Part I Introduction, Introduction: The Convention, from Inception to Young Adulthood

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From: The 2003 UNESCO Intangible Heritage Convention: A Commentary
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Subject(s):
Cultural property / heritage
Introduction

The Convention, from Inception to Young Adulthood

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Background to the Development of the Treaty

Since its inception in 1945, the preservation of cultural diversity has been a principle underlying UNESCO’s standard-setting activities and its international Conventions and Recommendations in the cultural heritage field have played a significant role in this. The move to regulate the world’s cultural and natural heritage through a single instrument adopted in 1972, effectively breaking down previously existing barriers between these two aspects of heritage, was a major step forward at that time. Similarly, the adoption by UNESCO in 2003 of a Convention for safeguarding the intangible aspects of cultural heritage was a further ground-breaking move that served to recalibrate fundamentally both our understanding of the concept of ‘heritage’ itself as well as the paradigm by which it should be protected.

Given the significance of this move, it is not surprising that to develop this new standard-setting instrument was by no means an easy task; even deciding upon the most appropriate term to use for this form of heritage, let alone identifying its character and content as a subject for protection, proved to be a great challenge. This has required a shift in how we view the legal approach towards ‘traditional culture and folklore’, moving away from a purely intellectual property-type approach towards one that pays greater attention to the cultural character of this heritage and one that takes account of its social and cultural significance for its bearers and practitioners. This, in turn, involves placing an important focus on the skill and know-how of the communities (groups and individuals) who produce or enact it, to the importance of transmission of related knowledge and know-how, and to the social, cultural, and intellectual context of its creation. Hence, it becomes clear that the human context within which intangible heritage develops and is maintained itself requires safeguarding as much as the tangible ‘product’, a shift in perspective that introduces a strongly human rights-based approach towards safeguarding and one that places participation by cultural communities and associated groups and individuals at the centre of this process.

It is not surprising that this extension of the notion of the subject-matter of international cultural heritage protection to include intangible aspects occurred at a time when the international community was deeply concerned with the twin goals of establishing truly sustainable forms of development and preserving the world’s cultural diversity. In its report published in 1995, the World Commission on Culture and Development underlined that, in order to be a reliable basis for development, the notion of culture must be broadened considerably. One important way in which this could be done was to give more weight to the intangible aspects of culture and heritage, helping the global society to move forward from a predominantly economic growth-driven view of development (which had been dominant in the 1970s and continues to dominate policies in many countries today) towards one in which the social and cultural dimensions are fully acknowledged. Rather than viewing traditional cultures as inevitably a break on development, it can help to demonstrate that they are often an essential part of sustainable forms of development and
that, as a consequence, supporting the diversity of such cultural traditions globally is an essential aspect in achieving sustainable development.\(^8\) The adoption of the ‘Rio’ Declaration in 1992,\(^9\) setting out twenty-seven principles of sustainable development and whose ‘third pillar’ constitutes socio-cultural factors, was central to this process. Importantly, it establishes the centrality of participation as a procedural principle\(^10\) in approaches to development and it accords formal recognition of the value and importance of indigenous and local communities in this.\(^11\) As part of UNESCO’s efforts to highlight the constitutive role that culture plays in development, the Stockholm Action Plan of 1998\(^12\) explicitly linked the sustainability of development with protecting (p. 5) cultural heritage, and made direct reference to the need to strengthen policies for safeguarding and enhancement of both tangible and intangible heritage.\(^13\)

The other significant legal (and policy) context within which the 2003 Convention was developed is that of human rights and, in particular, cultural rights as linked to the value of cultural diversity.\(^14\) Initiated in the late 1990s, UNESCO’s work in the area of cultural rights\(^15\) resulted in the adoption of the 2001 Universal Declaration on Cultural Diversity\(^16\) which was an instrument of fundamental importance for the elaboration of the 2003 Convention. Although it does not enjoy any specific legal status,\(^17\) the Fribourg Declaration on Cultural Rights adopted in 2007 was also an important step in bringing attention to respecting cultural rights and diversity as a basis upon which truly sustainable development policies can be built.\(^18\) The Final Communiqué\(^19\) issued by a Round Table of Ministers of Culture organized by UNESCO in 2002 in the run-up to the intergovernmental negotiations on the text of the 2003 Convention, the necessity of safeguarding ICH in order to achieve truly sustainable development was emphasized: ‘Laying the foundations of true sustainable development requires the emergence of an integrated vision of development based on the enhancement of values and practices involved in the intangible cultural heritage.’ The connection between this and respecting cultural diversity was also noted in the acknowledgement that, like cultural diversity ‘which stems from it, intangible cultural heritage is a guarantee for sustainable development and peace.’\(^20\)

**Structure and Drafting of the Convention**

The Convention on Safeguarding Intangible Cultural Heritage adopted by UNESCO in 2003 (henceforth ‘2003 Convention’) was broadly modelled on the 1972 Convention on the Protection of World Cultural and Natural Heritage. Divided into nine Parts, it contains generally similar elements to that earlier heritage treaty, but these are not arranged in the same order and contain some significant adaptations as well as additions required by the specific character of ICH as a subject of safeguarding. Part I (Articles 1–3) sets out the purposes of the Convention, in the following order as: to safeguard ICH, to ensure respect for ICH, to raise awareness of it at local, national, and international levels, and to provide for international co-operation and assistance. It also defines key terms (p. 6) such as ‘ICH’ and ‘safeguarding’, and sets out its relationship with other international instruments. Providing a workable definition of ICH proved, initially, to be a very challenging issue in view of the lack of much precedent in international regulation\(^21\) and since it would, of course, largely determine the nature and scope of the obligations to be contained in the Convention. The form of the definition finally arrived at comprises a general definition\(^22\) followed by a non-exhaustive list of five main domains in which ICH is found which is designed to explain further the content of this heritage.\(^23\) The term ‘safeguarding’ as it is applied throughout the 2003 Convention is defined in Article 2(3) as being to ‘ensure the viability of ICH’ though such measures as identification, inventorying, research, and transmission activities.
Part II (Articles 4–10) establishes the two organs of the Convention, the Intangible Heritage Committee comprising a maximum of twenty-four States Parties and the General Assembly of States Parties as the sovereign body, describing their relative functions; it also sets out the role of the Secretariat of UNESCO. The task of the Intangible Heritage Committee is to oversee the implementation of the Convention which involves, inter alia, administering the three international lists, administering an international assistance system, drafting and up-dating the Operational Directives for implementing the Convention. Part III (Articles 11–15) is devoted to measures to be taken at national level to ensure the safeguarding of intangible cultural heritage. Article 15 requires Parties to seek the widest possible participation of communities, groups, and (where appropriate) individuals ‘that create, maintain, and transmit’ ICH through safeguarding activities and their active involvement in its management. This represents an innovative bottom-up approach that poses significant challenges to many States Parties that operate a state-driven approach to cultural heritage management. Part IV (Articles 15–18) deals with safeguarding intangible cultural heritage (ICH) at the international level and establishes two international Lists (the Representative List and the Urgent Safeguarding List) and a Register of Good Safeguarding Practices; Part V (Articles 19–24) sets out provisions relating to international co-operation and assistance while Part VI (Articles 25–28) contains provisions for establishing and operating an Intangible Heritage Fund; a six-yearly (p. 7) reporting system by States Parties is established in Part VII (Articles 29–30); Part VIII (Article 31) contains a single transitional clause that allows for the incorporation of elements previously proclaimed by UNESCO as ‘Masterpieces of Oral and Intangible Heritage’ since 1998 into the Representative List; and Part IX (Articles 32–38) sets out fairly standard final clauses for a heritage treaty.

The elaboration of this Convention for safeguarding ICH was seen as a necessary initiative to ‘satisfy social and cultural needs not yet adequately met by international law’ felt particularly strongly by Member States of the African, Asia-Pacific, and Latin American regions for whom ICH often comprises a major part of their cultural heritage and makes an important contribution to social and economic development. There had also been growing frustration on the part of such countries that World Heritage as conceived of under the 1972 Convention did not adequately represent their, often intangible, forms of cultural heritage. Hitherto, UNESCO’s standard-setting activities had been focused on protecting tangible aspects of cultural heritage, such as sites, buildings, and cultural objects, and the ‘intangible’ dimensions of cultural heritage had not been explicitly protected. In fact, these had implicitly been protected alongside tangible cultural heritage since they often represent the significance of these and the distinction between ‘tangible’ and ‘intangible’ heritage is a formally necessary but artificial construct that fails to reflect the reality of cultural heritage.

Early attempts had been made in the 1970s and 1980s to safeguard ‘folklore’ through intellectual property approaches copyright and it had been proposed in 1973 that the conservation, promotion, and diffusion of folklore be regulated under the Universal Copyright Convention (UNESCO, 1952). In 1989, in recognition of the fact that a copyright-based approach was limiting, a Recommendation on the Safeguarding of Traditional Culture and Folklore adopted in 1989 was adopted by UNESCO Member States that took a more broadly cultural approach. The impact of the 1989 Recommendation was disappointing, however, and an international conference was co-organized by UNESCO (p. 8) in 1999 with the Smithsonian Institution to evaluate the Recommendation. This evaluation showed that the Recommendation favoured the interests of scientific experts over those of the bearers of this heritage (who were treated largely as passive informants) and that its effectiveness was limited by its non-binding character. As a result, it was felt that there was the need for a new (or revised) standard-setting instrument in this area. In spite of these criticisms, however, the Recommendation played a crucial role in paving the way for the 2003 Convention as the first international standard-setting instrument to
provide a framework for safeguarding what later came to be known as ICH. In particular, it provided a new way of thinking about ‘traditional culture and folklore’ through a cultural and interdisciplinary approach which was largely adopted in that treaty.

Alongside such normative activities, UNESCO also developed two major operational programmes during the 1990s that were to have a significant impact on how the safeguarding of ICH was conceived. The first of these was the Living Human Treasures (LHT) programme established in 1993. Inspired by an approach already well-established in Japan, its main purpose was to recognize the living exponents of traditional cultural elements who ensured that their skills, techniques, and knowledge were transmitted to future generations. This, then, foreshadowed the central importance accorded in the 2003 Convention to the inter-generational transmission of ICH. The second, established in 1998, was entitled ‘Masterpieces of the Oral and Intangible Heritage of Humanity’ and was aimed at raising awareness of this aspect of heritage through international proclamation. This programme was an important predecessor to the 2003 Convention since: (i) it referred to ‘oral and intangible heritage’ and not ‘traditional heritage and folklore’; and (ii) it provided an early opportunity for Member States to identify examples of this heritage which was still a relatively unknown quantity then.

At its 30th session in 1999, the UNESCO General Conference had invited the Director-General to undertake a preliminary study ‘on the advisability of regulating internationally, through a new standard-setting instrument, the protection of traditional culture and folklore’. After it had been determined to develop a new international treaty with binding obligations the question remained as to which legal approach it should take towards safeguarding and what nature of obligations it should impose on States Parties. At this time, three main potential types of instrument were mooted which included a treaty applying sui generis intellectual property approaches to protection, a treaty taking a mainly cultural approach alongside some sui generis intellectual property measures, and a treaty taking a cultural approach that was modelled on the 1972 Convention but with the necessary adaptations for it to suit the needs of ICH and its cultural communities. The advantages associated with choosing the third approach included that this would help to raise awareness of what was a relatively unknown aspect of heritage, it could avoid problems over the potential scope of the treaty, and it would provide a financial mechanism allied to a system of international co-operation and assistance to support States Parties in their implementation actions. It did, however, face opposition from some Member States at the intergovernmental negotiations who were, in particular, concerned that establishing an international listing mechanism might lead to the creation of a hierarchy of ICH or to the ‘fossilization’ of this heritage.

UNESCO’s General Conference took the decision at its 31st session in 2001 to start drafting an international standard-setting instrument for the safeguarding of ICH. A meeting of Ministers of Culture of Member States was then held in September 2002 in order to facilitate this process. At this, certain concerns were expressed regarding defining the subject of safeguarding and the importance of not overlapping with mandates of other international organizations or creating conflicts with obligations under other treaties. In 2000, the World Intellectual Property Organization had established an Intergovernmental Committee established an intergovernmental committee on intellectual property rights associated with traditional knowledge, genetic resources and folklore in August 2000. However, it was generally understood that this new UNESCO treaty would plug an important gap in cultural heritage protection and the two approaches—cultural and intellectual property—were left to run in tandem at this point. During 2001 to early 2002, UNESCO also organized two major Expert meetings designed to explore further the drafting of an operational definition of ICH and identifying priority domains for the Convention and two sessions of a Restricted Drafting Group were held at UNESCO Headquarters in March and June 2002 to produce a preliminary draft text that was to be
the basis for the intergovernmental negotiations. Between these two drafting group sessions, a further expert meeting was held to clarify terminologies central to the new Convention, demonstrating again the novelty of this field of regulation.\textsuperscript{48} The final text of the Convention was adopted by the 33rd session of UNESCO General Conference in November 2003.

**Some Innovations and Challenges**

Given that it represented standard-setting in an area in which no binding treaty had previously existed, that was relatively poorly understood, and for which a different legal (p. 10) regime had traditionally been applied, it is no surprise that implementing the 2003 Convention has thrown up some important challenges as well as led to some innovative approaches. One of the most fundamental of these concerns the relationship between ‘tangible’ and ‘intangible’ cultural heritage and how best to integrate protection/safeguarding approaches to both. This separation of cultural heritage is largely due to the fact that previous international regulation of cultural heritage had focused on different aspects of material heritage, even if the intangible aspects were, at times, implicitly recognized.\textsuperscript{49} As much as ICH may often be found in these aspects associated with tangible heritage, it also has a wholly separate existence from the material elements typically protected by international cultural heritage law.\textsuperscript{50} This independent existence of ICH is predicated on the ‘significance’ or ‘value’ of that heritage rather than its ‘non-material’ character per se.\textsuperscript{51} Hence, for example, although the physical artefact of the *lenj* boat is in itself an important material heritage element, it is primarily in the boat-building know-how, navigational knowledge and associated cultural elements (such as sea shanties) that its heritage value is located. There are cases where physical heritage inscribed on the World Heritage List has associated ICH that is or may potentially be inscribed on the Representative List (RL) of the 2003 Convention. Iranian *qanats* (traditional aquifer systems) have recently been inscribed on the World Heritage List and it is quite possible that the associated traditional knowledge of water management will be the subject of a nomination to the RL in the future.

The listing mechanism under the 2003 Convention, comprising the RL and the List of Intangible Heritage in Need of Urgent Safeguarding (USL), has been controversial from the beginning of the life of the Convention. The RL, established under Article 17, has proven particularly problematic for the Committee and the Secretariat to deal with. First, there are many misconceptions among States Parties as to its primary purpose which is to celebrate the global diversity of ICH. This could mean, ideally, that it should contain not more than one or two examples of any type of ICH element and that it should not be important how many inscribed elements any country had. Of course, the reality is very different with, for example, the same elements inscribed separately in the names of more than one Party.\textsuperscript{52} This competitive listing reflects a desire on the part of Parties to showcase their ‘own’ ICH elements and also, sadly, regional geopolitical rivalries that are played out in the RL inscriptions. It also reflects a characteristic of ICH (generally unlike material heritage elements) that it often traverses political frontiers; the Committee has, in recent years, encouraged multinational nomination files in order to address these issues. An associated practical challenge now relates to the number of elements inscribed on the RL: by Autumn 2018, 430 elements had been inscribed. This creates an enormous (p. 11) burden on the Secretariat and the Evaluation Body established to evaluate nomination files, and States Parties are now limited to two nominations per year.\textsuperscript{53}

Although priority is now given to nominations for the USL and Register of Good Safeguarding Practices (RGSP), the bulk of nominations are still for the RL which is perceived by States Parties as being more prestigious. Thus far, the RGSP has failed to fulfil its purpose of showcasing good practices in safeguarding that can be emulated in other places, having secured only twenty practices by 2018. One can only hope that, once Parties
have satisfied their initial enthusiasm for RL inscriptions and more practice has developed on the ground, this will be reflected better in the RGSP. Another problem is that, until now, Parties have been slow to nominate elements to the USL. This is a lot to do with the sense of stigma associated with the equivalent list of the 1972 World Heritage Convention\(^54\) on which properties are inscribed if Parties have failed to manage risks and threats to them effectively. In contrast, the USL is intended to reflect the fact that much ICH is by definition vulnerable in the modern world and it can offer Parties an opportunity to safeguard it better through the listing mechanism. Again, this is much due to Parties having built up expertise over decades in dealing with World Heritage inscriptions and it will take time and experience for a new psychology surrounding ICH inscription to develop.

One of the most innovative and, at the same time, challenging aspects of implementing the 2003 Convention has been the requirement for a deep involvement of communities (groups and individuals) in the design and implementation of safeguarding.\(^55\) Indeed, the inclusion in this commentary of two complementary but contrasting chapters on Article 15 which addresses the involvement of communities, groups and individuals in safeguarding ICH is testament to the difficulties of identifying ways for applying a participatory model to heritage; if experts (from diverse disciplines) cannot easily find a single voice on this question, how can States Parties be expected to understand the content and scope of their obligations in this regard? In international legal scholarship, we are still grappling with the question as to who/what ‘communities’ are from a legal perspective (which is unlike the perspective of anthropology, for example), and we have not yet reached clarity on identifying how they relate to and may differ from the ‘groups’ of the 2003 Convention. Certainly, we have not yet been able to resolve the question: What legal status can and do ‘communities’ and ‘groups’ enjoy under international law?\(^56\)

Since safeguarding ICH as understood in the 2003 Convention can only be undertaken with the participation of communities (groups and individuals), it is intrinsically controversial.\(^57\) Although, community participation was understood to be a significant principle from the inception of the Convention and the intergovernmental negotiations,\(^58\) the requirement placed on States Parties to involve communities (groups and individuals) in safeguarding is more exhortatory than obligatory.\(^59\) This given them wide discretion as to the degree of participation and the type of participatory approaches employed, which means that how this is to implemented is not yet sufficiently clear.\(^60\) New paragraphs on awareness-raising were added to the Operational Directives in 2010 setting out how the participation of communities, groups (and, where applicable, individuals) as well as experts, centres of expertise and research institutes in various safeguarding activities should be realized.\(^61\) To this end, Parties are encouraged to create a consultative body or similar coordinating mechanism to make participation in safeguarding activities easier.\(^62\) If they are put into effect, these 2010 Directives will dilute the privileges of States Parties regarding the identification of ICH for national safeguarding and international recognition.\(^63\) Despite such moves, the mechanisms for ensuring real and effective community participation in the operation of the Convention remain weak\(^64\) and communities (groups and individuals) as yet enjoy no formal role in the work of the Convention’s organs.\(^65\)

The idea that safeguarding ICH can contribute directly towards achieving sustainable development is another of the more innovative approaches taken in the 2003 Convention. However, how this is to be achieved, while ensuring the sustainability of the heritage itself and of related communities, is not yet sufficiently clear and the Convention does not explain how ICH safeguarding is to be incorporates into sustainable development policies.\(^66\) Safeguarding ICH is now understood by States Parties to have implications for policy-making for sustainable development (among other policy objectives), as is demonstrated in their periodic reports to the ICH Committee. Areas in which this can apply cut across a number of policy-making sectors and include food security, health, disaster prevention and

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management, rural and urban development, job creation, conflict prevention and post-
conflict resolution and providing sustainable livelihoods. In 2016, Chapter VI was added to
the Operational Directives\textsuperscript{67} to clarify this question by detailing those aspects of ICH that
have intimate links with sustainability. Treating ICH as ‘a strategic resource to enable
sustainable development\textsuperscript{68} this chapter takes a rather comprehensive approach towards
ICH and sustainability, covering the following four main sections and related sub-sections:
(1) Inclusive social development covering food security, health care, quality education,
gender equality and access to clean and safe water and sustainable water use (177–82); (2)
Inclusive economic development encompassing (p. 13) income generation and sustainable
livelihoods, productive employment and decent work, and the impact of tourism on the
safeguarding of intangible cultural heritage and vice versa (183–7); (3) Environmental
sustainability which covers knowledge and practices concerning nature and the universe,
environmental impacts in the safeguarding of intangible cultural heritage and community-
based resilience to natural disasters and climate change (188–91); and (4) Intangible
cultural heritage and peace which addresses social cohesion and equity, preventing and
resolving disputes, restoring peace and security, and achieving lasting peace (192–7). It is
notable that this also gives rise to a range of ethical considerations, such as equality, social
justice and inter-generational equity, which are also addressed in Chapter VI. This requires,
for example, that related plans and programmes ‘respect ethical considerations and do not
negatively affect the viability of the intangible cultural heritage concerned or de-
contextualize or denaturalize that heritage’.\textsuperscript{69}

Beyond cultural heritage law itself, three other areas of international law can be identified
as principally implicated in the development and/or implementation of the 2003 Convention.
These are the legal regimes governing intellectual property, human rights law, and
environmental protection. Since the relationship of the 2003 Convention with the
international legal regimes governing intellectual property rights and environmental
protection are examined in the chapter on Article 3(b), I will focus my discussion here on
the interaction between the Convention and international human rights law. Cultural
heritage treaties are by definition situated within a human rights context under the right to
participate in cultural life which, inter alia, guarantees access to and enjoyment of cultural
heritage.\textsuperscript{70} The objectives of human rights and cultural heritage share important
characteristics\textsuperscript{71} and the latter has now been formally recognized as a proper subject for
human rights protection.\textsuperscript{72} Human rights law and cultural heritage protection also have a
number of shared objectives, including the protection of individual and group/community
identities (their human dignity) and a future-oriented perspective.\textsuperscript{73} The shift of focus in
international cultural heritage law from protecting a ‘world heritage’ to one that primarily
celebrates local, specific heritage, an approach that typifies the 2003 Convention,\textsuperscript{74} also
reflects a more human rights-oriented approach. This more participatory approach is,
indeed, essential for democratizing heritage practice and, hence, for instituting a human
rights-based approach to heritage safeguarding and management. At the same time, the
strong reservation of State sovereignty found in cultural heritage treaties, including the
2003 Convention,\textsuperscript{75} effectively limits the degree to which they (p. 14) fully reflect a human
rights-based approach and sets up a tension between state control over and community
participation in identifying, inventorying, and safeguarding ICH.\textsuperscript{76}

Despite this proviso, the 2003 Convention is probably the most obviously human rights-
based heritage treaty, name-checking as it does the Universal Declaration on Human Rights
(1948) the International Covenant on Economic, Social and Cultural Rights (1966), and the
International Covenant on Civil and Political Rights (1966) in the first recital of its
Preamble. Its definition of ICH\textsuperscript{77} also introduces a negative relationship with human rights,
by limiting what can be recognized as ICH under this treaty to heritage that is ‘compatible
with existing international human rights instruments’. This is not insignificant given that a
number of traditional cultural practices, such as certain taboos and forms of bodily
mutilation, contravene universal standards of human rights many, but not all, on the basis of equality and non-discrimination. For example, an internal UNESCO evaluation from 2013 noted that the ICH Committee should define more clearly where these human rights-based limits should be drawn in order to exclude ICH that clearly violates them and Chapter VI of the Operational Directives (on ICH and sustainable development) adopted in 2016 contains a section on gender equality. Such moves are important in encouraging cultural communities themselves to address the discriminatory aspects of their ICH elements to allow them to be recognized as ICH under the 2003 Convention. Indeed, such evolutions are occurring naturally in response to social change, most noticeably in the inclusion of women in formerly all-male performing arts.

**Conclusion**

The 2003 Convention is only fifteen years old (according to its date of adoption) and twelve years old (dating from its entry into force in April 2006) and so has not yet reached full maturity and still faces significant challenges in terms of its implementation. As a work in progress, new challenges will, no doubt, emerge over time that the States Parties will seek to resolve, acting through the Committee and their own practice and working, one sincerely hopes, in close co-operation with the communities, groups and individuals of the treaty as well as other stakeholders such as NGOs, institutes of expertise and even the private sector.

With its adoption, the 2003 Convention introduced a wholly new subject of protection not previously explicitly regulated by international law. As a consequence, this treaty has been part of a process of identifying and defining this recently officially acknowledged area of heritage, with all the difficulties associated with such an endeavour. Importantly, it also cemented the cultural approach towards intangible heritage that was set in place (p. 15) initially in the 1989 Recommendation, thus clearly delimiting ICH safeguarding from intellectual property protection, even if that regime will remain an important tool in the ICH-safeguarding toolbox. The decision to safeguard ICH through a binding treaty was in response to a perceived gap in international cultural heritage law, in particular as expressed by countries of the ‘global South’ which felt that the model based primarily on material heritage, particularly monumental heritage and world heritage, did not represent their cultural heritage. It also reflects broader policy objectives that had gained prominence by the late 1990s, in particular the importance placed on achieving sustainable modes of development as well as on preserving cultural diversity, including that which is manifested in cultural heritage.

The modalities for making operational the community participation called for explicitly in Articles 11(b) and 15, and implied elsewhere in the treaty, are not yet well-formulated and identifying these will remain a major task for the stakeholders of the 2003 Convention in the following years. Indeed, one of the most challenging but also most fascinating aspects of this question relates to how non-state actors can be better integrated into the work of the intergovernmental Committee. This is a relatively poorly understood issue in international law generally, with the human rights bodies, in particular ECOSOC, and the environmental treaty bodies leading the way in finding workable mechanisms for integrating non-state actors into the intergovernmental process. The 2003 Convention and UNESCO’s 2005 Convention are likely to be the trail-blazers in this area within international cultural heritage law. Through the mechanisms developed within these treaty frameworks for deeper participation by NGOs, communities, groups, individuals, and other actors, UNESCO and its Member States may well contribute to the future development of international and human rights law, in particular to ensuring better participation in cultural life.
Footnotes:

1 Lyndel V. Prott, ‘International Standards for Cultural Heritage’, in UNESCO World Culture Report (UNESCO Publishing, 1998), 222. The Constitution of the United Nations Education, Science and Culture Organization (1945) notes in its Preamble that ‘the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern’ (recital 5) and that ‘peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind’ (recital 6).

2 UNESCO Convention on the World Cultural and Natural Heritage (1972) [1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972)].

3 For more on this, see: Janet Blake ‘Development of UNESCO’s 2003 Convention: Creating a New Heritage Protection Paradigm?’, in Peter Davis and Michelle L. Stefano (eds), Intangible Cultural Heritage (Routledge, 2016).


5 The second recital of the Preamble to the 2003 Convention makes reference to ‘the importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development’.


7 The importance of these dimensions of development was captured effectively by Amartya Sen in his ‘human development’ approach that was adopted by UNDP for its Human Development Reports series from 1990.

8 First formally articulated in World Commission on Environment and Development, Our Common Future (Oxford University Press, 1987) (known as the ‘Brundtland Report’). One of three ‘pillars’ of sustainable development is understood to be socio-cultural.


10 Principle 10. This is incorporated into environmental treaties adopted after Rio de Janeiro, such as the Convention on Combating Desertification (UN, 1994) [1954 UNTS (1994) 3] as well as the 2003 Convention.

11 Principle 22 states that: ‘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 . . . .’ The UN Convention on Biological Diversity (1992) [1760 UNTS 79; 31 ILM 818 (1992)] adopted at Rio de Janeiro also gives a prominent position to ‘local and indigenous knowledge, practices and innovations’ in ensuring environmental sustainability (Art. 8(j)).


13 Objective 3.
The first recital of the Preamble of the 2003 Convention makes reference to ‘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’ which clearly sets out this as a primary context for the treaty.

The publication of Cultural Rights and Wrongs edited by Halina Niec (UNESCO 1998) was part of the attempt to understand the scope and content of cultural rights better.


This was drafted and adopted by a group of experts by the Institute of Human Rights at Fribourg University in association with UNESCO.

In the sixth recital of the Preamble, it stresses that ‘respect for diversity and cultural rights is a crucial factor in the legitimacy and consistency of sustainable development based upon the indivisibility of human rights’.


Para. 3. This is mirrored closely in the language of the second recital to the 2003 Convention cited above (n. 5).

For more on terminology related to ICH, see the chapter by Antonio Arantes in this volume.

According to Art. 2(1), ICH comprises: ‘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’.

Art. 2(1) and (2). These five domains are: oral traditions and expressions (including language as a vehicle of ICH); performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship.

Representative List of Intangible Heritage of Humanity (RL), a List of ICH in Need of Urgent Safeguarding (USL), and a Register of Good Safeguarding Practices (RGSP) established under Arts 16, 17, and 18.

(and other non-state actors) in safeguarding, the role of the media, ICH and sustainable development, gender and ICH, and so on.


27 See, for example, the ASEAN Declaration on Cultural Heritage adopted by ASEAN in Bangkok, Thailand, 25 July 2000.

28 UNESCO Convention on the World Cultural and Natural Heritage (1972) [1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972)].


32 A proposal made by Bolivia. Universal Copyright Convention (1952) [6 UST 2731; 25 UNTS 1341].


34 *Director General’s Preliminary Report on the Situation Calling for Standard-setting* (n. 26).

35 Peter Seitel (ed.), *Safeguarding Traditional Cultures: A Global Assessment* (Smithsonian Institution, 2001).


41 Blake, *Developing a New Standard-setting Instrument* at 75–8 and 87–90.


‘Intangible Cultural Heritage—a Mirror of Cultural Diversity’, Final Declaration of the Third Round Table of Ministers of Culture, Istanbul, 16–17 September 2002 reads, at para. 7(viii): ‘. . . an appropriate international Convention, which should be developed in close cooperation with relevant international organisations and take into full account the complexity of defining intangible cultural heritage, could be a positive step towards pursuing our goal’.

‘Intangible Cultural Heritage—a Mirror of Cultural Diversity’ (n. 20).


Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge, 2010) at 363 notes that ‘the beginnings of a normative regime [for intangible cultural heritage] can be found in the very creation of UNESCO but it was, for many years, overtaken by the apparently more pressing need to address the tangible aspects of heritage’.


As in the case of *Kimchi* which is inscribed independently by both the Democratic Peoples Republic of Korea and the Republic of Korea and Lavash (flatbread) which is inscribed in the name of: (a) Armenia; and (b) Azerbaijan, Iran, and Kazakhstan. However, the joint inscription by the Democratic Peoples Republic of Korea and the Republic of Korea of Traditional Korean wrestling (Ssirum/Ssireum) on the RL in 2018 is a positive move, reflecting the recent détente on the Korean peninsula.

To any of the three lists (RL, USL, or RGSP) and for International Assistance.

List of World Heritage in Danger.


Blake, *Commentary on the 2003 UNESCO Convention* 35.

Ibid. 76.

Dawson Munjeri noted, ‘one finds it incomprehensible that four years after the adoption of the ICHC, there is still debate on an acceptable definition of “community”, and on whether or not, and to what extent, the community’s consent should be sought when considering what constitutes intangible cultural heritage’ in ‘Following the length and breadth of the roots: some dimensions of intangible heritage’ in *Intangible Heritage—Key Issues in Cultural Heritage Series* (n. 36) at 143–4.

OD, paras 79–89.

OD, paras 86–8.


As noted by Meskell (2013b in Stefano & Davis/Deacon Smeets).


Chapter VI on ‘Safeguarding intangible cultural heritage and sustainable development at the national level’, paras 170–97.

OD, para. 173(b).

OD, para. 171(c).


This is expressed in Art. 2 of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 27/10/2005) [CETS No.199] which defines ‘a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions’.

See Arts 2(1), 11(b), and 15 of the 2003 Convention.


Art. 2(1). See chapter 3 in this volume by Francesco Francioni.


OD, para. 181.

Examples include *Naqqâli: Iranian dramatic story-telling* element in Iran and the *Tsiattista poetic duelling* element in Cyprus which were inscribed on the RL in 2011, respectively, by Decisions 6.COM 8.9 and 6.COM 13.12. A cynical reading of this, however, might be that drafters of nomination files now realize that such an emphasis can increase an element’s chances of being inscribed by the Committee.