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Introduction

The 2003 Convention on the Safeguarding of the Intangible Cultural Heritage (ICH), secured a high number of ratifications in a short space of time. This reflects the concern of the international community to respond urgently to threats to this vulnerable heritage. The willingness of so many states to commit themselves to this Convention is noteworthy, particularly in view of the fact that this represents an important departure in terms of the cultural heritage regulation, and is a unique instrument in the cultural heritage field. This departure is mainly as a result of the character of its subject matter – one that is primarily without material form and whose expressions and physical manifestations are, in fact, secondary. In this sense, it is the mirror image of the previous cultural heritage Conventions where the material heritage (movable cultural property, monuments and sites) was the central subject of protection and any intangible values contingent on these. For example, in the 1972 World Heritage Convention, under the 2002 revision of the Operational Guidelines, the ‘associated intangible values’ of cultural properties were recognised as an element in the value for which such properties might be inscribed on the World Heritage List (Luxen 2000; Deacon and Beazley 2007), while the spiritual significance of movable items of cultural property is also recognised in the 1970 Convention. UNESCO’s 1989 Recommendation on Safeguarding Traditional Culture and Folklore opened the path for the development of this Convention, but was much more limited in its ambitions and did not impose on member states any binding obligations.

One of the most significant aspects of this Convention, and a focus of this chapter, is the central role it gives to the cultural communities (and groups and, in some cases, individuals) associated with ICH that is unprecedented in this area of international law. This is a response to the very specific character of ICH that exists only in its enactment by practitioners and, therefore, whose continued practice depends wholly on the ability and willingness of the cultural
group and/or community concerned. This introduces a clear cultural rights dimension to the safeguarding of ICH that, although present in other areas of cultural heritage protection, is much more explicitly drawn in relation to intangible cultural heritage and is another noteworthy characteristic of this Convention.

With the introduction of intangible cultural heritage into the picture, cultural heritage preservation has become a much more complex and political question than it was when preservation institutions restricted their interest to monuments and artefacts. Since ICH is embedded in the social and cultural lives of the cultural communities, safeguarding when exercised as a public policy will interfere directly in processes taking place in the present and developed by real, human collectives (Arantes 2007). Moreover, inclusion of the idea of ICH within the broader rubric of cultural heritage provides opportunities to democratise the process by which we give value to heritage, giving a larger role to local people especially in the developing world. Indeed, the question of assigning value or significance to ICH raises a further one – is it necessary for ICH expressions or practices to be highly valued outside the immediate cultural community in order to be defined officially as heritage? (Deacon et al. 2004: 11). The implications of these and other questions run deep and must be addressed.

The purpose of this chapter, then, is to explore the implications of this new approach in cultural heritage treaty-making and, in particular, what it means for the implementation of the Convention itself and national cultural policy-making. In order to do this, I attempt to place the 2003 ICHC in the wider context of the evolution in thinking about ‘culture’ in international policy-making over the last quarter century – moving from a high art to a more anthropological conception – and how this has informed both the development of cultural heritage law and human rights thinking. I also situate the references to the community (group and individual) of the 2003 ICHC within international law, in particular human rights and environmental law in which these notions are much more often applied.

However, before taking this discussion further, it is useful to present a brief outline of the main elements of the Convention itself, with a focus on the references in the text to the role of the cultural community (see also Aikawa-Faure this volume).

**The Convention and the cultural community**

The purposes of the Convention are given in Article 1 and are:

(i) To safeguard ICH.
(ii) To ensure respect for ICH.
(iii) To raise awareness at local, national and international levels of the importance of ICH and thus to ensure a mutual appreciation of it.
(iv) To provide for international cooperation and assistance.3
These four purposes already show us that the Convention is operating on three main levels – ‘local, national and international’ – and that it represents an interplay between the three. Of course, since it is states that make international law, the national (i.e. state) level will always be a primary one for the implementation of any treaty. However, in this Convention it is the way in which these three levels relate to each other that is of importance. The international safeguarding actions (international cooperation and assistance and the international lists) are seen as raising awareness of the ICH within the communities as well as at the level of the state and encouraging and facilitating national implementation of safeguarding measures. Equally, as we shall see, the relationship between the state and local levels in implementation is crucial and it is here that this Convention breaks new ground and raises many important questions as to how this is to be done. Last, there is also a relationship between the local and international levels whereby the ‘global’ culture may be one of the threats to this heritage and so a global response (in the form of an international treaty) is needed. This last point is picked up later in the essay, showing how the 2003 ICHC can be seen also as a response to cultural as well as economic globalisation and the place of the local community in this picture.

‘Intangible cultural heritage’ is defined in Article 2(1) and, here again, the centrality of the community (group or individual) to ICH as much as its importance for their sense of identity is clearly drawn out. First, the identification of any ‘ICH’ as such is dependent on the recognition by ‘communities, groups and individuals’ who are continuously recreating it and to whom it provides a sense of community. Paragraph 2 sets out the domains of the ICH while paragraph 3 defines ‘safeguarding’ for the purposes of the Convention. This last is important since the notion of safeguarding – placed at (i) in the Convention’s purposes – runs throughout the whole of the Convention text from national safeguarding measures to international safeguarding activities, policies and programmes.

Following the model of the 1972 Convention, the ICHC establishes two international lists of ICH – the Representative List of the Intangible Cultural Heritage of Humanity and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding – on which ICH will be inscribed according to criteria to be developed by the ICH Committee. The first is designed to raise awareness of the ICH both internationally and locally, the second to respond with greater urgency in cases where ICH is in immediate danger. Beyond achieving greater ‘visibility’ for ICH at all levels, the purpose of the listing mechanism is to encourage better national safeguarding of all ICH (not only that listed) and this is shored up by the requirement on parties to draw up national inventories of ICH on their territory (Article 12). A set of national measures for safeguarding is set out in Articles 11–15 and it is in this section that the most important references to the cultural community’s role in safeguarding and management of ICH are to be found.

Community involvement in safeguarding
In recognition of the fact that the safeguarding of ICH is not just a matter of national measures but also requires a clear commitment from the international community, a framework for international cooperation and assistance is provided for. This is supported by the establishment of an Intangible Heritage Fund to support parties in their safeguarding activities as well as assist in the implementation of the Convention’s other provisions. In terms of institutional mechanisms, two main organs are also established – the General Assembly of the States Parties as its sovereign body (Article 4) and an Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (henceforth ‘ICH Committee’) (Article 6) whose task is to ensure implementation of the Convention, especially those provisions relating to the listing of ICH and the provision of international assistance." A system for parties to report on their activities under the Convention is also provided for.

Culture and development – the wider context

The adoption of the ICHC is in many ways the culmination of a revision of our way of thinking about the relationship between culture and development over the preceding two decades (Arizpe 2004, 2007). During the 1960s and 1970s, development had been conceived very much as a purely economic phenomenon whereby growth in a country’s gross domestic product was the main, if not sole, indicator of success. Within this picture of development, culture was often viewed as a break on development, particularly the ‘traditional cultures’ of the poorer countries, and theories of development generally supported ‘acculturation’ policies. By the 1970s, in reaction to this in Africa and Latin America, there was an intellectual shift towards the notion of ‘endogenous development’ in which local and ethnic cultures (and languages) were given value (Arizpe 2007).

The World Conference on Cultural Policies (1982)7 presented a view of culture which may be typified as an ‘anthropological’ one that sees culture as the way of life and form of social organisation of a group, along with their traditions and other cultural manifestations. In such a view, of course, the intangible elements of cultural heritage are given a more important role and the notion of cultural heritage is expanded beyond the monuments and sites themselves to their socio-cultural and economic contexts (Garcia-Canclini 1998; Aikawa 2004; Klamer 2004). The UN World Decade for Cultural Development (1987–97) reinforced this view of cultural heritage as a source of cultural identity for groups, communities and whole nations and as playing a key role in development. It was at this time that UNESCO officially noted the need to highlight the function of the cultural heritage for the community as a living culture of the people, and that its safeguarding ‘should be regarded as one of the major assets of a multidimensional type of development’ (UNESCO 1990: para. 209, cited in Aikawa 2007).
In 1995, the World Commission on Culture and Development in its report stressed the creative and constitutive role played by culture in development and, in particular, intangible cultural heritage, and made clear the centrality of the cultural group or community to this (UNESCO 1996: 24). This was further linked with the achievement of sustainable development and the importance to this of local know-how and traditional knowledge and practices that ensure sustainable use of natural resources (Warren et al. 1995; Leach 1998). Such a conception of culture and development would imply the application of bottom-up approaches that are community-driven and exploit this invaluable local know-how and other aspects of intangible cultural heritage. From this, then, it is easy to understand how safeguarding ICH has a direct connection not only with local development but also with community empowerment within that process. If we accept here Sen’s (2004: 4) view of well-being (i.e. human development) as a set of capabilities that people have, with culture as one of these capabilities, we reach that of ‘intangible development’ (Zakayeva 2003) as the set of capabilities that allow groups, communities and even nations to define their own futures in a manner of their own choosing.

It is important, however, when presenting this picture of the potential role of ICH in development not to ignore the fact that traditional cultural attitudes may also act as a break on participatory local development where, for example, community leaders may resist threats to established power relationships or capture resources intended for the whole community for themselves (Abraham and Platteau 2004; Douglas 2004). This is, of course, an issue of direct significance when considering the participatory approach towards identification, safeguarding and inventorying required by the ICHC.

References to ‘communities’, ‘groups’ and ‘individuals’ in the ICHC

As noted above, the centrality of cultural communities (groups and individuals) to the identification of ICH and its continued viability, as well as the essential role it plays in constructing the identity of such entities, is explicitly stated in the definition of ICH. Hence, we can expect that this Convention will take an approach towards identifying and safeguarding ICH that places the community at its centre and that requires of state parties a participatory approach to this endeavour.

It is not without significance that Part III dealing with national safeguarding should open with a provision (Article 11) covering the ‘role of States Parties’. This signals that the ICHC is not following a standard approach in cultural heritage instruments here and that it needs some explanation; at (b) we see what this is, in its requirement that parties identify and define the elements of ICH on their territory ‘with the participation of communities, groups and relevant nongovernmental organizations’. This
provision then applies to Article 12 which requires parties to draw up one or more inventories of ICH ‘to ensure identification [of ICH] with a view to safeguarding’. The importance of this should not be understated since the identification of ICH is not only fundamental to its safeguarding but it also addresses a deeply political issue as to what and whose ICH is to be given value by the process.

The most explicit and far-reaching reference to the role that the Convention envisages for communities and others is to be found in Article 15 that reads:

Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.

This requires parties to take a participatory approach – and one that is effective – in relation to the range of activities described as ‘safeguarding’ in Article 2(3), namely: ‘measures aimed at ensuring the viability of the intangible cultural heritage, including … [its] identification, documentation, research, preservation, protection, promotion, enhancement, transmission … revitalization’. It is thus a wide range of activities to which this applies and, furthermore, parties are also required here ‘to involve them actively in its management’. This latter does not allow parties simply to pay lip-service to the notion of participation but requires them to ensure a much deeper involvement from the community.

This last part echoes more recent developments with the operation of the 1972 Convention where local and indigenous communities have become increasingly involved in the management of properties inscribed on the World Heritage List, especially the ‘mixed’ cultural and natural sites such as Uluru-Kata Tjuta National Park (formally Ayers Rock – Mount Olga) in Australia.

Reference to ‘communities’, ‘groups’ and ‘participation’ in international law

The ICHC is not unique as far as international treaties are concerned in making reference to the ‘communities’, ‘groups’ or ‘participation’; rather it is its use in the context of a cultural heritage instrument that is new. These are notions that already have a currency in the fields of human rights and environmental law, and it is worth examining their use in these areas in order to elucidate their use in the ICHC. Equally, what this brief review of international law will also show is that the ICHC may break new ground in seeking to provide a clear understanding of what is meant by ‘community’ or ‘group’ and thus potentially contribute to their broader understanding in international law. However, since their definition in relation to the ICHC is
specific to that Convention’s subject matter, it may not be easy to extrapolate from this to a wider meaning.

During the preparation of the experts’ draft of the ICHC, a Glossary of relevant terms was produced by an expert meeting held at UNESCO which defines a ‘community’ as: ‘People who share a self-ascribed sense of connectedness. This may be manifested, for example, in a feeling of identity or common behaviour, as well as in activities and territory. Individuals can belong to more than one community’. Further definitions are also given for ‘cultural community’ and ‘local community’. It was on the basis of these understandings that the term is employed in the Convention text.

‘Communities’, ‘groups’ and ‘individuals’ in international law

In considering the question as to how these terms are and have been understood in the human rights context, we should bear in mind that there is a difference between the meaning of a term such as ‘community’ to an anthropologist, for example, and its legal definition(s). However, I wish to start by considering the significance of another term used in the ICHC that is of relevance to this discussion.

A notable aspect of the ICHC is that it concerns not the ‘protection’ – the standard term used hitherto in the cultural heritage field – but the ‘safeguarding’ of ICH. Although this term is employed by UNESCO’s 1989 Recommendation on the Safeguarding of Traditional Knowledge and Folklore, the ICHC gives it both a specific definition (in Article 2(3)) and a centrality to the whole Convention text that is new. Its use in relation to ICH implies a far broader approach, not only protecting ICH from direct threats to it but also requiring of parties positive actions that contribute to its continuing viability. These actions go beyond such measures as identifying and inventorying ICH and include fostering the conditions within which it can continue to be created, maintained and transmitted.

Since the community is the essential context for this, it must imply the continued capability of the cultural communities themselves to practise and transmit their ICH. Hence, the community is placed at the centre of this Convention rather than the heritage itself and the safeguarding of ICH must take into account the wider human, social and cultural contexts in which the enactment of ICH occurs. Moreover, the measures to be taken by parties to achieve this include guaranteeing the economic, social and cultural rights of the communities (groups and individuals) that ensure the continuing viability of the community. It is wholly appropriate, therefore, to begin an examination of the use of the terms ‘community’, ‘group’ and ‘individual’ in international law with the human rights field.

From a brief survey of the use of the terms ‘people’, ‘group’, ‘minority’ and ‘community’ in international human rights law, it becomes clear that they are to some degree interchangeable and that there is no absolute and agreed
meaning for any of them. Even the term ‘people’ with its associated legal baggage of the right to self-determination has no clearly agreed meaning even though it is clear under international law what the requirements are for a people to be capable of claiming self-determination (Cassese 1995). Hence, the way in which we understand and use these terms is, to a large degree, context-dependent. What is important, then, is to determine the parameters in which we are working in order to understand their meaning for the purposes of the 2003 ICHC. To reach this, there are some indications from legal doctrine that can help us.

When asked to provide an elucidation of the term ‘community’, the Permanent Court of International Justice noted that ‘[t]he existence of communities is a question of fact; it is not a question of law’. This suggests that we should follow ‘ordinary meaning’ when considering such terms, while always remaining aware of the wider legal context and the potential pitfalls of apparently ascribing rights not recognised in international law. If we look at a more standard human rights terminology, the accepted understanding of ‘minorities’ in relation to Article 27 of the United Nations International Covenant on Civil and Political Rights (1966) (ICCPR) relies on both objective criteria (such as ethnicity, language etc.) and the subjective one of self-identification or ‘solidarity’ (Capotorti 1976; Thornberry 1991). This raises an interesting question – can a group that has no consciousness of itself as a group or a community be said to ‘exist’ legally, despite the existence of objective criteria that sets it apart from other elements in a state’s population? In other words, is it primarily their sense of distinct cultural identity and their desire to preserve it that gives minorities this cultural right? This would seem closely related to the way in which the relationship between the community and its ICH is presented in Article 2(1) of the ICHC. The 1989 ILO Convention on Tribal and Indigenous Peoples also places high importance on ‘self-identification’ as a criterion for determining the groups to which the Convention applies.

Article 27 (ICCPR) is also noteworthy in not referring directly to minorities qua minorities as the right holders but rather to individual members of minorities who exercise the rights ‘in community with’ other members. Hence, the right attaches to individuals but can only be exercised within the community context. This reflects a strong prejudice in the human rights canon against ascribing rights on a collective basis, although the International Law Commission Commentary on this article suggests that the phrase ‘in community with’ does actually imply some communal or collective character since, logically, such rights can only be exercised within the context of an existing, viable minority community. The recently adopted UN Declaration on the Rights of Indigenous Peoples is unusual in making explicit the collective nature of the rights in question. Although this is not a binding text, it suggests the possibility of further development in this direction in future in relation to indigenous rights.
The 1966 UNESCO Declaration on the Principles of International Cultural Co-operation refers to the right of ‘every people’ to develop its culture; the African Charter (OAS 1981) talks of the right of ‘all peoples’ to their economic, social and cultural development. The African Charter also contains a very interesting provision in Article 29 that adds a new dimension to the relationship between the individual and the community by placing the duty on the individual ‘to preserve and strengthen positive African cultural values in his relations with other members of the society ... and, in general, to contribute to the promotion of the moral well-being of society’. The UNESCO Declaration on Racial Prejudice (1978) uses the unusual formulation ‘all peoples and all human groups’ (Preamble) and refers to the ‘right of all groups to their own cultural identity’. This is, of course, extremely germane to the subject matter of the ICHC and it is intriguing that here the term ‘groups’ is favoured over that of ‘communities’.

In view of its close association with the right to self-determination, the terms ‘communities’ or ‘groups’ are generally less potentially controversial than that of ‘peoples’ (Brownlie 1988), although, with the exception of provisions that deal specifically with self-determination, these terms are used fairly interchangeably. It is possible, however, to identify certain different nuances in meaning between ‘communities’, ‘groups’ and ‘minorities’. Much, then, is dependent on the context of the instrument in which they are used. The 1992 CBD, for example, talks in Article 8(j) of preserving and maintaining the ‘knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles’, and the 2001 United Nations Food and Agriculture Organization (FAO) treaty refers to the contribution of ‘indigenous and local communities and farmers’ to conserving plant genetic resources. Neither treaty defines exactly who these ‘communities’ are and we are left to interpret this in terms of each particular instrument as well as in the wider context of international law. Despite this, it is possible to understand that these are communities primarily defined by their specific knowledge/know-how and their way of life and so that they are ‘cultural’ communities in the sense that the communities of the ICHC also are.

These terms and the related rights create theoretical dilemmas for human rights law that should be noted here since they may also be of relevance in implementing those provisions of the ICHC that directly affect communities and groups. First, can collective rights exist? The classic theoretical position is that some ‘individual’ rights (such as the enjoyment of culture) presuppose the existence of a community of individuals and the underlying assumption here is that the rights of groups are taken care of automatically by protecting individuals’ rights. Moreover, individuals do not exist in abstracto but, in reality, are defined by their membership of certain (cultural, ethnic, linguistic, etc.) groups. The African Union, for example, has undertaken work that seeks to challenge the ‘Western’ system of individual rights by developing a notion of ‘community’ or ‘peoples’ rights held directly by the collective.
Second, even if we do accept some collective rights as held by groups, there is always the potential for conflict between the needs of the group and those of the individuals within it. For example, an individual’s right to choose not to be part of a certain cultural identity set against the right of that group to exist. In such circumstances, we must always recognise the primacy of individual over collective rights (Niec 1998). The corollary to this is that the ‘community’ or ‘group’ should be defined in terms of the individual members that make it up. To some degree the ICHC avoids this dilemma by defining the community or group in relation to its ICH, although awareness that certain individuals may not wish to be associated with the ICH in question has always to be taken into account (Sunder 2001). Moreover, certain elements deeply embedded in many cultures clash directly with widely recognised human rights norms, which then sets up a clash between those norms and the right to cultural identity. We should also remember that an individual can claim multiple identities – the choice is the individual’s not the community’s (Stavenhagen 1998).

Third, can we define ‘cultural identity’ and ‘community’ independently of each other since the former requires reference to some group or community to which it attaches while the latter cannot easily be defined without reference to cultural criteria? (Prott 1988). Thus, there is some circularity to be addressed here in identifying a ‘cultural community’. Lastly, once we have identified a ‘community’ there remains the issue as to who, in practice, can exercise the rights ascribed to it or represent it in other ways. Many cultural communities are heterogeneous in character; it is difficult to find a ‘representative’ who speaks for the group (and all individuals within it), and principles of democratic participation must come into play in dealing with this issue. This question is taken up again later in relation to the implementation of the ICHC.

**Community involvement in development and participation in international law**

A similar participatory approach to that of the ICHC may be found in Conventions dealing with sustainable environmental protection, for example, and it is therefore useful to consider in brief how these notions have developed and operate in contemporary international law. This linkage with the ICHC is made even stronger by recognition of the important role played by ICH in ‘achieving truly sustainable development’ (UNESCO 2002: paragraphs 3 and 7) connecting it directly to the requirement of a participatory approach to development in order to achieve sustainable development (UNCED 1992: Principle 10). By examining the nature of this requirement and its expression in various international treaties and other texts, I seek to throw some light on the nature of community participation or involvement in safeguarding ICH.
Sustainable development as expressed in the Rio Declaration\textsuperscript{25} comprises both substantive and procedural elements, and the latter contain an international obligation on governments to operate in certain ways. Principle 10 places the requirement on states to take a participatory approach to development issues. Principle 22 specifically refers to the vital role of ‘indigenous people and their communities, and other local communities’ in environmental management and development and a concomitant requirement on states to ‘recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development’. These two principles together have inspired the various international treaties that make reference to participation by indigenous and local communities.\textsuperscript{26}

The 1992 UN Convention on Biological Diversity,\textsuperscript{27} for example, makes one of the most explicit references in Article 8(j) to the role of local and indigenous communities’ knowledge and practices for preserving biodiversity.\textsuperscript{28} In relation to this article, parties undertake inter alia to establish mechanisms to ensure effective participation by indigenous and local communities in decision-making and policy planning. The specific content of such mechanisms is examined below. According to the 1994 Convention to Combat Desertification,\textsuperscript{29} parties should be guided by the need to ensure that decisions on the design and implementation of programmes ‘are taken with the participation of populations and local communities’ (Article 3(a)). It contains further articles that elaborate on this.\textsuperscript{30} The 2001 FAO treaty states that the right to participate in national-level decision-making regarding plant genetic resources is fundamental to realising Farmers’ Rights\textsuperscript{31} while the 1989 ILO Convention\textsuperscript{32} recognises the right of indigenous people to decide their own development priorities ‘as it affects their lives, beliefs, institutions and spiritual well-being’.\textsuperscript{33}

In terms of this essay, it is helpful to identify certain specific approaches that have been proposed to ensure the participation of indigenous and local communities in relation to these and other instruments. This may help to clarify the nature of the measures parties to the ICHC might take in fulfilling their obligation under Articles 2(1), 11(b) and 15.

In relation to Article 8(j) of the CBD, the following broad approaches are identified:

- Establishing local-specific systems for classifying knowledge and procedures for acquiring and sharing it, based on customary law.
- Recognising the importance of addressing the needs not only of the community but also of its members.
- Ensuring free prior informed consent for access to, acquisition and use of knowledge.
- Establishing mutually agreed terms (MATS) for the above and in planning and management of the resource, reflecting mutual respect and understanding.
• Full and equal participation and partnership in planning and management.
• Creating local implementation and incentive measures.
• Establishing access and benefit-sharing agreements (ABS).
• The right of non-disclosure of confidential information.
• The right to review research and authorise its dissemination and community or joint ownership of copyright on publications based on traditional knowledge research.

An FAO report related to the 1994 Convention to Combat Desertification (CCD) notes ‘of prime importance is the participation of the local people’ and makes the following proposals:

1. Institutional, legislative and infrastructure constraints should be eliminated to facilitate the co-management of development and collective community decisions.
2. A variety of technological models and decision-making tools should be provided to cope with local diversities.

A non-governmental document, the Mataatua Declaration (1993) on the Intellectual and Cultural Property (ICP) Rights of Indigenous Peoples, makes certain recommendations that may also be worth considering in the context of this discussion:

• Indigenous communities should define their ICP for themselves.
• Development of a Code of Ethics for external users when recording their traditional knowledge.
• Prioritising the establishment of indigenous education, research and training centres to promote traditional knowledge.
• Developing and maintaining customary practices for the protection, preservation and revitalisation of ICP.
• Assessment of existing legislative and institutional structures for their effectiveness in protecting ICP.
• Establishing an appropriate body with mechanisms for managing, safeguarding and consulting on ICP (Blake 2001: 66; O’Keefe 1995).

Finally, of course, one can also find models from within existing UNESCO practice in relation to the proclamation of Masterpieces of Oral and Intangible Heritage (1998–2005) and the 1972 World Heritage Convention. These should be taken account of since both address the issue of community involvement in cultural heritage management and related areas.

The guidelines for candidatures for the proclamation of Masterpieces contain several useful points which are, in brief:
A candidature file must be prepared as far as possible by persons belonging to the communities concerned or, at least, have the guaranteed participation of members of the community (Paragraph 11).

In preparing candidature files, the right of access of the community to its own ICH and protection of the custodians of the tradition (i.e. confidentiality of data) should be guaranteed (Paragraph 13).

The jury, in its evaluation, should focus *inter alia* on the involvement of the community and recognised practitioners of the tradition in the action, revitalisation and protection plan (Paragraph 18).

Where the bodies referred to in the candidacy are not ‘directly representative of the community concerned or the performers/practitioners and/or custodians’ of the ICH in question their ‘support and collaboration’ must be clearly demonstrated (Paragraph 24 (a)).

The action plan should include, as far as possible, ‘substantial and active participation from the community concerned or the performers/practitioners and/or custodians’ of the ICH in question ‘in the design and application of strategies and mechanisms aimed at safeguarding and preserving’ it (Paragraph 24 (b)).

Further relevant considerations might be: measures taken to raise the awareness of members of the community concerned of the importance of safeguarding the ICH concerned; the benefits to be derived by the community concerned from the safeguarding measures; the measures taken within the local community for safeguarding ICH; and the existence of local democratic structures that can ensure full participation.

Over 30 years of experience of implementing the 1972 WHC has provided certain examples of cultural properties that are managed with the active participation of local/indigenous communities, of which Uluru in Australia is probably the best-known example (Simmonds 1997). The 2005 version of the Operational Guidelines to the 1972 WHC also includes certain references to community involvement and participation in the process of nomination and management planning. It notes (UNESCO 2005: 110) that an effective ‘management system’ depends on the type and needs of the property nominated and ‘may vary according to different cultural perspectives, the resources available and other factors’. It may incorporate traditional practices and should demonstrate ‘a thorough shared understanding of the property by all stakeholders’ and ‘the involvement of partners and stakeholders’ (2005: 111). In relation to candidacies for cultural landscapes, ‘nominations should be prepared in collaboration with and with the full approval of local communities’ (Annex 3 at paragraph 12).

The operational guidelines also set out the Global Strategy for World Cultural and Natural Heritage of which ‘the primary goal is to ensure that the necessary skills are developed by a wide range of actors for better implementation of the Convention’. This signals a crucial element in
ensuring participation and community involvement in the various aspects of safeguarding – capacity-building in the communities in order to equip them to undertake these roles effectively.

Implementing the ICHC – how to ensure community involvement

Role of the Intergovernmental Committee for Safeguarding ICH

One of the main tasks of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (‘the Committee’) during its early sessions is to draw up the first set of operational directives for the Convention which will govern the operation and implementation of the ICHC during its early years. Given the innovative nature – in the cultural heritage field, at least – of the requirement that parties ensure the participation and active involvement of communities and groups in various aspects of safeguarding and managing ICH, it will be a significant challenge to the Committee not only to identify such communities and groups, but also to define the exact nature of this participatory approach.

The first session of the Committee was held in Algiers on 18–19 November 2006 and this was mainly concerned with administrative and procedural matters. An extraordinary meeting of the Committee was then held in May 2007. At this meeting, several decisions concerning the Convention’s implementation were taken of direct significance to the role of communities, groups and individuals in identifying and safeguarding ICH. These included drawing up criteria for inscription in the List of ICH in Need of Urgent Safeguarding and in the Representative List and drafting criteria for the accreditation of non-governmental organisations. This meeting also requested that the Secretariat prepare for the General Assembly of State Parties some preliminary draft operational directives for the implementation of Article 18 (dealing with ‘Programmes, projects and activities for the safeguarding of the ICH’). This is also an area in which the involvement of cultural communities can be understood to be desirable.

It is still early days in terms of both the Convention’s operation and the Committee’s deliberations on its operational directives to give any specific indication as to how the involvement of communities required by Articles 11(b) and 15 will work in practice. In order to support the Committee in its work of drafting the Convention’s directives, UNESCO held a series of expert meetings between 2004 and 2006 that dealt with some of the more difficult issues of implementation. Three meetings that dealt with questions of direct relevance to this essay concerned: the establishment and management of national inventories of ICH (under Article 12); developing criteria for listing ICH; and the use of the terms ‘community’, ‘group’ and
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‘individual’ and how the involvement of communities and groups in the process of identifying, inventorying and safeguarding ICH can be ensured by parties.39 Clearly, the latter is the most directly relevant although the former, given the relationship between Articles 11(b) and 12, is also important. These meetings were organised with a view to providing the Committee with an initial basis to work from and the views of the participants cannot be taken as reflecting those of parties. However, they do give a useful indication of some of the important questions that need to be addressed in considering the role of communities under the ICHC and some possible directions in which Articles 11(b) and 15 may be implemented by parties.

The 2005 expert meeting on inventory making recognised that there is a general lack of institutional basis for this activity in member states, exacerbated by a limited availability of financial and human resources. It is one of the major national safeguarding measures proposed in the 2003 Convention (Article 12) and the expert meeting identified a need to develop systematically, or continue to develop, accessible inventories in most countries. International exchange of experience on making inventories of ICH was also seen as very important. Insufficient awareness at both the community and political levels of the importance of ICH and the need to ensure that it is effectively identified and inventoried was also identified as a crucial issue to address. Capacity-building and expanding of capacity in this area, both among government officials and at community level, are therefore key to fulfilling the Convention’s obligations in this area, along with education and awareness-raising measures. Since the 2003 Convention places a heavy emphasis on the representative character of intangible cultural heritage, the involvement of the communities concerned in its identification, inventorying and safeguarding40 was also stressed.

An expert meeting was held in Paris in 2005 on defining the criteria for inscription of ICH on the Representative List. The identification of suitable criteria is dependent on the way in which ICH is defined in the Convention as well as on the broader objectives of the listing mechanism. Given the way in which the definition in Article 2(1) very explicitly links ICH to the cultural community (group or individual) that creates, maintains and transmits it and for whom it is an essential element in construction of cultural identity, the selection criteria for inscription will have to reflect this connection. For this reason, the Paris meeting took the recognition of ICH by communities, groups and, in some cases individuals, as part of their cultural heritage as one of three bases from which to develop a set of criteria. This became the first of six specific criteria developed by the meeting, and one of four ‘intrinsic’ criteria. Further ‘extrinsic’ requirements were also suggested by this meeting, including that ICH for inscription should be submitted following the participation of the community, group or, if applicable, the individuals concerned at all stages of identification, definition, documentation and nomination.
The Committee, at an Extraordinary Session in China in May 2007 then proposed its own criteria for inscription on the Representative List. Specifical reference to identification by the cultural community (group or individual) as part of their cultural heritage was dropped and subsumed into a general reference to the requirement that it ‘constitutes intangible cultural heritage’ as defined in Article 2(1). This is a drawing back from the more explicit requirement of community identification and reflects a desire on the part of states to be the primary actors in defining national cultural heritage elements of any kind. There is clearly a potential for tension here between the state and the cultural communities that will need to be addressed. However, the wording of the requirement for ‘the widest possible participation of the community … individuals concerned and with their free, prior and informed consent’ for the nomination process is unequivocal.

The expert meeting held in Tokyo in 2006 drafted definitions of the key terms and drafted some guidelines on the implementation of provisions relating to community involvement in inventorying and safeguarding ICH. The definitions produced by this meeting were as follows:

- **Communities** are networks of people whose sense of identity or connectedness emerges from a shared historical relationship that is rooted in the practice and transmission of, or engagement with, their ICH.
- **Groups** comprise people within or across communities who share characteristics such as skills, experience and special knowledge, and thus perform specific roles in the present and future practice, re-creation and/or transmission of their intangible cultural heritage as, for example, cultural custodians, practitioners or apprentices.
- **Individuals** are those within or across communities who have distinct skills, knowledge, experience or other characteristics, and thus perform specific roles in the present and future practice, re-creation and/or transmission of their intangible cultural heritage as, for example, cultural custodians, practitioners and, where appropriate, apprentices.

These definitions met with some criticism from certain parties, which is inevitable with such an extremely sensitive issue, but they do represent an attempt to define terms that have hitherto been used without any exact meaning, albeit with strict reference to ICH. As such, they reflect the expertise of those who work in the field of ICH as well as practitioners and are crafted specifically with the 2003 Convention in mind. It is quite possible that the Committee will choose either to ignore them or to substantially re-work them in drafting their operational directives. However, the Committee cannot ignore that a Glossary of some key terms had been prepared by a previous expert meeting in 2002 and that these had been generally accepted by the Intergovernmental Meeting of Experts that negotiated the ICHC. They included:
- **Community** – ‘People who share a self-ascribed sense of connectedness. This may be manifested, for example, in a feeling of identity or common behaviour, as well as in activities and territory. Individuals can belong to more than one community’.

- **Cultural community** – ‘A community that distinguishes itself from other communities by its own culture or cultural design, or by a variant of the generic culture. Among other possible extensions, a nation can be a cultural community’.

- **Culture** – ‘The set of distinctive spiritual, material, intellectual and emotional features of a society or social group, encompassing, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs’.

There are certain specific points that we can propose in addition that might be helpful when making any further attempts at defining these terms. Beyond the need to define a ‘cultural community’ in terms of its relationship to its ICH, it can also be defined in terms of the spaces in which the ICH occurs and the community exists. Moreover, the community in question must be a viable one in order to rule out revival of ‘folklorised’ practices by others who do not belong to that community. Communities must not be viewed as monolithic, but the existence of variation both within and between them should be accepted. For example, some members may be knowledge holders while others have lost their knowledge and some may identify with a specific practice while others reject it. This acceptance of dissent within the community is an important point that serves also to protect the rights of individual community members when they are in conflict with those of the wider group (Sunder 2001). Equally, a community may be a small group or operate as a political ‘hypercommunity’ and may operate within one geographical region or exist trans-nationally and as a diaspora – taking ICH as the starting point can help in identifying the latter. What must always be born in mind is that the choice as to how we define community membership can have serious social, political and economic impacts on individuals and groups within the state (N’Diaye 2006).

The guidelines prepared by the Tokyo meeting (2006) for ensuring community involvement in inventorying and safeguarding ICH were fairly detailed. They recommended that parties should create appropriate institutional arrangements, inter alia, for evaluating the effectiveness of traditional safeguarding systems for inventorying ICH, drawing up inventories of ICH and developing safeguarding policies. They should also establish advisory bodies, comprising cultural practitioners, researchers, NGOs, civil society, local representatives and relevant others, for the purpose of consultation on inventorying and safeguarding ICH. Local support teams including community representatives, cultural practitioners and others with specific skills and knowledge in training and capacity building should also be set up to assist in inventorying and safeguarding specific cases of ICH.
The meeting also proposed a method for inventorying ICH that includes certain specified steps, several of which emphasise the central role of the community and community representatives in this endeavour. For example, in the identification of the ICH present on their territory, parties should identify and inform all relevant stakeholders as well as identify representatives of the communities and groups to ensure the involvement of the community in the process. They should obtain free and prior informed consent from the cultural community for their ICH to be inventoried and establish procedures, if possible in the form of protocols, to ensure an ethical relationship between stakeholders. Lastly, they should respect customary practices governing access to the ICH. Many of these approaches echo demands made in the Matautua Declaration (1993) cited above.

Some issues relating to community participation and involvement

As noted above, by entering into the area of community (and group) participation and ‘active involvement’ in the safeguarding and managing of ICH, including its actual identification, the ICHC is navigating relatively uncharted waters and faces some complex and difficult questions. These new legal parameters created by the ICHC will have a significant impact on the formulation and implementation of national policies in the cultural heritage field (Arantes 2007). As Albro (2007) asks in relation to the ICHC and the 2005 Convention on Diversity of Cultural Expressions (that also makes reference to participation) – ‘how do UNESCO’s conventions help to configure the extent and limits of heritage participation and for whom?’ The following section attempts to address these and other questions raised by the references to community participation in the 2003 ICHC, but recognises that it is very early in terms of the Convention’s operation to be definitive on these matters.

A fundamental point to make is that the relationship between the community and the ICH resource is vital to this and needs to be clarified before further steps can be taken. This is not simple given that the potential for conflict exists here both within and between cultural communities over who should identify and manage the resource. Moreover, communities are not static and unchanging but rather are fluid entities, and it is not always clear what this relationship is or who practised a certain ritual or held certain knowledge (Deacon et al. 2004: 42). This then brings into play the question of who should represent the community and, as Arizpe points out (2007), the cultural ‘gate-keepers’ in a community can play either a positive role in safeguarding ICH or a negative role in repressing it. It is therefore crucial that the relationship between a community and its ICH – the extent of which may vary according to the ICH in question – needs to be carefully defined at the start of negotiating the identification and management of an ICH element.
When writing about participatory development approaches, Alkire (2004) notes that external actors such as experts and government officials (who may well be the same people) have a role to play in supporting informed community participation by providing information, countering local patterns of domination and supporting democratic approaches and handing over decision-making to local people. As Sen argues (2004), the local community may face difficult decisions concerning preserving old and traditional forms of living, but at considerable economic cost to themselves; what is crucial is that people have the ability to participate in public debate on matters concerning ICH safeguarding. Hence, the effective functioning of local democracy is essential to the success of this process. This shows that fully implementing this aspect of the ICHC will present many parties with a great challenge. This challenge is made greater by the fact that there is no clear consensus on the exact meaning and extent of ‘participation’ even in the relatively better explored area of participatory development. If, for example, it implies the meaningful involvement of local and cultural communities it could range anywhere from simple information dissemination to project planning and the facilitation of people’s own initiatives (Albro 2007).

Identifying who ‘owns’ the heritage management process is also very important since it is not uncommon for CRM professionals to regard the community participation approach as ‘belonging’ to them. To avoid such pitfalls, clear ground rules need to be established as to how the different actors should work together in the tasks of defining, inventorizing and managing the ICH as well as when this is to be done solely by the community and when professionals can assist in this. Involvement of the community at the start of this process is essential so that they have a sense of ownership and will co-operate fully in later safeguarding and management measures. It should also be recognised that there may be a multiplicity of stakeholders in such cases all of whom need to be taken into account. For example, the identification of and safeguarding the Moussem of Tan-Tan in Algeria involved women and men, tribal leaders, local politicians, intellectuals, artists, government officials and specialists (Skounti 2006).

A complicating factor here is that the very act of identification and safeguarding of ICH itself can have unintended or unexpected side effects. An example of this was given during the expert meeting on inventory making (UNESCO 2005) and it illustrates the potentially negative effect of drawing a cultural community’s attention to an element of its ICH. Here, a previously unknown traditional dance performed during a village festival in Bulgaria was documented and the dance then became increasingly ornamented and enriched until it had become transformed into something completely different. A counter-example given during the expert meeting in Tokyo in 2006 was that of the Kung San in South Africa whose cultural community feel ashamed of their own culture and do not transmit it to younger generations (Manetsi 2006). In such a case, raising awareness of the
value of their ICH could well contribute greatly to its chance of continuing and being transmitted to the next generation.

The new national policy approach required under the ICHC will create a fundamental shift in the relative position of the governmental agencies involved in heritage preservation, particularly vis-à-vis the local communities’ new role in identifying what should be officially regarded as heritage. The significance of this should not be underestimated since it has, up until now, been the prerogative of the state to decide which cultural items to include within the domain of ‘official culture’, representing as it does the public interest (Arantes 2007). As Deacon et al. note (2004: 11), including ICH within the national culture or heritage provides opportunities to democratise the process by which we give value to heritage, giving a larger role to local people especially in the developing world. Arantes (2007) points out that this shift of authority is reflected in the inclusion of ‘cultural reference’ in Brazil’s heritage legislation as ‘a legitimate source of value to be taken into account in the identification and proclamation of a cultural item as heritage’. This has the effect of giving cultural communities a much stronger position with regard to this process.

There is therefore a need to build a state/community partnership that is both bottom-up and top-down, with the role of government seen as being primarily a supportive one (in terms of finances and expertise). However, such a partnership is not easily constructed and this process will involve complex and often difficult negotiations in which ‘cultural mediators’ that are both internal and external to the cultural communities will play an important intermediary role (Arantes 2007). These cultural mediators may include: community representatives, office bearers and cultural custodians; technical and administrative personnel of government institutions; independent experts and political activists involved in the institutional practices; and entrepreneurs seeking to develop business opportunities related to the cultural resource. Moreover, any state-level interventions concerning ICH will directly impinge on social and cultural processes taking place within cultural communities. State-sponsored measures to safeguard ICH therefore raise questions concerning the role of the state in regulating social relations.

We can already identify some successful examples of instances where communities have engaged in heritage conservation initiatives through partnerships with the state. In Mexico, for example, the state established civil associations, neighbourhood councils and ‘rural inhabitant’ (campesino) unions with a view to protecting ancient monuments and conservation zones (López 2002, cited in Deacon et al. 2004: 44). In New Zealand, the Maori Heritage Council has been established with community representation and control in order to manage Maori heritage and ensure that sites of Maori interest are protected. It also seeks to mediate any conflicts of interest that may arise over the use of these sites and heritage (Paterson 1999). As Deacon et al. (2004) point out, one of the key roles for community/government
partnerships is to resolve disputes over the meaning and management of heritage, and such disputes are much more likely to occur in relation to ICH than monumental heritage. It is important for these and similar experiences, where they relate to ICH in particular, to be documented and shared between parties of the ICHC – with the UNESCO Secretariat acting as a clearing-house of best practices – and non-parties as well.

Capacity building locally is anticipated by the ICHC as an important element in facilitating effective community involvement in the safeguarding and management of ICH (Article 14). Florey (2003) describes a project on Malukan languages in eastern Indonesia that illustrates how the partnership between specialists and the community (and to some degree the state) can work (Hinton and Hale 2001). The goals of this project were (a) to facilitate language documentation and maintenance by the community and (b) to promote greater linguistic tolerance among speakers in order to facilitate language transmission and maintenance. As she points out, the goal of community empowerment (through local capacity building) is a common feature of such models that facilitate the ownership and control of languages at the local level (see, for example, Hinton 2002; Hinton and Hale 2001; Thiebreger 1995). Encouraging fieldwork by speakers themselves is important since it provides them with skills essential to language revitalisation and maintenance activities. There are obvious parallels here with projects for safeguarding ICH, especially since languages ‘as a vehicle for’ ICH already feature as the first domain of ICH set out in Article 2(2) of the ICHC.

**Conclusion**

The ICHC, then, is a new departure for a cultural heritage Convention and, to some degree, for an international treaty in attempting to provide culturally based protection to a non-material subject.

Moreover, the nature of ICH is such that it is people acting as the communities, groups or individuals of the 2003 Convention on whom its very existence is predicated. Unlike a site, a monument or artefact that has a material existence beyond the individual or society that created it (possibly wholly unknown to us today) it is only through its enactment by cultural practitioners that ICH has any current existence and by their active transmission that it can have any future existence. Hence, any actions aimed at its safeguarding must rely heavily on the collaborative efforts and active involvement of cultural communities and their members. This, in turn, requires governments and government institutions to find new forms of operating in the cultural heritage field that are both alien to them and challenging. They need to move away from the traditional top-down approach of governmental cultural heritage organisations where the institutions are acting as custodians of the national cultural patrimony and where decision- and policy-making are the domain of
the government and its representatives. In relation to ICH in particular, the cultural community has become a new and significant actor with whom governmental bodies must interact directly and seek to build a partnership.

As this chapter has shown, such a participatory approach is not unprecedented in international law and was called for in Principle 10 of the 1992 Rio Declaration as a fundamental means of achieving sustainable development. It is no accident, indeed, that ICH itself is seen as a basic social resource for finding sustainable forms of development and environmental practices. In international law, it has been in the area of environmental protection that this notion has found its greatest expression, although, as this chapter has sought to show, this has suffered from a lack of clarity as to what form such participation should take, how the communities referred to should be identified and who should be their representatives. In the field of development, quite a lot of work both theoretical and practical has been done in relation to participatory decision-making and management approaches and to addressing the aforementioned uncertainties. There has also been, as seen above, criticism of the participatory development approach that (a) should serve as a warning to those tasked with implementing the 2003 ICHC and that (b) they have an opportunity to try to address in new ways.

The 2003 Convention makes unusually direct reference for an international treaty to the central role that communities, groups and individuals have to play in safeguarding ICH and in its management. The requirement placed on parties to apply participatory approaches in safeguarding and to involve them actively in its management is also unusually explicit. It is, in fact, an explicit recognition that without their active involvement such actions become meaningless or, worse, become an appropriation of this heritage by the government from the control of the community that creates and maintains it. In this sense, the ICHC can be seen to go beyond simply calling for participatory approaches to be used as a ‘better’ model than other existing ones since, in the case of ICH, there is nothing to safeguard without the enactment of cultural practitioners.

In view of the institutional structure of the Convention, in particular the establishment of the intergovernmental ICH Committee, the opportunity exists for future development of practice in this area. If we look to the parallel example of the World Heritage Committee of the 1972 Convention, we see that it has responded actively to the various challenges and evolution in understanding it has faced over the 30 years of its operation. We can hope for a similar responsiveness in the ICH Committee that is currently preparing the first Operational Directives for the Convention, although the make-up of the Committee and its openness to outside views and opinions will be crucial to this. If its members (and those bodies they consult with) are well chosen for their expertise and include a range of people, including practitioners, as well as government officials, then the chances of a dynamic development of practice in this area will be greater.
At a recent meeting, the Committee took decisions on several issues relevant to community participation/involvement. First, a chapter on ‘Participation in the implementation of the Convention’ was also adopted as part of a draft set of operational directives for the Convention, with a section on the participation of communities, groups and (if appropriate) individuals. In its Preamble, this section recognises that ‘at the core of safeguarding of the intangible cultural heritage are the communities … that create, maintain and transmit it and are therefore the prime concern of the Convention’. Here, then, is an explicit statement of the centrality of the communities, groups and individuals in achieving the Convention’s primary stated purpose. Here, parties ‘are encouraged to create a consultative body or a coordination mechanism to facilitate the participation of communities [etc.]’ as well as other actions such as community sensitisation and capacity building (at 77). Elsewhere, it is noted that the Committee may invite communities (groups and individuals) to participate in its meetings ‘in order to sustain an interactive dialogue and consult them on specific matters’, in conformity with Article 8(4) of the Convention. Moreover, in relation to national, sub-regional and regional programmes, projects and activities for safeguarding ICH (Article 18 of the Convention), the criteria for selection include that the selected programme, project or activity ‘has been or will be implemented with the participation of the community, group or, if applicable, individuals concerned and with their free, prior and informed consent’.48

In sum, the intergovernmental ICH Committee of the 2003 Convention has an opportunity to inform international law through its practice in relation to participation and community involvement, not only in the narrow field of cultural heritage protection but more widely in any areas such as environmental law in which such notions have become a more common currency. However, it is still very early to anticipate what the Committee will do since, as the experience of the 1972 WHC would suggest, their practice will evolve over the next few years and may well develop into something quite different from what they decide at the early meetings now being held. It is, indeed, this capacity for the practice surrounding implementation of the treaty to evolve that is such an important feature of its model and provides the potential, at least, for it to set an important example.

Notes
1 As of 20 February 2008, there were 90 states parties to the Convention of which 21 are from Africa, 26 from Europe, 18 from Latin America and the Caribbean, 13 from Asia and the Pacific and 12 Arab states. This should be compared with UNESCO’s Convention on Protecting the Underwater Cultural Heritage (2001) that has still only secured 15 ratifications.

The ‘intangible cultural heritage’ means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, 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. (Article 2(1), my emphasis)

Although much adapted to avoid, for example, any notions of the ‘outstanding’ value of heritage listed.

The Committee’s main functions (as set out in Article 7) are: promoting the objectives of the Convention and encouraging its implementation; providing a guiding role for the establishment of best practices in the field of safeguarding ICH; preparing operational directives to aid states parties in the implementation of the Convention; preparing and submitting to the General Assembly a plan for using the resources of the Fund; establishing criteria for the inscription of ICH on the Lists; inscribing ICH on the basis of these criteria at the request of states parties; and examining requests by states parties for international assistance.

World Conference on Cultural Policies (MONDIACULT), Mexico City, 6 August 1982. The Preamble, at para. 6, reads, ‘[I]n its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only arts and letters, but modes of life … value systems, traditions and beliefs’.

‘People, however, are not self-contained atoms; they work together, co-operate compete and interact in many ways. It is culture that connects them with one another and makes the development of the individual possible. It is in this sense that all forms of development, including human development, ultimately are determined by cultural factors’.

To be clarified by the ICH Committee when defining the criteria for inscription of ICH on the Lists.


Under the ‘Treaty of Montevideo (1936) – a sufficient population, control over a territory, the ability to establish political institutions and to enter into relations with other states.

Precursor to the International Court of Justice.


Convention No. 169 Concerning Tribal and Indigenous Peoples in Independent Territories.

Art.1(2) refers to ‘Self-identification as indigenous or tribal’ as a ‘fundamental criterion’ for this.


Article 1 states that: ‘(1) Each culture has a dignity and value which must be respected and preserved. (2) Every people has the right and the duty to develop its culture’.
19 African Charter on Human and Peoples’ Rights (Banjul 1981). Article 22 (1) states: ‘All peoples have the right to their economic, social and cultural development with due regard to their freedom and identity … ’ Article 29 notes that: ‘The individual shall also have the duty: … 7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society’.

20 Article 5 states unequivocally: ‘the right of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international context, it being understood that it vests with each group to decide in complete freedom on the maintenance and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity’. Interestingly, the Preamble refers to ‘all peoples and all human groups’ and to the right to be different as a right of ‘all individuals and groups’ while Article 3 makes reference to ‘human beings’, ‘people’ and ‘groups’ in one article.

21 The UN Convention on Biological Diversity (1992) and the International Treaty on Plant Genetic Resources for Food and Agriculture (FAO 2001), respectively.

22 OAU Model Legislation on Community Rights and Access to Genetic Resources.


24 They read as follows: ‘3. In order to ensure the sustainability of this process [of safeguarding ICH] governments have the duty to take measures facilitating the democratic participation of all stakeholders’ and ‘7 (iv) Consider that it is appropriate and necessary, within this framework, in close collaboration with the practitioners and bearers of all expressions of intangible cultural heritage, to consult and involve all the stakeholders … ’


26 Principle 10 reads: ‘Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment … and the opportunity to participate in the decision-making processes … ’ Principle 22 reads: ‘Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development’. UN Convention on Biological Diversity (1992), available online at: http://www.cbd.int/convention/convention.shtml

28 Article 8 requires each Contracting Party, as far as possible: ‘(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustained use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge’. UN Convention to Combat Desertification (1994), available online at: http://www.cbd.int/convention/convention.shtml and the UN Convention to Combat Desertification (1994), available online at: http://www.unccd.entico.com/English/text1

30 Article 5 calls on affected country Parties to undertake to ‘(d) promote awareness and facilitate participation of local populations, particularly women and youth, with the support of non-governmental organizations, in efforts to combat desertification … ’ Article 10 states that national action plans should ‘(f) provide for effective participation at the local, national and regional levels of non-governmental organizations and local
populations … in policy planning, decision-making and implementation and review of national action programmes … ’

31 Article 9(2) reads: ‘Parties should take measures to protect and promote Farmers’ Rights, such as …

(c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture’.

32 Both cited in the previous section.

33 Article 7(1) reads: ‘The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly’.

34 Established under Article 5.


40 As required by Arts. 12 and 15.


42 As drafted at Expert Meeting cited n. 38.


44 Of course, the subject matter of intellectual property law – a well-established body of law – is equally non-material in character. However, the aim and approach of IPRs is quite different since they are designed primarily to protect economic (and related moral) interests associated with exploitation of the intellectual property in question.


46 Chapter 3.1, para. 75–86 in ibid at pp. 35–7.

47 Idem.

48 Decisions cited n. 45 at p. 31.

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