Unit 10

Intangible Cultural Heritage policies and institutions

This unit is about how the Convention for the Safeguarding of the Intangible Cultural Heritage[[1]](#footnote-1) and the Operational Directives (ODs) suggest that legal, technical, administrative and financial measures at the local, national and international levels can help to facilitate the implementation of the Convention at the national level. The topics covered include:

* What the Convention recommends.
* Local policies and measures.
* National policies and measures.
* Institutional frameworks.
* Intellectual property rights protection at the national level.
* The international context.

Relevant entries in Participant’s text Unit 3 include: ‘Intellectual property’ and ‘International, regional, subregional, local’.

Examples relevant to this unit can be found in Case studies 1 and 28–32.

10.1 PROVISIONS OF THE CONVENTION

The Convention and its ODs strongly advocate (but do not require) that the States Parties try to:

* *Adopt policies* to ensure that intangible cultural heritage will be safeguarded in the spirit of the Convention and in conformity with codes of ethics (Article 13(a); ODs 105(d), 105(f) 105(g) and 107), respecting customary practices governing access to specific aspects of ICH (Article 13(d)(ii)) and with community participation and consent in matters that concern their ICH (Article 15; ODs 79–89);
* *Establish or designate competent bodies or institutions* that can assist in the safeguarding of ICH, capacity building (Article 14; OD 107), inventory-making (Article 13(b) and 13(d)(i); ODs 80 and 82–83), research (Article 13(c); ODs 105(b), 105(c) and 107(k)), documentation (Article 13(d)(iii); OD 85) and awareness-raising (Articles 1(b), 13(d)(iii), 1(c) and 14(a); ODs 85, 105 and 107(b)); and
* *Encourage coordination* between all types of stakeholders involved in ICH safeguarding and promotion at the national level (ODs 79 and 83) and to facilitate cooperation at the international level (Article 19; ODs 86 and 88).

Some States Parties to the Convention have had legal and administrative systems in place to assist in ICH safeguarding for decades, long before the Convention came into force. Japan’s Law for the Protection of Cultural Properties established a protection system for ICH at the national level as early as 1950. The Republic of Korea’s Cultural Heritage Protection Act introduced a Living Human Treasures programme in 1962 that aimed at both the recognition and the transmission of ICH.[[2]](#footnote-2)

Existing policies, agreements, laws and institutions may be adapted or extended as required to assist in implementing the Convention, while continuing to perform their other functions. Formal legal and policy frameworks are not always required to support ICH safeguarding: sometimes communities can proceed with safeguarding strategies perfectly well without them.

10.2 A MULTILAYERED SYSTEM

The broad context for safeguarding ICH at the national level can be provided by a multilayered system (in much the same way as occurs in many States for tangible heritage) that consists, for example, of interlinked local, provincial and national measures. A high level of administrative decentralization often seems to work well for ICH safeguarding.

Case study 1, discusses the Yamahoko float ceremony in Kyoto, Japan: this can be used as an example of close interaction between different stakeholders in a safeguarding system. A local community organization coordinates the training and participation of participants and ensures the maintenance and storage of the floats. The procession has been inscribed on national, provincial and municipal inventories of ICH and the national, provincial and municipal governments assist with the procession logistically and through legislative provisions. Kyoto industries participate in the maintenance of the floats. At the international level, Yamahoko, the float ceremony of the Kyoto Gion festival was inscribed on the Representative List of the Convention in 2009, so Japan takes on specific safeguarding obligations for it.

States Parties must ensure that these different levels work together efficiently, so as to create enabling frameworks to address the safeguarding needs of the ICH and the communities concerned. States Parties should also ensure that safeguarding efforts at the national level benefit from exchange of expertise and cooperation at the international level.

In federal States with a high level of decentralization, the national level sometimes has coordinating tasks only (Article 35(a)). In such cases, what is said here about the national level applies, for example, to the ‘provincial’, ‘county’, ‘republican’, ‘state’ or ‘canton’ level (Article 35(b)).

In Belgium, a federal State with strong regional and community autonomy, the Governments of the Flemish, French and German-speaking communities take responsibility for their own heritage issues. They have created different agencies in order to achieve this aim (see Case study 54).

Some non-federal States also formally devolve heritage policy and management to the subnational level, as happens to some extent in South Africa (see Case study 29).

It is important to remember that, in the first place, States Parties (i.e. their agencies) must ensure the general enabling conditions in which the ICH can thrive. If the viability of specific elements is not threatened, or when community-based safeguarding activities function effectively without outside support, then no external intervention is required, not even from the State. Stewardship over the ICH should remain with the communities concerned even when there is assistance for safeguarding from outside.

10.3 POLICIES AND MEASURES AT THE LOCAL LEVEL

Local (or subnational, e.g. provincial and municipal) actors play an important role in ICH safeguarding because their interventions can easily be tailored effectively to the needs of local communities and local projects. Local or subnational measures include regulations, subsidies, and policies relating to ICH enacted both in public spaces (such as festivals or performances) and in more private community settings. They may involve institutions such as community organizations and local NGOs, schools, museums, research centres, archives and documentation institutions. As a rule, local communities also commit themselves financially and logistically to ICH practice and transmission and look for sponsors in their own area.

In the province of Limburg, the Netherlands, for example, most villages and town suburbs have their own *harmonie* (brass band or orchestra); traditional music associations that regularly give performances in public spaces and on occasions of a more private nature. Most of them have a large membership and try to be self-supporting, finding their own sponsors, but as a rule they also receive small subsidies from the municipal and/or provincial budget. The boards of these associations usually include local administrative officials. In small villages in the area, over half the population participates on a voluntary basis in the preparation, organization and enactment of local festive events and in the cleaning-up afterwards.

In most municipalities in Limburg, carnival is celebrated in one form or another. An almost obligatory element is the annual election of a ‘Prince of the carnival’ (princesses are rarely elected); well before the carnival itself is celebrated. The Prince of the carnival takes on various duties, including visiting elderly and sick people who cannot participate in the public festivities, sometimes accompanied by the local *harmonie*. In Maastricht, the capital of the province of Limburg, the Mayor hands over the keys of the town for the four days of carnival to the local Prince, while the town administration and the police – following local regulations – ensure that the town centre is safe and accessible for the duration of the festivities.

#### Local organizations

Many countries have organizations of people, often from different communities, who practise similar forms of ICH and who assist each other by providing expertise and resources.

The *harmonies* mentioned above, for example, have umbrella organizations that not only ensure mutual assistance, but also organize joint manifestations and competitions. In Germany there are organizations of storytellers; in Brittany, France, there are community organizations that play traditional music. By supporting such organizations, States Parties may make an important contribution to the safeguarding of ICH expressions by the communities themselves.

#### Integrating ICH safeguarding with other local initiatives

At the local level, there are good opportunities for integrating ICH safeguarding activities with the health, education and other development concerns of local authorities and communities.

An example of legislation at the local level enabling ICH safeguarding is the Northern Territory Aboriginal Sacred Sites Act (2006), which helps Indigenous (Aboriginal) communities in the Northern Territory of Australia retain control over their intangible heritage management and the benefits accruing from it. The act created institutions such as the Aboriginal Areas Protection Authority, which tries to balance the need to safeguard indigenous ICH and its relationship to land and the economic, social and cultural development of all people in the Territory.[[3]](#footnote-3)

#### Local government regulations and policies

The role of local government is of vital importance in ICH safeguarding, whether or not this role is set out in regulations or policies. States Parties should encourage and facilitate support to local initiatives for ICH safeguarding.

In Nepal, municipalities and Village Development Committees play an important role in supporting religious and cultural activities as well as fostering local participation in decisions around health, education, services and so on. There is currently no policy stating that Village Development Committees are directly responsible for the safeguarding and promotion of ICH at the local level, nor do they currently have a regular income source to carry out such activities. But as local-level authorities, they can and do help to mediate between national government, relevant agencies, local performers and tradition bearers on issues relating to ICH safeguarding.[[4]](#footnote-4)

10.4 NATIONAL LEGAL AND ADMINISTRATIVE FRAMEWORKS

National (or federal) legal and administrative frameworks may include ICH-related provisions in a constitution and in heritage legislation or cultural and heritage policies, national research and documentation centres for ICH (at universities and elsewhere), museums, archives, etc., consultative bodies and coordination mechanisms. They may also include mainstreaming of ICH in policies, laws and institutions relating to other areas including finance, intellectual property rights, medicine, health and agriculture.

Legal and administrative measures taken at the national level are primarily meant to contribute to ICH promotion and safeguarding in general and to create a supportive framework for safeguarding actions at the local level. Measures implemented at the national level usually have a very direct impact on the viability of ICH elements.

#### Relationships between ICH policies or institutions and other national frameworks

In some States tangible and intangible heritage are the responsibility of a single legislative and institutional framework; in others, these responsibilities are separated. Existing institutions may take on new functions required for supervising aspects of the implementation of the Convention or new bodies may be created.

Case study 29 provides an example of a range of State agencies that are involved in ICH safeguarding in South Africa.

In States where government is fairly centralized, central institutions perform heritage functions under the guidance of a national ministry and its policies. The legal and administrative framework for implementing the Convention at the national level is usually not solely the brief of the Ministry of Culture or its equivalent. In many States, national Constitutions or Bills of Rights protect the rights of people to participate in cultural practice (as long as it does not infringe other human rights). Policy and legislation in agriculture, tourism, medicine, finance or other areas may (positively or negatively) affect how communities, NGOs and other institutions, and government agencies, can safeguard the ICH in their territory.

In some countries, high inheritance taxes discourage people from handing down valuable traditional musical instruments or costumes in their possession to younger practitioners for their continued use in ICH practices; instead they are forced to sell them to museums or other institutions. Appropriate changes in the law might encourage continued enactment of the ICH.

#### Danger of too much legislative control or administrative intervention

Although the Convention encourages States Parties to implement legal and administrative measures, States Parties do not require formal legislation to implement the tasks that they are obliged to undertake in implementing the Convention. Paradoxically, too much legislative control or administrative intervention could also hinder ICH safeguarding: communities should be left as free as possible to decide when and how they want to enact their ICH. Communities should also be left in control of their ICH, as long as their ICH practices and expressions comply with relevant legislation and policies in their States. State legislation and policy would hopefully not exclude any ICH that meets the definition of ICH in the Convention, nor should they appropriate the ICH of these communities to the State.

10.5 INSTITUTIONAL FRAMEWORKS

The types of activities for which, following the Convention and its Operational Directives, various institutions could assist (with community participation and consent) in ICH safeguarding were summarized in Participant’s text Unit 4.8. Institutions may, of course, also work directly with communities on their own initiative if the communities concerned agree. The activities they undertake do not have to be centralized, but they may need to be coordinated to maximize efficiency and avoid duplication.

The Operational Directives encourage States Parties to create a consultative body or a coordination mechanism to facilitate community and expert participation in various tasks (OD 80). States Parties are under no obligation to create such bodies, but it is advisable for them to consider how community participation in ICH safeguarding can be ensured and the coordination of safeguarding activities achieved. Proof of community participation – and sometimes also their consent – is required in periodic reports (ODs 157(e) and 162(d)) and in nomination files (ODs 1–2).

10.6 INTELLECTUAL PROPERTY RIGHTS PROTECTION
AT THE NATIONAL LEVEL

The Convention focuses on safeguarding ICH rather than on legally protecting specific manifestations of ICH through intellectual property rights regimes. OD 104 does recommend, however, that States Parties ensure, through the application of intellectual property rights or other forms of legal protection, that community rights over their ICH are duly protected during awareness raising and when commercial activities are developed.

See Participant’s text Unit 3: ‘Intellectual property’.

Some existing types of intellectual property protection, such as trademarks or certification marks, can help to protect the intellectual property rights associated with ICH, including moral rights. Existing intellectual property rights regimes cannot always protect community rights over their ICH, however, and in some countries intellectual property law has thus been amended to enable this to occur. For example, traditional knowledge can be registered in a special database (such as the Traditional Knowledge Digital Library, or TKDL, in India) to prevent commercial patents being taken out on it without community participation or consent.

#### How IPR protection can benefit the communities concerned

Through modified intellectual property rights regimes and other mechanisms, companies interested in the commercialization of ICH knowledge or expressions could be encouraged or forced to develop benefit-sharing agreements with the communities concerned. Protecting intellectual property rights can help communities retain better control over economic benefits gained from different types of ICH, from access to performances, the sale of recordings and of products associated with their traditional knowledge or skills. It can also help communities to fight against misrepresentation of themselves and their ICH. It is often ignorance of the law and an inability to enforce it that prevents communities from protecting their rights in respect of their heritage. Communities can be helped, where necessary, to negotiate agreements that protect their rights and interests.

Intellectual property rights protection is sometimes difficult to enforce and it cannot necessarily address broader problems of poverty and social marginalization. In some circumstances, putting non-secret information about ICH in the public domain and focusing on community development projects may also be an effective driver of development.

10.7 THE INTERNATIONAL CONTEXT

The way in which the Convention is implemented and the ICH safeguarded at the national level is influenced from the international level by conventions, recommendations and declarations, codes of ethics, codes of conduct and other authoritative documents. Through networking at the international level, various international organizations such as research centres or NGOs may also influence the way the Convention is implemented, not only in the international arena, but also at a national level.

Legal instruments and institutions at the international level relevant for the interpretation and implementation of the ICH Convention include:

* international human rights instruments (Article 2.1);
* the World Heritage Convention (mentioned in Article 3(a) of the ICH Convention) and other UNESCO Conventions in the field of heritage and culture;
* international instruments relating to intellectual property and the use of biological and ecological resources (mentioned in Article 3(b)), including guidelines to be drawn up by the World Intellectual Property Organization (WIPO); and
* international, bilateral and regional cooperation mechanisms (Article 19), including networks and category 2 centres (ODs 86 and 88).

The international instruments mentioned under the first three bullet points above are discussed in the following sections of this unit; the international cooperation mechanisms referred to under the fourth point are discussed in Participant’s text Unit 12.

10.8 INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

The Convention refers to a number of international human rights instruments in its Preamble:

Referring to existing international human rights instruments, in particular to the Universal Declaration on Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966 …

**Article 2.1** states that only ICH compatible with international human rights instruments will be taken into account under the Convention:

… 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 …

There are of course other human rights instruments, not specifically mentioned in the Convention, that are relevant in this respect. Especially relevant is the widely endorsed UN Declaration on the Rights of Indigenous Peoples (2007),[[5]](#footnote-5) which recognizes that ‘respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development’. It stresses 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 also have the right to ‘maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions’. Moreover: ‘Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture’.

10.9 WORLD HERITAGE CONVENTION

The World Heritage Convention is mentioned in Article 3(a) of the Intangible Heritage Convention:

Nothing in this Convention may be interpreted as:

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

A number of ICH elements listed on the Representative List or Urgent Safeguarding List are indeed enacted by communities on or near World Heritage sites. For example, the Rice Terraces of the Philippine Cordilleras are on the World Heritage List; the Ifugao live near and work on these terraces. Their Hudhud chants, narrative chants traditionally performed when working on the rice terraces and in specific rituals, are inscribed on the Representative List of the Intangible Heritage Convention. In this case, there is a very organic relationship between the site, the community concerned and their ICH. The protection of the rice terraces and the safeguarding of the Hudhud chants are closely intertwined and mutually profitable for the Ifugao community concerned.

Refer to Case study 33, for more information on the Hudhud chants.

See Participant’s text Unit 13 for more information on the World Heritage Convention.

10.10 OTHER INTERNATIONAL LEGAL INSTRUMENTS
REFERRED TO IN THE CONVENTION

Other types of international instruments are also alluded to in **Article 3** of the Convention:

Nothing in this Convention may be interpreted as: …

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

In this context it is appropriate to introduce briefly the attempts by the World Intellectual Property Organization (WIPO) to draft an internal legal instrument for the protection of intellectual property rights over ICH and related issues, and the 1992 UN Convention on Biological Diversity.

#### World Intellectual Property Organization (WIPO)

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has, for a number of years, been discussing the desirability and possible provisions for an international standard-setting instrument dealing with intellectual property rights over practices and expressions that by and large fall under the definition of ICH of the Intangible Heritage Convention. There is a good chance that such a standard-setting text, probably a Convention, will be finalized in a few years, in spite of the obvious problems that it faces: ways have to be found to determine who is a member of a community and who can speak – or assume rights – in the name of that community; the ever-changing character of ICH must be taken into account; and the Member States of WIPO have different vested interests, as do industries, for instance the pharmaceutical and cultural industries. (Note that the Member States of WIPO and UNESCO almost completely coincide.)

Various regional agreements on intellectual property instruments to protect community rights over their ICH are already in force. The African Regional Intellectual Property Organization (ARIPO), for example, has recently developed a Legal Instrument for the Protection of Traditional Knowledge and Expressions of Folklore (2007) and the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (2010).

#### UN Convention on Biological Diversity (CBD)

The Convention on Biological Diversity came into force at the end of 1993 and has now been ratified by most UN Member States. It creates a legally binding commitment on States Parties to conserve biological diversity, to use its components sustainably and to share equitably the benefits arising from the use of genetic resources. The Convention of Biological Diversity encourages States Parties to develop, recognize and protect the rights of indigenous communities and individuals over their traditional practices relating to the conservation and sustainable use of biological diversity.

10.11 GUIDELINES AND CODES OF ETHICS

Various communities, professional associations and organizations around the world have drafted guidelines or codes of ethics that can (or in some cases must) be used by people doing ICH-related research, safeguarding or awareness raising. Some are international in nature, others have more restricted applicability. Governments and institutions may also draw up their own guidelines or codes of ethics to ensure that community rights are protected. The Operational Directives encourage States Parties to develop and adopt codes of ethics to ensure that awareness raising is undertaken in the spirit of the Convention (OD 103). There are, of course, many other types of activities under the Convention for which such codes might also be developed.

WIPO has commissioned surveys of codes, protocols, policies, practices and standard agreements relating to the safeguarding of, access to, ownership of and control over cultural heritage in a number of regions of the world. WIPO believes these can serve as an empirical basis for the eventual development of best practices and guidelines in this field.

Case study 31, discusses the system by which authorization to carry out research among indigenous groups is managed in Brazil.

Case study 32, describes the Hopi research protocol that states how the Hopi people in the USA would like their intellectual resources and traditional cultural expressions to be used by others.

1. 1. Frequently referred to as the ‘Intangible Heritage Convention’, the ‘2003 Convention’ and, for the purpose of this unit, simply the ‘Convention’. [↑](#footnote-ref-1)
2. 2. L. Lowthorp, 2010, ‘National Intangible Cultural Heritage (ICH) Legislation and Initiatives’, UNESCO-New Delhi Field Office. [↑](#footnote-ref-2)
3. 4. Aboriginal Areas Protection Authority: http://www.aapant.org.au/ [↑](#footnote-ref-3)
4. 5. T. Diwasa, C. M. Bandhu and B. Nepal, 2007, *The Intangible Cultural Heritage of Nepal: Future Directions*, UNESCO Kathmandu Office, p.19. [↑](#footnote-ref-4)
5. 6. http://www.un.org/esa/socdev/unpfii/en/drip.html [↑](#footnote-ref-5)