required) for safeguarding (Articles 13, 14; ODs 79–99 and 107(k) and 109). Various activities under the Convention require evidence of the 'free, prior and informed consent' of communities. These provisions were covered in detail above, under 'Creating an infrastructure for safeguarding'.

Of course, communities will undertake most safeguarding activities without assistance from outside agencies, and cannot, and should not, be compelled to be involved when they do not wish to be. The infrastructure and policies set up by the state should therefore encourage consultation and cooperation between communities and other stakeholders without forcing community involvement and consent, or displacing the power of communities to make their own decisions. At the same time, policies should recognize that different members of communities often have diverse views about their ICH and how to safeguard it, and ensure that those who are deemed to represent communities have appropriate mandates.¹³⁴

Policies encouraging community engagement with safeguarding activities, and ensuring consultation and consent when third parties are involved, or when inventorying and documentation is taking place, can include structural provisions (for example, the establishment of consultative bodies), as well as regulations to encourage adherence to ethical standards. In 2012, recalling Operational Directive 103, which encouraged the development of codes of ethics 'based on the provisions of the Convention and these Operational Directives' to cover ICH awareness-raising activities, the Intergovernmental Committee of the Convention called on the Secretariat to 'initiate work on a model code of ethics',¹³⁵ which was intended to encompass other aspects of safeguarding ICH including research and inventorying as well.¹³⁶ This work is now underway, and could assist in the development of policies at the national level. In the meantime, additional inspiration could be garnered from other initiatives in this regard.¹³⁷ The Intellectual Property and

132. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 31.

133. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 61.

134. Kuutma, 'Reflections on key issues of policy development for safeguarding intangible cultural heritage'.

135. UNESCO, Intergovernmental Committee of the Intangible Heritage Convention, DECISION 7.COM 6/11.

136. UNESCO, Intergovernmental Committee of the Intangible Heritage Convention, Adoption of the summary records of the seventh session of the Committee, ITH/13/8.COM/4, paras 64, 66, 113.

137. IRCI, 'The First Intensive Researchers Meeting on Communities and the 2003 Convention: Documentation of ICH as a Tool for Community's Safeguarding Activities', Tokyo, 3-4 March 2012.
http://www.irci.jp/Research_Projects/research/meeting_03032012.html; Guidelines for Ethical Research in Australian Indigenous Studies (GERAIS) <http://www.aiatsis.gov.au/research/ethics/gerais.html>.

Research Ethics Working Group of the Intellectual Property Issues in Cultural Heritage (IPinCH) research project at Simon Fraser University in Canada is creating an archive of research ethics guidelines and protocols, IRB procedures, and model memoranda of agreement relating to archeological work with communities.¹³⁸

Examples

- In Mali, local clans and communities are the main custodians of much intangible cultural heritage and they implement traditional management approaches; local authorities consult and work with these traditional structures directly in their safeguarding activities.
- Practitioners' associations in Croatia (e.g. Bell ringers) work with Benedictine convents, local dioceses, educational institutions, private businesses, artisans' cooperatives (e.g. Lepoglava Lace Co-operative) and tourist promotion organizations in safeguarding and promoting ICH.¹³⁹
- In Estonia, community-based safeguarding activities are supported financially by the state.
- Cyprus provides state subsidies to communities and civil society organizations for ICH-related activities.
- In Slovakia, state subsidies are provided for community-based initiatives as part of a wider policy approach that aims to promote the function of ICH in society.
- In Venezuela 287 community councils have been established to safeguard cultural heritage and diversity, comprising 687 groups representing various ICH elements.
- In Brazil, 'culture points' and 'reference centres' assist communities where required in safeguarding of their ICH.¹⁴⁰
- Hungary employs county-level intangible heritage coordinators who act as a bridge between local communities and Government.
- In Flanders (Belgium) various NGOs (in particular, FARO - Flemish Interface for Cultural Heritage and Tapis plein) interface with heritage cells, and the wider heritage community to promote ICH inventorying and safeguarding.¹⁴¹

IDENTIFICATION AND INVENTORYING

Identifying and inventorying are one of the few obligations under the Convention (Articles 11-12). States Parties are asked to ensure the 'widest possible participation of communities, groups and, where appropriate, individuals as well as relevant non-governmental organizations' in this process (Article 11(b)). Inventories should be tailored to the local situation in a state, but should ultimately, at least, cover the whole range of ICH 'on their territory' and be compiled 'with a view to safeguarding'; the inventory should be regularly updated (Article 12.1).

Inventorying is therefore usually one of the main areas of state intervention (whether through policies, regulations or institutional mandates) in ICH safeguarding. The 2014 report for the Committee on the Periodic Reports notes that:

According to the 58 Periodic Reports submitted in four cycles of reporting, inventorying is specifically mentioned as a leading priority by a large majority of States Parties.¹⁴²

The diversity of ICH inventorying approaches already adopted could provide an interesting starting point for States Parties considering what options have been pursued by other states. Setting up an inventory is a complex process that may take some time to organize, set up and implement. The Convention simply requires states to have begun the task, not to have finished it, although any

138. <http://www.sfu.ca/ipinch/project-components/working-groups/ip-and-research-ethics-working-group>

139. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 91.

140. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 14-15.

141. Examination of the reports of States Parties 2013, ITH/13/8.COM/6.a, para 14-15.

142. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 40, 43, 44.

elements nominated to the Lists of the Convention do have to be included on an inventory that complies with Articles 11-12.

Because there is no fixed method of inventorying that will work in all states, or even perhaps in all parts of states, it is advisable to focus any initial policy provisions on broad statements about the need for inventorying, key principles and funding allocations or institutional mandates for coordination of inventorying. Specific approaches to inventorying that will be adopted within the state can best be determined through local investigations, consultations, trial inventorying projects and other similar activities. Further policy provisions may follow once these investigations have been done.

Examples

- Some states rely on regional bodies to manage and update their inventories (e.g. the County Centres for Conservation and Promotion of Traditional Culture in Romania and the 11 regional offices of the relevant Ministry in Indonesia).¹⁴³
- In Brazil, there are multiple inventories. About 160 sub-inventories have been compiled to date and over 1,000 cultural elements have been included. Two national inventories have been created for different purposes, namely: (i) officially recognizing ICH through a declaration of its heritage value and (ii) the identification, documentation and investigation of ICH to promote its safeguarding. Since the inventories in Brazil are structured around the concept of cultural reference, bearer communities themselves indicate the elements considered most important and representative of their culture: only those elements will be included in the inventory.¹⁴⁴
- There is no national ICH inventory for Spain and, due to the cultural specificity of each Autonomous Community, they have taken different approaches for inventory-making, with different objectives. There are 16 different regional ICH inventories and atlases, five of which register all of an Autonomous Community's ICH (Andalusia, Catalonia, Madrid, Murcia and the Canary Islands) and 11 that catalogue one or several aspects of the ICH of an Autonomous Community (e.g. Aragon and Castile-Leon). The Atlas of Andalusia describes an element's viability according to 12 potential threats, including 'political and economic exploitation, fossilization, reification and media-induced standardization', as well as 'enforcement of environmental regulations without considering the importance of the traditional social uses of land'.¹⁴⁵
- States choose widely differing ways of organizing their inventories. Kyrgyzstan's inventory is ordered according to seven domains, including sub-divisions such as epics, sayings and proverbs; traditional technologies; national games; pastoral and nomadic knowledge; traditional systems of self-government; methods of inter-generational transmission of information of ecological and ethnic importance; and ornaments. The domains for Venezuela's inventorying include such categories as 'natural with a cultural significance' and 'individual heritage bearer'.¹⁴⁶
- The Automated Inventory System of Cuba is divided into four domains and, for each domain, there are other specific classification principles, such as the periodicity of popular festivities or the typology of an oral tradition or traditional food and beverage. The elements are also classified according to location (province, municipality, neighbourhood, rural or urban area), and origin (African, Spanish or other origin).¹⁴⁷

143. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 76.

144. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 56, 63.

145. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 55, 64.

146. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 58.

147. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 60.

SPECIFIC PROVISIONS FOR ICH PRACTITIONERS AND ICH ELEMENTS

The Operational Directives encourage States Parties to, inter alia, 'promote policies for the public recognition of bearers and practitioners of ICH and to develop policies to recognize the contribution of the manifestations of the ICH present in their territories to the cultural diversity and wealth of the States'.¹⁴⁸ In some states, ICH practitioners and even specific ICH elements receive policy attention. For example, the Resolution of the Cabinet n.º 96 of 26th July (2000), presents the Portuguese gastronomy as an intangible asset which is an integral part of the Portuguese cultural heritage.¹⁴⁹ A focus on specific practitioners and elements can in some cases contribute to safeguarding. However, as Lixinski points out, it can also have unintended effects, such as creating tensions between different interests in the society (practitioners versus community elders, for example), and thus hamper safeguarding.¹⁵⁰

The Republic of Korea's Cultural Heritage Protection Act introduced a Living Human Treasures (LHT) programme in 1962 that aimed at both the recognition and the transmission of ICH.¹⁵¹ Inspired by this and other experiences in East Asia, UNESCO introduced their LHT programme in 1993. Some of the systems have yielded good results, but today UNESCO itself does not promote the system in the same way, nor is specific funding set aside for it.¹⁵² In the spirit of the Convention, the focus of projects to safeguard ICH should be on transmission in a broader sense, not just on transmission between 'excellent' masters and their apprentices. Projects should also focus more on the knowledge and skills involved rather than on individuals who happen to have these skills at any one time. It should be noted that persons cannot be inscribed on the Lists of the Convention, but their skills or knowledge could be inscribed as an element.¹⁵³

Many states have adopted LHT or related systems, and continue to do so. The systems differ widely from country to country, but most recognize key practitioners of ICH and reward them in some way in order to encourage the transmission of their skills and knowledge to others. Practitioners can benefit from funding to provide training for others, subsidized access to workshop facilities, state pension schemes or tax exemption programmes, for example. States (through authorized bodies) usually select such people on the basis of their outstanding accomplishments and their willingness to convey their knowledge and skills to others.¹⁵⁴ Many of these programmes involve the creation of a legal and administrative infrastructure. LHT programmes do not necessarily need to have specific laws, inventories or permanent bodies to administer them, however, and nor do they need to cover all forms of ICH or all regions of a state. Where restrictions are placed on the kinds of ICH whose practitioners can be recognized and rewarded under LHT systems, careful consideration should be given to possible negative effects on transmission.

Examples

- LHT programmes may have many different titles: Viet Nam (People's Artists, Excellent Artists); Mongolia (List of Talented Persons with the Highest Skills in Intangible Cultural Heritage); Republic of Korea (Masters); Mali (Living Human Treasures); Nigeria (Living Human Treasures); Pakistan (Pride of Performance Awards, National Awards and National Recognition Certificates); and Peru (Distinguished Recognition of Praiseworthy Personality of the Peruvian Culture).¹⁵⁵ France has set up a system of Maîtres d'art, who are recognized for their knowledge

148. IOS report, para 285.

149. UNESCO database of cultural heritage laws.

150. Lixinski, *Intangible Cultural Heritage in International Law*, p.126.

151. Lowthorp, L. 2010. 'National Intangible Cultural Heritage (ICH) Legislation and Initiatives', UNESCO-New Delhi Field Office.

152. UNESCO's guidelines on LHT systems, drafted around the time the Convention was adopted, indicated how such systems can be compatible with the Convention: <http://www.unesco.org/culture/ich/doc/src/00031-EN.pdf>

153. UNESCO ICH Section, Participants' Materials for Workshop on Implementing the Convention.

154. UNESCO ICH Section, Participants' Materials for Workshop on Implementing the Convention.

155. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 48.

and skills and assisted in the transmission of their crafts; the town of Paris created in a similar vein a system of *Artisans d'art de Paris*.

- Legal frameworks are sometimes put in place for LHT systems: Cambodia and Senegal have recently introduced new laws that recognize LHTs.¹⁵⁶ In Cambodia, a single inventory on artists and private troupes was established under the 2010 Royal Decree on Living Human Treasures. Turkey also has a 'National Living Human Treasures Inventory' for over 2000 bearers and practitioners.¹⁵⁷ In Côte d'Ivoire, a new body has been set up to administer their living human treasures programme under which designated persons can receive state support for their transmission activities.¹⁵⁸
- The 'Living Heritage Treasures Awards' of the Penang Heritage Trust were established to recognize the work of traditional artisans in Penang, Malaysia. Awardees, selected from public nominations, received publicity, public acclaim and honour, and financial assistance for the rest of their lives. Their skills, processes and artisan works are fully documented for posterity.¹⁵⁹
- Pakistan recognizes folk artisans at ceremonies held during work festivals, namely the *Dastar bandi* (putting on the turban) of male folk artisans and *Chadar Poshi* (putting on a chador) of female folk artisans.¹⁶⁰
- LHT policies do not always cover every kind of practitioner: Gagok performers can be designated as Masters (LHTs) in the Republic of Korea, but not the musicians who accompany them.¹⁶¹

AREAS OF POLICY AND LEGISLATION OUTSIDE THE CULTURE SECTOR

Legislation and policy frameworks for ICH safeguarding are usually located in the arena of heritage and culture, but are also closely related to policy in other areas such as development, health, IP, tourism and education. However, policy and legislation in these other areas does not often take account of ICH in ways that promote its safeguarding, and may actively impede such efforts. For example, education policies do not always enable the use of minority languages in schools, thus hampering the transmission of associated ICH such as storytelling.

The IOS report noted that integration of ICH into sustainable development policies and legislation outside of the cultural sector was generally weak; inter-sectoral cooperation was hampered by the generally large number of institutions and stakeholders involved and the lack of efficient cooperation mechanisms between them.¹⁶² It will not always be easy (or even possible) to amend or develop policies in other sectors than culture in order to integrate ICH safeguarding concerns. Ministries and government departments or agencies other than culture have many different perspectives and concerns, and their list of priority policy questions may not include ICH. In such cases, states could develop coherent ICH policies and approaches in the field of culture first, and then identify key areas outside culture where policies and laws actively hamper ICH safeguarding, and find ways of addressing this problem. Where ICH safeguarding is considered a priority in government, and for example where mention of ICH is made in the constitution or at the highest levels of government, it may be easier to ensure that ICH safeguarding issues are integrated into policies in a wide range of areas outside the field of culture.

156. Examination of the reports of States Parties 2013, ITH/13/8.COM/6.a, para 10.

157. Examination of the reports of States Parties 2013, ITH/13/8.COM/6.a, para 26, 38.

158. Examination of the reports of States Parties 2013, ITH/13/8.COM/6.a, para 13, 38.

159. Lin Lee Loh-Lim, 2007, 'Handicrafts in the Context of Sustainable Cultural Tourism', UNESCO-EIHCAP Regional Meeting, Safeguarding Intangible Heritage and Sustainable Cultural Tourism: Opportunities and Challenges, Hué, Viet Nam, 11–13 December 2007.

160. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 48.

161. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 48.

162. IOS report, para 121-2.

EDUCATION POLICIES

Article 2.3 of the Convention defines safeguarding to encompass a variety of ‘measures aimed at ensuring the viability of the intangible cultural heritage’, including its ‘transmission, particularly through formal and non-formal education’. Article 14 encourages States Parties to use education to ensure ‘recognition of, respect for and enhancement of’ the ICH; OD 107 translates this general suggestion of the Convention into many possible actions.

Education, both formal and non-formal, has always been used for transmitting ICH knowledge, skills and practices. For example, transmission may take place within the family, from parent to child, from master to disciple as part of an initiation rite, or from teacher to pupil in a more or less formal educational setting. When traditional transmission systems become less effective or even obsolete, new ways of transmission may be needed. It is in this context that the Convention suggests resorting to new methods of formal and non-formal education for transmitting ICH-related knowledge and skills.¹⁶³

In schools, ICH-related subjects can be integrated into a wide variety of subject curricula as well as being offered as extra-mural activities. Institutions like museums and cultural centres can incorporate ICH into their training programmes.¹⁶⁴ However, it is important to ensure that ICH programmes in the education system involve custodians, bearers and practitioners to support their role in safeguarding, and that formalized programmes for ICH practice and transmission do not replace or marginalize existing master-apprentice transmission methods. It is also important that the formal school calendar, regulations and practices do not prevent school children from participating in the ICH practices of their communities. Schools can play an important role in fostering respect for and knowledge of the ICH of local communities, and should not undermine them.¹⁶⁵

Integrating ICH-related themes into training programmes for community members and NGOs, and into the curricula of universities, centres of expertise and research institutions can help to foster the development of methodologies and skills in ICH management, research and documentation for safeguarding (Article 13). This can present a challenge because ICH is a relatively new field and many academic courses have been set up to focus mainly on tangible heritage management. Also, many academic approaches for heritage management (in what Laurajane Smith terms the ‘authorized heritage discourse’) either focus on the important role of experts in heritage conservation, or on the deconstruction of the idea of heritage (with few suggestions for its management with communities). The field of ICH management is a complex and multi-disciplinary one (spanning anthropology, politics, indigenous studies, human rights, IP law, heritage studies, etc.), so it can be helpful when policies for education and research development in this field are not approached from one disciplinary perspective alone.

Non-policy initiatives are often the best ways of integrating ICH safeguarding activities into non-formal education practice, and this can be a starting point for awareness-raising within the broader education sector. It is not always necessary to include mention of ICH in education policy or legislation if safeguarding, awareness raising and community engagement can be supported through other means. If the attitude in education policies and the education system is rather positive towards ICH safeguarding, ICH policies may usefully be integrated into provisions for formal education. If the prevailing attitude in education policies and the education system is rather dismissive or even negative towards ICH safeguarding, and education policies currently do not support ICH safeguarding, it may be possible to identify key areas where this is actively hampering

163. UNESCO ICH Section, Participants’ Materials for Workshop on Implementing the Convention.

164. See background paper, Eighth Annual Meeting of the South East European Experts Network on ICH: ‘Intangible cultural heritage and education: experiences, good practices, lessons learned’. Limassol, Cyprus 15-16 May 2014. Accessed at <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Venice/pdf/news/ICHmeetingLimassol2014-FinalAgenda.pdf>.

165. Chifunyise, ‘Policies for Safeguarding Intangible Cultural Heritage - Conceptual Issues’.

ICH safeguarding and raise this issue with the relevant stakeholders and government authorities in the education sector.

Examples

- Integration of ICH into formal and non-formal education: In China, information concerning several elements of ICH is included in formal educational programs from primary school to university. Local safeguarding centres for ICH, museums, theatres and performing centres offer training in a variety of ICH. The teaching of traditional craft techniques has been integrated in the curricula of tertiary education institutions when feasible and adequate, for example in the case of traditional architecture, or in vocational schools, and with the full involvement of master artisans.¹⁶⁶
- Integration of ICH into extra-curricular programmes: In Mauritius, specific elements of ICH such as traditional games are promoted among schoolchildren through extra-curricular activities.¹⁶⁷
- Municipal support for integration of ICH into education, and cross-Ministerial cooperation in the development of policies: In Latvia, city and municipal authorities provide rehearsal spaces, travel expenses, further education, folk costumes, musical instruments and technical equipment for ICH practices. Planned new legislation will place safeguarding of ICH under the leadership of the Ministry of Culture with the broad participation of other ministries, other governmental institutions, academic institutions, various civil society associations and individual experts (linguists, folklorists, economists, etc.).¹⁶⁸
- Integration of ICH into non-formal education: In Lithuania, a well-developed network of associations (music and dance groups, etc.) and NGOs related to different aspects of ICH are active in ICH safeguarding, identification and transmission. The Lithuanian Folk Culture Centre, a semi-autonomous body, offers training courses on ICH management and inventorying.¹⁶⁹

HEALTH POLICIES

The Convention does not specifically mention healing practices in the list of domains of ICH (Article 2.2), but is widely interpreted to include these in the definition of ICH. Indeed, a number of healing practices have been inscribed on the Lists of the Convention.¹⁷⁰ The UNDRIP says that indigenous people have the ‘right to practise and revitalize their cultural traditions and customs’, and to ‘the dignity and diversity of their cultures, traditions, histories and aspirations’ including traditional medicines.¹⁷¹ One of the key issues concerning traditional medicine in the context of ICH safeguarding is how to protect community IP rights over their traditional healing practices (OD 104). This is covered under IPR protection below. Another key issue is the question of traditional healing practices (such as divining) that are illegal for various reasons under national law or human rights provisions – these are covered in the discussion above under ‘human rights and illegal practices’. In this section of the paper, we consider in what ways health policies affect legal forms of traditional medical practice and practitioners thereof.

In many states, policies support mainstream (often western) forms of medicine but many people go to traditional medical practitioners for advice and therapy as well. Some states wish to promote traditional medical practices, and perhaps also benefit (or help communities to benefit) from the associated IP. There are a number of ways in which health policies and other measures could support the safeguarding of ICH practices:

166. Examination of the reports of States Parties 2011, ITH/11/6.COM/CONF.206/6 Rev., para 28, 54.

167. Examination of the reports of States Parties 2011, ITH/11/6.COM/CONF.206/6 Rev., para 28.

168. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 20-1.

169. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 22, 23.

170. For example, ‘Acupuncture and moxibustion of traditional Chinese medicine’ (China, RL 2010) <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011&RL=00425>

171. See <http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>

- Raising awareness of the contribution of traditional medical practitioners to the wellness of communities;
- Recognizing the organizations of traditional medical practitioners;
- Supporting the training of traditional medical practitioners;
- Supporting (ethical) research on traditional medicine;
- Integration of traditional medical practices into public health systems and public health campaigns; and
- Ensuring the availability of wild plants and other resources for traditional medicine, for example through biosphere reserves.

Of course, in many cases the relationship between the state, mainstream medical approaches and traditional practices may not be conducive to such policies and approaches. Traditional medicine is often ignored by state policies because it is considered ineffective or even dangerous, and as discussed above, some practices may be banned on grounds of health or human rights, or regulated in a way that does not encourage their use. Where regulation of traditional medicine and its practitioners is set out in health policies, care should be taken to ensure that this does not damage the viability of ICH that is consistent with the promotion of public health and human rights.

Examples

- Research into traditional medicine promoted: In Ethiopia, Regional Cultural and Tourism Agencies conduct research on traditional medicinal knowledge.¹⁷²
- Regulation of traditional medical practitioners: In South Africa, traditional healers are regulated under the Traditional Health Practitioners Act, 2007. In 2014, this act started to be implemented through the establishment of an Interim Traditional Health Practitioners Council of South Africa and a regulatory framework 'so as to ensure the efficacy, safety and quality of traditional health care services'.¹⁷³
- Traditional medicine acknowledged in ICH projects: The Peruvian ICH inventory is organized according to the domains set out in Peruvian legislation, including ethno-medicine and ethno-botany.¹⁷⁴

POLICIES FOR SUSTAINABLE DEVELOPMENT

Recent work in UNESCO has underlined the importance of the link between ICH safeguarding and the goal of sustainable development as part of a broader effort to integrate culture into the international agenda for sustainable development.¹⁷⁵ The Convention's Preamble recognizes 'the importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development'. Article 2.1 of the Convention says that 'consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.'

The concept is also referred to in OD 73 (on contributions to the Fund), and 111 (on raising awareness about the link between ICH and sustainable development). OD 102(e) says that

172. Examination of the reports of States Parties 2013, ITH/13/8.COM/6.a, para 37.

173. 'South Africa: Sections of the Traditional Health Practitioners Act Commence' <http://allafrica.com/stories/201405050122.html>

174. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 31.

175. See <http://en.unesco.org/themes/culture-sustainable-development>. This section draws on the background paper, 'Expert meeting on safeguarding intangible cultural heritage and sustainable development at the national level', Available at <http://www.unesco.org/culture/ich/doc/src/ITH-14-EXP-1-EN.docx>; Chengdu International Conference on Intangible Cultural Heritage (document ITH/13/EXP/8); Meeting Report, UNESCO-EIHCAP Regional Meeting Safeguarding Intangible Heritage and Sustainable Cultural Tourism: Opportunities and Challenges Hué, Viet Nam 11-13 December 2007, <http://www.unesco.org/culture/ich/doc/src/00349-EN.pdf>. See also Keitumetse, S., 2011. 'Sustainable development and cultural heritage management in Botswana: towards sustainable communities'. Sustainable Development, 19(1), pp.49–59.

awareness-raising actions about ICH should not 'lead to over-commercialization or to unsustainable tourism that may put at risk the intangible cultural heritage concerned.' OD 117 stipulates that 'Particular attention should be paid to avoiding commercial misappropriation, to managing tourism in a sustainable way, to finding a proper balance between the interests of the commercial party, the public administration and the cultural practitioners, and to ensuring that the commercial use does not distort the meaning and purpose of the intangible cultural heritage for the community concerned.'

In spite of the attention paid to this issue in the last few years, the IOS report found that

although the link between ICH and sustainable development is generally considered to be important, clarifying the nature of this link, identifying its potential both for sustainable development and for the viability of ICH and identifying the potential risks that development, if not sustainable, holds for ICH are still very much work in progress.¹⁷⁶

In 2014, on the recommendation of the Committee in its 2013 session,¹⁷⁷ a new chapter of the ODs that dealt with the relationship between safeguarding ICH and sustainable development at the national level was drawn up. These draft ODs will go before the General Assembly in 2016.¹⁷⁸

Following the Rio+20 Conference position expressed in the report,¹⁷⁹ the draft ODs define sustainable development in terms of four core dimensions: inclusive social development, environmental sustainability, inclusive economic development, and peace and security. The draft ODs state that 'States Parties shall endeavour to integrate the safeguarding of intangible cultural heritage fully into their development plans, policies and programmes, striving to maintain an appropriate balance among those four dimensions. States Parties shall further endeavour to keep the principles and goals of sustainable development at the forefront of their safeguarding plans, policies and programmes.'

One of the problems with implementing these ideals within States Parties to the Convention is that both states and communities generally interpret sustainable development in a primarily economic, rather than a holistic way, and different groups and interests have different interpretations of what sustainable development means.¹⁸⁰ Communities (and other interest groups within states) that assume safeguarding will necessarily bring economic advantage can be disappointed when this is not the case. There is sometimes a conflict between indigenous views of sustainability and 'scientific' views presented in environmental policies, as indicated above under human rights law. In a number of Southern African states, communities living close to protected wildlife conservancies and nature parks are prevented from hunting animals and birds whose skins, horns and feathers are used in the enactment of their ICH, for example in costumes and regalia for their rituals and ceremonies. The lack of attention paid in environmental policies to the importance of hunting to local communities, leads them to be regarded as poachers. At the same time, commercial hunters are licensed to shoot lions, leopards and other protected animals, taking skins and other body parts abroad as trophies.¹⁸¹

One way in which state policies on sustainable development can affect ICH safeguarding is through regulations on social and environmental impact assessments. In the United States, most Social Impact Assessments (SIAs) are done under the National Environmental Policy Act, 'considering, for instance, the impact of fisheries' policies upon the traditional way of life of indigenous peoples. Another important environmental instrument is the Endangered Species Act,

176. IOS report, ITH/13/8.COM/INF.5.c.

177. UNESCO, Intergovernmental Committee of the Intangible Heritage Convention, Decision 8.COM 13.a

178. On this see UNESCO, Report of the expert meeting on safeguarding intangible cultural heritage and sustainable development, <http://www.unesco.org/culture/ich/doc/src/ITH-14-9.COM-13.b-EN.doc> which also contains the draft ODs.

179. United Nations 2012, Realizing the Future We Want for All, http://www.un.org/millenniumgoals/pdf/Post_2015_UNTTreport.pdf

180. L Lixinski, 'Sustainable Development in International Heritage Law: Embracing a Backwards Look for the Sake of Forwardness?', Australian Yearbook of International Law (forthcoming, 2015).

181. Chifunyise, 'Policies for Safeguarding Intangible Cultural Heritage - Conceptual Issues'.

which has roughly the same type of effect upon intangible heritage: environmental concerns examined through the prism of traditional ways of life. SIAs are governed by guidelines which require the involvement of all affected publics and populations. The guidelines also require that alternatives be sought for every step of the developmental project under scrutiny, and that all probable social impacts be addressed. Mitigation plans must also be developed, alongside an estimate of indirect and cumulative impacts.¹⁸² As research elsewhere has demonstrated,¹⁸³ such regulations offer opportunities to ensure the consideration of ICH safeguarding in development plans, but ICH-related aspects are often ignored in favour of solutions tailored to commercial developers' needs.

In developing regulations for conducting impact assessments, the Akwé: Kon Guidelines of 2004, developed in respect of Article 8(j) of the Convention on Biological Diversity may be helpful.

[The Akwé: Kon Guidelines] provide a framework that ensures the full involvement of indigenous and local communities in assessing the cultural, environmental, and social impact of proposed developments on the interests and concerns of traditional communities. They take into account traditional practices and knowledge as part of the impact assessment process. The guidelines propose a collaborative framework involving governments, indigenous and local communities, decision-makers, and managers of development projects. In this framework, these actors can support full and effective participation of communities, taking into account their cultural, environmental, and social concerns and interests. They ... should be implemented taking into account other international instruments and obligations (which presumably includes taking ICH-protecting instruments into account).¹⁸⁴

Another area where there are examples of international efforts for ICH safeguarding in the context of sustainable development is tourism. The World Tourism Organization (UNWTO) conducted a study on Tourism and ICH that made various recommendations:¹⁸⁵

- Form partnerships with other key players so as to ensure that the interests of all are taken into consideration, while simultaneously maintaining the authenticity and dynamism of the ICH in question.
- Support efforts to review, formulate and implement national legislation to:
 - ensure that tourist guides are required to receive training and licenses, and that their fees are appropriate to their qualifications and experience;
 - ... protect the intellectual property rights of communities with regards to ICH products used in souvenirs and other items (such as traditional music CDs, food recipes, cosmetics and medicines); ...
- Manage the impact of tourism development on ICH so that all stakeholders can enjoy the benefits of engaging in ICH activities, performances and practices, while safeguarding core heritage values;
- Establish projects with communities, the heritage management sector and educational institutions to document ICH assets that are either disappearing or undergoing revitalization/change;
- Support initiatives that follow international good practice for documentation, the use of information technologies and the communication of ICH values;
- Work with relevant stakeholders to devise strategies for the creation of new T&ICH [sic] products, improving links to existing products, and marketing products responsibly;

182. Lixinski, *Intangible Cultural Heritage in International Law*, p.139.

183. 'Cultural heritage impact assessment in Africa: an overview', <http://www.heritageinafrica.org/news/119.html>

184. Lixinski, *Intangible Cultural Heritage in International Law*, pp.217-8.

185. UNWTO 2012. *Tourism and Intangible Cultural Heritage*. Available at <http://www.e-unwto.org/content/l62353/>

- Promote performances of local culture that provide useful information and do not disrespect core cultural values;
- Support the sale of ICH-related goods through official outlets and licenced retailers, such as museums, airports and hotel shops, with appropriate displays;
- Adopt and promote quality accreditation schemes for handicrafts;
- Participate in the design of specific principles to guide the management of tourism and intangible cultural heritage, given that current codes and charters do not deal with both subjects simultaneously.

These recommendations mostly support ICH safeguarding in the spirit of the Convention, but also raise some concerns. The idea of ‘authenticity’ (defined by external stakeholders) is not generally considered appropriate to ICH safeguarding.¹⁸⁶ Tour guides should ideally be drawn from communities concerned or be working closely with them when giving information on ICH practices. The likely benefit to communities concerned of the ‘sale of ICH-related goods through official outlets and licenced retailers’ and the establishment of ‘quality accreditation schemes’ is debatable. If quality accreditation is done through state agencies rather than by communities themselves, it could have a negative effect on ICH safeguarding.¹⁸⁷ These kinds of concerns should be addressed when seeking to include ICH in policies for tourism promotion.

Examples

- The legislative and policy framework for ICH safeguarding in Slovakia encourages integration of ICH management into society and development activities.¹⁸⁸
- The National Programme in Kyrgyzstan presupposes the preservation of the traditional rural landscape, including traditional architecture, sacred sites and the environment, and an emphasis is placed on traditional ecological knowledge held by pastoralists and nomads.
- In Burundi, two important sites of rituals and ceremonies and the various tambourine sanctuaries are protected by the Ministry of Environment, Water and Land-use Planning.
- Traditional authorities in Namibia play an important role in the conservation of natural spaces related to ICH. They govern local communities through customary laws and draw on the experience of the elderly and their indigenous knowledge about the landscape to make laws to protect them. For example, the laws of the Ombandja Traditional Authority state that anyone who damages berry bushes or water lilies or makes palm wine without permission will be fined.¹⁸⁹
- In Honduras, safeguarding of ICH has been integrated into a ‘cultural guards’ training programme for park rangers.¹⁹⁰
- In Viet Nam, ICH safeguarding is incorporated into development programming and the Strategy for Cultural Development 2010-2020 encourages joint programmes with the Committee for Ethnic Minorities to strengthen the development of ethnic minority cultures. The impacts of the construction of hydro-power plants on ICH have also been assessed, by applying a cultural sustainability test.
- The 2008 ‘Endorsement of the Millennium Development Goals-based Comprehensive National Development Strategy’ in Mongolia calls for state support for the preservation, protection and restoration of tangible and intangible heritage.

186. Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage (1994) http://portal.unesco.org/culture/en/ev.php-URL_ID=31373&URL_DO=DO_TOPIC&URL_SECTION=201.html

187. Deacon, H.J. ‘Intangible heritage safeguarding: ethical considerations’, paper presented at Heritage Ethics conference, University of Kent, June 2014.

188. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 10.

189. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 37.

190. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 17.

- The National Programme of the Development of Small Towns and Villages of Belarus provides some measures and investments for development of the economy and social and cultural environment of provinces rich in ICH.
- The 2011-2015 strategy for safeguarding, protecting and the sustainable commercial use of the cultural heritage of Croatia requires the inclusion of ICH in local- and State-level strategic programmes and plans and includes culture and tourism and supporting craftsmanship in its main goals.¹⁹¹

POLICIES FOR INTELLECTUAL PROPERTY RIGHTS PROTECTION¹⁹²

IP rights were at the very heart of the original request by Bolivia in 1973 for a Convention on ICH safeguarding. There is now a growing literature on the protection of IP rights associated with ICH.¹⁹³

The Convention and its ODs mention IP rights in two main contexts. First, Article 3(b) of the Convention states that the Convention does not affect existing kinds of IP rights in ICH:

Nothing in this Convention may be interpreted as ... 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.

Second, OD 104 encourages States Parties to use IP rights regimes to help communities promote and profit from their ICH:

States Parties shall endeavour to ensure, in particular through the application of intellectual property rights, privacy rights and any other appropriate form of legal protection, that the rights of the communities, groups and individuals that create, bear and transmit their intangible cultural heritage are duly protected when raising awareness about their heritage or engaging in commercial activities.

The Committee at its 2012 meeting 'welcomed the diverse initiatives of States Parties to implement intellectual property protections and other forms of legal protection for intangible cultural heritage'.¹⁹⁴ IP protection over ICH can assist ICH safeguarding by ensuring the moral rights of communities over their ICH are respected, or that they can control use of or access to their symbols and ritual art (OD 102). It can prevent the misappropriation of ICH from communities concerned (for example, through controls over bioprospecting), and ensure that benefits are channelled back into communities, for example, by ensuring that communities can exert a monopoly over the sale of their cultural products or services (OD 104). However, the Committee also sounded a note of caution, particularly about how IP protection mechanisms such as 'certificates of origin' (geographical indications or protected designations of origin) could 'freeze' ICH. The Committee also reiterated the need to ensure that communities concerned benefit from the safeguarding of their ICH through IP protection.¹⁹⁵

191. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 50.

192. This section is adapted from a draft paper on IP and ICH safeguarding by Deacon, H.J. 2015.

193. See for example Antons, C. 'Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions', *Modern Asian Studies*, Volume 47, Issue 04, July 2013, pp.1403-1433 <http://dro.deakin.edu.au/eserv/DU:30054576/antons-asianborderlands-2013.pdf>; Antons, C. 2009. Traditional knowledge, traditional cultural expressions, and intellectual property law in the Asia-Pacific region, Kluwer Law Intl; Forsyth, M. 'Do You Want it Giftwrapped?' and other articles by that author cited in this paper; Nicholas, G. et al. 2010. 'Intellectual Property Issues in Heritage Management Part 2: Legal Dimensions, Ethical Considerations, and Collaborative Research Practices', *Heritage Management*, Volume 3, Issue 1, Spring 2010. http://www.sfu.ca/ipinch/sites/default/files/outputs/publication/nicholas_et_al_legal_dimensions_ethicalconsiderations_collaborative_researchpractices.pdf

194. UNESCO, Intergovernmental Committee of the Intangible Heritage Convention, Decision 7.COM 6.

195. UNESCO, Intergovernmental Committee of the Intangible Heritage Convention, Decision 7.COM 6.

In developing a regulatory framework for IPR protection in the context of ICH safeguarding, a state may wish to address the following issues:

- Will conventional forms of IPR (trademarks, copyright, patents, etc.) be the only means to protect community rights over ICH or will a *sui generis* regime also be developed (i.e. one that is specifically adapted for this purpose)?
- How will a *sui generis* regime for the protection of IPR associated with ICH, if developed, prioritize the interests of communities concerned and to what extent will it consider the interests of the broader society in a state, or humanity in general? How will it accommodate the variety of ICH elements and community needs and perspectives in regard to their rights?
- How will identification, documentation and inventorying of ICH under the Convention intersect or interact with the development of databases under systems for protecting IP rights in Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs)?

Using conventional IPR regimes for safeguarding ICH, or creating sui generis regimes

Conventional IPR protection gives rights to individuals or commercial concerns, usually for a limited time (e.g. patents, copyright), over works or signs that are novel or unique. Some states wish to adapt IPR regimes to protect community rights over their ICH, which has been handed down over the generations. In the absence of binding international agreements on this issue, states have considerable flexibility in developing approaches to IPR protection of ICH. Whichever approach is chosen at the national level, the nature and purpose of IPR regimes, and their implementation, materially affect the development of policy for ICH safeguarding.

Every state makes its own IP laws, and these have in the past differed quite markedly from each other, but most states now provide basic levels of protection set by international agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS agreement) under the World Trade Organization (with 160 member states),¹⁹⁶ and the Berne or Paris Conventions.¹⁹⁷ It is of course possible to apply conventional IPR regimes to some embodiments of ICH, whether by asserting individual rights over creative products or preventing others from doing so (the latter is called defensive protection).¹⁹⁸ Conventional IPR regimes (such as copyright, trademarks, patents, industrial designs) are designed to provide time-limited protection over new, individually-created functional or artistic works or signs that have commercial possibilities. Geographical indications (GIs) probably come closest to protecting ICH-related products because they can be used to refer to traditional ways of producing things within a specific territory. However, the international agreements for protecting GIs are still in their infancy. They only protect designations of origin (e.g. champagne comes from the Champagne region) and not the copying of practices themselves (e.g. how to make champagne).¹⁹⁹

In some states, the legal system has been able to stretch conventional IPR regimes even further, for example in one case in Australia, by using the idea of 'cultural harm' in customary law to help assess damages for copyright infringement of a ritually important artwork created by a member of an Indigenous community.²⁰⁰ By protecting the rights of communities (or in most cases, individuals from those communities) over the products of ICH practice, it is possible to contribute to the safeguarding of the ICH itself, for example by giving monopolies over claims to authorship, and controlling production or sale. However, conventional IP protection is limited to fixed physical embodiments of ideas and practices, rather than the ideas themselves, and especially the loosely

196. TRIPS agreement http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

197. Berne Convention Convention for the Protection of Literary and Artistic Works http://www.wipo.int/treaties/en/text.jsp?file_id=283698; Paris Convention <http://www.wipo.int/treaties/en/ip/paris/index.html>

198. For examples see Janke, T. 'Case studies on Intellectual Property and Traditional Cultural Expressions', WIPO 2003 http://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf; Deacon, H.J. et al., 2004. The subtle power of intangible heritage: Legal and financial instruments for safeguarding intangible heritage, Human Sciences Research Council. Available at <http://www.hsrcpress.ac.za/product.php?productid=2044>.

199. For a discussion on this see Lixinski, Intangible Cultural Heritage in International Law, p.193.

200. See Indofurn case, Janke, T. Case studies on IP and TCEs, p.8.

defined and often changing practice of ICH. Although there are a number of cases where applying conventional IP rights has aided ICH safeguarding, the development of parallel *sui generis* regimes in states is a growing trend.²⁰¹

There is currently no international treaty or agreement, and few regional instruments, which set specific requirements for the protection of IP rights over ICH. Subsequent to the UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Forms of Prejudicial Action, 1982,²⁰² WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has been developing a *sui generis* framework for IPR protection over community-owned aspects of cultural practice since 2001. This resulted in the publication in 2014 of two sets of Draft Articles, one for the Protection of TK and another for TCEs.²⁰³ Regional agreements on IP relating to ICH include the Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002),²⁰⁴ and the Melanesian Spearhead Group Framework Treaty on the Protection of Traditional Knowledge and Expressions of Culture (2011).²⁰⁵ In Africa, there is the Bangui Agreement of the African Intellectual Property Organization (OAPI, amended in 1999) and the 'Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore for Africa' (2010).²⁰⁶

Aside from regional agreements which specifically cover TK and TCEs there are thus few international limits on the drafting of national law in this field, or adapting conventional IPR regimes (as long as this does not affect the minimum standards required by TRIPS and other international agreements). IPR protection for TK and TCEs thus tends to be more diverse, and highly tailored to local needs, than conventional IP regimes constrained by TRIPS and other international agreements. However, in some localities, such as the Pacific Island States, regional agreements have been very influential in shaping local legislation.²⁰⁷

Developing a sui generis regime that responds to a diversity of interests and needs

If states wish to develop a *sui generis* regime for protection of IPR in ICH, they may wish to set out the general aims of such a project, the best means to achieve these aims, and likely outcomes. According to the spirit of the Convention, IPR protection for ICH would need to focus on safeguarding rather than simply commercialization of ICH; and it would need to prioritize the interests of communities concerned. How questions of agency and representation are addressed in the system, including 'who gets to register the manifestations of heritage on behalf of the community, and who administers and controls the rights of the community to attribution and even royalties', affects whose interests the system serves.²⁰⁸ A *sui generis* regime needs to accommodate considerable diversity in the needs and wishes of communities concerned regarding the protection of rights over their ICH. Communities are never homogenous, and there may be

-
201. WIPO keeps a database on legislation in the area of TK, TCEs and IP which contains examples of this <http://www.wipo.int/tk/en/databases/tklaws/>
202. UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action, 1982 <http://www.wipo.int/wipolex/en/details.jsp?id=6714>
203. WIPO, Draft Articles for the Protection of Traditional Knowledge, Rev. 2, March 28, 2014. Available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=238182. See also WIPO, Draft Articles for the Protection of Traditional Cultural Expressions, Rev.2, July 7-9 2014, http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_28/wipo_grtkf_ic_28_6.pdf
204. Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture <http://www.forumsec.org.fj/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprssnsOfCulture20021.pdf>; See also 'Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law 2002' at <http://www.wipo.int/edocs/lexdocs/laws/en/spc/spc001en.pdf>
205. Melanesian Spearhead Group Framework Treaty <http://www.msgsec.info/index.php/latex-developments/135-msg-framework-treaty-on-the-protection-of-traditional-knowledge-and-expressions-of-culture>. Suzuki, Yuri 2013. 'Melanesian spearhead group framework treaty on the protection of traditional knowledge, traditional cultural expressions: Emerging challenges for Pacific Island Countries' [online]. Asia Pacific Journal of Environmental Law, Vol. 15: 177-188.
206. Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=201022
207. Forsyth, M. 2011. 'The traditional knowledge movement in the Pacific Island countries: the challenge of localism', Prometheus, 29:3, pp.269-286.
208. Lixinski, Intangible Cultural Heritage in International Law, p.210.

considerable disagreement within and between communities, groups and key practitioners, on this issue. Much ICH is already in the public domain, and being widely used. States may wish to take into account other interests, including those of the broader population within the state, and humanity in general. These are all difficult questions to address, and there are no solutions that will work in all contexts.

In the spirit of the Convention, it is important to ensure that, in extending IP regimes to cover ICH, states do not appropriate it. States do sometimes assert 'ownership' of IP rights in ICH, and over ICH itself, both *vis a vis* communities, and *vis a vis* neighbouring countries.²⁰⁹ This is often justified by governments as promoting general development in society (for example by bolstering international status for diplomacy and tourism income), and ensuring equitable distribution of benefits where communities concerned cannot be easily identified or do not agree among themselves. While some of these justifications may have merit in certain circumstances, a general approach of this kind would not be in the spirit of the Convention, which focuses on reaffirming community stewardship over their ICH.

There are risks in assuming that giving communities stronger IP protection over their ICH will always aid in its safeguarding. Most communities wish to be acknowledged when others use their ICH at the very least, but not all communities wish to protect the IP rights associated with their ICH, whether or not these rights are being appropriated by others. Some wish to exert strong control over their ICH, but not necessarily through conventional forms of IPR or *sui generis* regimes that favour a western model of IP.²¹⁰ As Forsyth notes, 'it is difficult to boil down the multiple links and resonances that traditional knowledge has within the community of which it is a part to a single 'right' that is 'owned' by a clearly defined group of people'.²¹¹ Given this fact, there is a danger that conferring IP rights on ICH-related products can and does change its relations of production: it is 'perhaps the most extreme form of legal commodification [to which] intangible heritage can be subject'.²¹² IP regimes for protection of TK can impose alien ways of conceiving value and property on ritual objects and practices.²¹³ *Sui generis* IP policies thus have to accommodate considerable diversity with respect to the needs of communities in safeguarding their ICH. The *sui generis* regulatory structure that is created should not undermine the ability of 'institutions of customary law, as well as customary norms, to determine questions regarding responsibility for, and access to, traditional knowledge'.²¹⁴

In developing *sui generis* regimes for protection of IP in ICH, local consultations with communities and other stakeholders are particularly important; states should not simply import external models, even from regionally-specific instruments.²¹⁵ One way of accommodating the specific needs and interests of communities is to create a system in which different contractual arrangements can be set up at the community level in regard to specific elements, perhaps with the assistance of state agencies or NGOs.²¹⁶ Ethical guidelines for negotiating IP-related agreements with communities in regard to their ICH, such as the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2010) and the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (2002), may be of some assistance in regulating such agreements, although they have little power to prevent abuses by the state itself.²¹⁷ Also, externally developed guidelines or models may not be locally appropriate.

209. Antons, 'Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions'.

210. Lixinski, *Intangible Cultural Heritage in International Law*, pp.207-8.

211. Forsyth, 'The traditional knowledge movement in the Pacific Island countries', p.272.

212. Lixinski, *Intangible Cultural Heritage in International Law*, pp.175-6.

213. Forsyth, 'Do You Want it Giftwrapped?'

214. Forsyth, 'The traditional knowledge movement in the Pacific Island countries', p.272.

215. Forsyth, 'The traditional knowledge movement in the Pacific Island countries', p.270.

216. Lixinski, *Intangible Cultural Heritage in International Law*, p.210.

217. Lixinski, *Intangible Cultural Heritage in International Law*, p.217.

Even where the focus is on promoting the interests of communities as stewards of their ICH, states developing *sui generis* regimes alongside other IP policies may want to consider different interests as well. They may wish to ensure that legal provisions to protect community-held IP rights over their ICH (which may exist in perpetuity) do not unduly restrict opportunities for general benefit to society, and the maintenance of a 'creative commons' for all artists and inventors.²¹⁸ The model of compulsory licensing under conventional IP regimes²¹⁹ raises the question also of whether *sui generis* regimes should consider the interests of humanity in general. This situation might come into play where for example traditional remedies offer a cure for serious illnesses, and communities are unwilling to license production or sale of such treatments to others at a reasonable fee, even where this would not be detrimental to them.

Addressing the economic marginalization of poorer communities is a common policy aim in states. Justifications for protection of community-held IP rights over their ICH are often based on the fact that these communities are poor, but this is not always the case. Also, communities who own IP rights in their ICH do not necessarily benefit economically from exploitation of these rights, and may have unwarranted expectations of such benefit. There may also be downsides to exploitation of IPR in regard to safeguarding, as it renders ICH a commercial property in a very specific way. In some cases, economic development can be achieved without necessarily conferring IP rights in perpetuity on those communities, for example through development and benefit-sharing agreements. Some states may therefore wish to focus on policy development in these areas, or deploy other means to ensure that poorer communities can control and benefit from any commercialization of their ICH.

Databases and inventories of ICH elements

Even where *sui generis* regimes for IPR protection are not developed, setting up and populating databases or inventories of ICH may play a role in the establishment and defensive protection of IP rights in ICH. Both the Convention and the WIPO Draft Articles provide for some kind of listing or documentation of ICH elements, whether in ICH inventories under the Convention (and by extension, its international Lists, the RL and USL), or in databases of TK; such databases are already a common feature of many national regimes for the protection of TK.

Databases of ICH can assist communities in establishing prior claims as stewards of their ICH, thus preventing others from claiming IP rights over it. However, 'fixing' the identification of ICH for the purpose of establishing these IP rights can clash with the need to 'update' descriptions of ICH for the purposes of safeguarding. Providing information about ICH in the public domain can also have negative effects on safeguarding and community rights protection. The report on the Periodic Reports of States Parties in 2012 noted that 'recording and digitization of intangible cultural heritage ... can ... have serious intellectual property implications',²²⁰ both positive and negative, including:²²¹

- Broader access to data from communities concerned (this might aid safeguarding through awareness-raising);
- The danger of distortion of the ICH (misrepresentation, affecting the link with the community and safeguarding);
- The fixation of performances in audio-visual media (this might result in 'freezing'); and

218. See for example the discussion in Lixinski, *Intangible Cultural Heritage in International Law*, p.212.

219. Compulsory or statutory licensing is intended to make certain goods more widely available where this is in the common interest, for example in respect of anti-malaria drugs in developing countries. Under a compulsory license, licenses for producing and marketing some medical treatments can be acquired (usually at a fixed, but reasonable, rate) by anyone in the relevant territory.

220. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 46.

221. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 103.

- The potential exploitation of traditional botanical and other knowledge for commercial exploitation (thus potentially depriving communities of benefit therefrom, if commercialization is done by others, and benefit-sharing or other arrangements are not in place).

The aims of the Convention and the WIPO Draft Articles are very similar. The WIPO Draft Articles aim to provide legal and other means for IP rights protection for TK and TCEs of communities to prevent misappropriation, promote community benefit, and encourage creativity and innovation.

In both sets of Draft Articles words like ‘conservation’ are used instead of ‘safeguarding’, but the broad approach follows that taken in the Convention. The Draft Articles for the Protection of TK recognize the importance of innovation and change in traditional knowledge, its relationship to community benefit and development, and of retaining community control over it in the traditional context (Preamble). They emphasize ‘respecting, preserving, protecting and maintaining traditional knowledge systems [and providing incentives to the custodians of those knowledge systems to maintain and safeguard their knowledge systems]’ (phrases still under review are in square brackets). The Draft Articles distinguish to varying extents between legal measures to protect community IP rights over traditional knowledge that is sacred or secret, knowledge that is already widely known and not sacred or secret, and knowledge already in the public domain.

The Draft Articles for the Protection of TK, but not those for TCEs, propose complementary measures such as databases or registers for ‘defensive protection of traditional knowledge, [including through the prevention of the erroneous grant of patents], and/or for transparency, certainty, conservation purposes and/or transboundary cooperation’. The inventorying of the ICH is however proposed as a safeguarding measure in the Convention (Articles 11-12), effectively creating a database for TCEs. The defensive protection of traditional knowledge (preventing others from claiming IP rights over it by establishing prior art in patent applications, for example) probably requires a greater level of consistency in database entries and codification of information within each entry than is required by the function of inventories under the Convention, which is simply to contribute to safeguarding of each element. The legal status of information in the databases of traditional knowledge also changes the incentives for community members seeking to include their ICH on the database or giving consent for its inclusion. Some kinds of ICH, such as traditional medical or agricultural knowledge, are probably more likely to be included on databases for traditional knowledge than other kinds of ICH.²²²

Some have criticized the existence of separate IP regimes for TK and TCEs on the basis that communities do not distinguish between these kinds of ICH;²²³ one could raise similar objections to having separate ICH inventories and TK databases. One reason for not merging TK databases with ICH inventories is that they perform very different functions, and inclusion of elements on them has somewhat different effects. Many states will want to implement a system that merges ICH inventories and TK databases, or two systems of identification and inventorying. Different approaches to dissemination and use of these databases and inventories may be proposed, with varying levels of community involvement and access. It is important to consider the possible risks and benefits of the proposed approaches, what the interactions between different databases might be, and what implications this might have for ICH safeguarding.

Examples

- Raising awareness about IP issues: In Seychelles the 2008 Research Protocol and 1994 Copyright Act provide an ethical and IPR framework for collecting and making publicly available documentary materials, recordings, etc. on ICH.²²⁴

222. See Deacon, ‘Intangible heritage safeguarding: ethical considerations’.

223. Forsyth, ‘The traditional knowledge movement in the Pacific Island countries’.

224. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 26.

- Establishing databases of traditional knowledge that may require IP protection: In Abu Dhabi there is a specific Inventory of Traditional Medicine managed by the Zayed Complex for Herbal and Traditional Medicine Research Centre.²²⁵
- Assisting communities to protect IPR in their ICH: In Madagascar the registration of a Zafimaniry trademark in the Madagascar Intellectual Property Office is used by the Zafimaniry Association on all woodcraft products by Zafimaniry artisans in order to protect their interests and involve them more directly in safeguarding.²²⁶
- Developing flexible *sui generis* solutions: In the Philippines, the Indigenous Peoples Rights Act of 1997 requires that the free, prior, and informed consent of indigenous communities must be obtained, in accordance with their customary law and practices, prior to the use of their ICH by third parties. The legislation gives the community group rights over the IP associated with their ICH. Where this approach 'does not fit with the affected community's worldviews, a *sui generis* solution is to be developed for each case' after community negotiations.²²⁷

225. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 56.

226. Examination of the reports of States Parties 2013, ITH/13/8.COM/6.a, para 39.

227. Lixinski, *Intangible Cultural Heritage in International Law*, p.140.

ANNEX 2: REPORTING TEMPLATE

NAME OF THE STATE PARTY

BACKGROUND INFORMATION ON THE STATE

What are relevant aspects of the population, socio-economic and historical context, and demographics (including ethnic diversity) of the state?

How has the state and its communities or NGOs engaged with the Convention to date (nominations, international assistance requests, committee membership, public comments on nomination files, accredited NGOs, etc.)?

SCOPE AND METHODOLOGY OF THE NEEDS ASSESSMENT

What was the scope and purpose of the needs assessment?

How was the needs assessment compiled, and with what involvement from country counterparts, communities and other stakeholders?

CURRENT PROVISIONS FOR ICH SAFEGUARDING IN STATE POLICIES AND INSTITUTIONAL MANDATES

Is ICH mentioned in any existing policies or institutional mandates? If so, how is it defined, and what provisions have been made for its safeguarding?

What regional and international legal instruments have been ratified or agreed to by the State Party and how they could inform policy making relating to ICH safeguarding

How does the existing policy and institutional framework in the State Party assist in ICH safeguarding in the spirit of the Convention? In what ways, if at all, does it:

- Encourage stakeholder awareness about the value and function of the diversity of ICH in the territory, the principles of the Convention, and the important role of communities concerned in safeguarding it (Articles 1,15);
- Encourage the widest possible participation of communities concerned in all activities concerning their ICH, and consultation between them and other stakeholders in ICH management (where necessary) (Article 15);
- Integrate ICH safeguarding into planning programmes and promote its function in society (Article 13(a)), for example by promoting mutual respect, human rights (including gender equality) and sustainable development (Article 2.1);
- Support identification and inventorying of ICH in the territory with the full participation and consent of communities concerned, updating these inventories and making the information accessible to communities for safeguarding purposes (Articles 11-12);
- Support other ways of safeguarding the ICH with the full participation and consent of communities concerned. This can include capacity building, research, information dissemination (appropriately managed) (Articles 13-14);
- Encourage synergies between the implementation of the various UNESCO conventions in the field of culture, as well as synergies between the safeguarding of ICH, the promotion of cultural industries and the conservation of tangible heritage; and (depending on provisions in specific ICH policies) (Article 3);
- Protect the rights and well-being of the communities concerned while safeguarding the ICH, promoting sustainable development, ensuring the ICH is not de-contextualized or over-

commercialized, and that communities concerned are not misrepresented or abused (OD 102, 104);

- Share expertise and information across international borders (Articles 1(d) and 19; ODs 86–88), including cooperation and networking between communities, experts, centres of expertise and research institutes and international networks of ICH-related institutions and Category II centres (ODs 79–80, 86 and 88)?

KEY PROBLEMS IN ICH SAFEGUARDING

What are the key problems faced in safeguarding ICH and ensuring communities benefit from safeguarding processes, as indicated by communities concerned and other stakeholders?

Are there any additional issues identified by the advising expert?

POLICY GAPS IN ICH SAFEGUARDING

Which of these problems can best be addressed through the development of policies?

What policy gaps have been identified by country counterparts and stakeholders? Are there any other policy gaps that could be indicated?

THE POLICY PROCESS

What policy process will likely be adopted by the State? What recommendations can be made in this regard, if any, to assist in the planning for this process?

CAPACITY-BUILDING NEEDS

What are the capacity-building needs identified by country counterparts, communities concerned and other stakeholders? What additional capacity-building needs might be relevant?

What examples of policy approaches might be relevant for country counterparts and stakeholders to explore?

What programme for capacity building would best meet these needs?

ANNEX 3: DETAILED QUESTIONS

The following questions (supplementing those in Annex 2) may help advising experts to assess capacity-building needs for policy development to support safeguarding of ICH in the framework of the implementation of the Convention, and they may be useful in developing policy advice for States Parties.

CULTURE AND HERITAGE POLICIES IN GENERAL

- Are there culture/heritage policies? If so, when were they drafted and when are they likely to be reviewed? In what language(s) are they available?
- Why is culture and heritage considered important in the state, according to the culture/heritage policies? Are specific forms of culture and heritage, or specific communities, prioritized in the policies, and if so why?
- Under whose authority are the culture/heritage policies implemented, and what are the mechanisms for doing so? How far, and how effectively, have they been implemented?
- What is the approach taken in the culture/heritage policies towards engagement with communities in the state (including recent immigrants, minorities or indigenous groups) and their participation/consultation regarding cultural/heritage management, and safeguarding of ICH?
- Are other UNESCO Conventions in the field of culture that have been ratified by the state mentioned in the culture/heritage policies? What is the envisaged articulation between the implementation of these Conventions, and/or between the safeguarding of ICH, the promotion of cultural industries and the conservation of tangible heritage?
- Do the culture/heritage policies mention ICH, and if so in what contexts? Do they set out ways in which ICH is understood or valued within the State?
- Do the culture/heritage policies set up an infrastructure for cultural management (and safeguarding) in the State? If so, where do (or could) ICH safeguarding responsibilities fit into this infrastructure? Is such an infrastructure required, and for what purposes?

STAND-ALONE ICH POLICIES

- What is the relationship between the existing (or planned) stand-alone ICH policies and existing provisions in other policies or legislation?
- Can other policies be referred to specifically in the stand-alone ICH policies? Are there any areas of conflict or overlap with other policies? How can such conflicts be resolved?
- How can ICH policies encourage the safeguarding of ICH in the spirit of the Convention, with specific reference to:
 - The promotion of community consultation, benefit, involvement and consent in all aspects of safeguarding;
 - The promotion of human rights (including specifically gender equality), sustainable development and mutual respect between people;
 - The involvement of young people in the practice and transmission of their ICH;
- How could ICH policies define ICH, and communities concerned? Are there any aspects of ICH (or any communities) that would thereby be prioritized or excluded? What could be the reasons for this?
- What kinds of functions could institutions and bodies perform to support communities in ICH safeguarding that are not already provided for in existing institutions and their mandates?

- How could provision be made for identification and inventorying in ICH policies? How much detail is necessary at the policy level to set up or enable this process?
- Are there any reasons why specific provision should be made at a policy level to safeguard ICH elements? How will these specific provisions avoid creating hierarchies between ICH elements?
- Are there any reasons why specific provision should be made at a policy level to support ICH practitioners? Who might benefit from such provisions, and how will they be selected? Could such provisions assist in the promotion of gender equality? How will such provisions avoid creating hierarchies between ICH elements?

CONSTITUTIONAL PROVISIONS

- Are there provisions for the recognition of human (and specifically cultural) rights and for the promotion and/or restriction of some cultural activities?
- What is the system of law and governance (especially in the domain of culture), including provisions for devolution of powers and/or the recognition of customary and religious systems of law and the role of traditional leaders, if any?
- What approaches are adopted in relation to culture, heritage and linguistic, religious and cultural diversity? What is the purpose or role of culture (and/or ICH) in society, according to the constitution?
- What provisions, if any, are made in the constitution for the recognition of indigenous and minority groups, and/or communities defined in other ways?
- Are any provisions made for ICH safeguarding in the constitution or in other legislation or policy?
- What approaches are adopted in relation to health, education, IP and other areas of government activity that can impact on ICH safeguarding?

HUMAN RIGHTS ISSUES

- What legal provisions are made in the state to ensure human rights are protected?
- Are there any human rights violations associated with the practice (or prevention of the practice) of ICH in the State? What is the role of ICH elements in contributing to (or undermining) gender equality?
- Does the definition of ICH used at the national or sub-national level include or exclude that which is not compliant with existing international human rights instruments, or the requirements of mutual respect or sustainable development?
- Are there any existing provisions for addressing ICH non-compliant with the requirements of mutual respect, human rights or sustainable development? How could such ICH be taken into account for inventorying and safeguarding, if at all; could specific strategies be developed to address harmful effects of certain forms of ICH?
- How can ICH policy take account of, or respond to, public support for, or legal provisions in a state that make exceptions for, certain cultural practices that are not compliant with human rights provisions?
- How can ICH policy take account of, or respond to, legal provisions in a state that ban, prohibit or marginalize forms of ICH that are widely accepted in society and compliant with human rights provisions?

INDIGENOUS OR MINORITY GROUPS

- In a state with recognized indigenous and minority groups, what special provisions are in place for them, if any, and what is their purpose and effect?

- Is there any reference to recent immigrant communities (if any) and how identification and safeguarding of their ICH will be supported, if at all?
- Do these special provisions refer to culture or ICH, or to ethnic identities? How might they be used to encourage safeguarding, or develop policy to that effect?

DEVOLVED POLICY MAKING AND PLURAL LEGAL SYSTEMS

- Is there a system of devolution of power in the state, and is authority for ICH policy making (or other related policies) entirely or partially devolved to different levels of government?
- How much flexibility is there in decisions about which specific functions are devolved, or whether they are devolved? How much is this likely to affect safeguarding of the ICH?
- What are the ICH-related support functions (best) performed at the different levels of government, and what is the most effective form of articulation between them?
- Are traditional authority structures, if any, recognized formally by the State? How have they changed over time, and what is the extent of their public support?
- If there is a plural legal system in the country, what is the relationship between the different parts of this system? For example if customary law, based on traditional governance systems, is recognized by the dominant legal system, is it subordinate to that system, or parallel to it?
- Is the customary law based on different fundamental concepts or principles compared to the dominant legal system? How does customary law interface with ICH management structures in the communities concerned?

LANGUAGE

- What languages are spoken by the native population of the country? What is the level of viability of those languages? If the viability of one or more of these languages is at stake, what effects does that have on the ICH of the communities concerned?
- What languages are used in administration, education, justice and the media? Are there communities or groups who do not master these official and/or working language(s) of the country? Are official/working languages the same all over the country? If not, what is the situation?
- What languages are spoken by settled groups of immigrants?
- What legal provisions or policies (if any) were developed concerning the status and use of other languages spoken in the country other than official or working ones?
- Does language play a role in the identification of communities and groups for purposes of the implementation of the ICH Convention?
- Are the basic texts of the Convention available in one or more of the languages spoken in the country?
- Are linguistic minorities, if any, involved in awareness-raising and capacity-building activities?
- In what language(s) is/are the ICH inventories (if any) presented?
- Has language, or language as a vehicle of the ICH, been taken into account in the design or the population of the inventory(ies)?

EDUCATION

- What is the attitude to ICH (such as indigenous or local knowledge or culture) in education policies for the formal education system? Is culturally-specific content developed or used in the formal education system?

- To what extent do formal and informal education policies and their implementation support the principles of community-driven safeguarding of ICH? In what ways can active community involvement be achieved in planning and delivery of formal or non-formal education programmes about their ICH?
- How can cultural institutions, educators and ICH experts work together with communities concerned to share experiences and develop formal and non-formal educational programmes for awareness-raising about, the development of mutual respect for, and transmission of ICH?
- On what basis should specific ICH elements be chosen for inclusion in formal or non-formal education programmes at different levels of the system, and who should decide? Considerations might include local or widespread practice of the ICH, viability or endangerment of the element, level of community support and availability, level of research and documentation available.
- What kinds of resources could be developed (with community involvement) to assist teachers to introduce ICH topics in schools? What IPR considerations might be considered in doing so, to ensure maximum community access to the material as well?
- What kinds of support or enabling conditions are required for the successful integration of ICH-related topics into (a) early childhood education programmes, (b) school curricula and (c) the programmes of cultural institutions?
- How can inclusion of ICH topics in formal or non-formal education programmes help to involve and retain specific groups in the education system (learners with disabilities, ethnic minorities, learners in lower socio-economic groups, etc.)?²²⁸

HEALTH

- What policies are already in place within the health sector that could promote or hamper the practice of traditional medicine as ICH? How are traditional medical practitioners recognized, regulated and/or supported, if at all?
- Are there any public health concerns raised about specific ICH practices? By what means could these concerns best be addressed?
- How is research and data about traditional medicine regulated or used in the state, if at all? How does the work done on traditional medicine within the health sector intersect, if at all, with research in the field of traditional knowledge as IP, and inventories of ICH?

SUSTAINABLE DEVELOPMENT

- To what extent, and for what reasons, is ICH, and culture more generally, considered to be a driver of sustainable development in the state? What are the roles of different groups (e.g. youth, women, indigenous groups) in this process?
- How does this affect the kinds of priorities for ICH safeguarding in the state, from the perspective of policy makers?
- What kinds of development needs do communities in the state express? How can these be addressed through safeguarding of their ICH, if at all?
- What major barriers are there to ensuring that communities benefit from the safeguarding of their ICH? How can these be addressed?

228. See background paper, Eighth Annual Meeting of the South East European Experts Network on ICH: 'Intangible cultural heritage and education: experiences, good practices, lessons learned'. Limassol, Cyprus 15-16 May 2014. Accessed at <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Venice/pdf/news/ICHmeetingLimassol2014-FinalAgenda.pdf>

INTELLECTUAL PROPERTY PROTECTION

- What legal and policy measures are already in place (or being planned) that could be used to protect community IP rights in regard to their ICH, including moral rights (rights of attribution)?
- Will conventional forms of IPR (copyright, patents, trademarks, etc.) be the only means to protect community rights over ICH or will a *sui generis* regime also be developed?
- How will a *sui generis* regime for the protection of IPR associated with ICH, if developed, prioritize the interests of communities concerned and to what extent will it consider the interests of the broader society in a state, or humanity in general? How will it accommodate the variety of ICH elements and community needs and perspectives in regard to their rights?
- Are there any examples of infringements of the rights of communities over their ICH that could have a negative effect on community development and safeguarding of this ICH?
- How (if at all) is research on traditional knowledge or ICH (including bioprospecting) regulated?
- What initiatives are underway to document or research traditional knowledge with a view to generating associated IPR (such as patents)?
- How will identification, documentation and inventorying of ICH under the Convention intersect or interact with the development of databases under systems for protecting IPR in TK or TCEs?

ANNEX 4: CHECKLIST

This is a checklist for the preparation of a needs assessment, mainly to guide budgeting.

Task	Actions
Development of scoping document	
<p>Advising expert produces a scoping document for the needs assessment based on consultation with country counterparts and UNESCO to identify a common understanding of:</p> <ul style="list-style-type: none"> the purpose behind the needs assessment, its scope, process and outcomes; the roles of the advising expert, country counterparts, community representatives and other stakeholders; and the relationship between the needs assessment and the process of policy development in the state. 	<p>Advising expert meets/exchanges with country counterparts and UNESCO (could be on email or skype)</p> <p>Identification of key stakeholders</p> <p>Output: scoping document (chapter 1 of the needs assessment)</p>
Development of draft desk review	
<p>Provision by country counterparts of information about:</p> <ul style="list-style-type: none"> key issues and challenges in ICH safeguarding; existing policy instruments that relate to ICH; and institutional mandates that relate to ICH. <p>Initial desk review of country background, key issues and challenges in ICH safeguarding, existing policy instruments that relate to ICH and institutional mandates that relate to ICH.</p>	<p>Country counterparts provide information</p> <p>Advising expert does desk research</p> <p>Output: draft desk review</p>
Consultation on draft desk review and development of policy analysis	
<p>Consultations to discuss and develop issues raised in the initial desk review and to identify possible policy gaps and solutions. Discussions on capacity-building needs in addressing these policy gaps.</p>	<p>Advising expert meets with country counterparts, community representatives and other stakeholders</p>
Development of draft needs assessment report	
<p>Advising expert develops draft report and circulates it for comments to country counterparts and UNESCO before amending and finalising it.</p>	<p>Consultation on email or skype with country counterparts and key stakeholders as appropriate and with UNESCO</p>
Development of final needs assessment report	
<p>Advising expert develops and submits final report to UNESCO for approval and dissemination.</p>	<p>Output: final needs assessment submitted to UNESCO</p>