Intangible Cultural Heritage under Pressure?

Examining Vulnerabilities in ICH Regimes -
Minorities, Indigenous Peoples and Refugees

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Content

List of Abbreviations

CEDAW Convention on the Elimination of All Forms of Discrimination Against Women

CFR Charter of Fundamental Rights of the European Union

CoE Council of Europe

CPHRFF Convention for the Protections of Human Rights and Fundamental Freedoms

CPPDCE Convention on the Protection and Promotion of the Diversity of Cultural Expressions

CSICH Convention for the Safeguarding of Intangible Cultural Heritage

ECHR European Convention on Human Rights and Fundamental Freedoms

ECJ European Court of Justice/Court of Justice of the European Union

ECtHR European Court of Human Rights

EPSICH Ethical Principles for Safeguarding Intangible Cultural Heritage

EU European Union

GC General Comment (referring to interpretations issued by UN treaty monitoring bodies)

IACtHR Inter-American Court of Human Rights

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

ICH Intangible Cultural Heritage

IHRL International Human Rights Law

NGO Non-Governmental Organisation

OPs Operational Directives for the implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage

TEU Treaty on European Union

TFEU Treaty on the Functioning of the European Union

UN United Nations

UNESCO United Nations Educational, Scientific and Cultural Organisation

UN OHCHR United Nations Office of the High Commissioner for Human Rights

WHC World Heritage Convention

WIPO World Intellectual Property Organisation

WTO World Trade Organisation

Foreword

The play of the Irish harp, the *Kwagh-Hi* theatrical performance from Nigeria and the traditional massage technique *Nuad Thai* were included in the UNESCO Representative List of Human Intangible Cultural Heritage in 2019 with 32 other forms of living traditions. The Representative List, containing 464 forms of Intangible Cultural Heritage in total, gives greater visibility and awareness to the importance of Intangible Cultural Heritage worldwide. Endangered cultural expressions which require effective conservation measures are classified on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding that includes 64 forms to date.

The main reasons of practices being classified as 'in need of urgent safeguarding' are because of urbanisation, (forced) migration and technological developments, according to the author of this study, Jessika Eichler. In times of ever faster technological developments and increasing migration including from rural to urban areas within respective countries, we have to discuss the transmission of oral traditions, handcrafting or cultural knowledge to following generations.

Jessika Eichler describes legal international developments in protecting Intangible Cultural Heritage, highlights the main challenges of the current system due to increasing threats to cultural traditions and discusses possible actions. This study offers a unique overview of the development of international ICH regimes including an analysis of cultural and human rights within these regimes.

This publication forms part of ifa's Research Programme 'Culture and Foreign Policy', in which experts address relevant issues relating to culture and foreign policy with the aim of involving academics, practitioners, policymakers and civil society.

I would like to thank Jessika Eichler for her dedicated work and commitment to this research project. In addition, I would like to thank my ifa colleagues Odila Triebel, Sarah Widmaier and Anja Schön for their work on the coordination and editing of this project.

Ronald Grätz
Secretary General, ifa

Abstract

Intangible Cultural Heritage (ICH) is increasingly subjected to social, economic and political pressures in the light of neo-liberal developments and dispossessing, neo-colonial discourses of domination, perpetuated by cultural heritage politics. In response, international legal regimes have been established, finding proximity to those subjected to such very regimes, namely cultural bearers and ultimately holders of cultural rights. However, the very nature of such safeguarding standards may not permit rights holders to enjoy non-discriminatory access to legal remedies, revealing some form of disintegration from general human rights standards. This may, in turn, have resulted in new patterns of inequalities, arbitrariness and eventually vulnerabilities, causing at the same time detrimental, adverse impacts on specific groups of communities and individuals. Indigenous peoples, ethnic and cultural minorities and migrants prove to be particularly affected by such dilemmas – being attributable to disassociated regimes, powerful actors in international governance and the disfranchising systemic dynamics of majority-oriented regimes. The study disentangles such dynamics and sheds light on both endangered ICH elements and its practitioners. Similarly, this piece traces agency in ICH practices, proving to be empowering and responding to current patterns of cultural imposition while orienting ICH towards plural identity recognition by way of discovering spaces of contestation. Finally, measures are proposed to respond to urgent needs articulated at grassroots' levels and international frameworks that prove ill-equipped to meet the specific demands arising in ICH contexts, and thereby cultural rights.

Executive Summary

Intangible Cultural Heritage (ICH) is increasingly subjected to social, economic and political pressures in the light of neo-liberal developments and disfranchising, neo-colonial discourses of domination perpetuated by cultural heritage politics. In fact, cultural heritage recognition does not constitute an inclusive, unbiased process: rather dominant sectors such as tourism or product-driven industries may exert considerable influence on ultimate ICH decisions. Cultural bearers as holders of cultural rights are, in turn, submitted to the homogenising politics of dispossession, illustrated by a somewhat excluding process of recognition. Most notably, list systems and similar selective processes illustrate the everyday realities of ultimately unilateral decisions in the case of safeguarding. Unequal positions are thereby maintained or perpetuate the 'shrinking space' for civil society to articulate demands on (local) community needs.

Societies' most marginalised groups thereby face additional burdens, turning safeguarding into an indispensable, multi-dimensional undertaking. Lacking positive measures illustrate persisting legal gaps in protecting the particular needs arising in such contexts. In fact, cultural heritage regimes fall short of granting effective human rights protection. Existing research has largely ignored such persisting fragmentation, played out to the detriment of particular rights holder groups. By disentangling such 'black boxes' in international law, this study uncovers new forms of vulnerability, intersectionalities and responses (or failure to do so) developed by relevant legal instruments.

Similarly, inequalities arise at international level where intangible cultural heritage has been submitted to the rule of material heritage. Therefore, conceptual debates need to be re-opened and widened in order to (re-) discuss the needs of reforming the current safeguarding regime in vulnerability-prone manner, allowing excluded practice to be codified. The Global South, for instance, had remained largely excluded from UNESCO material heritage debates and safeguarding respectively. Indigenous oral traditions illustrate such forms of exclusion and their institutional perpetuation by means of domestic ICH recognition as well as international negotiation.

Tracing the legal historical origins of ICH regimes allows us to gain further insights into the particularities of such regimes, including their specific safeguarding measures oriented towards civil society and their respective responses to mitigate disadvantageous inter-State relations. However, such regimes equally establish spaces for new inequalities to emerge, evolving somewhat in isolation of co-existing international human rights regimes. In fact, infringements of cultural rights also come to the fore in international hu-

man rights governance – despite multilateral efforts undertaken in cultural rights frameworks, jurisprudence and monitoring work. This may be attributed to unawareness of existing laws and supervisory mechanisms, lacking legal expertise, competing claims at local level, distrust in justice systems generally or the burden of exhausting domestic legal remedies in the first place. However, communities and groups have gradually found their way into legal frameworks, demanding respect for their very right to collective cultural self-determination while curing the wounds of past injustices.

Inequalities, however, are not limited to global levels, where the necessities of recognising alternative, unwritten epistemologies clearly come to the fore, being eventually translated into ICH discourses and ultimately invokable provisions and effective policies. Further vulnerabilities demonstrably emerge at community level and among rights holders who are faced with powerful actors such as the State. These commonly adopt majority-oriented procedures that prove disabling for applying ICH comprehensively and inclusively, both domestically and under the realm of international UNESCO safeguards. Pressures for conformity are, however, exerted by a number of actors beyond the State, such as the natural resource sector which has tended to privatise basic services and ultimately rights, unsustainable tourism, digitalisation and commodification patterns, limiting the space(s) for ICH to be practiced. Urgent safeguarding measures exemplify such adverse impacts, enhanced by a complex amalgam of geo-political and social developments, perpetuated by unsustainable policies.

Aggressive land grabbing processes add to the common burden, resulting in indigenous peoples' and cultural/ethnic minorities' expulsion from their lands as well as new migration developments – unveiling yet another vulnerability and inequality dimension inherent to ICH. In that sense, the study focusses on developments beyond the law, grasping the complexities of socio-political shifts of global scope which affects such groups in particularly serious manner. Basic access rights are thereby denied despite the non-discriminatory nature of existing ICH provisions. In fact, arbitrary policies and disproportionate impacts particularly exemplify the shortcomings of supposedly inclusive, non-discriminatory ICH regimes.

The Convention for the Safeguarding of Intangible Cultural Heritage explicitly addresses the dilemma of alienation from those practising ICH; most notably, it establishes a participatory regime of implementation oriented towards cultural bearers and ultimately holders of cultural rights, experts and research institutes. Similarly, inter-actor and institutional imbalances are evened out by means of an evolving and constantly adjusting framework included in the Convention's Operational Directives and a set of ethical prin-

ciples. However, the very nature of such instruments and safeguarding standards may not fully grant non-discriminatory access to its protection regime, being disintegrated from general human rights standards. In fact, conflicts of ICH and cultural rights demonstrably jeopardise implementation and interpretation, the latter being oriented towards rights holders as communities, individuals or groups. This becomes apparent in the case of gender-based violations, demonstrating particular exposure to violence and 'cultural practices' which are played out to the detriment of observing other rights including implications for gender identities.

Similar observations can be made at regional levels, most notably embracing standards developed by the EU and the Council of Europe respectively: specific ICH measures aimed towards the fulfilment of cultural rights hardly find their way into jurisprudence and policies despite extensive existing legal foundations. This may, in turn, result in new patterns of inequalities, arbitrariness and eventually vulnerability causing detrimental, adverse impacts on specific groups of communities and individuals. Indigenous peoples, ethnic and cultural minorities as well as migrants in particular become subjected to such disassociated regimes, powerful actors of international governance and the disfranchising systemic dynamics of majority-oriented regimes.

The study thus disentangles such dynamics and sheds light on both i) endangered ICH elements such as those safeguarded by urgent measures and ii) those most affected and hence vulnerable practitioners including individuals and groups. Similarly, the study places a focus on ICH practice which proves to be agency-driven and empowering, hence responding to and contesting current patterns of cultural imposition. Interviews with stakeholders, members of civil society, academia and ultimately cultural bearers allow us to engage deeply with everyday implementation practice and the socio-political limits placed on genuine enjoyment of cultural rights. Two ways of guaranteeing cultural rights are looked into more closely. Firstly, the study identifies difficulties associated with transmitting ICH claims in the light of overlapping human rights frameworks. Secondly, the study delves into the mutually reinforcing functions of different minority rights regimes, exerting virtuous effects on cultural rights enjoyment both i) across the human rights spectrum and ii) as far as ethnic and cultural minority and migrant rights categories are concerned. Further light is shed on the very practices at stake here: Carnival celebrations, theatre and other artistic expressions illustrate the way ICH is absorbed and shaped by different marginalised groups and introduced into 'untraditional' contexts. In that sense, newly emerging practice is understood in terms of its functionality; in this case,

ICH may assume an empowering, status-quo contesting spirit, struggling against the harmonising, assimilating forces of cultural governance.

Finally, such persisting difficulties in enforcing cultural rights are understood according to different institutional contexts and neighbouring regimes. Intellectual property regimes, for instance, are critically examined, uncovering common challenges such as granting equitable, non-discriminatory access to ICH (elements) and intrinsic problems related to embedding ICH in the WIPO (World Intellectual Property Organisation) framework. Further insights are gained by exploring the conceptual and safeguarding potential of human rights frameworks, allowing for 'multiple framework safeguarding' and the eventual adoption and universal recognition of ICH elements as cultural rights. Such debates address common concerns as to enforceability, rights holder status, list and recognition processes, revealing the multiplicity of persisting gaps in legal frameworks and in extrajudicial ways of guaranteeing cultural rights. Accordingly, measures are proposed to fill current gaps, responding to i) urgent needs articulated at grassroots levels by the very rights holder communities and ii) international frameworks, hitherto ill-equipped to meet the specific demands arising in ICH contexts as expressed through people's individuals' and peoples' cultural rights.

1. Introduction

Ever since the adoption of the UNESCO (United Nations Educational, Scientific and Cultural Organisation) Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH) in 2003, 'Intangible Cultural Heritage' has become a buzzword in international political discourse and among stakeholders: its presence in international legal documents and policies suggests a sort of 'heritage fever' (Lixinski, 2013); others term it 'cult' or 'faith' (Lowenthal, 1998) or 'patrimonial obsession' (Jeudy, 2001). Some cultural bearers even describe the UNESCO representative list system as 'inflationary', referring to the rapidly growing list of ICH elements. The list system and related safeguarding might also be considered a danger being reduced to States' understanding of ICH to enhance their international visibility.[1] The high interest in this possibly controversial object can be attributed to a number of reasons including its topicality and the institutional, social and intellectual debates around it that eventually culminated it its establishment (Bortolotto, 2011).

The focus in this piece is placed on current dangers for cultural heritage to be maintained and developed. This intrinsically relates to the role Intangible Cultural Heritage has assumed in particular *vis-à-vis* its tangible counterpart. By way of providing broad insights into historical developments which inform power relationships underlying the two regimes until today, the author explores the role and importance of cultural bearers as the ones who eventually transmit ICH practice in an intergenerational way. 'Cultural heritage extinction' as such thereby assumes a marginal role; rather, dangers are placed in the context of cultural rights violations.

Following this very focus on the 'human side' of cultural heritage, the author looks into some core issues of concern, addressing the following questions in this study: 1) What kinds of dangers, pressures or infringements are cultural bearer communities (as rights holders!) confronted with, touching upon their very cultural needs?

Based on such specific systemic grounds, attributable to the common suffering of cultural bearer groups, emphasis is placed on the 'human side' which incentivises us to ask 2) What kind of vulnerabilities and marginalisations do arise and materialise? Evidently, the latter question cannot be treated in isolation from the former: indigenous peoples and minorities including migrated populations often reveal particular vulnerabilities in rela-

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[1] Interview with Filomena Sousa (Researcher in the Portuguese NGO Memória Imaterial and Member of "Institute for the Study of Literature and Tradition – heritage, arts and culture").

tion to what could be understood as contemporary threats. These are identified – in an albeit limited fashion – by urgent safeguarding lists and measures. Such vulnerable and specifically exposed populations engage in practices that coexist at different places; on some occasions practices (and people(s)) transcend jurisdictions – this has shown itself to be particularly relevant in the case of indigenous peoples, minorities and migrants. It is thus examined 3) to what extent specific commonly identified practices function as empowering or needs-oriented counter-measures or instruments of prevention in the light of continuing cultural rights violations, past and current injustices?

Accordingly, definitional and conceptual-historical questions form part of this piece, being addressed in the first part of the present study. The author thereby disentangles the intangible and the tangible as well as their wider power implications. The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH) is placed in broader contexts, grasping its increasingly recognised role in cultural and world heritage regimes more generally. Similarly, its significance is understood in relation to UNESCO and regional frameworks, shedding light on its embedment in wider international legal debates while paying due regard to politicised heritage discourses common to such regimes. Particular emphasis is placed on ICH elements that require urgent safeguarding and quick responses on the part of State parties which explicitly support or negligently lose oversight over cultural rights infringement. Political economical dynamics often explain unilaterally imposed pressures which are systematised here, placing emphasis on those most affected by global dispossessing neo-liberal policies. Other challenges remain to be identified in existing ICH regimes, including conflicts of human rights and so-called 'traditional' cultural heritage; the latter potentially jeopardises women's rights and gender rights more generally. Having embraced different forms of pressures that demonstrate negative impacts on ICH practice and cultural rights enjoyment, the very groups engaging in ICH deserve attention. Particular groups such as indigenous peoples and minorities including (recently) migrated groups embody and represent marginalised positions in accessing and living ICH, hence requiring special consideration in ICH regimes. We thus concern ourselves with specific practices in detail, identifying both i) challenges for cultural rights fulfilment *vis-à-vis* such groups and ii) potential ways of preventing the impacts caused by homogenising status-quo-driven ICH regimes promoted at domestic levels. In a final part, safeguarding is approached through specific regimes including 'classical' intellectual property ideas and co-existing frameworks in the ICH field, most notably human rights. It is thus examined what role can be assumed by safeguarding and similar mechanisms which are in principle directed towards evening out cultural rights-specific inequalities, seeking in fact non-discriminatory enjoyment of cultural rights.

2. Methodological Considerations and Interdisciplinary Nature

This study is informed by an interdisciplinary blend of methods and approaches from the legal, socio-political and anthropological disciplines including theoretical perspectives. International and regional legal frameworks and accompanying policies are taken as a starting point to understand ICH recognition. At the same time, such frameworks are disentangled, taking dynamics, formal and informal mechanisms into account; these underlie or accommodate processes of ICH recognition. Anthropological ICH debates provide further insights into community perceptions, the use of ICH and the very making of the Intangible Cultural Heritage regime. Emphasis is placed on overall dynamics rather than providing in-depth historical background information of the cases at hand. While the findings are briefly contextualised, the former are discussed in relation to the research questions and main themes of the study (see preceding sub-chapter), allowing common challenges and specific dilemmas to be identified and debated. Particular emphasis is placed on systematising ICH recognition in the UNESCO system, urgent safeguarding and global developments without refraining from paying tribute to empirical detail in the following chapters.

Apart from literature reviews and related desk research on current studies and other secondary sources, the study is sustained by a qualitative data collection process including 38 in-depth interviews. These include experts in the ICH field, such as rights holders, stakeholders and community representatives, civil society organisations and academics. The study applies an exploratory format to stimulate diverse debates and respective findings that are catalysed by the in-depth interviews. This also implies variations in terms of questions and topic guides due to particular expertise attributed to the interviewees who added to different focusses and parts of the study. Accordingly, interview data was not systematised according to quantitative objectives, but diversity-oriented in terms of contexts, reflecting different angles towards the main research themes.

The data collection process and research activities also included the conceptualisation of the panel "Intangible Cultural Heritage under Pressure: Vanishing Existence or Protective Measures just in time?" as part of ifa's Research Programme "Culture and Foreign Policy" which took place in the framework of the European Culture Forum in Milan in 2017. It included speeches and debates with Natsuko Akagawa (lecturer at The University of Queensland, Australia), Francesco Francioni (Emiritus Professor of international law and human rights at the European University Institute, Florence), Filomena Sousa (FCT researcher at Memória Imaterial Portugal) and Máiréad Nic Craith (Director of Research at Heriot-Watt University in Edinburgh) on combining theoretical findings with everyday

practice in a policy-oriented manner. The author gained further insights by participating in and presenting at a few conferences and/or specific panels dedicated to (intangible) cultural heritage in current contexts. This encompassed an International Cultural Heritage colloquium "*Geteiltes Erbe. Trans- und interkulturelles Kulturerbe im euro-afro-mediterranen Raum*" convened by the *Stiftung Wissensraum Europa-Mittelmeer* in January 2018, the meeting „*Unser WeltErbe – die montane Kulturlandschaft Erzgebirge/Krušnohoři*" organised by the Institute Heritage Studies in January 2018, the international conference "Urban Cultures, Superdiversity and Intangible Heritage" organised by the Dutch Centre for Intangible Heritage, Workshop intangible heritage Flanders, FARO and the German Commission for UNESCO in February 2018, the "Festival of Theatre made by Refugees" in Bristol of the Refugee Engagement and Integration through Community Theatre collaboration (REACT) in March 2018, the "Art, Culture and Heritage" stream of the Socio-Legal Studies Association Annual Conference in March 2018, the seminar "*Spannungsfeld Immaterielles Kulturerbe – der Wert von immateriellem Kulturerbe für heutige Gesellschaften*" convened by the German language UNESCO Commissions in May 2018, the 9th Multidisciplinary Meeting on Indigenous Peoples (EMPI) "Territories in dispute: epistemologies, resistances, spiritualities and rights" in June 2018 and the Summer School *trAndes Desigualdades sociales y Desarrollo sostenible: Tensiones locales – nacionales – globales en territorios andinos "Turismo, patrimonio y habitat*" in October 2018. All such (academic) events generally informed the data collection and reflection process of the present study. This encompasses a panoply of speeches, responses, comments, group discussions, individual conversations, debates as well as follow-up interviews.

3. Definitional Issues: Towards a Universal Definition of Intangible Cultural Heritage?

3.1 Summary – Chapter 3

The chapter traces the conceptual and legal historical origins of Intangible Cultural Heritage both within classical (material) cultural heritage regimes and ever since its endorsement by the Convention on the Safeguarding of the Intangible Cultural Heritage (CSICH) in 2003. Particular emphasis is placed on the conceptual dividing lines between tangible and Intangible Cultural Heritage as well as the novelties coming to the fore in the latter case: its focus on the rights holders, community-driven approaches, inter-generational transmission processes, geo-political orientation on the Global South and its eventual transformative, future-oriented potential characterise such a novel legal regime. Apart from its growing significance in international law, ICH has clearly entered the academic world, transcending the disciplines and fields of study. Further conceptual considerations touch upon the meaning and impact of safeguarding practice which is explored by means of different legal authoritative sources. Other concerns include future conceptual developments and their significance for ICH practice, especially as relating to ethical principles, revised operational directives and (other) soft law instruments. Finally, ICH implementation is discussed beyond its embedment into UNESCO regimes; instead, it finds articulation in EU and Council of Europe (CoE) frameworks, shedding light on the multiplicity of responses and approaches emerging in such institutional settings.

3.2 Intangible Cultural Heritage, the World Heritage Convention and beyond

The first milestones towards legally recognising Intangible Cultural Heritage were built as early as 1972 when the Convention Concerning the Protection of the World Cultural and Natural Heritage, known as World Heritage Convention (WHC) was formally adopted. The first steps to ensure heritage protection by means of official lists were taken in that context while embedding cultural heritage issues in strongly preservationist discourses. The Convention distinguishes between cultural heritage including 'monuments, groups of buildings and sites' and natural heritage encompassing 'natural features, geological and physiographical formations and natural sites' (Arts. 1 and 2). Protective measures are further spelt out and include identification, protection, conservation, presentation and its intergenerational transmission.

A complementary instrument was adopted in 1977, yet it periodically undergoes revision, accommodating new experience and conceptual (re-)considerations: the *Operational Guidelines for the Implementation of the World Heritage Convention* provide criteria for inscribing properties on the World Heritage List and for providing international assistance under the World Heritage Fund as well as for mobilising support. The document also specifies some minimum criteria, *inter alia* the representative, balanced and credible character of the World Heritage List which builds on tentative lists at State level. Other than common UN

reporting mechanisms, States do not report on a state-by-state basis, but inform on implementation within their (world) regions.

In an attempt to complement the described legal framework on the protection of tangible or material cultural heritage, similar intergovernmental endeavours in the area of Intangible Cultural Heritage materialised in the last two decades. This culminated in the adoption of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH) that responds to current developments: this includes a strong community and participatory focus, an orientation towards diversity and pluralism and sustainable development. It might, however, be critically remarked that cultural heritage and cultural rights are based on a State-centric framework, disparities at different levels and underlying imbalances of power of those involved.[2] On the bright side, CSICH in particular has been understood as a success 'moving away from physical remnants and towards living cultures' constituting 'the second most successful cultural heritage treaty' including 178 State parties (Lixinski and Schreiber, 2017: 17-18).

Just as the WHC, list mechanisms form an essential part of safeguarding Intangible Cultural Heritage. The definition of ICH encompasses a wide range of elements allowing for an inclusive policy regime including:

> 'practices, representations, expressions, knowledge, skills – as well as the instruments, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their cultural heritage' (CSICH, Art.2(1))

The Convention further stipulates certain domains in which said ICH-elements may find articulation, namely:

> 'oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship' (CSICH, Art.2(2))

Despite the common acceptance of the term Intangible Cultural Heritage, variations include *Traditions vivantes* or *Patrimoine vivant* as used in Canadian and Swiss contexts as

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[2] Interview with Rebecca Fan (Postdoctoral Scholar, UC Berkeley and International Union for Conservation of Nature).

well as *Cultura Viva*[3] in Brazil. These concepts, it could be argued, reflect the current or living nature of ICH which cannot be limited to past practice, but needs to be identifiable in current contexts and exercised by current rights holder(s) (groups).

Apart from the Convention, academia has contributed to norm-setting ever since the adoption of ICH in international discourse. While UNESCO-CSICH largely influences academic normative discussions in terms of the definition, some additional constitutive elements have been identified complementing the legal instrument; accordingly ICH is characterised by:

> 'the self-identification of this heritage as an essential element of the cultural identity of its creators and bearers; by its constant recreation in response to the historical and social evolution of the communities and groups concerned; by its connection with the cultural identity of these communities and groups; by its authenticity; and by its indissoluble relationship with human rights' (Lenzerini, 2011: 101)

3.2.1 Tangible versus Intangible Cultural Heritage: A Mere Conceptual Divide?

The 1972 UNESCO WHC established a framework that would conceptually exclude all forms of intangible heritage, limiting cultural heritage to cultural and natural sites (as shown above). The latter instrument was accepted as a form of common framework of reference until the 1990s when first reconsiderations of intangibility and cultural values re-opened conceptual debates, culminating in a paradigm shift and the eventual adoption of the 2003 UNESCO instrument. It also meant re-defining or re-inventing cultural heritage as such, revising existing dimensions such as 'authenticity' and introducing criteria that would demonstrate a clear link between communities, groups and individuals and their respective practices. In fact, the 2003 instrument would eventually attribute cultural heritage to humans as cultural bearers constituting, at the same time, a key change in cultural heritage law and policies more generally[4] and equally pave the way for human rights to enter cultural heritage debates and legal developments in a broader context.

The importance of such cultural bearers and their influence (if not authority) in identifying, declaring and recognising ICH is emblematic in that sense, doing justice to the spirit of the 2003 Convention. It could similarly be considered a response to a framework that would not pay appropriate due regard to peoples'/people's worlds or cosmovisions and

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[3] Interview with Christoph Wulf (Professor for Anthropology and Education, Member of the Interdisciplinary Center 'Historical Anthropology' at the Free University of Berlin).
[4] Interview with X1.

their living conditions, or to follow a holistic approach that could do justice to such needs.[5] In that sense, CSICH and associated agreements have broadened the concept of cultural heritage, also in terms of creating a non-Western counterweight in approaching cultural heritage, owed partly to thorough negotiations and its proper dynamics.[6] Other than material heritage, ICH could hence be regarded as 'specifically designed for the benefit of the Global South' (Brumann, 2018): world heritage developments and initiatives at the end of the 20th century indicated 'a better representation of the Global South and such aspects as indigenous peoples' (Brumann, 2018; 2014). Indeed, world heritage and its original focus on material forms of heritage in existing instruments showed to be associated with a particular picture that would not include specific ICH elements or social structures.[7] Most notably, the legacy of the past which transcends cultural heritage regimes might sometimes impede an understanding embracing contemporary interpretations of heritage and allow for expression beyond purely property-based interpretations.[8] Conversely, it could be advanced that such intangible (contemporary) nature is invoked in rather implicit ways: where temples are destroyed in conflict situations, this inevitably affects how ICH practice can be maintained or developed; something which is not taken up as such in transmission processes in the context of, for instance, university curricula.[9]

In practice, the two frameworks are difficult to distinguish based on the complexity of practice and the relevance of cultural objects for practice-related issues and vice versa. Accordingly, Lixinski established a conceptual framework that would accommodate two forms of Intangible Cultural Heritage; namely a 'dependent' one that would encompass practices based on or resulting in some material good while 'independent' forms would not be associated with any particular tangible means (Lixinski, 2011, 83). Even in current contexts where intangibility becomes gradually accepted and appropriated in State practice, some sort of 'dual trajectories' in relation to intangible and tangible heritage is maintained, the latter enjoying primacy (Nic Craith and Kockel, 2016, 429). Therefore, it might be important to emphasise their conceptual equality, by stating that 'all heritage is intangible' (Smith, 2006, 56) in addition to its widely assumed tangible character. Indeed, it becomes visible how such dualism gradually disappears with the evolvement of a comprehensive framework. To put it simply, both forms of heritage become fused in what

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[5] Interview with Robert Rode (Brandenburg University of Technology (BTU) Cottbus).
[6] Ibid.
[7] Interview with X28.
[8] Interview with Rebecca Fan (Postdoctoral Scholar, UC Berkeley and International Union for Conservation of Nature).
[9] Interview with X32.

could be attempts to 'marry the two concepts of heritage together' (Smith, 2006, 56). Others describe the relation between the two as a symbiotic concept in which the intangible symbolises the framework in which the tangible materialises (Bouchenaki, 2003).

Other than most tangible heritage practice seems to imply, intangible heritage is gaining in legitimacy in academia. This might be attributed to the very way it came into existence, namely through so-called bottom-up processes or, as socio-anthropologist debates might suggest, ICH is created or invented which, in turn, resulted in its codification in legal frameworks. Some even argue that ICH could be regarded as a 'corrective to the World Heritage List' (Kurin, 2004, 69) in the sense that recent developments were integrated into the novel instrument. In more moderate terms, it could be stated that the current ICH regime at least emerged in several heritage contexts (Rudolff, 2010) and thereby CSICH absorbs its multidimensionality that was created by means of subsequently held and parallel debates. In that way, the very CSICH regime reveals a different drafting process and, it could be argued, more conceptual complexities compared to its first predecessor, the World Heritage Convention.

Yet, Intangible Cultural Heritage regimes also differ in the sense that they no longer glorify what became known as a preservationist approach in terms of safeguarding. Selection processes inherent in preservationist processes also entail conflict and exclusion (Bendix, 2009): some might argue that the very fear of loss has stimulated such selection to materialise (Peckham, 2000). Especially in the ICH contexts other safeguarding attributes add to or replace preservationist methods: intergenerational transmission and the possibility to change past practice in contemporary settings outweigh preserving traditions while enabling new generations to re-invent heritage in accordance with new needs and current challenges. Furthermore, the new framework has (at least partly) opened up to allow for cultural diversity and pluralism to find expression, thereby approaching a more universalistic perspective which the instrument arguably represents. This is also reflected in cultural bearer communities: by its nature and considering ICH practice, ICH transmission is not limited in its outreach; it rather enjoys universal applicability and transmission to those interested.[10] Again, cultural bearers are attributed cultural rights in shaping to what extent this materialises in everyday life and in the light of socio-economic, political and legal pressures. Despite such potential, cultural heritage is not lived and transmitted

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[10] Interview with Christoph Wulf (Professor for Anthropology and Education, Member of the Interdisciplinary Center 'Historical Anthropology' at the Free University of Berlin).

without its conceptual, societal and political limits: a new idea of heritage might thus be demanded going beyond concepts of 'decay, salvage and loss' (Alivizatou, 2012: 16).

Relatedly, questions on preservation in the material cultural heritage sense give rise to considerations of the forums in which safeguarding takes place. Museums as classical material heritage spaces have subjected ICH to the very logics of material heritage in many cases. However, it is equally possible to question the role of museums as a repository of material culture, calling for a 'people-centred museology' (Alivizatou, 2012) and to rethink the very relationship of contemporary museums in linking intangible and tangible forms of heritage (Svensson, 2008). Seen from classical museum preservation practice, ICH was initially thought of as the story behind the objects, being an intrinsic part of material heritage.[11] The establishment of cultural heritage centres with specific ICH mandates opened up institutional dialogues which enabled stakeholders to broaden their understanding of intangible elements.[12] This, in turn, also transformed the *raison-d'être* of museum artefacts or objects that would be increasingly exposed to shared authority including both communities and curators.[13] Intangible heritage might further require measures to be adopted beyond funding for restorations and instead require an explicit community link, understanding ICH as an ongoing process with different dimensions.[14] Funding, however, equally proves important for maintaining ICH practice – beyond the merits of symbolism and similar safeguarding practice – for festivals to take place, instruments to be built etc.[15]

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[11] Interview with Albert van der Zeijden (Dutch Centre for Intangible Cultural Heritage).
[12] See for example "The Intangible Cultural Heritage and Museums Project", a cooperation between the Werkplaazs immaterieel erfgoed, the Dutch Centre for Intangible Cultural Heritage, the Maison des Cultures du Monde – Centre français du patrimoine culturel immatériel, the Swiss Museums Association and SIMBDEA.
[13] Interview with Albert van der Zeijden (Dutch Centre for Intangible Cultural Heritage).
[14] Interview with Monalisa Maharjan (researcher at Centro Interdisciplinar de História, Culturas e Sociedades da Universidade de Évora; UNESCO Chair for Intangible Cultural Heritage and Traditional Know-How).
[15] Interview with Norbert Müller (head of CIOFF® Germany and Vice President of CIOFF® world association); interview with Michael Gerhard Kaufmann (Professor, University for Church Music in Heidelberg, authorship: application for inscription on Representative List of the Intangible Cultural Heritage of Humanity "organ craftsmanship and music").

3.2.2 The Convention for the Safeguarding of Intangible Cultural Heritage (CSICH) and its Predecessor(s)

Yet, the Convention and the list system as (integrated) legally binding documents as well as the Operational Directives also build on declarations and other ICH soft law instruments that were adopted previously. First initiatives to include ICH in international standards were undertaken as early as 1973 when the Republic of Bolivia addressed a letter to UNESCO, referring to missing instruments that could include expressions such as music and dance while highlighting their intensive commercialisation and export (Hafstein, 2014). It was further recognised elsewhere that some world regions, most notably Africa and Latin America had pressed for recognition of intangible forms such as rituals and folklore (Bouchenaki, 2003; Campagna, 2017).

The Recommendation on the Safeguarding of Traditional Culture and Folklore eventually formally included ICH in international law in 1989, establishing both a definition and criteria of identification of folklore; the instrument further developed a few guidelines on conserving, preserving, disseminating and protecting folklore. Current instruments and CSICH in particular can be understood as a response to a folklore-prone approach, they may also respond to nationalist ethnography and 'regimes that use folklore as an instrument of acculturation' they may also contest links between (cultural) tradition and "authenticity", the "typical" or the "picturesque"'[16]. It might be suggested this included a change in the philosophy of thinking or paradigm shift, moving away from traditional culture and folklore (Blake, 2017).

Such first endeavours in legally codifying ICH were followed by the adoption of a few specific ICH-related instruments. Namely, the Living Human Treasures initiative adopted in 1993 establishes a solid framework for recognising 'highly skilled and knowledgeable' cultural bearers with the aim of contributing to intergenerational transmission. A third influential instrument was developed, considering a particular initiative from Moroccan authorities from 1997 till 2005 in the form of the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity. Most notably, the Proclamation helped to create an international distinctive framework, denominating special examples 'forms of popular and traditional cultural expressions' and 'cultural spaces, i.e., places where cultural and popular activities are concentrated and regularly take place (market squares, festivals, etc.)'. Importantly, the Proclamation was incorporated into the Representative List

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[16] Interview with Filomena Sousa (Researcher in the Portuguese NGO Memória Imaterial and Member of "Institute for the Study of Literature and Tradition – heritage, arts and culture").

(Art.31(1), CSICH) assuming legally binding value by such assimilation. In their entirety, the three documents developed as responses to threats that are related to urban migration, industrialisation and ceasing traditional employment (Alivizatou, 2014). At the same time, respective drafting processes embodied the very logic underlying its leading institutions, or to put it differently, the international ICH regime has hitherto predominantly been shaped by the UNESCO.

Complementary to such soft law instruments in the specific area of ICH, a few instruments have been adopted in the field of cultural diversity strengthening the overall spirit of CSICH as well as specific provisions. The UNESCO Universal Declaration on Cultural Diversity adopted in 2001 adds to soft law developments by declaring cultural heritage a 'common heritage of humankind', strengthening cultural diversity and pluralism while understanding cultural and human rights as enabling mechanisms for cultural diversity – provided that equal access is guaranteed. In a legally more committing way, the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CPPDCE) more specifically strives to promote and protect the diversity of cultural expressions; to establish conditions in which these can materialise while stimulating dialogue among cultures, intercultural respect, a culture of peace, interculturality and cultural interaction; and to establish a link between culture, development, international cooperation and solidarity. More specifically, CPPDCE also focusses on the uniqueness and particularities of culture by recognising the distinctive character of cultural activities, goods and services that could serve as vehicles of identity, values and meaning.

Negotiations around CPPDCE were primarily motivated by a general demand to devote a new instrument to the very protection of cultural rights which was missing in existing International Human Rights Law (IHRL) (Donders, 2012); it may be considered a counter proposal to purely trade-motivated regimes.[17] It was further maintained that IHRL had hitherto refrained from providing a clear definition of cultural rights, also as a way to respond to the existing (diverse) artistic and anthropological approaches (UNESCO, 2003). Similarly, the adoption of CPPDCE was catalysed by the need to coordinate and create coherence, adopting a more systemic vision in the field of culture and trade (Richieri & Norodom, 2016). Indeed, the Convention was perceived by some as attempts of preventing global governance and establishing conflicts between culture and trade including global film industries (Hahn, 2006). At the same time, general conflicts in international law between UNESCO and the World Trade Organisation (WTO) continue

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[17] Interview with X1.

to exist in matters of competence and the overall fragmentation of international law, dealing with the promotion and protection of cultural expressions (El Zein, 2013). Apart from its emphasis on creative industries, goods and services, CPPDCE and its operational guidelines considerably strengthen CSICH in the sense that the two core dimensions of pluralism and cultural diversity are deepened. CPPDCE further extends the focus to cultural bearers and diversifies the concept of identities while implementing human and cultural rights in a more specific and arguably legally committing way compared to CSICH; minorities and indigenous peoples are particularly included in the latter regard. That way, CPPDCE inspires and reinforces an inclusive approach towards ICH that puts cultural and human rights on the agenda of other cultural heritage instruments – legally enforceable cultural rights as embraced by international human rights monitoring mechanisms do not enter 'ICH realms' though. In fact, cultural rights and identity debates are commonly rejected based on controversies that question 'established' or 'official' culture that is known and promoted by majorities in society and the State. Cultural diversity and pluralism in the CSICH context thereby bring new light and nuances into long established traditions and customs.
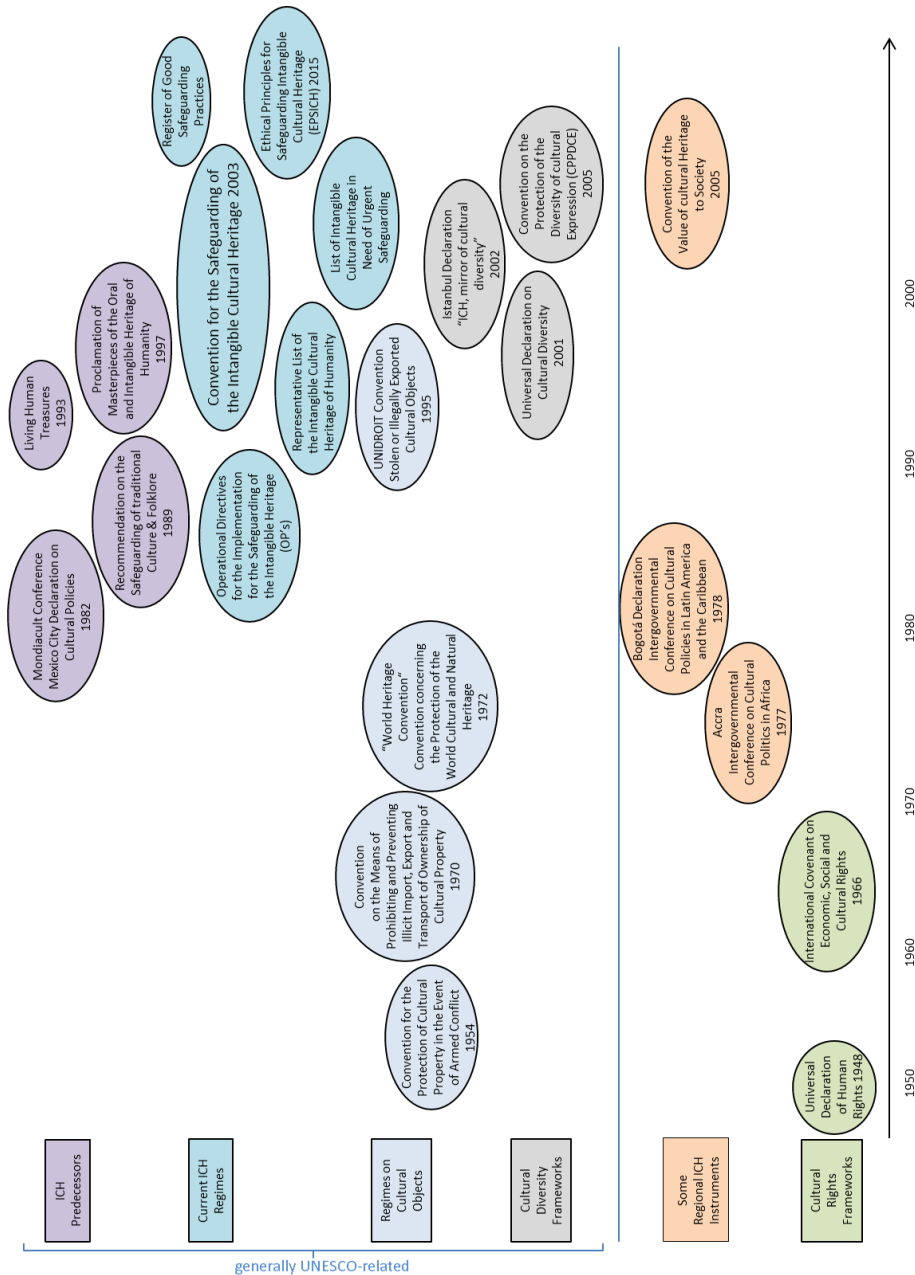
Chart 1: Towards an Intangible Cultural Heritage Regime, own research and illustration

3.2.3 Safeguarding at Different Levels

While conceptual issues establish an essential point of departure for the drafting of new international safeguards, implementation remains largely limited to the State level. Safeguards in the latter case include a number of different elements encompassing the

> 'identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education (…) and revitalisation'. (CSICH, Art.2(3))

Safeguarding thereby adopts a multi-layered format and involves different sectors such as State or non-State documentation mechanisms, universities and other research institutions, schools and other education entities, campaigns and public relations organisations, and any other societal actors involved in transmitting ICH. CSICH further spells out measures that are understood as 'safeguarding' at the domestic level. As the wording of Art.2(3) CSICH suggests, regularly updated inventories and respective reporting mechanisms (Art.12(1) & (2) CSICH) constitute one of the core measures of the safeguarding framework. Other state-based measures complement inventorying such as adopting general policies and integrating ICH into planning programmes; designating or establishing competent ICH safeguarding bodies; supporting scientific, technical and artistic studies and research methodologies; and adopting appropriate legal, technical, administrative and financial measures including training, ensuring ICH access and establishing documentation institutions (Art.13(a)-d) CSICH). All this shall be enhanced and facilitated by education, awareness-raising and capacity-building means that consist of educational, awareness-raising and information programmes; community education and training programmes; ICH-specific capacity-building activities; non-formal transmission of knowledge; public information on ICH-related threats; and education in relation to natural spaces and places of memory protection (Art.14(a)-(c), CSICH). Finally, a somewhat transversal theme runs through the Convention and safeguarding measures in particular: communities', groups' and to some extent individuals' participation is encouraged and considered itself an element of safeguarding mechanisms (Art.15, CSICH).

In addition to such specific elements and domains, CSICH is complemented by extensive list mechanisms at the international level that were established with the aim of contributing to safeguarding. However, creating lists proved to be a highly controversial issue, enabling States to manipulate concepts at their discretion with the objective of excluding or controlling heritage and its people(s) (Hafstein, 2009). In relation to CSICH, it is differentiated between the List of Intangible Cultural Heritage in Need of Urgent Safe-

guarding (Art.16, CSICH) requiring urgent measures to be adopted, the Representative List of the Intangible Cultural Heritage of Humanity (Art.17, CSICH) including a wide range of ICH elements and the Register of Good Safeguard Practices (Art.18, CSICH) which broadly encompasses programmes, projects and activities at domestic, sub regional and regional levels that conform to the overall objectives and principles of Convention.

The extent to which lists could be regarded as 'representative' poses challenges in terms of comparison with 'un-recognised' elements and priorities set by the States: most notably, selected Intangible Cultural Heritage 'items' enjoy some sort of *primus inter pares* position, (Foster, 2015) expressing implicit praise or distinction. Furthermore, the inherent complexities of ICH elements as they relate to human activity and social processes render their incorporation into lists a difficult task.

Similarly, International Cooperation adds to the safeguarding mechanisms in place at international level. In that sense, responses to persisting Global South – Global North cleavages become institutionalised despite somewhat cautious attempts as promoted by the Convention. According to CSICH, respective measures of cooperation can entail – without being limited to – exchange of information and experience, joint initiatives and the establishment of mechanisms of assistance; cooperation thereby reaches bilateral, sub regional, regional and international levels (Art.19(1) & (2)). ICH and CSICH have similarly become a focal point in programmes and inter-institutional cooperations such as Southern Mediterranean partnerships: the Euromed Heritage Programme and its co-founded sub-project Mediterranean Living Heritage Project (MedLiHer) reveal strong relations with UNESCO and promulgated agendas. Finally, 'assistance' adds to initiatives taken in the area of international cooperation; it takes a multidimensional form encompassing studies, experts and practitioners, staff training, standard-setting and creating infrastructures (Art.21(a)-(e), CSICH).

3.2.4 Operational Directives for the implementation of the Convention for the Safeguarding of the Intangible Heritage (OPs)

The list system and CSICH need to abide by further regulatory frameworks as spelt out by the Operational Directives for the implementation of the Convention for the Safeguarding of the Intangible Heritage (OPs) that were first adopted in 2008 and were last amended in 2018 which, in fact, amended its 2016 predecessor only slightly. Namely, the current regulatory framework specifies procedural monitoring obligations and adds a multilateral component to reporting processes while fostering regional exchange. OP procedures generally allow the Convention to be adapted to new developments, avoiding a static

status while enabling CSICH to remain a flexible legal instrument. The OPs can be regarded as fundamental in terms of their societal adaptability and progressiveness and when placing them into the overall UNESCO framework: most notably, they allow the Committee to regularly update provisions and to specify obligations in a contextual manner. While the OPs shall essentially guide the States in implementing the Convention, they also fill many gaps that are left unaddressed by CSICH, being itself a brief legal instrument. It is therefore crucial to engage with and comprehensively consider the OPs as the cornerstone of the overall UN ICH framework. Its thematic scope embraces

- all levels of ICH safeguarding at the international level, cooperation and international assistance,
- the ICH fund,
- participation mechanisms involving different entities,
- awareness raising on ICH and the use of the emblem of CSICH,
- reporting mechanisms and
- relating ICH and sustainable development at the domestic level.

A few issues stand out as particularly novel, broadening both substantive and procedural dimensions of the Convention. This particularly concerns the Convention's participation framework and modalities. Firstly, 'Representative List criteria' explicitly refer to the widest possible participation of communities, groups and individuals as well as to cultural diversity and human creativity. Secondly, particular attention is required for the principle of equitable geographical distribution, South-South and North-South-South cooperation and the particular needs of 'developing countries' (Best Practice Programmes criteria). In that sense, the instrument has been regarded as an approach towards fulfilling a promise to the Global South and for restoring relations in the form of recognition.[18] This further enables States to address world society and to demand inclusion of specific ICH practice in commonly agreed lists – if we would adopt a positive outlook of ICH practice.[19] The OPs also reveal possibilities of ICH requests beyond a State-based orientation: multi-national nominations as well as ICH subscriptions that are extended to other communities around the world diversify the State-based framework. In fact, priority is given to multi-national ICH submissions among other criteria. Such joint proposals have further spurred awareness-raising as well as variety and pluralisms emerging inevitably from the multiplicity of practices. Joint proposals are enhanced by a strengthened network, created

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[18] Interview with Robert Rode (Brandenburg University of Technology (BTU) Cottbus).
[19] Ibid.

partly based on common proposals,[20] partly spurred by the community focus of the in-strument, inspiring further cooperation in the light of a far-reaching scope of the commu-nity concept.[21]

At community level, a few steps have been taken to facilitate participation at the grass-roots. This concerns general recognition practice, for instance, such as the use of the ICH emblem which has been widely received in the minority context, largely based on the acknowledgement and appreciation it conveys.[22] While recognition practice similarly implies ensuring the very community's participatory possibilities of safeguarding ICH, such obligations could also be extended to informing people and capacity-building at local levels, constituting essential components of ICH safeguarding generally.[23]

Another, albeit comprehensive, part of the OPs in terms of thematic diversity is ac-commodated under the broad umbrella of 'safeguarding ICH and sustainable develop-ment' at the domestic level. ICH is considered a driver, a guarantee of and a strategic resource to enable sustainable development (SD) while both ICH and SD are regarded as interdependent. The OPs further disentangle the broad concept of sustainable develop-ment, distinguishing between social, economic and environmental dimensions. Thereby, an inclusive approach is adopted which is supposed to consider all sectors and strata of society: this explicitly encompasses indigenous peoples and migrants as well as people(s) of different ages and genders, persons with disabilities and members of vulnerable groups. Firstly, the social dimension comprehends 'sustainable food security, quality health care, quality education for all, gender equality and access to safe water and sanita-tion' (Para.177, OPs). Inclusive governance and freedom to choose respective value sys-tems thereby underlie the social dimension. The OPs approach each component in detail, specifying obligations in each case. Food security, for instance, implies both food prepara-tion skills and gathering, food preservation knowledge and practices as well as related rituals and beliefs which facilitate food security and nutrition. Again, a holistic approach is strived to be assumed, tackling different issues related to food. Similarly, provisions related to education go beyond educational systems; rather educational programmes and non-formal means of transmitting knowledge emerging within the respective communi-

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[20] Interview with X21 and X7.
[21] Interview with Robert Rode (Brandenburg University of Technology (BTU) Cottbus).
[22] Interview with Judit Šołćina (Head of Minority Secretariat of the four autochthonous minorities in Germany).
[23] Interview with Filomena Sousa (Researcher in the Portuguese NGO Memória Imaterial and Member of "Institute for the Study of Literature and Tradition – heritage, arts and culture").

ties and groups are required to stand on equal footing. The OPs also attempt to breach the gap between cultural rights and gender dimensions: while gender discrimination is explicitly ruled out, it is to be recognised that groups pass on their norms and values through ICH (see Chapter 4.6 for related debates). Secondly, the economic dimension similarly touches upon broader issues and ultimately rights, such as fighting against poverty and inequalities, addressing employment and energy as well as sustainable tourism which assumes a community-oriented role: States are required to demonstrate 'all due respect' in terms of safeguarding ICH and respect for the 'rights, aspirations and wishes' of the communities, focussing on the adverse impact tourism may have (Para.187, OPs). Thirdly, the environmental sustainability dimension addresses a particular urgent contribution based on its orientation towards the management of natural resources, climate change and natural hazards and the way vulnerable populations are exposed to such dilemmas.

3.2.5 Ethical Principles for Safeguarding Intangible Cultural Heritage (EPSICH)

Another recent development is embodied in the Ethical Principles for Safeguarding Intangible Cultural Heritage (EPSICH) understood as 'aspirational principles' (preamble, EPSICH) which were endorsed in 2015 and represent good practices. The Ethical Principles are intended to orient instruments and ethical codes. To some extent the Principles could be understood as a form of progressive development, leading to the endorsement of customary legal standards reiterating, at the same time, what is 'widely accepted (…) good practice for governments, organisations and individuals' (preamble, EPSICH).

The principles nominate mainly communities and groups as the ones who determine ICH and establish norms including principles to be obeyed in ICH-related negotiations. This is equally reflected in provisions that attribute a 'primary role' in safeguarding to cultural bearers (Art.1, EPSICH) while establishing some basic requirements for negotiations between the State and communities including mutual respect, transparent procedures and communities' or groups' free, prior and informed consent (Arts.3 & 4). EPSICH also refer to the particular ways communities should be enabled to maintain or revitalise ICH-related activities encompassing the following components:

- practices that ensure ICH viability;
- to gain access to ICH-specific objects and to ICH itself without being subjected to external judgement of value or worth;
- for the dynamic and living nature of ICH to be respected; not to be affected by any adverse direct or indirect impact on ICH;
- and to define threats to ICH including decontextualisation, commodification and misrepresentation (Arts.2, 5, 6, 8, 9, 10).

This demonstrates not only a clear emphasis on communities, groups and to some extent individuals as cultural bearers; rather specific rights are established, reflecting strong participatory constituent features. These entail having an ultimate say in negotiations; to be free from external judgement; and to identify threats. In that sense, the very defining powers associated with ICH are disclosed. The latter enables communities, groups and to some extent individuals to exert considerable interpretative powers by preventing externally-induced ICH misuse or reinterpretation of the concept by external interested parties. Practice reveals, however, how participation in 'intangible culture patrimonialisation processes is still residual and uninformed'[24]. Finally, pluralism and diversity are further enhanced by the EPSICH framework. Accordingly, cultural diversity and identities shall be protected, and – more specifically – respect and attention is to be paid to gender equality, youth involvement and respect for ethnic identities in the context of cultural norms (Art.12 CSICH).

These last aspects underline the significance of specific vulnerable groups and minorities in the CSICH framework. At the same time, the Principles seem to adopt a balancing approach, striving to reconcile international human rights norms including women's rights, youth rights and ethnic (minority) rights on the one hand and community values and cultural norms on the other hand. Yet, cultural norms and values are not excluded by their very definition; rather they shall be realised in the framework of community understandings. In fact, the wording 'in the respect of values' and 'sensitivity of cultural norms' suggests a reconcilable or intermediate approach towards both 'sets of human rights' that sometimes do conflict with each other.

3.3 The Convention and Responses from Academia

Critical voices concern themselves with the very definition of ICH that functions as a conceptual basis of the legal framework: beyond the UNESCO framework, a commonly recognised definition has yet to be agreed upon. Practitioners and experts in fact work with different conceptions of heritage that are rarely harmonised (Bendix, 2009) in the light of common working agendas or other streamlined policy purposes. In an attempt to clarify the meaning of the intangible component of cultural heritage, several theorists have agreed on the following elements; namely, a focus placed on people, not objects, and locating ICH in their 'practices, representations, knowledge and skills' (Ruggles and Silverman, 2009; Akagawa, 2016). Others question the very existence of ICH on the grounds

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[24] Interview with Filomena Sousa (Researcher in the Portuguese NGO Memória Imaterial and Member of "Institute for the Study of Literature and Tradition – heritage, arts and culture").

that heritage is made by people and undergoes processes of 'heritagitisation' (Bendix, 2009).

Yet, Intangible Cultural Heritage in the UNESCO regime has brought about more challenges related to its implementation apart from definitional concerns. Initial concerns related to how certain practice or tradition was selected and nominated, but also as to its evaluation in the inventory and listing in the CSICH framework (Akagawa, 2016). The very reasons for participating in the UNESCO framework including offering opportunities for States to engage in international cooperation and reaffirmation of cultural credentials (Kozymka, 2014) might hamper genuine efforts in terms of cultural rights safeguards.

Despite such institutional challenges, a few aspects have been widely understood as merits in the light of broader cultural heritage and human rights developments. While CSICH comes with a number of novelties in the legal heritage regime, its distinguished success can be attributed to bringing social structures and cultural processes to the fore rather than cultural objects themselves (Francioni, 2011). This could be exemplified by the way the term 'culture' is used in the Convention, suggesting a new understanding of culture that places emphasis on its flexible, changing role in social processes (Keller, Jacobs, and Jacobs, 2015).

In more general and conceptual terms, CSICH has come to offer new spaces for reflection including on the very nature and value to be attributed to cultural heritage (Smith and Akagawa, 2009). Such new spaces and the lists system in particular enhance reflection and provide contexts in which ICH elements can relate to each other (Kirshenblatt-Gimblett, 2004a). In a way, such processes embrace an understanding of cultural heritage that has undergone a process of 'anthropolisation'[25] (by) including groups that have conceptually been excluded from cultural heritage regimes such as indigenous peoples. Relatedly, this process has further allowed understanding world heritage in a more comprehensive way, as to peoples'/people's everyday life, for instance (Brumann, 2011). In that sense, communities have gained in agency. In fact; rights holders' and cultural bearers' roles can be traced throughout cultural heritage instruments.

Indeed, one distinguishing factor of the CSICH regime has increasingly gained attention in academic forums, namely the role of communities and groups. Academic debates broadly highlight cultural bearers' including communities' roles which are attributed to –

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[25] Interview with Robert Rode (Brandenburg University of Technology (BTU) Cottbus).

and in a way legitimise – their special position in ICH regimes, starting with decision-making powers over the very ICH definition. As a corollary, this might have inspired change in legislative endeavours and policies. In fact, a thorough reading of the Convention reveals cultural bearers' participatory rights in all phases of ICH safeguarding. The novel ICH regime indeed contributes to human rights protection, upholding principles that allow for mutual respect between different groups (Röschenthaler and Diawara, 2011). This is especially the case where CSICH is understood in the context of other legal developments under the UNESCO and UN OHCHR umbrellas and respective legal historical developments. For a long time, Intangible Cultural Heritage protection was taken for granted; responsibility was attributed to the communities which automatically transmitted and preserved heritage in the context of community development (Lenzerini, 2011).

By granting significant decision-making and shaping capacities to communities and local cultural bearers, the UNESCO enters a complex – albeit genuine – sphere where international norms encounter the vernacular. Indeed, it might be legitimately asked to what extent the UNESCO Convention as an umbrella framework may be able to capture local complexities such as places and people as well as their entanglements. It is such 'heritage-scapes' (Di Giovine, 2009) that go unmentioned in this framework. Places or sites and people reflect internal divisions, dynamics and diversity which are hardly reflected in standardised legal terminology. However, as a 'normative instrument' (Aikawa, 2004), the UNESCO significantly decides on a commonly recognised meaning of ICH.

Yet, numerous cases reveal how more dominant groups exert power in relation to cultural heritage within the structures of the State (Nic Craith, 2007), demonstrating quite the contrary. The Convention in that sense omits to establish protective measures to prevent such power struggles, imbalances, asymmetries or inequalities. In fact, this also suggests cultural dominance under the umbrella of harmonisation and integration: in turn, conflict could indeed be triggered by such unequal relationships among cultural bearers. In fact, critical voices have shed light on the assimilating discourses underlying legal language and implementation practice surrounding ICH. Accordingly, CSICH has largely been understood as a tool of the 'diplomacy of culture' to enhance above all 'national' cultural richness (Kozymka, 2014): so-called national cultural heritage thereby undergoes little deconstruction and respective reflections on the entanglements of different cultural understandings in place. China's ICH practice, for instance, illustrates how legal preference is given to cultural expressions that can demonstrate fulfilling specific economic or political purposes driven by the State: heritage enjoying less popularity thereby loses respective

protection given its supposedly less fundamental value (Gruber, 2017) or is subjected to attacks based on ethnic, cultural and religious grounds (taz, 2019). In a similar way, it is such societal understanding and recognition of particular collective identities that characterise the complexities inherent in societies, informing, at the same time, the main focus of this study: Intangible Cultural Heritage – if recognised genuinely and inclusively – exemplifies the way minorities including migrants are enabled (or not) to transmit traditional knowledge and skills (in societies) without being forced to assimilate under the popular and often-misused term 'integration'.

While the law could be criticised for assuming State-driven agendas and its harmonising roles of submission, it is maintained here that the very concepts of diversity and pluralism function as a 'safeguard within the safeguard' of the UNESCO-CSICH regime. In a way, the technical or quasi-procedural safeguards of the Convention including international lists, national inventories etc. are complemented by a substantive safeguard by means of pluralism, diversity and positive discrimination provisions, preventing any biased selection of traditions to take shape while allowing for a multiplicity of practices to be recognised. Of course, this implies tensions between supposedly universal values and cultural diversity, a famous debate within human rights circles with no definite reconcilable answer (see e.g. Tomuschat, 2008; Clapham, 2015; Eriksen, 2009).

In order to accommodate plural manifestations of ICH under its umbrella, it could be advanced that UNESCO adopts some form of 'metacultural policies' that stand in contrast with 'esocultural' or 'microcultural' dimensions, limiting culture to one single understanding (Foster, 2015). In fact, anthropologists often denounce the universalistic nature of the CSICH instrument which apparently establishes a 'museumalising' obsession *vis-à-vis* cultural processes (Bortolotto, 2011; Amselle, 2004). Namely, instrumentalising ICH can potentially recreate asymmetries between unequal creators of ICH and the ones to whom such objects (as in material heritage) are attributed (Kirshenblatt-Gimblett, 2004b) In a more reconcilable way, it could be argued that CSICH suggests a constant interplay between some sort of self-designation by the very practicing communities *vis-à-vis* the object on the one hand and a form of validation and 'distribution' by States on the other hand (Maguet, 2011).

Another core influence on shaping ICH conceptually at UNESCO level can be derived from non-Occidental Member States that inspired a new understanding of cultural heritage and, at the same time, being directed towards individualistic human rights discourses persisting in international organisations. Most notably, cultural heritage provisions in the

World Heritage Convention legitimised a particular Western perception of heritage (Smith and Akagawa, 2009; Sullivan, 2004). Conversely, Japanese and South Korean policies and the importance attached to the concept of 'authenticity' exemplify counter developments to such historical legacies. The Japanese conservation approach in particular describes a person's skill as a constitutive element of the process of creation and construction and in this way determines its authenticity: in practice this means that a specific practice or tradition cannot be authentic without the specific skill being transmitted in an inter-generational manner (Akagawa, 2016). It is this very form of 'embodiment' of a skill in another person which qualifies its successful transmission (Akagawa, 2016, 70) other than the traditional Occidental consideration of material components as being decisive for its authenticity.

Others have placed emphasis on local authenticity criteria determining, for example, how ICH elements should be performed or by adopting controlling functions.[26] Such understanding, however, inevitably contradicts the broad conception underlying cultural rights to be responsive to new developments. Definitional criteria for ICH recognition as promoted by CSICH indeed differ from the wording of preceding conventions that limited recognition to 'outstanding value' or 'excellence' which was eventually replaced by a more open understanding, embracing equal recognition and cultural diversity (De Cesari, 2012). Such conceptual shift also diversifies the meaning of transmission, not limiting ICH to written narratives, but understanding the latter as all-encompassing processes including different elements of human interaction. The body and person, for instance, become a means for knowledge and skill to be transmitted (Wulf, 2007). Similarly, it has been noted that intangible rights are closely related to or reflected in aesthetic life, senses, feelings and imagination (Kapchan, 2014). Again, this demonstrates how ICH is intrinsically related to the human body, including physical and psychological attributes through which ICH elements are lived and transmitted.

In that sense, the idea behind the UNESCO-CSICH regime could be regarded as novel in terms of the traditional understanding of law; it manifestly questions the relationship between safeguarded immaterial objects and the way these develop and possibly change in the course of time. In fact, the static and traditionally positivistic understanding of law – international treaties being no exception – is challenged by the Intangible Cultural Heritage regime in the sense that the object it promotes to protect is transformed by communi-

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[26] Interview with Interview with Máiréad Nic Craith (Professor at the School of Social Sciences, Heriot-Watt University, Horizon 2020 Heritage Project).

ties, groups and individuals throughout generations without compromising its legal value. Thereby it escapes the control of the very regime that brought it into existence, yet maintains its value of legal protection beyond its original state of creation. As a corollary, it could be argued that control and discretionary powers over what is defined as Intangible Cultural Heritage is shifted: it is handed over from the State (as criteria-setting institution) to cultural bearers (as creators and shapers of ICH development) – as long as the object remains in the realm of the UNESCO framework and its lists. In that sense, questions as to genuine power transfer need to be raised. In some way, cultural bearers' influence does not solely exemplify a novel form of progressive development of the law, but potentially changes State-community relations democratising its defining powers and with it the perceptions of the law by society, practitioners and academia alike.

On the dark side of ICH frameworks, however, UNESCO recognition practice enables us to oversee power politics and the way local, regional and domestic actors compete for scarce funds or diversify the distribution of financial resources to the extent that original or practicing cultural bearers do not get a piece of the pie in the worst case (You, 2015). In fact, this also jeopardises the very role of cultural bearers in a largely un-regulated field of 'cultural heritage competition' rather than cultural rights enjoyment: States as main duty bearers and rights guarantors may feel discharged of protective action.

Critical voices thus identify tensions, conflicts and power reinforcing mechanisms that are inherent to the very process of heritage making (De Cesari, 2012). Similarly, decentralised administrative structures benefit from blurred lines between decision-makers and cultural bearers and might jeopardise local communities' say in this. On the bright side, decentralised governmental structures might also come with a devolution of policy making to municipal decision-makers, allowing for more bottom-up participation or fostering inter-cultural dialogue between ethnic groups as in Peru and Mexico (UNESCO, 2016). Such bottom-up structures might, however, be restricted by language barriers that often 'carry' ICH practice. Cultural bearers thereby encounter difficulties of translation or unwillingness on the part of governments to speak local languages, hence impeding a thorough understanding of vernacular ICH practice.[27]

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[27] Interview with Monalisa Maharjan (Researcher at the Centro Interdisciplinar de História, Culturas e Sociedades da Universidade de Évora; UNESCO Chair for Intangible Cultural Heritage and Traditional Know-How).

3.4 ICH Implementation beyond the State: Responses from the EU and the Council of Europe

Responses to challenges in implementing Intangible Cultural Heritage have proven to be scarce at regional levels. This might partly be derived from inter-institutional gaps among international organisations and similar institutional or mandated actors persisting until today. In that sense, implementation faces yet another challenge, particularly as far as regional legal orders are concerned. This could be illustrated by regional IOs or similar institutions and their reluctance to obeying international law. In the case of the EU, for instance, overriding doctrines such as 'direct effect' and 'supremacy' require respective responses within domestic orders and policies. While being bound to international law, the EU would not necessarily assume prime responsibility when taking implementing action where States remain primordially accountable to peoples'/people's living in their jurisdictions. In that sense, State sovereignty prevails over regional legal orders. The rather fragmented international legal landscape, however, does not reveal similar binding effects, owing to the quasi-judicial nature of some instances; the voluntariness of submitting to monitoring or ad hoc revision; or limited fields of application such as human rights without streamlining effects beyond clearly demarcated frameworks, to name a few.

In the light of such persisting gaps between international and regional frameworks, cultural bearers and their advocates are called upon to engage in a creative reading of existing sources. Confronted with steadily growing human rights frameworks at regional levels and their binding effects for Member States, questions arise as to the altering status of international legal commitments towards, for instance, cultural rights and international ICH regimes. In the following, we will thus trace and discuss legal sources and policies adopted by the EU and the Council of Europe, providing some form of answer to the ICH implementation dilemma.

While several legal instruments have been adopted by the Council of Europe including minorities and language rights standards, these do not guarantee direct associations with or extending their protective mechanisms to Intangible Cultural Heritage *per se*. In a similar vein, European Union institutions have refrained from developing legally binding standards in the specific field of ICH and respective cultural rights regimes. However, existing 'hard law' instruments could inspire developments in the intangible sector by sensitising decision-makers in the subject area and, in turn, incentivise standard-setting.

Generally, EU institutions enjoy broad mandates under EU law and the Lisbon Treaty in particular. The very principle of cultural diversity is embedded in the Lisbon framework; cultural diversity is explicitly to be mainstreamed in all EU cultural policies.[28] The Treaty on European Union (TEU) further stipulates the Union's mandate in the cultural heritage sector, namely its role in respecting 'its cultural and linguistic diversity' and ensuring that 'Europe's cultural heritage' is safeguarded and enhanced (Art.3, TEU). Interestingly, the term 'safeguarding' is employed which at least suggests that cultural heritage is protected in a way that resembles the UNESCO framework. Similarly, the Treaty on the Functioning of the European Union (TFEU) provides some general orientation in terms of the Union's approach and core responsibilities in the cultural heritage sector. Accordingly, the Union is to 'contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore' (Art.167(1), TFEU). This context equally reflects the spirit that is promoted by CSICH and CPPDCE in the sense that it allows promoting cultural heritage while considering diversity and pluralism.

Yet, critical questions could be raised in terms of what constitutes 'the cultures of the Member States' which is ultimately determined by the very Member States and in that way does not preclude homogenous assimilationist narratives to be promoted at domestic level. Conversely, the same provision establishes protection regimes that resemble the ones established by TEU: the Union's actions 'shall be aimed at (…) the conservation and safeguarding of cultural heritage of European significance' (Art.167(2)TFEU). The very terms of the provision indicate a considerable mandate, including conserving and safeguarding cultural heritage that may be relevant beyond Europe's borders such as its role in external policies and development cooperation. The open and flexible wording might also encourage promoting recently recognised cultural practices and expressions such as knowledge that is transmitted by newly arrived migrants such as refugees to future generations. Finally, the terms 'conservation' and 'safeguarding' suggest that both material and Intangible Cultural Heritage have acquired legal status and entered common terminology to the EU legal framework.

Apart from the general mandate that is established by TEU and TFEU, particular emphasis is placed on the movement of cultural goods in the EU legal order, clearly emphasising the significance of material rather than Intangible Cultural Heritage. This is reflect-

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[28] Interview with Francesco Francioni (Professor Emeritus of International Law at the European University Institute and Professor of Int.l Cultural Heritage Law at LUISS University).

ed in EU-IO agreements in the area of trafficking cultural goods. It also includes a range of legislative acts dealing with, for instance, the return of cultural objects unlawfully removed from the territory of a Member State (e.g. Directive 2014/60/EU) or regulations on the export of cultural goods (e.g. Council Regulation (EC) 116/2009). Additionally, the Council of the European Union and the representatives of the governments of the Member States have committed themselves to promoting cultural diversity and intercultural dialogue in the external relations of the Union and its Member States in order to strengthen the

> 'role of culture in the policies and programmes conducted within the framework of external relations and promoting cooperation with third countries and international organisations with responsibility in the field of culture, in particular UNESCO and the Council of Europe (…)' (OH C 320, 2008)

Despite this broad mandate in recent cultural policies and programmes, Intangible Cultural Heritage remains at the very surface of policies with a few exceptions.

Similar to the aforementioned CPPDCE, the Council of Europe adopted the Declaration on Cultural Diversity in 2000 and thereby explicitly protects cultural diversity understood as culturally different practices and culturally different services and products. Some informal safeguards are provided by relating cultural diversity to free creative expression and freedom of information. Interestingly, the instrument embarks on other fields and rights by linking cultural diversity and sustainable development with the objective of enabling future generations to engage in culturally diverse practices, constituting at the same time one of the core elements in the ICH regime and transmission practice. The Declaration further proposes specific measures to promote and respect cultural diversity in the area of cultural and audio-visual policies in relation to trade, the knowledge economy, cultural industries that encourage linguistic diversity, public service broadcasting, education, professional and user training. A final role is played, it could be argued, by the Convention on the Value of Cultural Heritage for Society (Faro Convention)[29] adopted in 2005 which would accommodate cultural traditions, mutual cultural understanding and respect for pluralism.[30]

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[29] Other CoE instruments of possible relevance include The Declaration on Intercultural Dialogue and Conflict Prevention (2003), the Faro Declaration on the Council of Europe's Strategy for Developing Intercultural Dialogue (2005) or the Parliamentary Assembly of the Council of Europe Recommendation 1277 (1995) on migrants, ethnic minorities and media.
[30] Interview with Francesco Francioni (Professor Emeritus of International Law European at the University Institute and Professor of Int.l Cultural Heritage Law at LUISS University).

4. Intangible Cultural Heritage and its Imminent Extinction: Contemporary Risks and Challenges

4.1 Summary – Chapter 4

Intangible Cultural Heritage may emerge in a variety of forms, it may be practiced by a number of communities, yet it also finds itself enabled or jeopardised by powerful institutions. This chapter attempts to trace current challenges, being articulated at community level and in international forums alike in the light of a multi-instance safeguarding regime. A few main ICH categories are thereby uncovered and systematised, including the influence and limits placed by digitalisation and resulting commodification and economic impact, tourism and other contemporary challenges. This, in turn, has given rise to a few common areas of concern: inter-generational transmission is demonstrably interrupted or jeopardised; rural populations including indigenous peoples are forced to leave their homes, lands and territories; customs and identities related to tribes, ethnicities, indigeneity and language disappear or undergo severe threats. All this becomes accentuated in the List of Intangible Cultural Heritage in Need of Urgent Safeguarding, albeit without allowing for inclusive recognition of cultural rights. ICH discourses therefore remain to be disentangled while official safeguarding demands to be approached in a distinguished manner. In that sense, current ICH practice is compared and contrasted with overlapping and coexisting cultural rights protection regimes. Women's rights serve as a particularly telling example in such contentious situations and commonly conflicting rights.

4.2 The Pitfalls of Material Heritage Protection and Responses from an Evolving Safeguarding Regime under CSICH

To a significant extent the Intangible Cultural Heritage regime was established as a direct response to imminent threats in a specific historical context. This included European colonisation and assimilationist policies in the Global South (Tuhiwai-Smith, 1999), but it also extends to socio-economic changes within Europe such as developments associated with 19th century industrialisation and urbanisation that initiated a new scientific era threatening hitherto maintained traditional practices (Nora, 1989). Yet, the resulting preservationist regime which culminated in the UNESCO framework corresponds to material cultural heritage needs in the first place. Conversely, Intangible Cultural Heritage is closer connected to changing (native) identities and contemporary cultures as Alivizatou (2014) observed in Maori communities in New Zealand. In fact, ICH has been considered 'an integral part of people's group identity' and identity shaper (Lixinski and Schreiber, 2017).

Other theorists including Bharucha (2000) introduce the concept of 'politics of erasure' which considers re-inventing, re-interpreting and exploring new practices, considering these as legitimate cultural transmissions from the past. Most notably, this becomes cen-

tral in post-colonial contexts where histories are re-written, allowing historically marginal-ised groups such as indigenous peoples to gain voice in cultural, political and educational programmes and policies. Museums thereby gain different functions which emphasise living experience and memorial as opposed to mere conservationist purposes, stemming from the logics underlying material heritage. For a long time, it was not deemed important to establish specific safeguards for Intangible Cultural Heritage as this was to happen at local level. However, the forces behind globalising processes including cultural impositions have drawn to the urgency of establishing legally enshrined safeguards at global level (Lenzerini, 2011). Selling cultural goods to international art dealers illustrates such indispensable need (Hewitt, 2007): dispossessed populations would both lose access to their very (material) cultural heritage and respective cultural practice intrinsically related to the former. The CSICH 2003 List of Intangible Cultural Heritage in Need of Urgent Safeguarding provides a first impression of contemporary threats and needs in that regard.

4.3 Systematising Contemporary Threats and Needs

Despite their considerable diversity in nature, currently listed ICH practices and traditions face common threats that severely jeopardise their continued existence. A transversal indicator is obtained by observing sheer numbers of cultural bearers; declining numbers of cultural bearers also limit the possibilities for ICH transmission. Again, the person-specific-nature of ICH compared to tangible heritage qualifies its future existence. Apart from such general observation, a few common determinants become apparent when examining the 52 elements recognised by UNESCO under 'urgent safeguarding' from 2009 until 2017. The List of Intangible Cultural Heritage in Need of Urgent Safeguarding has in fact been generally described as one of the most important ICH instruments.[31]

One of the most common reasons attributed to ICH-specific loss are migration developments that affect cultural bearers in transmitting practices. In fact, around 40% of all endangered practices classified as 'in need of urgent safeguarding' are attributed to urbanisation and migration, specifically outward migration, emigration to further education or work, urban development and settlement, but also migration between communities and forced displacement of cultural bearers, resulting in a loss of ICH practices. In fact, traditional employment opportunities are often intrinsically linked with ICH practice which disappears when people migrate for employment elsewhere. On the bright side,

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[31] Interview with Filomena Sousa (Researcher in the Portuguese NGO Memória Imaterial and Member of "Institute for the Study of Literature and Tradition – heritage, arts and culture").

urban areas increasingly convert into highly diverse spaces; some authors would denominate them 'superdiverse' spaces (Phillimore, 2016; Van der Zeijden, 2017). It remains questionable though to what extent diversity in both rural and urban areas is able to be maintained and flourish: in that sense it could be argued that cities merely count with some form of 'relative diversity' in the light of rural cultural loss and impoverishment.

Somewhat relatedly, modern technologies and associated broader economic impact influence people's and peoples' possibilities to engage in ICH-related practice and transmission processes. Some processes and techniques might be directly embedded into market structures and hence depend on developments favouring specific designs or simply increase costs for non-industrial or mass-produced craftwork and arts which,[32] in turn, enable but also limit professionals to specific fields of expertise and employment. Such relationship between new technological developments, related economic impacts and ICH represents about 35% of all endangered practices inscribed in the UNESCO list.

In various cases, the use of modern technologies and entertainment practices have reduced the number of knowledgeable practitioners for several reasons. Firstly, the economic boom in many communities demonstrably incentivised people to abandon employment which was intrinsically related to maintaining specific cultural practice: ICH thereby disappears in a less direct or perceivable way while preventing any concrete (urgent) measures to be adopted. In a similar vein, economic insecurity has caused cultural bearers to abandon cultural practices by limiting peoples'/people's time, resources etc. Secondly, vanishing cultural practice can be explained by the introduction of new material or devices that replace material heritage which qualifies, in turn, possibilities of practicing respective intangible heritage. This includes inter-alia different means of transport, communication (mobile phones instead of whistle languages), agricultural equipment and methods (new grazing methods instead of shepherds) but also intangible forms such as commercial music genres and new forms of entertainment substituting traditional forms of music and dances. Reasons for such changes cannot solely be attributed to exogenous factors, but also lie with cultural bearer communities who are enabled to commercialise and popularise ICH practice or not.[33] At the same time, ICH practice faces dangers of being detached from its traditional meaning and context, adopting other functions in such processes of exaptation (Sedita, 2012).

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[32] Interview with X21.
[33] Interview with Norbert Müller (Head of CIOFF® Germany and Vice President of CIOFF® world association).

Conversely, it was noted elsewhere that (digital) technologies also open new ways to communicate and explore new options in the cultural heritage sector generally, provided that this is recalibrated in relationships between heritage as such and the individuals practicing it (Borowiecki, Forbes & Fresa, 2016). In fact, digital preservation has contributed to maintaining digitised material on cultural practice in the course of time (National and Kapodistrian University of Athens, 2013); this also means that traditional forms have been able to survive and could arguably be transmitted to future generations through archives, for instance. Further, digital technologies in the cultural sector have contributed to learning about cultures elsewhere, thus supporting reflective, critical and differentiated thinking about one's own cultural practice (Combi, 2016).

Thirdly and relatedly, market-driven factors contribute to the replacement of traditional practices by modern technologies. This is profoundly caused by popular demands for industrially-made alternatives. Indeed, cultural heritage itself has become popular culture, being converted into an extraordinarily fast process (Waterton, Watson & Silverman, 2017; Robinson & Silverman, 2015). Traditional materials are exposed to competition with factory-made products. At the same time, cultural bearers increasingly face difficulties in obtaining raw materials. In addition, more expensive and sophisticated techniques in the ICH sector are superseded by cheaper, simpler alternatives. This inevitably raises the question on cultural ownership and the open access nature of ICH practice: conflicts between the two easily arise in the ICH field (Calamai, Ginouvès & Bertinetto, 2016; Farah & Tremolada, 2015), to be further discussed in chapter 5.

Furthermore, urban migration strongly affects inter-generational ICH transmission in mainly rural areas; the universal phenomenon of aging populations thereby specifically affects inter-generational transmission practice. In fact, the aging of the population has been explicitly identified as one of the risk factors of ICH.[34] In addition to the general impact of urban migration on youth and their employment opportunities, a few other reasons explain difficulties for young people to become cultural bearers. Approximately 30% of all endangered practices are related to young people's unwillingness or incapacities in maintaining or developing cultural practice or traditions; this includes inter-alia their disdain, disinterest, waning or lost interest in ICH, decreasing popularity or considerations of ICH as irrelevant. Indeed, most cultural practices have not assumed digital

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[34] Interview with Filomena Sousa (Researcher in the Portuguese NGO Memória Imaterial and Member of "Institute for the Study of Literature and Tradition – heritage, arts and culture").

dimensions and online character; yet, digital media and merging online and offline worlds are decisive for young people's lives (Wulf, Kontopodis & Varvantakis, 2017), turning them into so-called 'digital natives' (Prensky, 2001).

However, when observed more closely, exogenous factors also influence such phenomenona. In many cases, young people are less exposed to traditional knowledge and encounter difficulties in accessing resources based on scarcity of knowledge sources which remain out of reach for new generations. More systemic reasons add to the access burden new generations are facing. Namely, the very formal nature of education systems often neglect immaterial forms of knowledge and for such forms to be respected, recognised and integrated into curricula. Oral narratives and informally transmitted knowledge enjoy less recognition and hence, hardly find their way into teaching and thereby formal transmission processes. The close relationship between teachers and students in ICH transmission processes as well as interpretative skills, for instance, become apparent in instrument-building processes and practising music.[35] Most notably, such forms of transmission have become an instrumental expression of society in the course of time, transcending different eras and paradigm shifts.[36] Finally, young generations' new interpretations of ICH practice might be understood as little authentic or illegitimate in the eyes of traditional practitioners and interpretative authorities in cultural communities and organisations. At the same time, alternative and hybrid identities created through cultural heritage constitute an important reference for youth (Kapchan, 2014). Such inter-generational discontinuity and explicit discouragement of new interpretations arguably violates the very flexible ICH nature as promoted by CSICH while threatening its overall survival as cultural heritage.

Finally, some threats concern particular customs and identities that are linked with tribes, ethnicities, indigeneity and language amounting to about 21% of all endangered ICH elements. While ethnic and cultural identities have been used in the heritage context as a vehicle for mobilisation and struggle for socio, political and economic agendas in the light of multiculturalism (Waterton, Watson & Silverman, 2017; Turner, 1993), minorities representing such identities confront difficulties in gaining ICH recognition. Such ethnic or cultural identities are faced with laws and societal rules that ultimately undermine ICH-related practices and traditions while reflecting majority rule. Majority rule as sup-

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[35] Interview with Michael Gerhard Kaufmann (Professor, University for Church Music in Heidelberg, authorship: application for inscription on Representative List of the Intangible Cultural Heritage of Humanity "organ craftsmanship and music").
[36] Ibid.

ported by State laws in particular may conflict with traditional tribal customs; in some cases, political and social processes may alter cultural universes. As case studies on rural minorities demonstrate, State policies may explicitly assimilate minorities to create homogenous citizenry (Human, 2017). This might be demonstrated by different settler policies around the world that strive to (re)conquest habited territories and engage in dispossessive land policies, so-called land grabbing. However, threats also emerge in more subtle ways, namely in the way traditional culture is appreciated by society at large, how traditions disappear, are neglected or confronted with animosity.

Influence and assimilation, including enforced forms of assimilation[37] or imposition of 'national' cultures are common place in most inscribed cases that concern ethnic, tribal or indigenous identities. This, in turn, also concerns diversity in society at large and diversity inherent in communities threatened by the homogenising forces of law and society. The very groups themselves as cultural bearers are exposed to additional pressures and vulnerabilities: Afro-Colombian Palenque communities, for instance, suffer additional rights' violations including racial discrimination in the context of large-scale agro-industrial projects and armed groups that control their lands (Escallon, 2017). In such situations, land rights prove essential for indigenous people's right to self-determination that ultimately relates to their cultural identities and respective rights.[38] Dissolving such links between ICH and lands, it is argued, alienates such demands from their political dimension and ignores the significance of political institutions that are oriented towards specific territorial notions.[39] As a response, academic debates have embraced yet another somewhat broader term, namely 'Intangible Cultural Heritage Systems' paying due regard to actors at different levels involved in their own way in the implementation process (Lixinski, 2017; Scounti, 2017).

Cultural identities themselves remain a debatable issue within the UNESCO framework when related to indigenous peoples:[40] ICH elements as distinctive cultural practice might touch upon wider concepts and interrelated customs as understood by indigenous peoples.[41] Such wider understanding also encompasses different dimensions of indige-

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[37] Interview with Clemens Škoda (Referent für Kultur und Ausland, Domowina Bund Lausitzer Sorben e.V.).
[38] Interview with Julian Burger (Visiting Professor and Fellow at the Human Rights Centre, University of Essex, Human Rights Consortium, School of Advances Study London).
[39] Interview with (refers to himself as) French speaking Canadian political scientist.
[40] Interview with Julian Burger (Visiting Professor and Fellow at the Human Rights Centre, University of Essex, Human Rights Consortium, School of Advances Study London).
[41] Ibid.

nous knowledge (systems) that form(s) part of what could be denominated 'emplaced knowledge', itself being intrinsically related to land tenure and land security (Fan, 2014).[42] While the open nature of ICH and its far reaching criteria and categories might allow for a broad range of practices to be recognised under the framework, there is a danger of selecting particular cultural aspects which, in fact, form part of a bigger cultural picture.[43] Accordingly, it has been advanced that the very distinction between intangible and tangible forms of cultural heritage exemplified by the situation of indigenous peoples constitutes 'an artificial and arbitrary distinction since the intangible significance of heritage informs its tangible significance' (Bassani, 2017). Politics influencing global cultural heritage thereby play a considerable role:[44] nominations and selection processes are ultimately embedded in wider power relations and priorities that might not always consider indigenous cultural rights as demanded by the communities. Other impeding forces include the fragmentation within international law affecting indigenous rights to cultural heritage enhanced by a form of compartmentalisation and specialisation of indigenous cultural heritage (Xanthaki, 2017) as well as conflicts and tensions between said regimes (Xanthaki, 2017; Jakubowski and Wierczyńska, 2016).

Such forms of fragmentation thus preclude a holistic understanding of cultural rights that pays due regard to indigenous cosmovisions and related rights. Conceptually speaking similar observations can be made. Most notably, cultural heritage has been understood as incompatible with indigenous heritage, partly owing to European colonial State-centric views that subordinate intangible and cultural values to tangible agendas (Bassani, 2017). For a long time, cultural rights debates have developed somewhat in isolation of group and minority rights by excluding the latter groups (Jakubowski, 2016). Critical voices might remark that culture itself – as understood by indigenous communities – cannot be separated and isolated from background and contexts.[45] Relatedly, the lack of specialised mechanisms such as treaty-based mechanisms or special rapporteurs on ICH prevents cultural bearers from accessing their cultural rights and exposing them to the discretionary powers exerted by the respective States.[46] These, in turn, may deny indige-

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[42] Interview with Rebecca Fan (Postdoctoral Scholar, UC Berkeley and International Union for Conservation of Nature).
[43] Interview with Julian Burger (Visiting Professor and Fellow at the Human Rights Centre, University of Essex, Human Rights Consortium, School of Advances Study London).
[44] Ibid.
[45] Interview with Julian Burger (Visiting Professor and Fellow at the Human Rights Centre, University of Essex, Human Rights Consortium, School of Advances Study London).
[46] Interview with Rebecca Fan (Postdoctoral Scholar, UC Berkeley and International Union for Conservation of Nature).

nous peoples status within their domestic boundaries, creating a barrier for them or other impacted populations to access international mechanisms in addition to the burden of institutional fragmentation.[47]

In many cases the decline in ICH elements is associated with language use which equally suffers discriminatory conduct. It could be argued that languages form part of ICH itself, complementing their role as vehicles of culture (Bernini, 2014). In fact, languages show to be fundamental in maintaining cultural identity and instrumental in passing culture on to future generations.[48] In practice, language use is often openly discouraged in the ICH context. Complementarily, native mother tongue(s) (speakers) are endangered and thereby affect the extent to which ICH elements can be maintained and transmitted at all. Such endangerment can be attributed to a number of factors and developments including linguistic imperialism and globalisation, States' language policies and language shifts (Bernini, 2014). As described above, ICH elements are closely related to cultural bearers and so are languages: Kenuz Nubian language communities in Egypt face and suffer forced displacement, constituting one of the predominant causal factors in terms of language endangerment (Rowan, 2017) in addition to severe language policies (Sharkey, 2007). In the case of indigenous peoples around the world, language extinction remains a prevalent human rights violation in addition to other (arguably related) dangers such as biodiversity loss.[49]

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[47] Ibid.
[48] Interview with Julian Burger (Visiting Professor and Fellow at the Human Rights Centre, University of Essex, Human Rights Consortium, School of Advances Study London).
[49] Interview with Rebecca Fan (Postdoctoral Scholar, UC Berkeley and International Union for Conservation of Nature).

4.4 Digitalisation and Commodification

In general terms, globalisation, its homogenising power and the promotion of mass culture may undermine local cultural expressions. Specifically, unemployment and other social impacts exerting detrimental effects on cultural practices are in part caused by new industries (Stefano, Davis and Corsane, 2014).

Commodification thereby takes a lead role in undermining the significance of heritage and its cultural bearers. In that context, one of the risks for cultural bearers consists of manipulations for commercial purposes; in that sense, particular care needs to be taken as 'cultural heritage shouldn't be regarded as an economically viable product that turns itself into capital when responding only to market and tourism needs'[50].

Furthermore, new technologies exacerbate such effects by introducing new electronic devices that contribute to blurring the boundaries between heritage and commodity. In this context questions of cultural property and copyrights have been raised as part of the larger digitalisation discourse (Mugabowagahunde, 2016). Digitalisation also provides challenges in terms of accessing new digital sources of heritage and its very creation: isolated communities may be excluded from decisions on how ICH elements are represented in public forums, and hence being perceived and interpreted. Again, cultural self-determination can be significantly undermined where cultural bearers' continued ICH-related practices are categorically separated from their digital counterpart and respective authorship. Participation through digitalisation thereby reaches limits and reveals a form of democratic deficit requiring positive measures to fill the accessibility gap of modern technologies.

At the same time, digitalisation has become an important means of mediation, providing opportunities to access more information on the context in which ICH objects evolve (Logan, Nic Craith and Kockel, 2016). Documenting specific practices in digital form such as films and audios can contribute to a virtuous circle in which archiving and documenting increases accessibility and distribution of heritage. This, in turn, stimulates cultural practice by facilitating wider use of dictionaries and collections (Keller, Jacobs and Jacobs, 2015). Dissemination by means of YouTube videos, for instance, offers a wide range of opportunities such as storing heritage in the very lived circumstances in which it materialises while capturing the changing nature of its practice; user-generated videos further add

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[50] Interview with Filomena Sousa (Researcher in the Portuguese NGO Memória Imaterial and Member of "Institute for the Study of Literature and Tradition – heritage, arts and culture").

to such representations which are provided by official archives or lists by offering alternative accounts and tracking of changes (Pietrobruno, 2014). In fact, it could be argued that such lists offer a new understanding of how ICH elements are constituted in a highly participatory format. Existing lists inherent to traditional archives may be reinterpreted by means of listings produced by algorithms; this may also associate documents that were previously unrelated or part of separate entities (Ernst, 2006).

Particular challenges add to the difficulties that come with digitalisation when addressing vulnerability. Most notably, fieldwork with indigenous communities in northeastern British Columbia reveals difficulties related to transforming Intangible Cultural Heritage into 'digital cultural heritage' (Hennessy, 2014). Namely, recent digitalisation of oral narratives in the area provoked tensions related to cultural representation, copyright issues and cultural property ownership which intensify in the context of digital circulation (Hennessy, 2014; Cruikshank, 1992). Social practices may or may not be maintained where mobile devices replace more 'traditional' ICH means, depending on the particular use made by the respective community.[51] However, 'borrowing' from the traditional conservationist tools of material heritage does not prove to be an option: other than material cultural heritage, ICH cannot be stored in museums and requires new means such as digitalisation. At the same time, digitalisation cannot be considered a neutral exercise which involves questions as to what constitutes an archive, its components and categories; in short, decisions on such issues could be considered part of colonial politics (Stoler, 2002) in indigenous contexts. Ultimately, digital archives are not necessarily in the hands of cultural bearers and depend on existing power relationships as well as related asymmetries.

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[51] Interview with X34.

4.5 Tourism

Communities and groups are increasingly exposed to pressures that are related to popular culture, trends and new economic income e.g. generated by tourism. In fact, ICH is increasingly associated with specific agendas and a particular utility: tourism exemplifies these endeavours in reaching high levels of utility and to measure cultural resources in terms of their economic value to increase life quality (Luger & Wöhler, 2010). Such economic importance also jeopardises community values and accessibility, being (at least partly) attributable to the alleged artificial nature and folklorisation of ICH practice.[52] Other cultural elements are thereby undermined.[53]

Other than tangible forms of heritage, intergenerational ICH transmission processes take longer, they spread across generations and largely resist market-driven agendas – and it could be enhanced that they might not immediately generate economic benefits.[54] One of the dangers related to particularly pronounced folkloristic forms of ICH such as festivals consists of dependencies on touristic agendas and interests. It could be argued that this potentially subverts specific practices and their meaning by submitting to external demands.[55] This might be especially true for intangible forms of cultural heritage, being more susceptible to contexts and external pressures[56] – demonstrating yet another vulnerability which proves particularly attributable to intangibility.

All this presupposes decisions on what counts as cultural heritage and is 'worthy' to be defined as traditions, practices, customs, expressions etc. (Luger & Wöhler, 2010) and hence to be widely recognised as ICH. In that sense, tourism potentially influences future ICH developments and the way in which ICH is represented *vis-à-vis* the outside world beyond cultural bearers' interpretations. By the same token, such external ICH representations are taken up by community discourses and interactions where cultural heritage elements are renegotiated and newly defined. Tourism therefore exposes ICH to bidirectional cultural processes and ultimately influences transmission and 'distribution' of recognised ICH elements. In the latter context, ICH inevitably faces pressures that call for

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[52] Interview with Marlen Meißner (PhD candidate Heritage Studies, UNESCO ICH Subsidiary Selection Commission Brandenburg).
[53] Interview with Clemens Škoda (Referent für Kultur und Ausland, Domowina Bund Lausitzer Sorben e.V.).
[54] Interview with Marlen Meißner (PhD candidate Heritage Studies, UNESCO ICH Subsidiary Selection Commission Brandenburg).
[55] Interview with X27.
[56] Interview with X32.

change and innovation, yet adaptability in the tourism context may be limited to economic values and hence assume exclusionary functions

Within the UNESCO-CSICH framework, Member States regard ICH recognition as an important contribution to tourism-related objectives such as exclusiveness and public awareness, going beyond ordinary meanings of everyday life practice embodied in ICH elements (Walcher, 2010). Such direct relation also entails dangers as recognition of certain cultural practices may be dependent on its distinguished success and popularity. It also exposes communities to popular demands which could be decisive for the survival or maintenance of a certain practice.[57] Such practices potentially start competing with tourism-induced goods or performances which become 'nostrificated', i.e. become part and parcel of vernacular cultural heritage regarded as authentic by the very communities (Schnepel, 2013). Tourism also exerts other forms of pressure on cultural heritage processes, including two contrasting effects that are related to the appropriation of perspectives by the touristic sector, namely homogenisation and differentiation: homogenisation emerged out of necessities to conform to standards of comfort, security and aesthetic presentations, whereas differentiation creates and represents particularities and singularity in terms of places and regions (Spode, 2013). Both 'touristic effects' could be considered threats for cultural bearers in their efforts to maintain ICH-related practice and traditions. Homogenisation, for instance, operationalises strong pressures to adapt ICH to popular demands which might affect the very core of some cultural practices and thereby endanger its very continued existence. Differentiation focusses on particularities as well as singularities that are created or represented by actors in the tourist sector other than by cultural bearers – this might in turn limit communities' cultural self-determination in deciding on the meaning, significance and visibility of ICH according to vernacular perspectives.

On a positive note, popularity related to certain traditions is demonstrated by an increase in wearing traditional customs on special occasions (Paulik 2009; Keller, Jacobs, and Jacobs, 2015). This demonstrably allows minorities to truly enjoy their cultural rights in accordance with their very own ideas of what constitutes collective identities and how to enforce them by means of ICH regimes. Increasing popularity combined with wider awareness can indeed spur further developments in transmitting ICH elements to future generations. ICH-related tourism may serve as a facilitating mechanism in a two-way

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[57] Interview with Judit Šołćina (Head of Minority Secretariat of the four autochthonous minorities in Germany).

relationship: tourism feeds spectators with identity-loaded presentations of marginalised and locally-based people whereas cultural bearers fill cultural performances with authenticity and relevance (Girke & Knoll, 2013).

Ultimately, challenges and opportunities related to tourism also depend on how communities have learnt to deal with external demands. In multi-ethnic and multicultural Nepal, for instance, continuous migration and traders of goods and 'news' have shaped societal developments for centuries; apparently, local culture and traditions were maintained despite such constant exchange and influence (Høivik, 2010). Ultimately, current ICH interpretations are eventually (re-)negotiated by their 'interpretational authorities or jurisdictions'.[58] Such a role as assumed by cultural bearers in interpreting ICH should be respected and valued, particularly by those directly involved, paying due regard to their voices.[59]

4.6 Conciliating the Irreconcilable? Intangible Cultural Heritage and Human Rights

While CSICH explicitly refers to existing International Human Rights Law (IHRL), such references do not reach deep levels or find sufficient elaboration. The International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as the International Covenant on Civil and Political Rights (ICCPR) find mentioning, yet their specific relevance and application go unmentioned in the non-operational preambular paragraphs. In a more committing manner, the definitional part of CSICH provides that ICH is only given consideration if it complies with IHRL.

However, such legal – not to mention human rights – dimensions are largely missing in debates around (intangible) cultural heritage (Silverman & Ruggles, 2007; Durbach & Lixinski, 2017) requiring further research and closer examination. Encounters between the two legal regimes require a more sophisticated approach, taking the debates beyond absolute divides and superficial analysis and require such questions to be addressed with more care.[60] Instead, (intangible) cultural heritage is merely dealt with under the umbrella of cultural diversity, not IHRL as such (Borelli & Lenzerini, 2012; Durbach & Lixinski,

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[58] Interview with Fabian Jacobs (wissenschaftlicher Mitarbeiter der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut) and Ines Keller/Kellerowa (wissenschaftliche Mitarbeiterin der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut).
[59] Interview with Filomena Sousa (Researcher in the Portuguese NGO Memória Imaterial and Member of "Institute for the Study of Literature and Tradition – heritage, arts and culture").
[60] Interview with Francesco Francioni (Professor Emeritus of International Law at the European University Institute and Professor of Int.l Cultural Heritage Law LUISS University).

2017). Within the field of human rights law, issues of cultural heritage are hardly addressed at all (Blake, 2011) which, in fact, calls for debates that use human rights as a starting point (Silverman & Helaine, 2007). It is also demanded to place human rights in the centre of heritage conservation activity such as heritage identification and as underlying conservation processes (Logan, 2012). Following this logic, ICH would require even more of a focus on human rights, on grounds of its strong connection with human actors as the ones who transmit specific practices, traditions etc. This would also demand accommodating social processes, the collective, values and the very articulation of potential conflicts with human rights.[61] Safeguarding thereby distances itself from the idea of placing exclusive emphasis on objects, material or immaterial and, instead extends protection mechanisms to the human world(s).

An entry point to such debates could be provided by linking the two frameworks in a conceptual sense: cultural heritage has primarily worked as a mechanism to ensure identity constructions; human rights, in turn, have facilitated the legal safeguarding of said identities (Francioni & Lixinski, 2017). It is often underestimated what role human rights can play to reinforce cultural heritage protection, thus going beyond safeguarding an object or practice itself (Durbach & Lixinski, 2017). The human rights framework thereby opens an alternative venue and forum for cultural bearers where ICH instruments do not establish specific rights and obligations or where ICH-specific laws and policies are not implemented. This becomes important where ICH instruments are not ratified in certain States and where human rights treaties as well as customary law can bridge such legal gaps to the benefit of communities, groups and individuals. In addition, cultural heritage can be enforced via IHRL whenever human rights show an enhancing function on heritage management and governance, providing access to decision-making mechanisms (Durbach & Lixinski, 2017).

Conversely, human rights can be considered through the tools of heritage management where communities' needs and values are identified before conservation frameworks are implemented (Gillespie, 2017) – in a way resembling a (pre-)screening exercise. It remains to be observed to what extent similar observations can be made in the case of ICH. Finally, human rights mechanisms have been used by States to reverse colonial heritage logics including issues of representation that led to exclusion of communities' heritage in, for instance, sub-Saharan Africa: explicit references to human rights norms in

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[61] Interview with Francesco Francioni (Professor Emeritus of International Law at the European University Institute and Professor of Int.l Cultural Heritage Law LUISS University).

domestic laws helped to protect local heritage expressions (Shyllon, 2017). The post-Apartheid context is often used as a reference in this case where cultural heritage laws, if in line with human rights may generate 'emancipatory outcomes' (Durbach, 2017: 224).

At the academic level, similar reciprocal relationships have been examined between the two legal regimes: human rights language can help to develop critical perspectives on (intangible) cultural heritage as such (Lixinski, 2015). Conversely, cultural bearer communities such as indigenous peoples have emphasised the importance of orienting cultural heritage towards human rights-specific needs, stating 'the protection and recognition of their cultural heritage is an essential element of their survival as distinct peoples' (Gilbert, 2017).

On the other hand, placing cultural heritage under the umbrella of IHRL bears certain dangers such as debates around cultural relativism exemplify: universalising human rights instruments may easily override cultural diversity if framed in static terms. It also creates dependencies between the two frameworks, particularly for cultural heritage to respond to IHRL. While normative foundations and ethical values characterise human rights law, the latter is sometimes criticised for its top-down manner in implementation processes as well as its one-sided orientation. This could be exemplified by the traditional orientation of IHRL towards the individual, the first treaties ICCPR and ICESCR in particular. Cultural heritage, on the other hand, is regarded as being of societal or collective nature (Francioni & Lixinski, 2017). At the same time, it could be argued that the particular bottom-up approach of CSICH might not methodologically coincide with numerous (not all!) human rights treaties that show weaker forms of rights holder orientation in terms of attributing shaping and interpretive powers of such treaties to those subjected to them. It has further been observed how little human rights provisions in international instruments explicitly address protecting culture (Francioni & Scheinin, 2008) or ICH-specific rights. Indeed, by doing so, IHRL enters difficult debates that go beyond universally condemned practice such as female genital mutilation. Traditional local justice mechanisms or traditions including specific gender-attributed roles enter these spaces, so-called interlegality (De Sousa Santos, 1995). In such complex contexts and dynamics, IHRL mechanisms struggle with accommodating diversity and spend considerable time finding the language (Groth, 2012).

Recent developments, however, reveal strong tendencies of relating the two regimes in terms of introducing collective agendas and right holder orientation into IHRL; this encompasses most notably indigenous and minority rights including migrant popula-

tions. Conversely, discussing new legal frameworks that could accommodate such groups also comes with conflicting rights and interests between the State and different groups (Borelli, 2012). On the bright side, such developments have led to recognising pluralism and diversity in legal instruments. General Comment 21 issued by ICESCR illustrates this: the protection of the right to take part in cultural life (Art.15, ICESCR) enables a panoply of cultural practices and ways of life to materialise, thus going beyond a narrow conception of culture (Borelli, 2012) and perspectives promulgated by the traditional world heritage regime, placing a primary focus on tangible heritage.

Other IHRL instruments reveal similar practice and approaches while being subjected to the conceptual difficulties as discussed earlier. The origins can be traced back to perceptions of culture that described the latter as static, abstract and homogenous rather than as a shared experience or practice operating across multiple social spaces (Preis, 1996). It is in the very framework of constructive dialogue between UN treaty bodies and States in the context of reporting mechanisms where States are urged to revisit or are challenged on specific cultural practices (Addo, 2010). In an attempt to balance between so-called universal human rights and their implementation in diverse cultural contexts, UN treaty bodies try to even out competing claims and scholarly polemicism that characterise some debates on the human rights and cultural heritage nexus (Addo, 2010). In fact, scholarly contributions have been largely criticised on studying the concepts separately; some disciplines focus only on a few concepts while leaving out others (Logan, 2012).

Somewhat simultaneously, cultural heritage regimes have opened up for human rights issues in a way that could be called the 'process of humanisation' of international cultural heritage law (Borelli & Lenzerini, 2012). This could be illustrated by the gradual involvement of participation clauses in heritage-relevant instruments, revealing both democratising potential as well as, albeit in a more indirect way, a human rights-based approach to heritage safeguarding (Blake, 2011). Indeed, it is commonly affirmed that traditional heritage conservation has been reconceptualised to be understood as cultural practice which includes human rights-based approaches (Logan, 2012). In addition, the very term 'minorities' understood as 'ethnic, religious and linguistic minorities' as interpreted by ICCPR (Art.27) coincides with the notion of 'cultural communities' linked through historical connectedness and traditions that bring together a shared past and traditions as key elements of enjoying human rights (Blake, 2011). However, critical voices may remark that human rights infringements might also be committed or attributed to rather than prevented by cultural heritage regimes: by establishing legal provisions on cultural heritage, boundaries are drawn; cultural violence in a way underlies designed categories inherent in legal regimes (Kapchan, 2014).

Gender Issues in the Spotlight

It is generally agreed upon a zero-tolerance position towards female circumcision or female genital mutilation, yet many cultural practices touch upon in-between positions that do not find general disapproval and are subject to heated debates instead. The case of women's rights in relation to cultural issues is particularly illustrative of the difficulties that arise when both frameworks (ICH and IHRL) are taken into account. The most recognised standard-setting framework has been accommodated under the umbrella of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article 5 of the instrument essentially requires States to change cultural patterns with the objective of eliminating prejudices and other practices that are grounded on perspectives of inferiority, superiority or stereotyped female or male roles. In practice, this might be difficult to disentangle as 'cultural practice' might be interpreted differently by individual community members and also evolve in the course of time, ICH being a fluid and changeable concept. This has led to regular debates within communities on the extent to which cultural practice or traditions should be modified in order to be in line with contemporary developments – and ultimately necessities – such as human rights and gender-specific aspects.[62] Interestingly, gender-based debates predominantly characterise intangible forms of heritage rather than tangible ones.[63] Reasons may be attributed to the scarcity of human dimensions in tangible or material contexts generally.

Again, 'purist voices' have attempted to adhere to strict rules on how cultural practice is to be understood and refrained from accepting the dynamic nature of ICH.[64] Cultural practice in these cases has been oriented towards maintaining the status quo rather than supporting women's rights (Tripp, 2001). Yet, in many cases cultural traditions and gender aspects have been found to be commensurable indeed. This might be motivated by communities' interest for their cultural heritage to survive in a fast developing world or considering ethical concerns. One way of approaching such potential conflicts consists of engaging more actively with the roles that are actually assumed by female and male cultural bearers and to observe more closely to what extent different roles reflect gender-based discrimination, inferiority or superiority in that regard.[65] Indeed, specific roles

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[62] Interview with Judit Šołćina (Head of Minority Secretariat of the four autochthonous minorities in Germany).
[63] Interview with Judit Šołćina (Head of Minority Secretariat of the four autochthonous minorities in Germany).
[64] Interview with Interview with Máiréad Nic Craith (Professor at School of Social Sciences, Heriot-Watt University, Horizon 2020 Heritage Project).
[65] Interview with Francesco Francioni (Professor Emeritus of International Law European University Institute and Professor of Int.l Cultural Heritage Law LUISS University).

might not reflect gender-based inferiority; it is the underlying relationships, power and control, the importance of specific tasks as understood by cultural bearers that provide insights on the extent to which unequal relationships based on gender are in place. This, in turn, requires deep knowledge and understanding of cultural practice and traditions. In fact, it has also been argued that cultural bearers do not themselves fulfil gendered roles but are subjected to interpretations that reflect such very roles in accordance with particular interpretations.[66] This might allow identities to flourish resisting exogenous categorisation, it might however also blur inequalities in the name of the community. Such a blurred, unnuanced picture could, in turn, allow discrimination and other rights violations to go unperceived, particularly where externals are not able to voice concern and in that sense resist any monitoring. This includes concerns as to how participation is enabled,[67] what roles are assumed reflecting such participation and power over decisions. Others place emphasis on the importance of such roles in decision-making such as active or passive involvement in ICH practice.[68] Some practices reveal changes from 'traditional' male-based practices which are now taken over by couples or partners and increasingly by women. Alternatively, such practices were hitherto considered gender neutral – concepts such as 'not purely female or male'-specific tasks indicate such change.[69]

Similarly, human rights and cultural heritage mechanisms have been confronted with such conceptual debates, revealing strong implications in practice. The Bejing Platform for Action, for instance, explicitly refers to 'harmful traditional practices'. Similarly, the CSICH OPs declare gender-based aspects as a transversal issue focussing on inter-alia eliminating gender-based discrimination while fostering gender equality and building on common spaces for dialogue and mutual respect among the communities, supporting critical examinations of ICH practice as well as scientific studies and methodologies and as relating to the planning, management and implementation of safeguarding measures. While gender-based discrimination and respective inequalities are generally ruled out by IHRL, specific guidelines as to how to deal with conflicts in practice are largely missing. Further, it is important to bear in mind that IHRL instruments mainly address gender-based discrimination in the public rather than private sphere (Moghadam & Bagheritari, 2007): women's role in the family thereby largely escapes IHRL jurisdictions. In the very

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[66] Interview with Fabian Jacobs (wissenschaftlicher Mitarbeiter der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut) and Ines Keller/Kellerowa (wissenschaftliche Mitarbeiterin der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut).
[67] Interview with Marlen Meißner (PhD candidate Heritage Studies, UNESCO ICH Subsidiary Selection Commission Brandenburg).
[68] Ibid.
[69] Interview with X21.

way IHRL is laid out, power facilitates the invisibility of gender-based violations that are committed in the private sphere as well as gender-based marginalisation in public forums (Charlesworth & Chinkin, 2000). ICH practice only occasionally materialises in the public sphere such as public festivals, presentations or other events – rather traditions are transmitted in unobserved spaces, hence jeopardising respective whistle blowing when ICH-relevant human rights abuses take place.

In academia, several approaches have been proposed to deal with conflicts between IHRL and cultural heritage in relation to gender issues. Collective rights frameworks, for instance, including strong demands for cultural rights have managed to accommodate women's rights that were identified as elements of broader struggles against inequality, racism and discrimination (Sieder & Sierra, 2010). To put it differently, collective rights strongly depend on women's rights that are considered essential for the implementation of collective rights more generally (Kuokkanen, 2012). This suggests a holistic view of both IHRL and ICH, creating dependencies and virtuous circles in terms of implementing both frameworks. In fact, it has been argued elsewhere that cultural heritage needs to be approached in a holistic fashion 'based on common material and spiritual values influenced by their environment' (Gilbert, 2017) according to indigenous peoples' perspectives.

In that sense, the CSICH framework lends itself for a critical engagement with ICH elements that violate women's rights while explicitly supporting ICH-related practice that reveals non-discriminatory practice. The UNESCO best practice lists, for instance, could declare human rights and gender issues 'compulsory criteria' or 'specifically encouraged practice'. Insights from daily ICH selection processes in fact reveal that human rights and gender issues can be reinforced by rejecting proposals that do not comply with said standards or by requiring communities to rethink current practice for them to fulfil such obligations: in that sense, selection criteria can be steered towards a form of democratic deficit and a tool to confront gender bias.[70]

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[70] Interview with X34; Interview with Christoph Wulf (Professor for Anthropology and Education, Member of the Interdisciplinary Center 'Historical Anthropology' at the Free University of Berlin).

5. Intangible Cultural Heritage and Vulnerability or 'Safeguard within the Safeguards'

5.1 Summary – Chapter 5

The chapter approaches ICH from yet another angle, placing emphasis on rights holders and vulnerable groups in particular. It combines empirical insights, legal debates and political contexts. The former thereby embraces perspectives as expressed by rights holder groups, civil society and relevant stakeholders to some extent. The latter conveys yet a distinct picture, shedding light on the complexities of legal gaps. The chapter also engages with coexisting frameworks and lacking political will as far as pluriculturalism and recognition practice are concerned. The study and the present chapter in particular thereby put weight on common patterns of discrimination and submission in contemporary contexts and daily ICH practice. The author thereby uncovers the interplay of OHCHR and UNESCO norms in both codified law and jurisprudential developments. In turn, grassroots perspectives illustrate a panoply of detrimental impacts exerted by homogenising policies on indigenous peoples, migrants and ethnic or cultural minorities in enjoying cultural rights, thus demanding tailored responses. ICH as an exclusionary, assimilation-driven discourse is placed into socio-legal and political realities; ICH may hence be understood as jeopardising minorities' full enjoyment of cultural rights. Conversely, novel ICH practices are identified, providing new spaces for collective identities to become articulated. While adopting a rights-holder approach, we attempt to uncover both specific minority practices in current realities and their larger implications on societal understanding and spaces for pluralism of ICH to become articulated.

5.2 (Re-)Conceptualising Minorities' Vulnerable Situations in the Law and Beyond

Pressures induced by globalisation and the consequential emergence of dominant streams in societies particularly affect marginalised groups whose cultural expressions become absorbed by harmonising developments; cultural hegemony, standardisation and limits placed on cultural diversity further qualify their position (Lenzerini, 2011). As a consequence, any ICH practice that reveals associations with the non-dominant culture is regarded suspiciously by a specific sector. Such ICH elements might similarly be undermined on grounds of the fear that such practice could imply the disappearance of something 'more traditional' of 'us'.[71] Right-wing movements and parties in Europe and the Americas currently make use of the latter line of argumentation and ultimately public discourse, and thereby further weaken ICH minority protection.

It could hence also be argued that vulnerabilities arise in broader contexts of assimilationist cultural policies and pressures that are exerted on groups who face difficulties in transmitting ICH to present or future generations. Common problems that concern vul-

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[71] Interview with X7.

nerable groups in particular include lack of representation, political power or social status (Weissbrodt and Rumsey, 2011). To what extent said groups manage to practice and transmit ICH remains an unexplored phenomenon both in legal developments and academic debates. In the light of persisting gaps in enjoying ICH protection, safeguarding could assume a complementary 'vulnerability dimension'. In such a way, ICH safeguards would function as a form of 'safeguard within the safeguards' (see introduction of term in Chapter 3.3), addressing minority-specific needs and the context of vulnerable situations. This becomes a pressing necessity in current minority vs. non-minority contexts where considerations of utility dominate public debates: most notably, it is asked to what extent it is worthwhile to establish specific minority rights regimes (Elle, 2004).

Similarly, it is commonly overlooked to what extent safeguarding measures shall reach certain levels of comprehensiveness, going beyond mere avoidance of adverse effects in the case of minority cultural heritage. Apart from general non-discrimination provisions, cultural minorities enjoy specific recognition and positive support; this may include inter-alia school education in minority languages, user rights in electronic media, the use of minority languages in State institutions and communal or regional autonomy rights (Bielefeldt, 2004, see also Levi 1997). In the case of ICH claims, this proves quintessential as ICH involves practicing and transmitting ICH elements beyond purely preservationist approaches. At community level, current recognition policies have, however, catalysed a number of positive developments such as actively dealing with ICH practice, reflections among practitioners or cultural bearer communities.[72]

As a matter of defining 'minorities' for the purpose of this study, the focus will be placed on ('nationally'-recognised) ethnic or autochthonous minorities, indigenous peoples and new minorities in terms of migration developments. Rather than understanding minority rights as standing in contrast to general human rights issues, they are understood as an extension to existing human rights approaches (Bielefeldt, 2004). However, different standards apply, depending on the specific minority situation being addressed. While ('nationally') recognised minorities enjoy specific legal regimes in inter-alia language and education sectors, minorities with migrant backgrounds or newly arrived refugees are exposed to arguably stronger assimilation pressures. Conversely, 'nationally'-recognised ethnic or autochthonous minorities and indigenous peoples often face the additional burden of territorial relations which might hamper processes of ICH recogni-

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[72] Interview with Judit Šołćina (Head of Minority Secretariat of the four autochthonous minorities in Germany).

tion: rigid legal frameworks might informally require ICH elements to be present in different geographical areas or to represent transversal phenomena to qualify as ICH.[73] The all-embracing term minorities certainly accommodates different characteristics and additional burdens which ultimately prove constitutive of minority-specific vulnerabilities. Commonalities regard, for instance, awareness of common origin in some cases, own languages, religion or other particularities of life style (Bielefeldt and Lüer, 2004). In the light of missing commonly agreed definitions, the following criteria have been regarded as indicative, namely objective criteria embracing ethnic, religious or language characteristics; subjective criteria including collective identification and self-determination; as well as quantitative imbalances referring to minorities and non-minorities (Carbonneau, Gruschke, Jacobs and Keller, 2017).

In the case of indigenous peoples, jurisprudential developments have revealed clear references to vulnerability situations in enjoying cultural rights and the right to cultural identity (Eichler, 2016). Even though such vulnerabilities mainly materialise in land and natural resource contexts, they do constitute at the same time a source of cultural identities and integrity (Inter-American Court of Human Rights, IACtHR, 2012), embracing peoples'/people's 'traditions, customs, languages, arts, rituals, knowledge and other aspects of their identity' (IACtHR, 2005). In fact, denying cultural traditions could endanger the very cultural survival of the groups (IACtHR, 2007) and as a consequence disrupt ICH transmission processes. This could be illustrated by the situation of indigenous peoples and their engagement in spiritual practices in Nepal. It was observed that land was given to the gods and reserved for religious practices which would, however, be dispossessed and as a result used for new constructions of buildings on such very lands.[74] Having been disregarded in their wishes to attribute such lands to the gods, people now demand the land to be returned for worship and, at the same time, ICH practice.[75]

In terms of legal recognition similar arbitrariness comes to the fore. Despite their orientation towards cultural bearer communities, CSICH provisions provide States with considerable discretionary powers on deciding how safeguarding is to be understood when dealing with communities. This could be exemplified by the way States ignore,

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[73] Several interviews including cultural bearers representing minorities or non-minorities have stressed the difficulties associated with such limited political-geographical scope for overall cultural rights enjoyment.
[74] Interview with Monalisa Maharjan (researcher at Centro Interdisciplinar de História, Culturas e Sociedades da Universidade de Évora; UNESCO Chair for Intangible Cultural Heritage and Traditional Know-How).
[75] Ibid.

appropriate or even deprive community cultures (Lixinski, 2011). Francesco Francioni problematises this relationship by identifying two ways in which State-minority relations are played out in the context of Intangible Cultural Heritage. Firstly, true risks emerge in terms of visibility where either the representing State or minority groups do not necessarily strive to become visible: particular groups may not feel represented by what State representatives introduce in international forums; conversely, specific representations of ICH elements arising at community level may never be taken up to the UNESCO or 'national' inventories in their very specific form. Ultimately, States' willingness in giving minorities visibility is decisive for recognition of their cultural heritage in international forums. Secondly, States may consciously appropriate themselves of minority heritage and represent it as 'their' ICH, referring to people(s) in the entire State: minorities could, in turn, claim such heritage as their exclusive heritage.[76] Such forms of appropriation also reveal how safeguarding minority ICH is consciously used to strengthen 'national' unity, patriotism and fulfils secondary objectives such as tourism (Shouyong, 2008).

In any of these cases, negotiating heritage becomes a crucial issue that remains a key challenge in many States. It might further give an indication on the small-scale forms of materialisation minority ICH is facing in the very cultural heritage regimes that supposedly provide recognition. It further shows to what extent asymmetries are catalysed, (re-) produced or strengthened in the very negotiation processes around ICH that ultimately lead to decisions on whether specific ICH elements are adopted or not. A third approach might materialise in these kind of negotiations, namely the deliberate selection of some ICH elements while leaving out others; this becomes apparent in cases where minority ICH is appropriated by the State: some cultural practices might be deemed suitable and fitting into ICH safeguarding schemes while other rights including autonomy are undermined (Montcastle, 2010; Wong, 2009). In that sense, safeguarding comes with the specific danger of 'revitalising' minority ICH in the form of new, State-sanctioned shapes and might turn into a mock show of ICH (Montcastle, 2010), maintaining firm control over minority heritage.

Indeed, safeguarding minorities' ICH is often perceived as a threat to 'national' security and integrity while the very concept of 'security' could also be viewed differently, from communities' perspectives. The very situation in which minorities enjoy basic rights could in fact be described as insecure or providing insecure environments. Existing research in

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[76] Interview with Francesco Francioni (Professor Emeritus of International Law at the European University Institute and Professor of Int.l Cultural Heritage Law LUISS University).

the field provides insights on the psycho-social impacts caused by negative experience of discrimination, persecution, flight, loss of language or cultural assimilation (Carbonneau, Gruschke, Jacobs and Keller, 2017). It could be argued that such insecurity becomes apparent in the particular context of ICH transmission, creating environments in which cultural rights are unequally granted by means of asymmetrical recognition processes. These do not necessarily take minorities as such into account despite the existing law including references to cultural diversity and human rights provisions that shall guide human rights protection, particularly as to communities', groups' and (where applicable) individuals' cultural right to live and transmit ICH.

The described assimilation of vulnerable groups deserves special attention here. This becomes particularly apparent in the case of indigenous peoples and minorities. Underlying power relations significantly qualify the extent to which assimilation has been responded to and influence the way it takes shape:[77] namely, assimilation is embedded in inter-alia State institutions that are dominated by majority positions without requiring the latter to making such role explicit; unequal value attributed to minorities and indigenous peoples' informal institutions compared to State-based standardised positions; undermining of other forms of informal institutions undergoing social coercion in terms of language practice; the role of history in establishing or evidencing past and current inequalities; making use of a language that does not do justice to groups' needs; politics of homogenisation inherent in supposed human rights commitments; and forms of patriotism, civic nationalism and ethnic nationalism.[78] Most prominently, minorities' and indigenous peoples' needs arising out of assimilationist policies crystallise in demands for self-determination as to enjoying multifaceted forms of autonomy and their own administrative units including State or societal independence with the objective of not being exposed to and depend on majority societies. Responses to such injustices include politics of revitalisation in the case of languages which have been contrasted by politics of normalisation, eventually leading to establishing and ultimately streamlining official languages to the detriment of minority languages. This, however, also includes adapting policies to phenomena which represent subtle or underlying unequal power relations. Such inequalities materialise in lacking access to debates with 'majority societies' or other reciprocal relations that concern intercultural tolerance and cultural diversity.

It is to be examined to what extent such deeply embedded power structures and pressures for assimilation are contested in existing ICH instruments. Similar to the CSICH

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[77] Interview with (refers to himself as) French speaking Canadian political scientist.
[78] Ibid.

framework, CPPDCE confronts conceptual difficulties as relating to minorities. While the Convention builds on collective entities and emphasises individual 'cultures' that constitute diversity in their entirety, the concept of culture is characterised by its equal and collective nature while shaping or co-constituting group identities (Niedner-Kalthoff, 2015). Yet, just as the concept of 'culture' is not disentangled in CPPDCE, group identities can hardly be regarded as homogenous wholes, commonly reflecting diverging agendas and individual sources of identities. Now, in the case of minority groups this becomes particularly striking: cultural expressions are commonly contrasted and produced in relation to society at large, sometimes as deliberate responses to ICH uniformity; dominant forms of cultural heritage thereby demonstrably permeate different societal sectors. In fact, the very situations of minorities reveal lacking uniformity as to (collective) identities, some strongly relying on historical accounts, others shifting their focus towards current realities.[79]

Another difficulty associated with minority protection under the CSICH umbrella relates to the political nature of cultural claims and respective perceived threats of secession. Cultural heritage can be used to enhance one form of identity as recognised by the State; intangible heritage thereby converts into a political tool to enforce (territorial-political) autonomy, it is feared (Lixinski, 2011). In fact, advocating for CSICH, for instance, has become salient in the context of independence campaigns.[80] At the same time, cultural self-determination is often confused or placed on equal footing with territorial claims, which in themselves may differ from autonomy-related or self-governance demands. In practice, collective rights and self-determination materialise in many spheres of life beyond the mere striving for political autonomy: this concerns indigenous peoples' interpretation of their own development, affecting social and cultural identity alike. Strictly speaking, the very term 'peoples' establishes an autonomy-related regime for indigenous peoples, being applicable to different manifestations of autonomy. Nevertheless, territorial political demands remain one of indigenous peoples' most crucial issues of concern as illustrated by re-occurring debates in UN specialised forums.

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[79] Interview with Judit Šołćina (Head of Minority Secretariat of the four autochthonous minorities in Germany).
[80] Interview with Interview with Máiréad Nic Craith (Professor at School of Social Sciences, Heriot-Watt University, Horizon 2020 Heritage Project).

5.3 Minorities, Intangible Culture and Societal Pressures: Particularities and Threats

Cultural property gains a specific human rights dimension when it is associated with the cultural and spiritual particularities of minorities (Francioni, 2011). In a way, cultural property has strong implications for external recognition and thereby adopts an important function for minorities' ICH protection *vis-à-vis* non-minorities. Non-minority or State-wide recognised cultural elements – commonly described as mainstream culture – often stand in sheer contrasts to cultural practices and traditions as exercised by 'national' minorities. This requires minority ICH to be present and acknowledged throughout State institutions and respective recognition processes.[81] In those cases minority groups are often forgotten about, being absorbed by the collective identity of the State and the fact that they constitute supranational, supra- cultural shared identities in multicultural contexts[82] resisting cultural, jurisdiction-oriented uniformism. A form of 'super diversity challenge' for so-called 'original' traditions can be noted in this,[83] rendering flexible, contextualised interpretations of such customs an utmost necessity and obligation. Such inherent diversity to minorities' cultural practices and respective rights claims have also been regarded as 'landscape of identities',[84] alluding to existing multiplicities rather than homogenous wholes which find accommodation under the umbrella of 'minorities'. Similar forms of diversity can be identified in the case of languages where minority languages prove to be far from unitary.[85] In that sense, ICH practices come to play an indispensable role for such landscapes of identities, cultures and language practice. This proves particularly detrimental given the absence of State territories: sovereignty, for instance, has become key for realising cultural rights and supporting identity formation.[86] Similar interdependencies and reciprocal effects exist between different forms of official recognition such as cultural heritage and nature preservation where one form reveals potential in strengthening recognition of the other,[87] owing perhaps to the growing awareness and acknowledgement of both frameworks by civil society and relevant institutions including

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[81] Interview with Clemens Škoda (Referent für Kultur und Ausland, Domowina Bund Lausitzer Sorben e.V.).

[82] Interview with Corinne Lennox (Senior Lecturer in Human Rights, School of Advanced Study, University of London).

[83] Interview with Albert van der Zeijden (Dutch Centre for Intangible Cultural Heritage).

[84] Interview with Clemens Škoda (Referent für Kultur und Ausland, Domowina Bund Lausitzer Sorben e.V.).

[85] Interview with X27.

[86] Interview with Clemens Škoda (Referent für Kultur und Ausland, Domowina Bund Lausitzer Sorben e.V.).

[87] Interview with X27.

decision-makers. This equally concerns specific ICH practices that attribute 'fame' or popularity to other cultural heritage elements as practiced by minorities.[88]

5.3.1 Tracing Cultural Rights-Specific Obligations in a Diverse Legal Landscape

As a response to persisting unequal heritage treatment, human rights gain a specific protective function as a judicial safeguard mechanisms for minorities' Intangible Cultural Heritage. In the ICH context, indigenous peoples and minorities are particularly affected, representing non-dominant groups: such 'non-dominance' comes to the fore in terms of legislative frameworks that do not support the expression of culture in the public sphere or exert control by means of budgets.[89] Similar illustrations can be derived by the fact that minorities (or members thereof) struggle to articulate 'cultural heritage markers' in the public sphere on grounds of (imminent threats of) prosecution by the State or respective lack of resources in the private sphere, including respective spill-overs from the public to the private sphere.[90] Certain dynamics between the two spheres impact on the right to practice ICH, including positive obligations on the part of the State.[91] Such positive rights encompass forms of territorial and non-territorial autonomy, establishing language laws, control of education, regional public support to cultural expression, political structures granting liberty and autonomy to the groups in deciding how they wish to support their own cultural heritage and respective resources.[92] Respective negative obligations include the absence of prosecution, restrictive laws, prohibitions of specific festivals, non-recognition of festival days and other infringements on, for instance, freedom of association, self-determination and cultural appropriation.[93] All such obligations and the latter right in particular essentially allow indigenous peoples and minorities to pass on their collective identity which could (in itself) constitute a basic human right.[94]

While endorsing positive rights obligations is met with reluctance by contracting State parties, negative rights have found more universal acceptance. In such light, CSICH adopts a rather minimalistic approach. An important 'follow-up' document on CSICH and minority rights instruments is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIPS, 2008) which establishes fundamental safeguards in the area of cultur-

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[88] Interview with X27.
[89] Interview with Corinne Lennox (Senior Lecturer in Human Rights, School of Advanced Study, University of London).
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.

al identity and indigenous knowledge, often touching upon subsistence and other existential concerns. Its shaping influence on CSICH remains debatable though. In fact, it has been noted that respective inter-agency mechanisms could improve ICH safeguarding to a significant extent.[95] The broad framework established by CSICH and accompanying documents could thereby consider particular needs as articulated by vulnerable groups such as indigenous peoples and minorities, and in that sense do justice to the community focus of the instrument. Establishing minority-sensitive safeguards becomes particularly essential given the subjugation of minorities and nationalistic (re-)presentations of the World Heritage Convention (Labadi, 2013; Askew, 2010). CSICH thus assumes a particular (contrasting) role, also in terms of minority ICH protection, being the result of long-lasting negotiations. In fact, the international ICH regime looks back at a long history of protecting minorities' rights to cultural heritage (Vrdoljak, 2005).

In practice, devoting attention to particular minorities' customs and practices under CSICH also potentially strengthens minority rights more generally. Most notably, application processes for gaining ICH recognition may include complex debates, allowing for identity formation and ultimately cultural self-determination. This could be exemplified by the inclusion of 'Sorbian customs and practices throughout the year' in a 'national' representative UNESCO list; debates evolved around the significance of its Sorbian character and its focus on the actors and communities involved therein (Keller, Jacobs, and Jacobs, 2015). At the same time, the previous heritage list framework could demonstrably be used to the detriment of minorities in the sense that the very concept of cultural diversity was understood based on the criterion of 'outstanding universal value' which would either marginalise minorities or strengthen the expert status of some minority groups (Labadi, 2013). In fact, by prioritising some minority heritage, hierarchies may be created among minorities and among different cultural bearer groups. Namely, specific minority heritage is given preference in the sense of supporting heritage that coincides with States' interests, thus perpetuating inequalities among minorities.

ICH debates have proven relevant for several decades and centuries as illustrated by developments in Europe. Most notably the 19th and 20th centuries gave birth to 'national' cultures in European contexts, leading to abolishing regional particularities and heterogeneities, developments that could be denominated 'homogenising paradigms' (Keller,

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[95] Interview with Francesco Francioni (Professor Emeritus of International Law European University Institute and Professor of Int.l Cultural Heritage Law LUISS University, discussant at ifa ICH evening event).

Jacobs & Jacobs, 2015, 87). Several Asian contexts illustrate similar developments occurring in the 1980s and 1990s: this became apparent where forms of patriotism as an overall dogma would transcend and be reflected in education ideologies and the resulting stigmatisation of Tibetan and other minority cultures (Montcastle, 2010; Bass, 2005). The pressures of modernisation and adaptation have further proven to be more destructive for non-Han populations and peoples in China, being subjected to discriminatory conduct (Massing, 2018) or governmental policies that encourage such groups to adapt their lifestyle to the 'more civilised' Han majority (Massing, 2018; Oakes, 1998) and to reinforce the 'superiority' of the latter group (Denton, 2014). It could be argued that there is a specific interest in stereotyping and including specific images of minorities in the State's interpretation of ethnic minority culture (Massing, 2018). Similar to indigenous peoples' situations, historical marginalisation and discriminated positions towards minority groups in society have thus given rise to legal regimes regulating cultural rights enjoyment.

5.3.2 Persisting Patterns of Discrimination, External and Internal Group Challenges

As the Sinti and Roma cases in European societies clearly demonstrate, continued forms of stigmatisation and identity-based discrimination persist until today, exerting systematic impacts on minorities' abilities to transmit Intangible Cultural Heritage. The history of marginalising minorities originated (at least partly) in the 19th century and with it modern anti-Semitism, materialising in forms of prejudice and hatred: this has come to affect different minority groups including Sinti and Roma who were subjected to specific prejudice (Benz, 2014b). Such patterns also become apparent in the way how little attention is devoted to differences among minorities who practice different religions and traditions; such groups thereby easily go unnoticed.[96]

To do justice to such diversity (among minority groups) proves to be a challenging task, paying due regard to different forms of administration, religion or language-specific differences.[97] Other difficulties include protecting minority rights within larger minority groups or dominant communities who live within non-dominant minority regions and overall minority contexts (Kochenov, Poleshchuk and Dimitrovs, 2011).[98] In fact, minority

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[96] Interview with Danilo Ćurčić (human rights lawyer).
[97] Interview with Fabian Jacobs (wissenschaftlicher Mitarbeiter der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut) and Ines Keller/Kellerowa (wissenschaftliche Mitarbeiterin der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut).
[98] Interview with Corinne Lennox (Senior Lecturer in Human Rights, School of Advanced Study, University of London).

ICH needs to be placed into the very situations surrounding the communities, such as new migration developments in the communities where leaving community members contribute to (demographical) challenges for minority communities[99] and hence continuation of ICH practice. Such complexities on the ground may jeopardise continued practice of specific customs or satisfying (cultural) needs in inter-generational ways.[100] Again, ICH needs to be understood in the context of underlying power relations and possible (mis-)appropriations. Authorities may interpret customs and exert determining influence on the (recognised) meaning of ICH and ultimately socio-cultural control which becomes renegotiated.[101] Specific language standards dedicated to minority languages or clothes customs during festivities illustrate such (re-)negotiations.[102] While direct forms of discrimination affecting cultural rights and hence ICH practice might not always become visible, this may occur through the denial of other rights such as access to income, education, social welfare, health and other related issues, exerting impacts on cultural rights enjoyment.[103] Relatedly, issues of segregation enhanced by (enforced) relocation[104] contribute to the disappearance of certain cultural practices from the societal sphere and in that sense curtail any form of possibility to publicly recognise particular cultural customs etc.

The very oral forms of transmission in the case of Sinti and Roma, for instance, hardly find their way into (formal) education or recognised knowledge systems, constituting a systemic difficulty in terms of ICH recognition: in fact, oral transmission of ICH elements could be regarded as the main source of inter-generational transmission.[105] This might at times be jeopardised by education systems that are built on 'mono cultures', impeding minorities to learn about their own cultures and preventing dominant groups to become

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[99] Interview with Fabian Jacobs (wissenschaftlicher Mitarbeiter der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut) and Ines Keller/Kellerowa (wissenschaftliche Mitarbeiterin der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut).
[100] Interview with Ines Keller/Kellerowa (wissenschaftliche Mitarbeiterin der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut).
[101] Interview with Fabian Jacobs (wissenschaftlicher Mitarbeiter der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut) and Ines Keller/Kellerowa (wissenschaftliche Mitarbeiterin der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut).
[102] Interview with Fabian Jacobs (wissenschaftlicher Mitarbeiter der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut) and Ines Keller/Kellerowa (wissenschaftliche Mitarbeiterin der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut).
[103] Interview with Danilo Ćurčić (human rights lawyer).
[104] Ibid.
[105] Post-film speech by Filis Demirov on the film "Es ging Tag und Nacht, liebes Kind: Z***R (Sinti) in Auschwitz", Werkstatt der Kulturen/Paria e.V.

aware and learn about minority groups.[106] This becomes crucial in processes of recognition concerning one of the most remarkable collective dimensions that can be traced in Sinti and Roma narratives, namely the traumatised experience of genocide, impacting generations until today (Benz, 2014a). However, cultural heritage protection mainly takes material dimensions into account, including monuments and historical sites, being indicative of persisting deficits in terms of contents and distortion of facts (Peritore, 2015). Spaces for intangible forms of minority heritage to find articulation in relation to such monuments and other historical sites are not yet provided – reflecting a general tendency in contemporary ICH developments. Conversely, minorities have been proven influential throughout music history at large in which Sinti and Roma were not able to claim ownership, especially since writing down musical notations would not represent a common way of transcription (Reinhardt, 2015): the very way music was orally transmitted – relying on people's/peoples' memory – represents a format that could easily be claimed by society at large and embedded in traditional cultural heritage discourses. This may happen to the detriment of minorities' own authoritative voices, their consultation or consent.

It is, however, via cultural rights that adequate legal grounding can be provided for Sinti and Roma histories to be transmitted. Yet, codifying cultural heritage comes with a number of challenges in the case of Sinti and Roma, revealing how heritage elements are instrumentalised for further stigmatisation. Antiziganism exemplifies such tendencies in current public debates and the enhanced role of media and communication sectors in creating, (re)producing or intensifying stereotypes and resulting prejudice. Such treatment may also amount to attributions of characteristics that underly homogenising and essentialising processes, exemplified by so-called 'social problems', 'poverty-driven migration' or lacking distinctions between Sinti and Roma (End, 2015). A core distinguishing aspect that helps us to contrast ICH cultural rights regimes and essentialising agendas consist of cultural bearers' self-determined heritage, i.e. the way in which cultural heritage and identities are constructed by minorities rather than public debates or the media. It is thus not the collective character underlying legal regimes that perpetuates instrumentalisation and essentialisation, but its arbitrary re-interpreted use by different sectors of society.

In the particular case of autochthonous or ethnic minorities, language rights play crucial roles touching upon important foundations for ICH elements to be transmitted in an inter-generational way. In such debates, 'language revival' and 'revitalisation' have prov-

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[106] Interview with Corinne Lennox (Senior Lecturer in Human Rights, School of Advanced Study, University of London).

en to be crucial elements to respond to developments that threatened or assimilated minorities' languages at large (Šatava, 2000, see also Fishman, 1991). Language revitalisation has proven to be successful in a number of cases that involved so-called linguistic engineering, reintroducing languages for specific populations and peoples facing particular situations such as indigenous Maori languages in New Zealand or Euskera in the Basque Country (Šatava, 2000). In fact, a common concern shared by cultural bearer communities consists of ruptures in inter-generational transmission processes. Language in that sense, plays a fundamental role as a means of transmission that might potentially qualify transmission processes which ultimately prove decisive for the continued (or not) existence of cultural heritage.

Indeed, upholding language practice and minority ICH commonly go hand in hand. In the case of the Sorbian minority language, this encompasses inter-alia diminishing numbers of active speakers; decreasing numbers of speakers using minority languages in their everyday life; decreasing territorial spaces in which languages can be used beyond private situations; decreasing numbers of families including school age children using minority languages colloquially in their everyday life; diminishing numbers of recipients who have access to minority literature as well as potential recipients of minority media, arts and culture; and the diminishing and gradually degrading quality of knowledge on minority languages among persons not having attended school teaching in minority languages (Elle, 2000).

5.3.3 Minority-specific ICH Transmission across the Human Rights Spectrum

Apart from language dimensions being emblematic of virtually all ethnic or autochthonous rights debates, economic, social and cultural rights as well as civil and political rights materialise in ICH transmission and safeguarding practice. Legal bases are manifold but are grounded in human rights applicable to all human beings, paying due regard to specific groups of people. This concerns non-discrimination provisions, including specific rights attributed to ethnic, religious or linguistic minorities (Art.27, ICCPR), first and foremost, however, this applies to rights going beyond said provisions (Weissbrodt and Rumsey, 2011) such as positive measures being of equal value to the ICH regime. Indeed, Art.27 first acquired the status of a negative right without any further reaching obligations; later on, it was generally acknowledged that States would need to create basic conditions for guaranteeing fulfilment of such rights (Toivanen, 2001). The far-reaching power of Art.27 has been widely recognised and understood by some as protecting cultural identities (Scherer-Leydecker, 1997). A second legal basis is established by means of cultural diversity provisions according to which 'national' or autochthonous minorities con-

tribute to such diversity by means of being part of the democratic system (Toivanen, 2001) and as active participants and shapers of the system they are part of.

Additionally, existing legal instruments including the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted in 1992 by the UN General Assembly, the Framework Convention for the Protection of National Minorities adopted by the Council of Europe in 1994 and the Council's instrument European Charter for Regional or Minority Languages adopted in 1992 play a complementary role in protecting ICH transmission. In fact, legal standards at European level reveal an interesting interplay of recognising and considering language, cultural and historical particularities on the one hand and integrating minority communities into the democratic structures of States on the other (Elle, 2012). Critics might, however, raise awareness of the narrow scope of some human rights obligations in the minority context, making the latter dependent on, for instance, minimum numbers of language speakers or requiring specific necessities to be in place or present.[107]

5.3.4 Disentangling Interpretations in the European Human Rights Sphere: Conflicts, Contradictions, Controversies

The 'national' minority framework adopted by the Council of Europe in fact provides further interpretations including wider reaching human rights obligations regarding participation in cultural life. The basis for minorities to participate in cultural life can be derived from articles 5, 6 and 15 of the Framework Convention for the Protection of National Minorities which stipulates basic conditions for persons belonging to minority groups to maintain and develop their culture and preserve the essential elements of their identity such as their religion, language, traditions and cultural heritage and preventing any assimilation (Art.5(1) & (2)). Such rights shall be granted in a spirit of tolerance, intercultural dialogue and by taking respective measures to enhance mutual respect, understanding and cooperation; this also includes measures to protect persons from discrimination, hostility or violence related to their particular identity (Art.6(1) & (2)). In a broader sense, the Convention establishes conditions that ensure minorities' effective participation in cultural life and public affairs (Art.15), stipulating obligations that intersect with different areas or categories of human rights.

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[107] Interview with Ines Keller/Kellerowa (wissenschaftliche Mitarbeiterin der Abteilung Kulturwissenschaften am Sorbischen Institut/Serbski institut).

The Advisory Committee on the Framework Convention specified such rights in the 'Commentary on the Effective Participation of Persons belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs'. The scope of protection relating to participation in cultural life extends to minority cultural heritage and the right to identity as well as taking part in so-called 'mainstream cultural life', paying due regard to tolerance and intercultural dialogue (para.65). This also includes conducting consultations on matters affecting a person's cultural life. Interestingly, the right to cultural life is intrinsically linked with civil and political rights in the sense that consultations need to be carried out. Consultation and participation are thereby interpreted in a broader sense, including involving representatives in the allocation of financial support for cultural programmes (para.66). Systemic issues are similarly included such as decentralising processes or cultural autonomy arrangements, contributing to the enjoyment of the broader right to participation in cultural life in the context of, for instance, delegating competences (para.67). Similar concerns as to participation are raised in relation to the media which minorities should be able to create, use, access and be present in; the representation of their particular views therein is explicitly mentioned in that regard (para.68).

The minority rights framework demonstrably establishes an essential standard in the light of the scarcity of cultural rights codification elsewhere. The Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) adopted in 1950 could similarly be used, e.g. by interpreting some provisions in a broad(er) context. This may include article 14, adding to general non-discrimination issues on grounds of discrimination based on race, colour or belonging to a national minority. Another venue is embarked on by means of the Charter of Fundamental Rights of the European Union (CFR) adopted in 2000, constituting a counterpart to the civil and political rights block of the aforementioned Convention. It promotes negative obligations in the form of respecting cultural, religious and linguistic diversity (art.22) and non-discrimination provisions, being applicable in cases where people(s) are subjected to discrimination based on "sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation" (Art.21(1)). Both standards fall under the Charter's equality provisions that can be invoked where minorities do have access to such specific rights regimes; minorities as a rights holder group thereby fall under a broader definition beyond 'national' and/or autochthonous minority categories.

To a somewhat, more specific extent, the ECtHR has pronounced itself on cultural heritage protection which is not addressed as such by legal instruments in place; however,

this predominantly concerns material heritage, as to property, for instance (Chechi, 2014; see e.g. ECtHR in Kozacioğlu versus Turkey, 2009). Interestingly, the very definition of rights holder groups plays a particular role, exerting – at the same time – influence on minority rights. Other than the UNESCO regime and other collective rights regimes, the ECtHR focusses on individual rights rather than common goods (Chechi, 2014). In the light of the broad framing of existing provisions, rights to cultural practice and traditions need to undergo extensive interpretations in order to find appropriate recognition. Further complexities come to the fore whenever such rights are subjected to limits or interferences with the public interest and may undergo proportionality tests (Chechi, 2014). Especially impacts on the public interests may prove to be decisive for limits on individual rights (ECtHR, Beyeler v. Italy. 2000; Chechi, 2014) and hence threaten basic cultural rights guarantees.

In terms of ICH elements and minority rights protection, the ECtHR identifies an 'emerging international consensus' among the Member-States in 'recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community' (ECtHR, Case of D.H. and Others v. The Czech Republic, 2007; see also: ECtHR, Case of Chapham v. The United Kingdom, 1996). In that sense, cultural heritage is interpreted as going beyond minorities' cultural rights, namely extending to the way in which diversity is promoted and enhanced by upholding their cultural rights. The latter reasoning was also employed in the case of (Roma) minority communities who showed to be particularly disadvantaged in terms of socio-cultural backgrounds and vulnerabilities arising for Roma children based on xenophobic conduct by non-Roma parents and other forms of discrimination in society.

Similarly, the Court establishes specific links with the rule of democracy and pluralism in the light of protecting minorities' cultural heritage. Accordingly, the Court rules that pluralism builds on the respect for and recognition of the dynamics of inter-alia cultural traditions, ethnic and cultural identities, religious beliefs which are to be associated with 'national' minority's freedom of association and the significance of the latter for expressing and promoting minority identity, thus helping minorities to preserve and uphold their rights (ECtHR, Case of Gorzelik and Others v. Poland, 2004). In a different case, the Court reemphasises the need for due consideration of minorities' particular situations when considering ICH, even though the concept of ICH as such is not explicitly mentioned: the Court maintains that the vulnerable position of Sinti and Roma as a minority group implies 'special consideration' of their needs and different lifestyle which, in

turn, also requires positive obligations on the part of Members States to facilitate such way of life (ECtHR, Case of Chapman v. The United Kingdom, 2001; see also: ECtHR, Case of Buckley v. the United Kingdom, 1996; ECtHR, Case of Marckx v. Belgium, 1979; ECtHR, Case of Keegan v. Ireland, 1994; ECtHR, Case of Kroon and Others v. the Netherlands, 1994).

Progressive developments may similarly be noted in the EU sphere of legal and political action. Ever since the adoption of the Treaty of Lisbon, human rights instruments have gained a more significant role in EU law. At the same time, the European Convention on Human Rights and Fundamental Freedoms (ECHR) finds explicit mentioning and application in relation to EU (primary!) law, thus providing an interesting entry into minorities' Intangible Cultural Heritage from a human rights point of view. Accordingly, the 'rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU (…) shall have the same legal value as the Treaties' and become general principles of Union law. At the same time, the Union could potentially accede to the ECHR, having however faced considerable criticism by a reluctant European Court of Justice (see ECJ Opinion 2/13 issued in 2014 for further details); in that sense, both human rights instruments – ECHR and CFR – would find articulation and embedment in the EU legal order.

While minority ICH is not explicitly mentioned in EU case-law, aforementioned article 167 TFEU is invoked, referring to actions in the area of the 'conservation and safeguarding of cultural heritage of European significance' while paying due regard to 'national' and regional diversity (European Court of Justice, General Court, Case T-529/13 Izsák, Dabis & Hungary versus European Commission, Hellenic Republic, Romania & Slovak Republic, 2016, para 98). The Court further interprets said provision, calling upon the EU legislator to

> 'adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, or recommendations furthering specific objectives, namely, first, improvement of the knowledge and dissemination of the culture and history of the European peoples, second, conservation and safeguarding of cultural heritage of European significance, third, non-commercial cultural exchanges and, fourth, artistic and literary creation, including in the audiovisual sector.' (para.98)

Interestingly, the Court makes explicit use of the term 'peoples', suggesting plurality which might be understood as including indigenous peoples and minorities. In the very context of Art.167, the Court also addresses preserving 'national' minority regions based on ethnic, cultural, religious or linguistic features, including the recognition of regional autonomies – which is, however, explicitly ruled out as a wide interpretation of reaching the objective of said provision.

Similarly, the Court has been confronted with controversial issues and conflicting rights in relation to ICH issues. The ECJ may indeed challenge ICH safeguarding practice if the latter is based on Member States' 'restrictive domestic cultural policies' and their infringement of market integration; more generally, the ECJ has been invoking EU norms directed towards protecting cultural heritage if compatible with EU primary law (Chechi, 2014). In fact, the same may be said about the rights of humans and other beings, setting a limit to some cultural practice. Most notably, the Court is faced with an ICH element recognised by UNESCO and its compatibility with EU secondary law: accordingly, bird trapping had been endorsed by UNESCO which was, however, ruled out by the EU's Birds Directive, allowing for no derogation. The Advocate General's Opinion on the case unequivocally rules out trapping as a cultural tradition. Commonly, however, conflicts concern minorities' cultural claims and majority-driven public interests and agendas.

Considerations of indigenous peoples' ICH as promoted by existing legal standards merit attention in that regard. Existing ICH standards have failed to refer to past injustices as included in instruments on indigenous peoples' rights. It could be maintained that 'indigenous cultural heritage was not on the radar of international bodies' (Xanthaki, 2017), particularly as to their distinct rights in the heritage field. The case of indigenous peoples indeed illustrates the treatment of cultural rights violations with long histories of dispossession and deprivation to a particularly alarming degree. Politics of erasure in terms of language and any kind of cultural expression led to subordinating the latter in the context of colonisation, exerting long term impacts on several generations. While indigenous peoples do not necessarily classify (themselves) as minorities, their unequal role in societies would allow justifying the use of the term including cases where they would not constitute minorities in numbers, forming 'non-recognised majorities', for instance. This could be illustrated by the way majorities in numbers may feel the need to speak minority languages[108] in the light of other societal pressures and histories of marginalisation or world-wide recognition of specific languages. ICH elements demonstrate particular needs in that regard as their complexity in nature suggests. For instance, specific dances may not be transmitted with the sole support of folklore groups, but may depend on general awareness in the education sector, oral histories to be transmitted and language developments that attach specific meaning and the "story around" their transmission. In that sense, IHRL might assume a facilitating role as indigenous peoples' particular right to cultural heritage and the 'current recognition of indigenous cultural heritage must penetrate all areas of international law' (Xanthaki, 2017: 19).

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[108] Interview with (refers to himself as) French speaking Canadian political scientist.

Furthermore, territorial questions have proven to be highly relevant for indigenous peoples and to be related to cultural rights. Indeed, it has been observed elsewhere that destroying original (sacred) environments in which ICH elements - such as rituals - are transmitted leads to their very disappearance (Johnson, 2014). However, transmitting ICH elements is also jeopardised in the context of official recognition processes. Indeed, where officially protected heritage is based on indigenous cultural practice, the gap between so-called inner and outer cultural domains and interpretations is particularly pronounced (Arantes, 2014). Recognition processes and officialisation may similarly reveal exclusionary effects on other vulnerable groups, particularly as far as migration contexts are concerned.

5.4 Migration and ICH-related Dilemmas in Contemporary Settings

Discussing migration and cultural rights in contemporary contexts constitutes a challenging and contentious task for several reasons. Understanding migrants' cultural rights and the transmission of cultural heritage in particular may mistakenly be confused with an antithesis to societal understanding: accordingly, practicing cultural traditions would be understood as being tantamount to missing links with society at large, disrespecting pluralism and diversity, or to put it bluntly, promoting a conscious policy of isolation. ICH debates, however, build on regimes of diversity and pluralism, allowing cultural practices to coexist and merge, owing to the fluidity and adaptability of ICH elements.

Apart from broader societal implications, ICH transmission processes need to be understood in the light of international human rights law with a particular focus on cultural rights. While such embedment allows challenges and conflicts to emerge (as discussed above, Chapter 4), it also provides a solid framework for cultural claims to be grounded and limits to be set where specific practice demonstrates discriminatory patterns or violations. Understanding ICH practice as cultural rights enjoyment further delegitimises claims of 'disintegration' or instrumentalisation, building up a framework based on the objective of evening out unequal positions in society, responding to particular needs of communities and groups, and enabling access to basic human rights.

Difficulties of implementation, however, remain and may relate to the multiplicities to find accommodation in restrictive legal frameworks. This, in fact, represents one of the core difficulties: processes of ICH recognition represent high levels of complexities de-

pending on the meanings attributed in the respective States.[109] Further dilemmas consist of lacking awareness of Conventions and other tools to invoke ICH-related rights, finding exacerbated expression in the case of refugee communities.[110] By the same token, ICH practice provides spaces for people(s) identities to become articulated and to gain voice in what they consider the very part(s) of their particular identities.[111] Definitional issues thereby also come to play a decisive role:[112] internally displaced people show to live in similar vulnerable situations as (externally displaced) refugees, others might be entirely excluded from existing human rights regimes.[113]

Transmitting ICH elements in the context of migration raises yet another challenge, namely jurisdictional questions which are not clearly answered in the field of legal studies. This may concern cultural heritage that is practiced by cultural bearers and enters new jurisdictions, namely 'travelling cultural heritage' being practiced, transpassing the territorial boundaries of the State and regions. While 'travelling cultural heritage' could be a perfectly acceptable term in the social sciences and humanities as a concept suggesting a fluid interpretation of ICH elements without clear geographical scopes or demarcations(!), political-legal realities remind us of State-oriented procedures of safeguarding practice. In many instances, however, travelling ICH practice would be considered reconcilable with such realities; in fact, ICH has been denominated 'shared heritage', reflecting such common safeguarding and inventorying.[114] Hybrid forms of cultural heritage have undoubtedly become common place in practice (see following sub-chapters), yet, their embedment in legal frameworks such as UNESCO requires debates on human rights at domestic level before entering the international realm.

In fact, debates within UNESCO institutions clearly indicate that ICH elements are understood as being practiced 'within the (territorial) boundaries of the State' as opposed to having 'emerged in' or 'originating from such State'. Yet, understanding such requirement in a broader sense would not exclude 'migrated' or 'travelling cultural heritage' as such. Other challenges related to procedural requirements include specific generational

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[109] Interview with Philipp Bludovsky (2015-2018 Curator-in-Chief German Cooperative Museum, German Association Hermann Schulze Delitzsch).
[110] Interview with Máiréad Nic Craith (Professor at School of Social Sciences, Heriot-Watt University, Horizon 2020 Heritage Project).
[111] Interview with Camilla Paternó (offf Onlus and Accoglierete Onlus, re-future project, Dugong films production).
[112] Interview with Robert Rode (Brandenburg University of Technology (BTU) Cottbus).
[113] Ibid.
[114] Interview with X31.

conditions such as for ICH to be practiced by n numbers of generations to qualify for recognition. To place the focus on (jurisdictions,) specific time frames and generations inevitably complicate matters, excluding migrant groups which also include refugees.[115] In fact, some jurisdictions reveal limited or no ICH applications by migrant groups and thereby reflect a narrow understanding of what ICH entails and consists of more generally.[116] Especially the criterion of external recognition may thus place limits on conceptual and practice-related ICH enjoyment. Such limits, however, require further critical reflections on drafting and implementation processes alike: excluding groups based on (migrant) background would not possibly satisfy the very criteria established by CSICH – apart from IHRL more generally(!).

It might be further questioned to what extent existing 'rapid action' such as ICH Urgent Safeguarding responds to situations of urgency and insecurity surrounding, for instance, recently migrated populations. This includes human security-related needs including the right to be free from attacks on physical or mental integrity, torture and other cruel or degrading treatment, representing common dangers for refugees. Basic subsistence rights might similarly be concerned such as the right to food, water, sanitation and hygiene. The role of cultural rights, however, hardly finds consideration under such extreme conditions, while deserving further discussions, paying due regard to the holistic nature of human rights and their indivisible, interrelated, interdependent and mutually reinforcing nature.

In that sense, cultural rights merit further attention and debates. 'Cultural security', for instance, requires more consciousness regarding claims made by minorities as relating to inter-alia affiliation, identity, personal fulfilment and self-esteem on the other (Carbonneau, Gruschke, Jacobs & Keller, 2017; Burton, 1979). Similar conclusions were drawn by the Inter-American Court of Human Rights, ruling on the importance of indigenous peoples' right to cultural identity in *Sarayaku versus Ecuador* (IACtHR, 2012). The Court decided that indigenous peoples' ancestral right to (collective) property was intrinsically linked to cultural identity, their very survival as communities and conserving their heritage, constituting a special relationship that qualifies people's social, cultural and economic survival. In the same context, the Court developed an interpretation on the significance of ICH transmission in an intergenerational way which is based on their environment, their

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[115] Interview with Christoph Wulf (Professor for Anthropology and Education, Member of the Interdisciplinary Center 'Historical Anthropology' at the Free University of Berlin).
[116] Ibid.

integration with nature and their history. More particularly, such a close relationship exists between the communities and their lands and their traditions, customs, languages, rituals and other aspects of their identity as suggested by the *Sarayaku* case. In some situations, such relationships between lands and traditions – to some extent the tangible and intangible – get blurred where divine rituals are performed by persons, where differences between temple statutes and persons wearing masks while dancing become obscured.[117] Such intrinsic entanglements of identity-related aspects demand a distinct engagement with cultural rights that prove to be difficult to distinguish from land or similar issues. Interestingly, the Court also places the right to cultural identity into broader societal debates including understanding its significance in a multicultural, pluralistic and democratic society. This proves fundamental for debates on migration contexts in which new minorities' cultural heritage finds a way into 'receiving' societies.

While indigenous case-law develops around or is based on land rights and thereby adopts strong territorial dimensions, cultural heritage in migration contexts is confronted with an opposing dilemma: namely, heritage may be detached from its territory-based foundations and travels into new spheres, new contexts, new jurisdictions, new societies. That way, it develops into new forms, hybridises with other cultural expressions, practices or traditions. At the same time, its very 'transmitters' are confronted with a panoply of human rights issues, being common among newly arrived groups and shared suffering including prosecution on discriminatory grounds. Where such grounds concern affiliations with specific religious or ethnic groups, there is a double burden migrants including refugees and/or minorities are faced with. This includes previous forms of discrimination eventually leading to their very persecution (in some cases physical and psychological violence faced in previous jurisdictions) and developed into missing consideration of the particularities and abilities to transmit ICH elements in new jurisdictions in addition to new-old forms of discrimination. The question to be asked concerns the degree to which such cultural heritage is being enabled to be transmitted in an intergenerational way in accordance with the UNESCO framework. While new migration groups face denial or interference with their right to cultural expression, practice or traditions, it remains to be reflected on the extent to which this requires States to adopt positive measures that explicitly facilitate transmission processes (according to the law).[118]

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[117] Interview with Monalisa Maharjan (researcher at Centro Interdisciplinar de História, Culturas e Sociedades da Universidade de Évora; UNESCO Chair for Intangible Cultural Heritage and Traditional Know-How).
[118] Interview with Corinne Lennox (Senior Lecturer in Human Rights, School of Advanced Study, University of London).

A few insights are provided by cultural rights frameworks developing under the umbrella of the UN High Commissioner for Human Rights. Aforementioned General Comment No.21 issued by the UN Committee on Economic, Social and Cultural Rights on the right of everyone to 'take part in cultural life' (ICESCR, Art.15(1)(a)) approaches cultural bearers as rights holders in a broad sense, encompassing individuals, groups of individuals and communities. While this does not create any particular human rights protection for migrants including refugees as such, the Convention includes and applies to them under the wide scope of the definition and basic non-discrimination provisions. Specifically, the Committee reiterates that no one shall be discriminated against because of his or her belonging to a specific cultural community or group or based on a particular (cultural) practice – which could be understood as an ICH element (para.22). Importantly, the Committee pronounces itself on the adoption of positive measures for disadvantaged and marginalised individuals and groups who must be protected by means of relatively low-cost targeted programmes (para.23). This can also include educational programmes for minorities which are conducted in their language in accordance with the will expressed by the communities and other human rights standards (para.27).

In the very context of 'taking part in cultural life', the Committee has established a range of specific positive obligations that add to the ones outlined above. Generally, such right needs to be understood in the light of the triadic respect, protect and fulfil framework,[119] characterising economic, social and cultural rights. A few core obligations provide answers to how ICH elements could be safeguarded and understood by means of the cultural rights framework.

Accordingly, the Committee establishes a core obligation under the 'respect dimension', requiring States parties to provide access to people's/peoples' own cultural and linguistic heritage, free access and free exercise of cultural identity and practices, including being taught one's culture and those of others.[120] In terms of the duty to 'protect', the Committee details out several obligations with regard to cultural heritage rights. First of all, the very duty to protect proves detrimental to cultural heritage and diversity in several ways. This means due regard needs to be paid in respecting and protecting cultural heritage in times of war and peace and natural disasters (para.50(b)). The context of refu-

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[119] 'Respecting' largely includes non-interference with rights guarantees, 'protecting' requires protection from third parties whereas 'fulfilment' requires measures to be adopted for the purpose of guaranteeing the right.
[120] To what extent such access is facilitated remains unanswered and in the most cautious interpretation of the obligation, it would merely mean non-interference.

gees thereby becomes very relevant indeed: leaving a certain place is often related to humanitarian reasons including conflicts and other external circumstances, jeopardising people's/peoples' very survival and covering of basic subsistence needs. In such situations, the Committee argues that cultural heritage must be preserved, developed, enriched and transmitted in an intergenerational way as 'a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures' (para.50(b)). By doing so, the Committee integrates ICH elements into its jurisprudence, and most importantly, into the international human rights system beyond UNESCO. It could be further argued that the emphasis on cultural heritage-related rights and vulnerable groups and minorities hereby provides a certain legal basis for 'traveling cultural heritage' and its exercise by cultural bearers to be established.

By addressing 'fulfilment', the Committee distinguishes between 'facilitating', 'promoting' and 'providing', all including a wide range of positive measures (para.51). Several references are made to cultural heritage, the particular situation as well as respective needs that apply to migrant groups including refugees. Apart from general references to protecting and promoting cultural diversity, cultural and linguistic rights stand out, requiring protective measures to be applied to cultural and linguistic minorities. More specifically, States are required to take 'appropriate measures or programmes to support minorities or other communities, including migrant communities, in their efforts to preserve their culture' (para.52(f)). Interestingly, this in a way differs from the ICH UNESCO framework that has distanced itself from 'conservation and preservation language' used in the case of tangible heritage.

At the same time, such interpretation of ICESCR offers a specific legal venue for migrant communities to enjoy cultural rights as explicitly recognised and supported by the State. The Committee further elaborates on 'minority versus majority issues' that often characterise the enjoyment of access to ICH, including structural discrimination and underrepresentation of persons (belonging to minorities) in some communities in public life, exerting impact on people's/peoples' right to participate in cultural life (para.52(g)). Taking consideration of the broader picture in terms of societal developments and interactions between people/peoples, the Committee also establishes State obligations to take appropriate measures to 'create conditions conducive to a constructive intercultural relationship between individuals and groups based on mutual respect, understanding and tolerance' (para.52(h)). For advancing the (at least partial) materialisation of the right, the Committee eventually establishes a number of measures directed towards the fulfilment of obligations: in the case of cultural heritage, this requires programmes to be created to

preserve and restore cultural heritage (para.54(b)). It further includes a range of participatory rights and the respective adoption of appropriate legislation and establishing effective mechanisms that allow groups to participate in decision-making including claiming protection to take part in cultural life (para.54(a)). Finally, fulfilment obligations encompass measures, generating public awareness and those aimed at education such as introducing cultural education in school curricula e.g. the history, literature, music and history of other cultures and providing access without discrimination to museums, libraries, cinemas, theatres and cultural activities, services and events (para.54(c)&(d)).

Such triadic obligations in particular allow integrating 'traveling cultural heritage' or new traditions in a more systematic and long-term way, doing justice to the intergenerational development of ICH transmission and respective needs that become articulated in such processes. Especially the needs emerging from vulnerable situations, minority versus majority status, disadvantaged status, marginalisation, underrepresentation and structural discrimination apply to cultural bearers of 'traveling cultural heritage' to a particular extent and underlie the reasoning of the Committee in the context of the right to take part in cultural life.

Again, cultural rights are understood by the Committee in a holistic way, encompassing the very situation or 'starting position' groups are confronted with. In many cases, subsistence-related needs and economically weak positions add to the multiple burden inherent to cultural rights infringements. The Committee thus elaborates on the precise circumstances, namely poverty (conditions) which can seriously restrict the ability of persons to 'take part in, gain access and contribute to, on equal terms, all spheres of cultural life, and more importantly, seriously affects their hopes for the future and their ability to enjoy effectively their own culture' (para.38). Thereby, cultural rights are not only directly associated with economic status and vulnerability in different spheres of life, they also relate to people's future opportunities to develop as active members of society in which (sources of) identity*ies are not denied. In the particular case of migrants including refugees, this becomes crucial, constituting minorities in numbers and as potential victims of cultural rights violations.

Related to this, the Committee expresses itself on the underlying premises of the right to take part in cultural life, namely the 'sense of powerlessness' and the potential of such right to 'significantly empower persons or groups of persons living in poverty' (para.38), touching upon the socio-economic dimension of such participation. In fact, denying cultural rights can impact other rights that enable particular groups to become active mem-

bers of society, including guaranteeing participatory rights that presuppose groups' awareness of such position and their perceived ability to shape their lives and meaning in society as a whole.

The Committee further conceptualises detailed obligations arising in relation to the right to take part in cultural life which could be identified as a tripartite conception of such right, encompassing 'freedom', 'access' and 'contribution' as well as aforementioned 'inclusive cultural empowerment' that is aimed to be achieved by means of the framework on cultural life established by Art.15(1) (Campagna, 2017). Interestingly, the Committee attributes a 'special value' to the 'productive intercultural kinship', coming into existence where 'diverse groups, minorities and communities can freely share the same territory' (GC n°21, para.16(a)). In a way, it could be argued, that the Committee thereby explicitly pays due consideration to hybrid forms of cultural expression, arising in such intercultural kinship relations. In fact, the Committee provides further insights on the basis of such reasoning: most notably, it is maintained that cultures, groups and individuals have been brought into closer contact to one another, at the same time as such groups attempt to maintain their own identity (para.41). By describing these realities, the Committee inevitably lays the ground for human needs, transformed into rights, by expressing identity through cultural practice. Adverse impacts on practicing cultural traditions are, however, particularly noticed in the case of disadvantaged and marginalised individuals and groups including people in poverty (para.42) of which migrants including refugees may be a part. Additionally, external influences add to the burden by exerting disproportionate adverse effects on refugees and their ability to access the right to take part in cultural life; this may include armed conflicts and persecution on discriminatory grounds alongside globalisation (para.42).

5.5 Traditional and Novel ICH as Forums for New Expressions: Celebrating Carnival and its Virtuous 'Side Effects'

Participation in cultural life can take many shapes, finding its way into or being reflected in ICH practice. If we wanted to focus on a contemporary cultural practice that integrates diversity and multiplicities into its current manifestations, (traditional) forms of Carnival illustrate such scenarios. These are celebrated in European spring, coexisting with some new forms such as so-called Summer Carnivals or Carnivals of Cultures, illustrating diversity of cultural life. Diverse framing indicate its prominence in the academic literature, including processes of 'carnivalisation', 'meta-carnival' (Abbott, 2014) or 'the carnivalesque' (Bakhtin, 1984). Carnival is celebrated based on different origins, yet spread by means of similar messages, contributing to the recognition of multiculturalism and diversity in an institutionalised setting. Related (traditional) ICH forms include religious or secular processions while not constituting a main focus of the debates in this study; these arguably contribute to social cohesion, integration and peaceful interactions among participants (and the audience).[121] Considering their multiplicities in kinds and places, a few forms of Carnival have found recognition by means of the UNESCO representative list system[122] whereas said new forms of Carnival have developed without explicit safeguarding measures.

While the following discussions evolve around Carnival as a cultural expression in the sense of the right to cultural life and other cultural rights, processes of cultural commodification; authentication and objectification, underlying so-called 'cultural tourism' and marketing strategies (Green, 2007) deserve further discussion elsewhere. In some cases, celebrations of what was originally considered Carnival have assumed different shapes and turned into community festivals, fostering the formation of minority identities by supporting custom and language use.[123] Interestingly, Carnival celebrations have shown

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[121] A few have been integrated into the UNESCO list system such as Shoulder-Borne Processional Structures (2013), Al'azi Processional March and Poetry (2012), Hopping Procession of Echternach (2010), Shrovetide Door-to-Door Processions in Hlinecko (2010), Holy Week Processions in Popayán (2009), Procession of the Holy Blood in Bruges (2009), Procession Za Krizen (2009), Spring Procession of Ljelje/Kraljice (2009) and Processional Giants and Dragons (2009).
[122] Illustrative of these are the following forms: Basel Carnival (2017), Carnival of El Callao (2016), Carnival of Granville (2016), Carnival of Recife (2012), Carnival of Imst (2012), Aalst Carnival (2010), Carnival in Kastav (2009), Carnival of Mohács (2009), Carnival of Barranquilla (2008), Carnival of Binche (2008) and Carnival of Oruro (2008).
[123] Interview with X27.

to transcend State borders,[124] and arguably represent ICH practice, assuming an extra jurisdictional dimension.

Conversely, it could be argued that both traditional and recently created Carnival expressions have assumed functions that meet current needs of society, including conflict mediating or solving potential. The UNESCO project itself, it has been argued, was built on a peace-oriented philosophy in the post-World War II context (Stanley-Price, 2007); cultural heritage itself reveals and assumes similar functions. The role played by culture and cultural heritage in the European peace process exemplifies the latter.[125] At the same time, the political nature of UNESCO as mandated institution and ICH as an object of safeguarding should not be underestimated, revealing conflict potential and processes of dispossession (see previous chapters).

In fact, a common reoccurring issue of concern relates to ICH use as a means of warfare or fulfilling other strategic aims. While this predominantly concerns destruction of tangible heritage, immaterial forms of cultural heritage similarly deserve attention, particularly as these concern less visible forms of destructions, affecting, for instance, cultural and social institutions or structures and identities which are difficult to measure (Bräuchler, 2011). Conversely, ICH practice has demonstrably proven to serve as active tool of conflict resolution and prevention, also to socially restore society (Bräuchler, 2011). In that sense, ICH assumes yet another function, namely to potentially enhance social justice, reduce inequalities and ultimately lead to better societal understanding on the basis of multicultural and pluralistic ICH.

ICH and its Peace-Making Potential in (Post-)Conflict Situations: From Cultural Rights to the Collective Right to Peace

Just as Carnival practice suggests, ICH has assumed a variety of functions, particularly in current contexts and international relations. As a (collective) cultural right, it may contribute to social gluing processes. Its transforming and rights-enhancing potential, however, becomes particularly relevant for the right to peace as a catalyser for individual empowerment, societal healing and the respect and promotion of cultural identities. In fact, Intangible Cultural Heritage as a peace project has also found application in current rela-

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[124] Interview with X34.
[125] Keynote speech by Professor Verena Metze-Mangold, President of German UNESCO Commission on 'Geteiltes Erbe. Das Thema des Europäischen Kulturjahrs 2018 aus der Sicht der UNESCO' at international colloquium on 'Shared Heritage. Transcultural and intercultural cultural heritage in the Euro-Afro-Mediterrenean Area'.

tions. It is generally assumed to 'provide a relief in potential conflict situations' (Kuutma, 2013). This includes serious conflict contexts such as the Syrian peace building process and transitional justice efforts which actively involved ICH regimes. Reasons may lie in the importance of group identity that is wiped out in the process of cultural heritage destruction and prolonged violence in post-conflict phases (Lostal & Cunliffe, 2016). It has been argued that cultural heritage as such should be included in these debates in its own right which would, in turn, also contribute to 'greater awareness of Syria's cultural diversity, and the understanding and healing that can bring' (Lostal & Cunliffe, 2016: 248). Cultural heritage thereby adopts several dimensions, encompassing awareness and promotion of a diverse society while at the same time exerting a conciliating impact, spurring peaceful developments in society.

Similar conclusions were reached in the context of post-conflict developments in Sudan where concepts such as identity and cultural heritage were used in often contradictory ways throughout time, as a demonstration of conflict(s) of identities and cultural identities on the one hand and as invoking cultural identity for a 'wide societal project of reconciliation through the recognition of cultural, religious, and linguistic diversity through a policy of cultural heritage-making' on the other (Leturcq, 2009). Post-agreement situations in Colombia similarly revealed the impacts of ICH policies on larger societal developments and on 'resilence, reconciliation and construction of peace environments' in current policy projects (UNESCO, 2018).

The concept of cultural heritage has equally assumed a political dimension, as a political resource employed by authorities and dissident groups, as a means for pacification or contestation (Leturcq, 2009). Others placed emphasis on the contrasting and conflicting nature of cultural practices, growing to a form of dissonant heritage (Kuutma, 2013; Tunbridge and Ashworth, 1996). It has also been enhanced that Intangible Cultural Heritage itself shows an explicit need to be protected as a conflict mediating and preventing tool, applied in the very post-conflict context (Seddon, 2016): apart from its cultural rights dimensions, its significance for representing a community's identity strikes out (Contreras, 2012). Post-conflict contexts also reveal the particular necessities arising out of ICH violations that were committed during conflicts; these prove difficult to be dealt with considering 'social and cultural structures, relationships and identities (…) potentially more grave in its consequences and more difficult to heal' (Bräuchler, 2012).

The peace enhancing role has albeit also been identified in non-conflict contexts: so-called 'civic intangible cultural heritage', implying historic relationships between neigh-

bouring communities related through common celebrations have shown to embody a 'way of maintaining peaceful and friendly relations between different communities' (Arizpe, 2013: 26).

Similarly, tensions have been noted where different ethnic, cultural, religious and 'national' groups entered into rivalry on inventorying and the selection processes for the ICH Representative List (Arizpe, 2013). Such 'contrasting, at times, conflicting versions of narratives' are however common and in these contexts – 'no aversion is truer than another' (Arantes, 2013: 54). Yet, such apparent irreconcilability does not necessarily impact on the enjoyment of cultural rights as these can be claimed by different groups without having to comply with some sort of cultural conformity or homogeneous applicability. The field of ICH (rather than cultural rights) and recognition regimes, however, reveal different realities and dynamics. At the same time, cultural practices constantly undergo negotiations, 'flourishing in voids, margins, borders, in difficult (and frequently conflictive) encounters between different cultures' (Amescua, 2013) that are 'nourished by divergences, displacements, convulsions and ruptures, by the questioning of identities' (Le Bot, 2006). It is for cultural rights regimes to accommodate such diverse, constantly evolving expressions.

All such theoretical considerations (see box above) find empirical grounding in many ways as they relate to Carnival practices. The specific ways of 'giving a sense of (…) identity' have been attributed to Carnival (Arizpe, 2013: 22), demonstrating its strength of creating a sense of belonging or affiliation despite the multiplicities of articulations and underlying messages Carnival may take and convey. (Traditional) European Carnival celebrations, for instance, have commonly been self-proclaimed as 'pluricultural events' (Arizpe, 2013). In the case of the Murga movement in several European cities, for instance, local street culture met with globally transferred cultural expressions: in Antwerp, Carnival expressions were used as a specific (policy) tool to combat hate crime and stimulate intercultural dialogue, resembling its 'original' cause in the neighbourhoods of Buenos Aires where it is employed to mobilise neighbourhoods and to promote social cohesion.[126] Murgas have been described as participatory formats and as proper cultural productions of districts in Buenos Aires persisting until today ever since the first decades of the 20th century (Canale and Morel, 2005). Murgas thereby draw on pluralistic origins, Spanish and African roots in particular.[127] To keep the Murga alive, transmission processes have

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[126] Interview with Margherita Serafini (Independent Researcher Intangible Heritage).
[127] Ibid.

included a variety of elements such as parades involving locals and promoting dialogue among participants and spectators.[128]

At the same time, Carnival expressions continue undergoing conceptual changes as illustrated by Latin American experiences. Several Carnival expressions in Latin America demonstrate conceptual developments, shedding new light on its pluralistic orientation: by breaking 'the order of values, bring(ing) social harmony, but most of all, they prevent Latin American cultural syncretism' (Lascar, 2014; Caclini, 1989). In several contexts where the Murga movement started flourishing, its significance as a socio-cultural, bottom-up movement and its gluing factor have been emphasised.[129] The social forces behind Carnival were similarly observed in the case of Samba Carnival in Rio de Janeiro and Favela Museums where preparations of the customs allowed to 'include disadvantaged youth from detention centers, orphanages, homeless shelters and drug problem clinics', while supporting people's artistic skills development and building up self-esteem (Dimitrova Savova, 2009).

Such particular articulations and expressions have been embedded in what could be understood as underling values of Carnival, being traced back to Catholic traditions, referring to 'celebrating a state of equality where people are under their masks (…) social classes differentiation dies (…) becomes the main element for ordering models of citizen cohabitation' (Lascar, 2014). Latin American Carnival celebrations have often made active use of such practices to respond to persisting colonial attitudes in societies, allowing for equal engagement in cultural practices as a case study on the Carnival of Barranquilla shows:

> '…combines festivities brought by the Spaniards mixed with indigenous ceremonies and African secular rituals. At colonised centers, the dominated ethnicities (indigenous and Africans) used to celebrate by dancing and singing. They used to make fun of their Spaniard's master's customs. In the end, the dominated as well as the dominator join together around the same space and the same party' (Lascar, 2014: 80)

In that sense, historically marginalised ethnic groups have gained voice in not only entering public spaces, but in promoting group identities in an egalitarian fashion. To what extent this could be considered a permanent state of societal relations and justice, being translated to long term changes remains questionable though. In fact, it has been argued

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[128] Ibid.
[129] Interview with Margherita Serafini (Independent Researcher on Intangible Heritage).

that, for instance, the performance of blackness remains reduced to the 'regulated time' of Carnival celebrations and would rather reflect an 'illusion of racial integration and black pride', limited to the 'Las Negritas Puloy de Montecristo' performance. Concurrently, 'the consciousness of inequality stays dormant and inequality continues being a quotidian practice in a supposedly tri-racial nation that was funded on the principles of mixture' (Gontovnik, 2018). Conversely, it may be argued that the very space that is created in Carnival celebrations provides an effective entry point for historically marginalised peoples to gain voice in public spaces, a form of – albeit – temporary recognition that initiates general awareness in society with the potential of opening more doors in an act of recognition of what is widely understood as a communitarian event. In fact, the Las Negritas Puloy of Montecristo performance has been identified as a 'collective custom' while 'becoming an ubiquitous image strongly associated with carnival time itself' (Gontovnik, 2018). This could also be reaffirmed at more general level: in Barranquilla Carnival is considered a 'main source of identity' (Gontovnik, 2018). Participation in such identity representation thus resembles an opening of identity recognition or demonstration of pluralism inherent to the city's identity and its peoples. At the same time, such performances represent the struggle for recognition and resistance described as 'a yearly fight for survival, a fight for continued visibility, for being allowed to perform in the official massive carnival public sphere' (Gontovnik, 2018). Apart from such collective struggle for recognition of Afro-descendant peoples, Carnival practices have contributed to 'pride in blackness, even via a stereotype inherited from other cultures, also giving 'criollos' a structure that defines them as uniquely non-white, non-Spanish, and anti-colonial' (Gontovnik, 2018; Lane, 2007).

The celebrations might thus be regarded as spaces of pluralism and diversity in which a wide panoply of identities is articulated and shaped by the rights holder communities. Similar forms of contestation particularly concern so-called 'hidden forms of resistance' in the context of Mardi Gras celebrations (Becker, 2013; Kelley, 1996), particularly for people(s) of African descent and indigenous peoples. Interestingly, different identities are being assumed by groups identifying with each other and representing plural agendas, becoming apparent in different dress codes through the 'creation and wearing of costumes on Mardi Gras Day that demonstrate Native American, Caribbean, and African influences' (Becker, 2013).

Different interpretations might also coexist and challenge each other as demonstrated by the Carnival of Oruro which brought up discussions on the underlying values and new interpretations developing in concurrent ways. Critics thereby identify hegemonic inter-

ests and an excluding impact *vis-à-vis* indigenous peoples and indigenous mestizos (Córdova, 2012). Much merit lies in the plurality of religions and spiritualities finding accommodation in such settings. In fact, Carnival performances integrate a wide range of pluralisms into the yearly festivities as 'Andean Catholic feast', including Christian symbolism and cosmological expressions in the Andes encompassing practices of reciprocity; symbolic charge; social communion; sacred forces (Córdova, 2012, Albó & Preiswerk, 1986) and special rituals of the agricultural calendar (Rowe and Schelling, 1991); dances encompassing different regions in Bolivia, representing cultural particularities and indigeneities, thereby promoting indigenous peoples' distinctive cultural rights. The Oruro festivity thus serves as an 'exemplary phenomenon of the cultural syncretism of the region' while illustrating liturgical symbiosis (Córdova, 2012).

Realities further reveal complex internal dynamics, a wide range of actors and negotiation processes around practices that eventually become part of recognised cultural heritage. This concerns not only participants engaged in direct performance of dance and music, but also 'the media, the authorities, the audience, and even the street-sellers and advertising sponsors' (Córdova, 2012). Another shaping role is assumed by societal impacts, including the 'mediatory powers of the festivity and often competing interests at play' (Guss, 2000; Córdova, 2012). Conversely, main decision-making instances remain key to the way ICH practice finds articulation and ultimately recognition. In that sense, 'homogenising cultural discourse produced by authorities' reflect general tendencies in cultural heritage regimes that commonly promote and reinforce specific images of what may or may not be included in ICH practice. This may, in turn, affect the way the individual, a group and collectivities are able to enjoy cultural rights: who gains voice, who is left out, which interpretations (pre-)dominate in the yearly Carnival festivities? The very right to equal value in the enjoyment of cultural rights thereby bridges the conceptual gaps between universalism and the politics of difference, and rules on the recognition of respective values: in the case of the Carnival of Oruro actors get to challenge ideological processes that limit other identities in being noticeable (Córdova, 2012; Taylor, 1992). In that sense, these processes could be understood as invoking differentiation and superimposition in the light of competing players acting in accordance with hierarchical symbolic differences (Córdova, 2012). On the ground observations reveal the difficulties associated with cultural heritage practice as far as vulnerable groups are concerned and hence included in Carnival practices:

> '…we observed that behind the scenes of the spectacularisation of the nation, indige-
> nous actors and urban indigenous mestizo groups are excluded. They are not allowed to
> have a say in the management of the parade, their histories are reduced or appropriat-
> ed (…) their experience of exclusion in a platform that mediates the nation at the level
> of representation is symptomatic of their erasure from national memory by the mesti-
> zaje discourse, itself a reconfiguration of colonial legacies around the correlation be-
> tween race and social 'worth'.' (Córdova, 2012)

At the same time, the virtuous, counter-colonial spirit of the celebration needs to be acknowledged, opening up a pluralistic, diversity-oriented ground for indigenous representatives and representations to find articulation and voice. Reflecting such magnitude of plural practices and expressions, the Carnival of Oruro has been described as a 'laboratory of Andean Cosmovision and cultural heritage of (inter-alia) Aymaras and Quechuas, through the festive' (Córdova, 2012). Digging deeper into the underlying rationale and historical embedment of such practice in the collective memory, we find ourselves confronted with the destructive forces of colonisation that would subvert transmission of autochthonous historical understanding (Córdova, 2012; Taylor, 1992). In an attempt to cure such historical injustices, ICH practice opens the door for counter-hegemonic approaches:

> 'We have seen that the Indian has been pushed into darkness under the mestizaje dis-
> course, under Western aspirations, and under the economic weight of capitalist accu-
> mulation. I have demonstrated that that dialogue and transformation can be sought
> through cultural performance, in that performance allows for interlocution' (Córdova,
> 2012).

Such interlocution and competing discourses as they relate to Carnival practice have recently formed part of a societal critique on the reactions and inactions concerning a fatal event during Carnival. Most notably, an explosion causing nine deaths and forty injured persons during the Carnival parade did not result in halting the festivities, allowing for remembrance of the dead persons and their families, but hardly affected the continued activities. Interestingly, the religious foundations of such ICH practice were invoked, disclosing people's incoherence in dedications to Virgin Mary, such as dancing in her name, turning her into an object, commercialising her role, and attributing immoral conduct in the very same context.[130] A painting gave insights into a critique directed towards the gradual sexualisation of women in the parade, serious forms of violence, societal

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[130] Interview with Rilda Paco (artist and activist).

hypocrisy and immoral conduct: it displayed Mary hardly dressed while people would perform indigenous dances, however, being excessively drunk.[131] According to local Carnival traditions, people*s demonstrate their gratitude for the Virgin's protection by means of dances in order to return something. The critique was hence directed towards the way such custom was changed in such a way that would hardly be justifiable in the light of the underlying rationale, that means to thank the Virgin. The explosion and its missing acts of remembrance triggered a series of societal critique, addressing expectations of gender roles, sexualised dress codes and dissonance between ethical or moral foundations and religious belief on the one hand and human behaviour on the other, debating the underlying values of Carnival practice.

Women's role in Carnival practice proves illustrative of such changes. In the early beginnings, women were not allowed to dance. When their participation increasingly received societal approval, their role and leverage also started to change just as cultural practice developed which turned her into an attractive 'object', illustrated by her way of dressing, something deemed unacceptable throughout the previous years. Some remnants of such persisting positioning may come to the fore in exceptional circumstances or commute to yet another form of oppressive pattern, that of violence. Apart from gender-based violence, notable violations include disappearance of children and other violations affecting children to a greater extent. Families more generally have been affected by the popularity of Carnival practice, losing homes or being unable to pay the rent given increasing numbers of tourists and respective rise in housing costs.

The author of such opinions was, in turn, confronted with an immense wave of negative reactions. This included threats by local authorities to initiate a penal process and death threats that would affect the artist or her family, eventually declaring her 'persona non grata' in Oruro. In that sense, the artist's right to freely express her opinion by means of a painting was severely infringed upon and similarly demonstrated difficulties in allowing co-existing views to be expressed (in public) on how ICH ought to be practiced. Accordingly, the views as expressed by means of the painting were explicitly ruled out and understood as an invalid account of a commonly lived narrative, and eventually, punished by means of threats to adopt judicial or extra-judicial measures. While diversity and pluralism demonstrably find expression by Carnival practices, opinions differ as to how these materialise in the respective cases, and ultimately who decides on their conceptualisation(s). In the end, cultural bearers as rights holders only gain little say on cultural

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[131] Ibid.

life as embodied in ICH practice whenever interpretations promoted by large parts of the public prevail, being limited to single valid or legitimate ICH understandings.

Similar observations were made in so-called traditional forms of Carnival in Barcelona which would open its spaces to include migrants.[132] Latin American groups have been particularly present and hence managed to shape Carnival as an ICH practice. Traditionalist sectors, however, criticised the way new interpretations would supposedly not do justice to more traditional forms of Carnival which had been documented for decades – hence generating a certain polemic[133] and discrimination. Apparently, traditional forms had contributed to enhanced forms of social participation.[134] For such reasons, distinct forms of Carnival are now being held in different parts of the city, with some including more Latin American components and others based on rather 'traditional' forms.[135] These forms of contestation and diverging forms of interpretation have been illustrative of 'traditional' Carnival celebrations everywhere in Europe that have to varying degree opened up to include a pluralistic and diversity-oriented space for identities to gain voice and room to develop. Current right-wing movements in many parts of Europe attempted to strengthen uniform interpretation of ICH practice including Carnival, in dictating dress codes, music, dance and style to conform to what was to be understood as 'Spanish', 'French', 'Dutch', 'British', 'German' etc. Such homogenising effects have, however, been met with bottom-up resistance just as illustrated by the Murga movement and other groups that rather recently discovered Carnival for themselves and as collectives. The equally traditional role of 'socio-political critique' and 'solidarity' – forming core components of Carnival – would find more resonance in practice if such pluralism was to be recognised and guaranteed.[136]

In a similar way, dominance has found expression in political terms as relating to Carnival. Carnival could thus be placed in broader debates and processes of production, circulation and contemporary cultural consumption (Bonet, 1995). In fact, Carnival has come to be generally embraced as a counter-homogenising force *vis-à-vis* globalisation by subjecting people to a rediscovery of diversity and cultural heterogeneity (Canale & Morel, 2005). It could be argued that such cultural diversity as expressed through Carnival

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[132] Interview with X7.
[133] Interview with X7.
[134] Interview with X7.
[135] Interview with X7.
[136] See, for instance, recent cases of Carnival celebrations in other cities of Bolivia, Brazil, other Latin American cities, but also Europe.

practices is valued as a new problem-solving mechanism to deal with contentious issues. These may concern challenges arising in the political economic order (as promoted by the forces of globalisation) and the general need to open up the space for pluralism and promoting democratic principles (Canale & Morel, 2005). However, the very process of officially legitimising cultural heritage constitutes by no means a neutral undertaking that would do justice to pluralisms and diversities as generally promoted by Carnival practices. Just as debates on Intangible Cultural Heritage demonstrate, such processes of recognition and legitimisation require cultural policies to acknowledge networks, leadership and forms of participation in each district where Carnival takes place (Canale & Morel, 2005). This is what has been termed 'practices of contemporary heritagisation' (*las prácticas de patrimonialización contemporáneas*), implying the political nature of such processes (Canale & Morel, 2005). Other accounts in cultural anthropology consider heritage as social processes or 'as the result of metacultural operation' (Tauschek, 2011). In many ways this could be translated to the legal and political sciences where principles and definitions in the ICH field are disentangled by means of such metacultural understanding, enabling a rich diversity of practices to be embedded and be safeguarded. Or, to put it differently, implementation processes of the novel CSICH regime encounter a cultural vacuum (Kirshenblatt-Gimblett, 2006).

Challenges of implementation are manifold; overcoming prejudice and constructed borders form part of transmission processes which are oriented towards reaching diversity and finding common grounds and connecting points.[137] Transmission is inherently a social practice, exercised by both communities and individuals: rather than being a mere copy of performed customs, every participant finds her or his own way, own experience and technique associated with practices of Carnival.[138] The further-reaching meaning of such practice materialises in people's/peoples' participation and learning to deal with others, to become part of a group and to connect people(s).[139] In that sense, social cohesion plays a fundamental role in Carnival practices which would be jeopardised if pluralism and diversity were not respected.

Other considerations concern recognising diversity within the Carnival movement itself, encompassing a heterogeneous field which is constitutive of subjects (institutions or

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[137] Interview with X28.
[138] Interview with Christoph Wulf (Professor for Anthropology and Education, Member of the Interdisciplinary Center 'Historical Anthropology' at the Free University of Berlin).
[139] Interview with Christoph Wulf (Professor for Anthropology and Education, Member of the Interdisciplinary Center 'Historical Anthropology' at the Free University of Berlin).

civil society players) that dominate each other and enter into exchange in dialogues of convergence (Canale & Morel, 2005). However, such heterogeneity is not generally officially acknowledged based on the State-centric nature of the regime in which dependencies are created between human rights holders on the one hand and State commissions on the other hand. The latter instance determines to a large extent which practices are considered or not and thus enjoy particular safeguarding. The State as a powerful actor 'manages' the creation of identities that are (partly) based on material and symbolic resources at its disposal to impose categories which are, in turn, employed by bureaucrats, judges and teachers and imposed on for non-governmental entities (Brubaker and Cooper 2001). The role of NGOs as active information agents proves fundamental for democratisation processes, including ICH-specific participation such as promoting inventorying at local level and community capacity-building.[140] Further societal control is exerted in the very transmission processes, namely by identifying who controls and arranges cultural practice including hegemonic structures (Tauschek, 2011; Kuutma, 2007).

In fact, contemporary realities do not reveal unified, single ideas of how ICH ought to be practiced. Such realities are similarly to be found in so-called Carnivals of Culture(s) or Summer Carnivals, emerging in European cities alongside 'traditional' forms of Carnival celebrated in spring time in accordance with the Christian calendar. In the case of Rotterdam, for instance, such forms of Carnival have shown 'including effects', allowing communities affiliated to other parts of the Kingdom of the Netherlands to introduce their very Carnival traditions in such Summer Carnivals. Cultural bearer groups thereby encompass participants of Dutch-Antille migrant background and participants from outside the Kingdom, for instance, participants of former Turkish or Moroccan descent which would attribute different meanings.[141] It could hence be maintained that Summer Carnival has become a 'feast of social cohesion' and a demonstration of superdiversity which is often challenged by strategies of ICH-related instrumentalisation by right-wing movements insisting, for instance, on figures such as Black Piet in the Sinta Klaas tradition.[142] On the bright side, the Carnival of Cultures has been viewed as key in standard-setting: there is indeed a need for standards that serve as orientation for diversity, the standards of 'human rights': if we take such standards seriously, society at large will also be able to acknowledge and accept diversity such as represented by the Carnival of Cultures.[143]

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[140] Interview with Filomena Sousa (Researcher in the Portuguese NGO Memória Imaterial and Member of "Institute for the Study of Literature and Tradition – heritage, arts and culture").
[141] Interview with Albert van der Zeijden (Dutch Centre for Intangible Cultural Heritage).
[142] Interview with Albert van der Zeijden (Dutch Centre for Intangible Cultural Heritage).
[143] Interview with X1.

Societalisation practices indeed permeate the public space, hence attributing important roles to awareness raising and the media as transmitters of cultural practice in their own terms. The Carnival of Cultures in Berlin, for instance, enjoys 'great information dissemination in mass social media' based on 'new informational processes and cultural practices in the 'network society' (Weinstock, 2013). In that sense, such structures and processes assume functions of quasi-safeguarding mechanisms, translating societal approval into public channels. Carnival celebrations in Latin American contexts play a significant role in shaping such novel forms by what could be called 'travelling cultural heritage'. Most notably, a variety of performances practiced in the aforementioned Carnivals of inter-alia Oruro, Barranquilla or Buenos Aires find novel expression in (European) Summer Carnivals and explicit recognition, breaking up uniformity and definitional polemics. Carnival thereby trans passes an understanding of culture and heritage that is limited to specific territorial spaces as promoted by right-wing movements, instead, it finds ways to create common awareness and explicit approval of the inherent multidimensional understanding of ICH.

5.6 Other ICH Mechanisms as Forums for Diverse Manifestations: Theatre, Arts and other Artistic Expressions

One similarly recurring ICH practice includes theatre and artistic expressions. Its orientation towards plurality has lent itself well for accommodating plural forms of expression, constituting a core necessity for newly arriving populations such as refugees and for advancing recognition of diverse societies. From a societal perspective, this has both allowed to gain understanding of vernacular traditions and to introduce hitherto little or unknown forms of cultural life while enabling cultural rights to become genuinely accessible – if implemented adequately. Officially recognised theatre and artistic expressions are manifold, encompassing a wide range of practices.[144] Such practices may encompass cultural heritage as engaged in by minorities, migrants and in that sense demand specific human rights mechanisms to come into play. They may equally require enhanced protection of gender-based rights; some ICH practices place a particular focus on the latter such as

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[144] UNESCO-wide recognised theatre practice includes the Kumiodori traditional Okinawan musican theatre, the Mudiyettu ritual theatre and dance drama of Kerala, the Ramman religious festival and ritual theatre of the Garhwal Himalayas, the Kabuki theatre, the Kutiyattam Sanskrit theatre, the Mak Yong theatre, the Ningyo Johruri Bunraku puppet theatre, the Nôgaku theatre, the Opera die Pupi Sicilian puppet theatre, the Sbek Thim Khmer shadow theatre and the Wayang puppet theatre. Artistic expressions are by their very nature quite extensive and won't be explicitly mentioned here due to reasons of space.

(theatre) plays where women's roles are played by men and vice versa,[145] allowing to question established, sometimes discriminating 'cultural heritage conduct'.

Providing equal access to theatres has been declared as one of the principal objectives in numerous existing projects directed towards human rights and refugee rights in particular. Reasons are manifold. Most notably, such orientation has been motivated by refugees' particular situation as victims of injustices within societies, by vulnerabilities in terms of access to many resources, by precarious housing situations or negation of such right, and by prejudice against them and poor economic access.[146] Theatre projects, it has been claimed, provide dedicated forums for making their stories heard, for providing access to the art, for providing channels to introduce their theatre to the rest of society, and ultimately for leaving many open spaces for what people want to tell – such as narratives on tragic journeys on the boat, the stories of homeland or present-day difficulties associated with encountering prejudice by authorities or parts of society.[147]

One of the expressed aims of such endeavours has been one of authorship, of leaving the decision of what to tell society (by means of theatre) in refugees' own hands.[148] This reflects much of what cultural rights require to be upheld, namely people's/peoples' proper decisions on what they consider cultural life and to be enabled to engage in respective practices. Rather than addressing preservation of cultural heritage, it is argued that cultural rights 'entail ensuring the conditions necessary to enable everyone, without discrimination and on a basis of equality, to contribute to the constantly evolving cultural life of as many – or as few – communities as they select to be part of' (Shaheed, 2015). Accordingly, cultural life is pictured as a continuously changing concept, allowing all communities to become involved, firstly, by the very nature of cultural life and secondly, by means of non-discrimination and equality, obliging States to guarantee such rights to migrants including refugees. Cultural rights, however, gain yet another dimension, namely as grounds for persecution, being applicable to violations originating in the situation before people leave a specific jurisdiction or region. It has been argued elsewhere that cultural rights as such constitute material grounds for persecution (Novic, 2016). In that sense, refugees could be considered particularly vulnerable in their equal enjoyment of cultural rights, facing the additional difficulty of potential past and current injustices.

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[145] Interview with Francesco Francioni (Professor Emeritus of International Law European University Institute and Professor of Int.l Cultural Heritage Law LUISS University).
[146] Interview with Neil Beddow (Artistic Director and Founder, acta community theatre).
[147] Ibid.
[148] Ibid.

Migrants may similarly identify as collective communities. In that sense, cultural rights regimes offer yet another venue to be explored, namely in granting 'freedoms connected to collective identity and the pursuit of specific ways of life' (Shaheed, 2015). Accordingly, theatre and other artistic expression can offer spaces for collective identities to find articulation without prejudicing 'individual identity and self-expression' (Shaheed, 2015), without enforcing or expecting collective identities to come to the light. In theatre projects, such (code of) conduct is colloquially denominated 'the gentle approach', leaving refugees the space to freely express emotions, to story tell the everyday and to ultimately appreciate people's/peoples' life experience.[149]

If this was taken to a somewhat more transcendental level, it could be argued that a State's approach towards safeguarding (intangible) cultural heritage would need to be broadened, applying to its entire conception of cultural heritage (Logan, 2016). Accordingly, official cultural heritage registers and programmes would need to be made inclusive by 'using cultural mapping approaches' and to develop cultural heritage protection specifically aimed at protecting cultural minorities (Logan, 2016). This is further motivated by the idea that certain practices do not find recognition in domestic cultural heritage discourses and respective domestic lists. Such discourses have, however, not remained uncontested, driven by the arts which testified new forms of assemblage of cultural practices materialising in, for instance, the hybridisation of cultures in Europe.[150]

In the refugee context, accounts differ as to the importance of territorial dimensions or geographical spaces and notions. Some would argue that 'it is the cultural heritage of the person and the place the person has been displaced from'[151] which prove decisive, revealing necessities to include such aspects in new heritage conceptualisations. Other accounts reveal, however, also fusions of what heritage can be in that regard: it is reported that

> 'they bring cultural heritage from their country and the cultural heritage where they arrive, this interface (…) or Somali mums who use folk stories from Somalia for children (…) Western theatre to interpret an African cultural tradition (…) example of how culture can mingle, they often use this, because people like to do that, it is about making a connection, shared humanity'.[152]

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[149] Interview with Neil Beddow (Artistic Director and Founder, acta community theatre).
[150] Interview with Ségolène Pruvot (European Alternatives, Cultural Director).
[151] Interview with Neil Beddow (Artistic Director and Founder, acta community theatre).
[152] Interview with Neil Beddow (Artistic Director and Founder, acta community theatre).

Such connections might prove fundamental where society has alienated itself from the daily suffering of its members, where images conveyed through television no longer reach society: it is in fact through art and theatre that people become aware of the consequences for people's/peoples' lives, of the cruel 'normalities' of a Mediterranean sea full of blood and cruelties.[153] Where this does not materialise (in such perceivable manner), observable phenomena include (enforced) cultural assimilation, missing exchange of cultural heritage and processes of 'ghettoisation'.[154] Conversely, artistic expressions and theatre potentially become tools of self-reflection on the part of society, questioning ('national') identities and cultural heritage by being exposed to realities not perceived in our daily life or unwanted perspectives.[155] That way, it is argued, ICH transmission processes are initiated and multiplied, albeit going beyond ordinarily recognised cultural practice.[156]

At the same time and most crucially, this impacts on several human rights dimensions, such as people's/peoples' right to express themselves freely culturally. As a matter of illustration, theatre and artistic expressions prove enabling in terms of expressing one's identity by means of clothes, language, non-verbal communication, depending on individual preferences and on the very environment that is created in such sectors, which offer ways to share such identity and allow for adequate representation.[157] Some initiatives make in fact explicit use of non-verbal devices which are aimed at reinforcing particularly refugee minors' needs in expressing themselves through camera use and conveying images of their perceptions of the world – this is partly based on their very incapacity to express themselves via other means.[158] It also enabled youngsters to develop identities by means of the videos that would go far beyond 'classical' stories on tragic trajectories; these might in fact only partially be included in youngsters' auto-perception, instead room is to be provided for alternative, authoritative accounts.[159] Beyond the realms of the ad hoc projects, transmission requires paradigmatic shifts throughout educational measures: this concerns intergenerational processes and transmission in school curricula, for instance, that hardly provide the space for cultural rights recognition to take shape in an inclusive way.[160]

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[153] Interview with Silvana Oliveri (Centro per lo Sviluppo Creativo "Danilo Dolci" (Italy).
[154] Interview with Silvana Oliveri (Centro per lo Sviluppo Creativo "Danilo Dolci" (Italy).
[155] Interview with Silvana Oliveri (Centro per lo Sviluppo Creativo "Danilo Dolci" (Italy).
[156] Interview with Silvana Oliveri (Centro per lo Sviluppo Creativo "Danilo Dolci" (Italy).
[157] Interview with Silvana Oliveri (Centro per lo Sviluppo Creativo "Danilo Dolci" (Italy).
[158] Interview with Camilla Paternó (offf Onlus and Accoglierete Onlus, re-future project, Dugong films production).
[159] Ibid.
[160] Interview with X1.

Other concerns might relate to the way cultural rights are framed. Critics remark how cultural rights provisions are interpreted somewhat in isolation from cultural diversity instruments, touching themselves upon cultural rights.[161] On the other hand, it may be argued that cultural diversity and similarly embedded principles fundamentally underlie UNESCO CSICH[162], enabling cross-referencing and to be invoked by other international legal mechanisms. Cultural rights have further provided fruitful soil for bottom-up movements to articulate and express resistance and demands for non-exclusion; to offer spaces for migrated artists to encounter a safer environment outside of, for instance, conflict zones; to document this resistance in diverse world regions; and to be able to continue being active in their very fields.[163]

In similar ways, storytelling has been used to enable refugees to gain a voice, express themselves and to exert influence on public opinion: this concerns both narratives on their journeys to the respective 'receiving' States and collective identities being articulated *vis-à-vis* society at large.[164] Apart from the burdens and devastating effects of such trajectories (living in isolation, daily high levels of stress, constant pressures and dangers), people's/peoples' experience demonstrates severe health-related effects such as the deformation of bodies that were addressed in storytelling and personal histories.[165] Conceptually, narratives being told or created throughout the painting process also become part of ICH, of who is considered as knowledge authority. It is hence crucial (for programmes) to grant such authority on the substance of ICH while avoiding expectations of what is to be said.[166] In practice, people convey particular images of traditions they miss practicing and feel attached to, which they may have lost.[167] Others have described such cultural practice as generating shared history, albeit attempting to avoid essentialising or reproducing images or potential objectifications.[168] Rather, an inclusive understanding of history is being sought; cultural practices thereby become part of both personal histories and collective history while actively shaping representation.[169] In fact, gaining voice by means of life

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[161] Interview with X1.
[162] Interview with Philipp Bludovsky (2015-2018 Curator-in-Chief German Cooperative Museum, German Association Hermann Schulze Delitzsch).
[163] Interview with Ségolène Pruvot (European Alternatives, Cultural Director).
[164] Interview with Nizar Keblawi (Malmo City Library - A Million Stories, Project manager).
[165] Interview with Daniel Urey (Färgfabriken Contemporary Art Centre, project "Shared History").
[166] Interview with Neil Beddow (Artistic Director and Founder, acta community theatre).
[167] Interview with Nizar Keblawi (Malmo City Library - A Million Stories, Project manager).
[168] Interview with Daniel Urey (Färgfabriken Contemporary Art Centre, project "Shared History").
[169] Ibid.

stories in a way takes consideration of vulnerabilities while shaping cultural heritage and the meaning of rights in an inclusive fashion.[170]

Refugee (and intersectional) identities appear in new light where such recorded interviews are passed on to the public.[171] The audience hereby develops empathy by grasping the intrinsic difficulties of such situations, it is argued.[172] In that sense, awareness raising becomes an indispensable part of transmission processes and ultimately influences the way ICH can be enjoyed as a cultural right. Apart from the merits attributed to ICH as a cultural right, societal changes become visible, if not prevalent: persons belonging to such groups are no longer seen as labels, but as human beings who have come to facilitate, at the same time, changes at macro scale, allowing us to gain an improved understanding of vulnerability, mutual learning, wider changes in society and eventually shifts in perceptions where prejudice prevailed.[173]

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[170] Ibid.
[171] Interview with Nizar Keblawi (Malmo City Library - A Million Stories, Project manager).
[172] Interview with Nizar Keblawi (Malmo City Library - A Million Stories, Project manager).
[173] Interview with Neil Beddow (Artistic Director and Founder, acta community theatre).

6. Concluding Remarks: Safeguarding, ICH-Specific Responses and Beyond

Safeguarding enjoys a considerable position within the ICH regime materialising in different forms; this may encompass procedural dimensions that improve cultural bearers' active shaping of and participation in creating ICH elements and for the latter to be recognised. This, however, also concerns inter-generational transmission including a gradual empowerment of society at large in divulgating but also taking share in existing practice. Civil society and research institutions are further attributed essential roles in such processes assuming both responsibilities and rights in ICH practice (see CSICH and OPs for further details). Other than the preceding 'material heritage' regime, strong participatory, bottom-up elements characterise the ICH framework which essentially builds on list mechanisms and different protective measures taken at domestic and international levels (see Chapter 3 for further details). These, however, fail to reach the profoundness and rigorousness including compensation and punitive measures of IHRL.

At the same time, the present study most essentially uncovers remaining gaps in this rather novel legal regime. Thereby, non-legal or quasi-legal ways for cultural bearers to access ICH are uncovered, shedding light on how ICH elements are practiced and promoted in their daily (community) life. Conversely, limits to enjoying cultural rights materialise in a number of ways. Rather than representing a mere framing exercise or conceptual discussion void of legal implications, the construction of rights holder categories in fact strongly indicates what kind of rights can be claimed, in what matter, guaranteed by whom etc. In that sense, we necessarily need to understand safeguarding in the very legal framework embedding ICH.

Similarly, inter-institutional dynamics provide some insights into the significance of ICH throughout the recognition process. Accordingly, safeguarding shows strong dependencies on unilateral decisions taken by the State. While communities, groups and individuals (where applicable) are encouraged to propose elements eligible for recognition, prospects of success are not given considering the long road towards international recognition (see Sub-Chapter 6.2 for further details). In fact, the very ad-hoc nature of annual meetings at domestic and international levels might be indicative of the limited outreach of a regime, claiming global outreach, universalism and, most fundamentally, granting equal worth to practice. The very political nature of such bodies that adopt domestic internal policy preferences further alienates safeguarding from those it shall protect. In fact, ministerial units, other governmental bodies and its representatives steer the process. A third or fourth instance advocating cultural rights protection and undertaking monitoring may thus be needed to ensure inclusive representation.

The study hence places particular emphasis on those left out, namely ethnic and cultural minorities, (including) indigenous peoples and migrants, being traditionally excluded from ICH discourses, recognition processes and ultimately legal entitlements. Safeguarding thereby needs to explicitly allow non-discrimination and equality principles to find application in current ICH practice. The study identifies such possibilities in a twofold way, namely by conveying a comprehensive approach on endangered ICH practice and by exploring such very group(s) (categories) affected in their very cultural practice. We do so by adopting a cultural rights approach to ICH, appreciating its potential in closing the 'safeguarding gaps' in UNESCO-CSICH and respective policies. The following two concluding excurses facilitate such understanding, shedding light on the challenges posed by co-existing institutions that assume 'co-mandates' in ICH-based cultural rights protection.

6.1 Intellectual Property Regimes as Safeguarding Mechanisms?

Cultural rights have increasingly become regulated by intellectual property regimes on a global scale (Röschenthaler and Diawara, 2016) which could be explained by a gradually dominating neoliberal order (Comaroff and Comaroff, 2009). Indeed, cultural heritage and intellectual property regimes respectively, touch upon similar themes, yet concern different legal debates. For political reasons States have largely refrained from understanding intangible cultural practice as intellectual property due to the complementary rights emanating from such regime. In general terms, it could be argued that ICH regimes focus on protecting cultural identity while intellectual property mechanisms prioritise economic interests (Lixinski, 2013). To put it differently, intellectual property regimes prioritise general access to and economic use of the respective good with particular regard to the individual creator while cultural heritage limits general access in order to return it to the collectivity and control of its original creator (Röschenthaler, 2011; Brown, 1998, Coombe 1993). Cultural property debates thus necessarily raise the question of who such property belongs to, turning into a highly sensitive issue. Cases where cultural heritage is appropriated by people other than its creators (such as in the case of indigenous peoples) reveal how cultural property becomes relevant in determining user rights. This becomes particularly salient where goods are not shared, but become exclusive property of people or entities to the detriment of cultural bearers. Originally, two dualistic views used to exemplify further difficulties associated with the concept of cultural property. Namely, cultural property could be regarded as belonging to powerful actors with little opportunity to be spread beyond them (1); conversely, cultural property is similarly associated with humankind more generally (2), reflecting a dynamic nature owing to its exposure to various peoples and their interactions (Francioni, 2011; Merryman, 1986). Again, such conceptual

debates reveal the need of regulating access to and use of cultural heritage, turning judicial questions into an existential necessity for cultural bearers and other sharers alike.

Yet, both concepts also touch common ground. Cultural heritage and intellectual property share similar needs in their susceptibility to destruction, piracy and capitalist interests that escape domestic control mechanisms (Röschenthaler and Diawara, 2011). This means that their protection necessarily requires global responses and multilateral problem-solving approaches. At the same time, such intergovernmental responses are jeopardised by multiple, often contradictory legal regimes in place, as outlined above. In fact, UNESCO and WIPO experienced decades of conflict (Blake, 2001) until both organisations appropriated and allocated respective informal responsibilities, separating safeguarding immaterial cultural heritage (UNESCO) and issues related to invention and trading of intellectual property (WIPO) as a result (Röschenthaler and Diawara, 2011). It might thus be called for a second pillar, a 'WIPO pillar' apart from the 'UNESCO pillar' which could even out inequalities arising from economic developments which could potentially be played out to the detriment of indigenous peoples.[174] In fact, alternative developments that pay due regard to indigenous traditions and alternative perspectives lose significance in such scenarios, such as rebuilding destroyed sides that prove essential for ICH practice in accordance with local traditions and cultural facets.[175]

However, conceptual dilemmas are not limited to the international legal sphere: which (legal) category heritage is attributed to and the value it assumes remains flexible and cannot be clearly predetermined (Röschenthaler, 2011; Appadurai, 1986). The very nature of Intangible Cultural Heritage, including how it would adapt to current circumstances and generational needs suggests such confusions in categorisation. Respective insecurities hence emerge which affect those living and practicing ICH and reveal, again, the paradoxes of ICH regimes. It could also be argued that cultural property itself may relate to or determine a person's political status, legal capacities, specific qualities or an individual's personhood (Turner, 2017). This, in turn, complicates the very concept of ICH which is mostly characterised by its collective nature, hence incompatible with the individual notion of the classic (Western) concept of property. Whenever understood in relation to other individuals and society at large, the concept of property is inevitably associated with

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[174] Interview with Francesco Francioni (Professor Emeritus of International Law at the European University Institute and Professor of Int.l Cultural Heritage Law LUISS University).
[175] Interview with Monalisa Maharjan (researcher at Centro Interdisciplinar de História, Culturas e Sociedades da Universidade de Évora; UNESCO Chair for Intangible Cultural Heritage and Traditional Know-How).

interactions among those employing it; thereby, property underlies patterns of control and exploitation (Turner, 2017). This may in fact reveal some form of alienation from debates on shared humanity, respect for diversity and non-discriminatory treatment. To define cultural practice as private property hence mirrors the difficulties in integrating human particularities in the broad, standardising language of legal instruments. Property regimes therefore add to the diversity challenge that is inherent in cultural heritage debates and in terms of its practical implications on the ground.

6.2 Multiple Framework Safeguarding: Intangible Cultural Heritage as a Distinct Cultural Right

Cultural bearers throughout ICH regimes emphasise the enabling impacts of the CSICH regime, exerted by means of emblems and other forms of public acknowledgement which has seemingly led to an enhanced public awareness and its – at least partial – virtuous effects on cultural rights enjoyment. Alternative protection may be granted by property rights frameworks (discussed above) which, however, have largely been transformed into what is recognised today as Intangible Cultural Heritage in the case of, for instance, indigenous peoples (Xanthaki, 2017). By way of conciliating the two, negotiations on a legal instrument have been undertaken which, however, has been met with reluctance by some States, based on a somewhat hesitant attitude towards compromise on sovereignty-related issues.[176] While cultural rights have undoubtedly been stipulated in respective treaties and other instruments, respective jurisprudence is treated somehow separately in cultural heritage frameworks, if not excluded. Underlying premises are based on colonial State-centric perspectives (Bassani, 2017); cultural bearer communities are thus structurally impeded from gaining full and genuine access to rights enabling regimes.

Systemic objections of a political nature thus remain as to how marginalised groups including indigenous peoples and minorities are to be granted special consideration in cultural rights regimes (Jakubowski, 2016). On the bright side, it is these very regimes that ultimately understand cultural bearers as 'rights holders' rather than 'attributing' legal value and personality to specific practice. Ultimately, the very nature of norms addressing such vulnerability and specific needs proves decisive as it is via norms that subjects are eventually determined and rights protection is established. In that sense, ICH regimes grant only limited opportunities for cultural bearer communities to claim, for instance, the right to take part in cultural life. Despite the merits of urgent safeguarding, list systems

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[176] Interview with Francesco Francioni (Professor Emeritus of International Law at the European University Institute and Professor of Int.l Cultural Heritage Law LUISS University).

could generally be characterised to a significant extent by their exclusiveness, remaining alienated from universal applicability to all human beings – contrary to the promises of some of its core provisions. Merits lie in the fast track nature of the list, resembling precautionary measures in IHRL that lend themselves for dealing with serious, systematic and particularly urgent matters. While ICH practice beyond the lists is not ruled out, positive measures remain with a selection of elements and lack legally binding force. Furthermore, the very structures underlying the regime reveal missing opportunities to monitor State compliance with failing safeguards which would, for instance, allow cultural bearers to resort to complaints mechanisms or specific mandates. Without explicit mandates beyond cultural heritage itself, respective monitoring might be further jeopardised.

Issues touching upon the substance of cultural rights remain reserved for other regimes that, however, fail to show operational power in the cultural heritage framework. Additional venues may be created by means of references to IHRL (see CSICH provisions). In practice, references to IHRL remain, however, rather marginal in both jurisprudential developments and State practice. A paradigm shift 'subjectifying' cultural heritage law to include a human dimension is thus called for; rights holders would thereby gain legal personality in a neighbouring regime and throughout recognition practice as an integral part of the ICH framework. This concerns predominantly provisions that attribute specific roles to 'communities, groups and where applicable individuals' which hitherto find application in a somewhat isolated manner from larger human rights developments. Regularly revised Operational Directives could certainly contribute to an improved and systematic integration of such paradigm shifts into the legal framework on ICH safeguarding and ultimately protection.

Far from being static, CSICH as a key instrument in cultural heritage issues could be considered a first step and allow a widening or pluralisation of perspectives to find legal recognition. It further contributes to improving access to cultural rights regimes by enhancing cultural bearers' active shaping role in interpreting ICH as their own practice. The Operational Directives thereby play a key role in allowing for ICH to be 'adjusted' to the spirit of time, doing justice to cultural bearer realities as embedded in ICH practice. We need, however, to be wary of the proceedings, permitting ultimate decisions to come about which ultimately remain with the State that unilaterally establishes ICH. It thereby limits itself to those elements most suitable for domestic cultural heritage narratives and facilitating homogenising cultural politics internally and externally.

If we wanted to further concern ourselves with Intangible Cultural Heritage as a cultural right, a first step would possibly embrace a 'cautious safeguarding' approach, working with existing references to IHRL included in CSICH. Further reaching objectives would include said subjectification of ICH regimes, allowing for genuine rights holder status to be inferred from IHRL. This would, in turn, allow for adopting positive measures to be applied. Communities, groups and individuals would hence be enabled to access support in inter-alia transmission processes; in accessing and practicing ICH in societal spaces while resisting possible undermining power relations; in being protected from external interference and submission to imposed ICH concepts; in exerting voice in all phases of ICH recognition processes; in invoking cultural rights side-by-side cultural heritage issues and opening up the space for the latter to respond to community, group and individual needs. Eventually, this would require us to rephrase our initial concern understanding Intangible Cultural Heritage to be under pressure. It would eventually demand us to place such pressures in the context of situations and contexts that surround cultural bearers and ultimately rights holders (see Chapter 5 for detailed discussions).

7. Recommendations – Towards a People(s)-Centred Approach in Current ICH Regimes: Refining Cultural Rights in Contentious Institutional Contexts

Institutional and Systemic Proposals for Reform

- **Tackling inter-institutional and inter-agency challenges of coordination between relevant international organisations such as UNESCO and OHCHR by**
  - establishing forums of reciprocal exchange identifying key challenges in common standard-setting and mainstreaming cultural rights with a focus on 'Intangible Cultural Heritage elements'
  - providing spaces for identifying gaps in current safeguarding practice with the objective of strengthening right holder orientation
  - equipping Intangible Cultural Heritage and cultural rights-mandated organisations with organisational units and specialised personnel tackling existing challenges, allowing respective agenda-setting and mainstreaming and ultimately adopting Intangible Cultural Heritage safeguarding measures
  - integrating or adopting cultural rights in Intangible Cultural Heritage-conform ways in any kind of inter-institutional and intra-entity arrangement and agreement
  - institutionalising such 'multiple framework safeguarding' in all Intangible Cultural Heritage-relevant processes and phases guaranteeing cultural rights-prone orientation

- **Strengthening cultural rights enforcement in Intangible Cultural Heritage contexts and frameworks by**
  - identifying agendas and homogenising processes as part of Intangible Cultural Heritage safeguarding practice with the objective of exploring venues for inclusive, universal and equitable enforcement
  - requiring and ensuring their enforcement through (quasi)judicial monitoring units where applicable and setting-up of respective instances where not existing
  - establishing of respective monitoring units at domestic levels, particularly where Intangible Cultural Heritage safeguarding processes are implemented under the auspices of ministries steering homogenising, selective Intangible Cultural Heritage recognition
  - creation of international monitoring units or control mechanisms at international level where Intangible Cultural Heritage is negotiated by intergovernmental assemblies such as in the case of UNESCO

- **Democratising and universalising existing Intangible Cultural Heritage recognition and selection processes by**
  - widening cultural bearers' decision-making capacities in all phases of such processes
  - mainstreaming cultural bearers' agency in all awareness raising initiatives including the right to information, especially where Intangible Cultural Heritage is spread beyond the realm of cultural bearer communities exerting detrimental effects
  - redefining cultural bearers' agency and the right to initiate proceedings throughout the entire recognition process
  - stipulating cultural bearers' right to take ultimate decisions, to consent and ultimately retain veto power on specific Intangible Cultural Heritage elements
  - opening multilateral forums up to take account of cultural bearers as actors at eye level

Intangible Cultural Heritage Reform in Inter-State Relations and *vis-à-vis* the Global South Facilitating a Decolonising Cultural Heritage Engagement

- **Reforming institutionalised stances or positioning towards recognising Intangible Cultural Heritage in material heritage forums and institutions by**
  - providing spaces in agenda-setting reserved for Intangible Cultural Heritage and respective specific needs to become articulated
  - mainstreaming Intangible Cultural Heritage in existing intergovernmental assembly sessions or meetings convened by other decision-making bodies

- **Widening States' collective memories with the objective of allowing and embedding pluralising understandings institutionally by means of Intangible Cultural Heritage recognition by**
  - officialising indigenous knowledge and oral traditions generally
  - adopting measures in the education sector to enhance such pluralistic understanding departing from homogenising, assimilating discourses
  - broadening collective memories beyond the realms of specific jurisdiction strengthening awareness and responsibilities towards Intangible Cultural Heritage practice in the Global South (where applicable)
  - establishing new forums or organisational subunits facilitating Intangible Cultural Heritage debates considered relevant in the Global South thereby universalising access to and shaping of Intangible Cultural Heritage

- **Decolonising Intangible Cultural Heritage by**
    - ensuring respective permanent State representation of formerly colonised States granting equitable de jure and de facto powers to decide on international recognition processes
    - adopting positive measures and facilitating international cooperation efforts to allow for regional representation and orientation towards the Global South
    - integrating colonised people's and peoples' perspectives in all Intangible Cultural Heritage recognition processes resembling affirmative action or positive discrimination

- **Adoption of special legal regimes tailored to representing world-wide Intangible Cultural Heritage by**
    - tailoring current provisions as frequently revised in Operational Directives towards indigenous knowledge and oral traditions
    - creating special legal regimes paying due regard to the Intangible Cultural Heritage-specific needs of colonised people and peoples including indigenous peoples and other minorities
    - including special provisions for consideration of extra-jurisdictional Intangible Cultural Heritage taking account of the specific needs as expressed by refugees and persons with migrant background

Societal Recognition Processes and Extra-Institutional Intangible Cultural Heritage Embedment

- **Contributing to societalisation processes embedding Intangible Cultural Heritage in societal structures by**
    - transversalising non-discrimination and non-exclusion in societal recognition processes and implementation by means of, for instance, public awareness raising campaigns, educational measures, media campaigns, political programmes
    - democratising transmission processes paying due regard to inter-generational particularities and respective potentially differing needs
    - establishing participatory mechanisms beyond (quasi)judicial instances allowing for inclusion in majority-oriented society spurring due consideration and positive discriminatory in, for instance, cultural programmes and other public forums and measures

- opening transmission processes up in an inclusive and agency-oriented manner through cultural bearer communities and relevant stakeholders ('multiplicators')
- developing instruments to tackle biased language and labelling processes generally that perpetuate patterns of societal exclusion and unifying Intangible Cultural Heritage discourse
- creating spaces for articulating (multiple), self-determined (collective) identity construction resisting and confronting labelling other forms of imposition in existing recognition processes and majority-steered Intangible Cultural Heritage practice

- **Widening transmission processes beyond inter-generational awareness and recognition to transcend regions and jurisdictions by**
  - strengthening existing societal movements and voices supporting non-discriminatory jurisdiction transcending concepts
  - supporting inter-State recognition initiatives both inter-governmentally and civil society-based that explicitly address Intangible Cultural Heritage as transmitted beyond State territories
  - facilitating awareness raising measures towards a deconstruction of dominant majority-prone identities and imposition on minority identities, particularly refugees
  - enabling formalisation processes of non-dominant cultural practice including measures to ensure protection from third party interference oriented towards integrating, assimilating or destroying Intangible Cultural Heritage as practiced by minority groups

- **Formalising cultural practice and respect alongside other rights towards a more holistic rights fulfilment by**
  - fostering a holistic human rights understanding in any societal agreement and sphere extending cultural rights and relating them to other rights affected by arbitrary, discriminatory societal attitudes
  - adopting a holistic approach entails addressing related impacts on, for instance, basic subsistence rights, participatory rights threatened where cultural rights are violated

- **Facilitating societal processes oriented towards multinational and plurinational idea of Intangible Cultural Heritage by**
  - adding diversity and pluralism components to existing awareness raising campaigns and transversalising any public programme or measure

– extending homogenous concepts of Intangible Cultural Heritage as recognised in specific jurisdictions or regions to extend to multinational and plurinational concepts (where applicable), thereby potentially inspiring constitutional change

Widening and Deepening Cultural and Human Rights in Intangible Cultural Heritage Regimes

▪ **Largely adopting three-tier human rights-based approach with regard to Intangible Cultural Heritage regimes by**
– calling upon States to I) respect cultural bearer communities and human rights holder rights implying primordially negative human rights obligations in terms of prohibiting interference
– requiring States to II) protect cultural bearer communities and human rights holders from third party interventions such as materialising in contentious contexts such as extraction or culturally oppressive policies aimed at annihilation
– demanding States to III) fulfil cultural bearer communities' and human rights holders' rights adopting specific measures going beyond mere awareness raising and symbolism inherent in emblem policies
– establishing respective monitoring units to ensure human rights focus with respect to previous three-tier framework rather than major emphasis placed on actual Intangible Cultural Heritage practice
– enabling a shifting approach from safeguarding practice towards protecting humans engaged in such very practice

▪ **Reforming legal, including constitutional, systems in fundamental ways by**
– integrating (inter-/intra) regional practice more deeply in current conceptions as promoted by the State(s)
– developing specific tools to extend provisions to include indigenous peoples' conceptions of development, autonomy and self-determination enlarging and disentangling commonly promoted understandings of political-territorial integration by means of, for instance, inter-State proposals and beyond
– enabling specific procedures for refugees, migrating communities to find explicit mentioning in inter-State proposals allowing for equitable representation such as quota systems

- **Mainstreaming human rights in Operational Directives by**
  - systematising gender-specific approaches, particularly as to potential conflicts between human rights and 'cultural' traditions
  - developing jurisprudence and referring to existing jurisprudence as to conflicts of rights alienating safeguarding regimes from traditionalist, conservative orientations of existing Intangible Cultural Heritage practice
  - establishing specific safeguards in recognition processes preventing any human rights-alienating discourses, public acceptance and institutionalised prejudice or stereotyping by means of Intangible Cultural Heritage recognition
  - developing (respectively) formalised criteria including non-discrimination and equality standards prior to recognising Intangible Cultural Heritage elements
  - facilitating rights-prone practice in grassroots activities by explicitly supporting and prioritising such practice over negative records of a given Intangible Cultural Heritage element
  - granting (thereby) and paying due regard to communities' freedom of expression and maintaining interpretative powers while rights-violating conduct is explicitly ruled out

- **Identifying and revising cultural rights and Intangible Cultural Heritage nexus by**
  - placing Intangible Cultural Heritage elements in jurisprudential regimes as developed by inter-alia the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of all Forms of Racial Discrimination, the Committee on the Elimination of all Forms of Discrimination against Women and relevant special procedure mechanisms
  - redefining Intangible Cultural Heritage regimes understanding 'communities, groups and individuals' as rights holders who can invoke rights rather than enjoy mere symbolic recognition and awareness raising, representing a first step with a view to its societal dimensions
  - requiring, in turn, existing human rights regimes to lay out specific obligations towards cultural rights holders considering needs arising out of Intangible Cultural Heritage practice
  - placing emphasis on the need for strong cultural rights provisions in the light of security and 'national interest' policies carried out to the detriment of rights holders and vulnerable groups in particular

- **Widening and deepening cultural rights in relation to Intangible Cultural Heritage-relevant elements pursuant to § 27 International Covenant on Civil and Political Rights on ethnic, religious and linguistic minorities and General Comment (GC) N°23 in particular by**
  - paying due regard to the multiplicity of cultural forms and ways of life (GC N°23, para.7), hence fulfilling the basic requirements of Intangible Cultural Heritage regimes while linking cultural rights to other, related fundamental rights including land resources and their relevance to indigenous peoples
  - requiring explicitly positive legal measures to be adopted guaranteeing minorities' effective participation in decisions affecting them (GC N°23, para.7)
  - orienting cultural rights protection to minorities' identities and ensuring respective survival and continued development addressing people's/peoples' very existential needs (GC n°23, para.9)

- **Widening and deepening cultural rights in relation to Intangible Cultural Heritage-relevant elements pursuant to § 15 International Covenant on Economic, Social and Cultural Rights and General Comment (GC) N°21 on the right to take part in cultural life pursuant to ICESR Art.15(1)(a) in particular by**
  - extending cultural rights protection beyond mere negative obligations in demanding positive measures to be adopted in the case of disadvantaged and marginalised individuals and groups including educational programmes (GC N°21, paras. 22-27)
  - placing cultural rights and Intangible Cultural Heritage-specific provisions in the three-tier framework of respecting, protecting an fulfilling human rights; accordingly demanding States to provide access to people's/peoples' own cultural heritage (respect), relating cultural rights to protection from external threats including societal dimensions with the objective of preserving, developing, enriching and transmitting Intangible Cultural Heritage in an intergenerational way (protect; GC N°21, para.50) and facilitating, promoting and providing as applicable particularly to cultural and linguistic minorities (fulfil, GC N°21, para.52)
  - underlining the significance of participating in cultural life on grounds of underrepresentation in public life and structural discrimination of persons in communities and the importance of measures creating conditions for dialogue, mutual respect, understanding and tolerance, but also participation in the adoption of appropriate legislation and in establishing effective mechanisms (GC N°21, para.38)

– embedding an inter-generational future-oriented outlook of human rights protecting (vulnerable) groups from poverty limiting people's possibilities to take part in cultural life and different spheres of life affecting future opportunities to develop as members of society (GC N°21, para.38)

– embracing a tripartite conception of participation in cultural life including 'freedom', 'access' and 'contribution' as well as 'inclusive cultural empowerment' appreciating the value of 'productive intercultural kinship' considering diverse identity-related rights tackling the adverse consequences of practicing cultural traditions (GC N°21, paras.16 and 42)

▪ **Widening and deepening cultural rights in relation to Intangible Cultural Heritage-relevant elements pursuant to § 5 of the International Convention on the Elimination of All Forms of Discrimination against Women on eliminating prejudices and customary and other practices which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles for men and women by**

– relating cultural rights to gender-related dimensions of refugee status, asylum, nationality and statelessness of women pursuant to GC N°32 demanding States to eliminate all forms of discrimination as relating to the cultural field (para.4), addressing difficulties in enjoying cultural restrictions on travelling for women (para.28) and tackling difficulties of statelessness creating cultural dependencies on men (para.55)

– ruling out any harmful practices such as female circumcision perpetuated by continuing cultural pressures (preamb. GC N°14 on female circumcision)

– eliminating any form of gender-based violence affected or exacerbated by cultural factors (GC N°35, para.14) including legal defences or mitigating factors based on culture such as honour, traditional apologies and pardons from families of victims (GC N°35, para.29(c)(ii)); adopting and implementing legislation concerning gender-based violence in the light of cultural rights neglection (GC N°35, para.30(a)) and assessing such cultural beliefs exacerbating gender-based violence by means of surveys, research programmes and studies (GC N°35, para.34(c))

▪ **Widening and deepening cultural rights in relation to Intangible Cultural Heritage-relevant elements pursuant to specific instruments protecting vulnerable groups including inter-alia the ILO N°169 Indigenous and Tribal Peoples Convention, the UN Declaration on the Rights of Indigenous Peoples (UNDIPS) and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities by**

  – guaranteeing indigenous peoples' right to cultural development (UNDRIPS, Art.3), to maintaining and strengthening cultural institutions and life (Art.5), to be protected against destruction of their culture, forced assimilation and cultural values or ethnic identities (Art.8), to revitalise their cultural traditions and customs (Art.11), to maintain, protect and develop the past, present and future manifestations of their cultures, for cultural property to be redressed where taken without consent (Art.11(2)), to maintain, protect and have access to cultural sites (Art.12), to establish and control educational systems and institutions in accordance with cultural methods of teaching and learning, (Art.14(1)), to education in their culture (Art.14(3)), to dignity and diversity of their cultures (Art.15(1), for indigenous cultural diversity to be reflected in State-owned media (Art.16(2)), to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions (Art.31(1)), to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expression (Art.31(1), to be redressed where measures cause adverse cultural impact (Art.32(3)) and to maintain and develop contacts for cultural purposes with their own and other members (Art.36(1))
  – protecting national or ethnic, religious and linguistic minorities' right to cultural identity including encouraging conditions to promote such identity (Art.1, Minority Rights Declaration), to enjoy their culture in private and public without interference or any form of discrimination (Art.2(1)), to participate effectively in cultural life (Art.2(2)), to develop their culture facilitated by favourable conditions created by the State (Art.4(2) and for minority culture to be encouraged by means of measures in the field of education (Art.4(4))

- **Widening and deepening cultural rights in relation to Intangible Cultural Heritage-relevant elements at regional level such as the Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, the CoE Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages by**
  – refer explicitly to relevant rights as stipulated in Arts. 10 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms
  – including references to non-discrimination and negative obligations to respect cultural diversity in accordance with Arts. 21 and 22 of the Charter of Fundamental Rights of the European Union

– mainstreaming and integrating Arts. 5, 6 and 15 of the Framework Conven-
tion for the Protection of National Minorities into current Intangible Cultural
Heritage (safeguarding) practice paying due regarding to specific rights rel-
evant to minorities' cultural identities as stipulated in paras. 65-68 of the
Commentary on the Effective Participation of Persons belonging to National
Minorities in Cultural, Social and Economic Life and in Public Affairs

Vulnerability Dimensions in Intangible Cultural Heritage Framework and its Modus Operandi

▪ **Strengthening intersectional dimensions in cultural rights protection by**
  – widening existing rights holder categories beyond 'community, group, indi-
    vidual' to explicitly include vulnerable groups
  – introducing non-discrimination and equality clauses in Operational Direc-
    tives wherever cultural bearers are addressed
  – stipulating vulnerable groups' rights wherever rights holders or cultural
    bearers find mentioning throughout Convention or Operational Directives

▪ **Promoting positive measures wherever urgent safeguarding is required in terms of particular threats by**
  – prohibiting forced relocation and adopting respective preventive measures
    where populations are to be forcibly relocated or pressurised to migrate ex-
    erting inter-alia adverse impacts on Intangible Cultural Heritage practice
  – mitigating adverse impacts where modern technologies and associated
    broader economic impacts unable cultural bearers to practice Intangible Cul-
    tural Heritage and engage in (inter-generational) transmission processes
  – adopting protective and preventive measures where Intangible Cultural Her-
    itage practice is threatened by imposing inter-alia specific means of
    transport, communication, agricultural equipment and methods, commercial
    music genres and new forms of entertainment
  – ensuring continued Intangible Cultural Heritage practice where digitalisa-
    tion and modern technologies impede transmission processes or replace tra-
    ditional techniques or materials proving essential for respective practice
  – providing complementary support for inter-generational transmission prac-
    tice on grounds of an aging population, (forced) migration developments,
    employment-related changes
  – establishing particular rights protection regimes where particular customs
    and identities linked to tribes, ethnicities, indigeneity and language are en-
    dangered, particularly as to socio, political and economic agendas

– promoting specific measures where language use as relating to Intangible Cultural Heritage practice suffers discriminatory conduct or is endangered by e.g. specific language policies

▪ **Promoting positive measures wherever urgent safeguarding is required in terms of affiliation with particular groups by**
  – allowing refugees, displaced persons and other groups affected by migration to enjoy cultural rights in the first place
  – contributing to the creation of collective and/or group rights regimes for said groups enabling, in turn, new groups to arise in legal frameworks
  – promoting Intangible Cultural Heritage practice confronting explicit oppressive conduct such as neo-colonial contexts and enduring injustices in the case of indigenous peoples
  – explicitly encouraging hybrid Intangible Cultural Heritage and practice arising from multiple group identities to find articulation in society and the law including institutional accommodation
  – ruling out any tacit understandings on temporal requirements for Intangible Cultural Heritage to be recognised, thus encouraging novel forms to enter institutionalised frames and societal expression and divulgation
  – opening and creating spaces for minority rights as relating to Intangible Cultural Heritage to enjoy positive discrimination by means of specifically dedicated measures

▪ **Uncovering novel vulnerability dimensions hitherto unrecognised in existing legal frameworks and current policies by**
  – identifying adverse impacts on groups within protected legal categories such as particular exposure of women to indigenous cultural customs practiced attributed to specific gender groups
  – shedding light on overlapping claims and multiplying effects on a wide range of rights holder and cultural bearer groups
  – associating current globally identified threats including inter-alia nutrition crises, biodiversity loss, general climate change related impact, loss of water quality and quantity with specific groups enjoying cultural rights
  – creating new legal categories enabling accommodation of potentially emerging vulnerabilities in a transcendental manner

Reconceptualising Safeguarding of Intangible Cultural Heritage

- **Disentangling existing safeguarding methods through integrating new forms by**
  - promoting an understanding of safeguarding beyond 'urgent lists', 'best programme, projects and activities lists' and 'representative lists' by including Intangible Cultural Heritage elements beyond pre-established, selective categories and listing
  - mainstreaming an Intangible Cultural Heritage-specific understanding of equitable and universal access in current safeguarding practice by amending the Operational Directives accordingly
  - reforming existing selection committees to include membership beyond intergovernmental representatives towards considerable cultural bearer representativity

- **Revising existing safeguarding procedures to be perceptible of new approaches by**
  - adopting I) measure-based approaches beyond emblem and awareness-raising to tackle other needs as expressed by cultural bearer communities
  - embracing a II) duty-based approach detailing out State and third party responsibilities arising in relation to any Intangible Cultural Heritage element
  - specifying such obligations by means of III) detailed measures such as to be found and stipulated in regulations and other implementing instruments

- **Initiating comprehensive reform procedures of the current Intangible Cultural Heritage regime alienating itself from its selective nature by**
  - establishing parallel procedures embraced by intergovernmental assemblies allowing for independent, list-unspecific monitoring of State compliance with cultural rights
  - strengthening follow-up monitoring of existing inscribed Intangible Cultural Heritage elements, preferably in the form of new, independent instances
  - including cultural bearer communities or rights holders in all phases of such reform procedures allowing for participatory constituent processes
  - depoliticising current selection procedures in a 'meta manner' with the objective of strengthening inclusionary dimensions by means of alienating such procedures from its cultural political, State-focussed nature

- **Reforming current 'urgent safeguarding' measures by**
  - finding inspiration in 'precautionary measures' in international and regional human rights systems speeding up and depoliticising urgent action
  - creating specific instances equipped with human rights-specialised person-nel tackling upcoming urgent threats and developing human rights-prone tools to respond to such threats in a timely, comprehensive, needs-oriented manner
  - allowing access to (quasi) judicial instances (if different from instance mentioned in previous point) to invoke cultural rights requiring immediate response by judicial instance and, in turn, immediate action on the part of State(s)
  - strengthening enforceability of cultural rights claims based on Intangible Cultural Heritage elements

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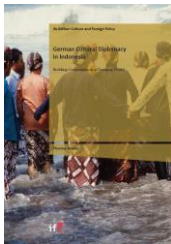
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Intangible Cultural Heritage under Pressure?

Examining Vulnerabilities in ICH Regimes - Minorities, Indigenous Peoples and Refugees

Intangible Cultural Heritage (ICH) is increasingly subjected to social, economic and political pressures in the light of neo-liberal developments and dispossessing, neo-colonial discourses of domination perpetuated by cultural heritage politics. In response, respective legal regimes have been established addressing alienation from those practising ICH, namely cultural bearers and ultimately holders of cultural rights. However, the very nature of such instruments and safeguarding standards may not fully grant non-discriminatory access to its protection regimes being disintegrated from general human rights standards. This may, in turn, result in new patterns of inequalities causing detrimental, adverse impacts on specific groups of communities and individuals. This study disentangles such dynamics and sheds light on both endangered ICH elements and its practitioners. Similarly, it traces agency-driven, empowering ICH practice responding to current patterns of cultural imposition oriented towards plural identity recognition while discovering spaces of contestation.

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