

INFORMATION SHEET: HUMAN RIGHTS POLICY

POLICY AREA / POLICY ISSUE

Other Sectors / Human Rights

ISSUES TO CONSIDER

Under the Convention, only ICH that is 'compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals' (Article 2.1) will be taken into account. This provision in the Convention refers to actions at the international level (for example, nominations to the Lists of the Convention) and does not necessarily require that States Parties ignore ICH at the national level that fails to comply with human rights provisions. However, OD 170 requests States to 'direct their safeguarding efforts solely on such intangible cultural heritage that is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals'. Other paragraphs of the Operational Directives (see below) place further emphasis on human rights.

Human rights are thus important aspects to consider when developing policy at the national level.

This fact sheet will discuss three main issues:

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

Human rights issues and ICH: raising awareness

Most States have adopted the principles of international human rights instruments such as the Universal Declaration of Human Rights (UDHR) of 1948, and ratified the subsequent International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) of 1966. Since then, many further instruments have been adopted in this area, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979). The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) is a Declaration adopted by the UN General Assembly, which is not subject to ratification and thus it is not a legally-binding instrument but it does establish a broad consensus on 'a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples'.¹ (See also the fact sheets on indigenous peoples and devolution).

Lack of attention to human rights issues can distort the representation of ICH and exclude some communities (and some members of communities) in the safeguarding process and therefore also pose a threat to the continued practice and transmission of ICH. It is thus very important that awareness about the relationship between human rights and the practice, identification and safeguarding of ICH, should receive attention in the policy development process, as far as this is possible.

1. <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx>

ICH that is non-compliant with human rights: policy approaches

Practice of some ICH elements can be associated with human rights violations or other negative outcomes for health or social life; these elements would arguably not be considered ICH under the definition in article 2.1 of the Convention. States take a variety of policy approaches regarding ICH of this nature. Practices that are not compliant with human rights can be prohibited by law. In some States, certain ICH elements widely practised and accepted in society remain illegal because they were originally banned under colonial rule, but the law is not enforced. Other States take the view that simply banning ICH practice can drive them underground and make them even more difficult to regulate and address. ICH practices that are not compliant with human rights provisions can also be explicitly or implicitly permitted by the State in existing legislation and policy. Legislation and policies within a State are not necessarily consistent with the principles of the international human rights instruments that they have ratified. Constitutions, and legal frameworks at the national level, sometimes pay lip service to the principles of human rights but then offer exemptions from compliance with these provisions.

ICH practice as a human right

Many States have colonial-era provisions relating to so-called ‘witchcraft’ or ‘sorcery’, for example that cover a wide range of ritual practices not contrary to human rights – these may include some divining or fortune-telling practices with no harmful effects or human rights implications. Communities sometimes challenge these bans as discriminatory, or on the grounds that they have the right to practice their culture.² Of course, some aspects of ritual practice may still transgress human rights, and thus attract the attention of law enforcement. There may also be discriminatory aspects to such practices: for example, where witchcraft allegations are mainly directed at women.³

There are some cases in which existing legislation impedes the practice and transmission of ICH. For example, Rastafarian ritual practices involve the use of marijuana which is illegal in many States. There has recently been considerable debate about whether it is better to legalize marijuana, which is also used as a medicinal herb, both in traditional healing practices and for contemporary medical and scientific purposes. In February 2015, Jamaica's Parliament approved an act decriminalizing possession of small amounts of marijuana and establishing a licensing agency to regulate a lawful medical marijuana industry. This will enable the medicinal and ritual use of marijuana in Jamaica.

Individuals and minority or indigenous communities also occasionally seek recourse to international human rights law for assistance in safeguarding their ICH once local remedies have been exhausted. For example, a few cases regarding the rights of individuals from minority and indigenous communities under Article 27 of the ICCPR⁴ have been adjudicated by the United Nations Human Rights Committee (UNHRC). These cases mostly involved the rights of individual community members to practice traditional hunting or animal husbandry where national laws prohibited this under certain circumstances. The UNHRC took the position that where the purposes (e.g. economic and ecological) behind the national law prohibiting such acts were legitimate, certain limitations on cultural practice were not in violation of Article 27.⁵ It took the view that the implementation of laws that have a ‘limited impact’ on the way of

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2. South African Law Reform Commission, 2014. *Issue Paper 29, The review of the Witchcraft Suppression Act of 1957* <http://www.justice.gov.za/salrc/ipapers/ip29-prj135-Witchcraft-2014.pdf>
 3. Forsyth, M. and Eves, R. 2015. Introduction, *Responses to Sorcery and Witchcraft Beliefs and Practices in Melanesia* (ANU Press).
 4. Article 27: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
 5. Ivan Kitok v Sweden (a case about Sami reindeer breeding), in Lixinski, L. *Intangible Cultural Heritage in International Law* (Oxford University Press 2013), p.156.

life of the individual members of a minority is not a ‘*de facto* denial’ of their traditional way of life and does not amount to a violation.⁶

Individual members of communities have also been able in some cases to safeguard their ICH with reference to freedom of religion (e.g. traditional slaughtering techniques), freedom of association, the right to physical integrity, the right to property (e.g. retention of traditional land), and the right to enjoy culture and its benefits under the ICCPR and (to a lesser extent) the ICESCR.⁷ With the entry into force of the optional protocol to the ICESCR allowing for individual petitions to the Committee, the number of international cases under Article 15(4) is likely to increase.⁸

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

WHAT THE CONVENTION AND ITS TEXTS SAY

The Convention

The Convention’s Preamble refers to ‘existing international human rights instruments, in particular to the Universal Declaration on Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966’. It recognizes ‘the invaluable role of the intangible cultural heritage as a factor in bringing human beings closer together and ensuring exchange and understanding among them’.

Article 2.1 of the Convention says that ‘consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.’

Operational Directives

OD 102: ‘All parties are encouraged to take particular care to ensure that awareness-raising actions will not ... contribute to justifying any form of political, social, ethnic, religious, linguistic or gender-based discrimination.’

OD 170: ‘States shall direct their safeguarding efforts solely on such intangible cultural heritage that is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals ...’.

OD 174: ‘States Parties shall endeavour to ensure that their safeguarding plans and programmes are fully inclusive of all sectors and strata of society, including indigenous peoples, migrants, immigrants and refugees, people of different ages and genders, persons with disabilities and members of vulnerable groups, in conformity with Article 11 of the Convention.’

OD 194: ‘States Parties should endeavour to recognize and promote the contribution of the safeguarding of intangible cultural heritage to social cohesion, overcoming all forms of discrimination and strengthening the social fabric of communities and groups in an inclusive way. To that end, States Parties are encouraged to give particular attention to those practices, expressions and knowledge that help communities, groups and individuals to transcend and address differences of gender, colour, ethnicity, origin, class and locality and to those that are broadly inclusive of all sectors and strata of society, including indigenous peoples, migrants,

6. *Länsman v Finland* (the impact of tree logging licenses on reindeer breeders in Finland) and *George Howard v Canada* (First Nations members fishing out of season), in Lixinski, *Intangible Cultural Heritage in International Law*, p.156.

7. See Lixinski, *Intangible Cultural Heritage in International Law*, pp.169-70.

8. Lixinski, pers. comm.

immigrants and refugees, people of different ages and genders, persons with disabilities and members of marginalized groups.’

OD 197(a): States Parties are encouraged to ‘ensure respect for the intangible cultural heritage of indigenous peoples, migrants, immigrants and refugees, people of different ages and genders, persons with disabilities, and members of vulnerable groups in their safeguarding efforts’.

Ethical Principles

Ethical Principle 3: ‘Mutual respect as well as a respect for and mutual appreciation of intangible cultural heritage, should prevail in interactions between States and between communities, groups and, where applicable, individuals.’

Ethical Principle 11: ‘Cultural diversity and the identities of communities, groups and individuals should be fully respected. In the respect of values recognized by communities, groups and individuals and sensitivity to cultural norms, specific attention to gender equality, youth involvement and respect for ethnic identities should be included in the design and implementation of safeguarding measures’.

OTHER RELEVANT LEGAL INSTRUMENTS⁹

Universal Declaration of Human Rights.¹⁰

United Nations, International Covenant on Civil and Political Rights (ICCPR)¹¹

United Nations, International Covenant on Economic, Social and Cultural Rights (ICESCR).¹²

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979).¹³

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007).¹⁴

African Charter on Human and Peoples’ Rights (1981)

<http://www.achpr.org/instruments/achpr/>

EXAMPLES

- Removing legal sanctions against ICH practices: In Jamaica, amendments to the law in 2013 removed the sanction of whipping that used to be a punishment for those who practiced ‘obeah’, a folk religion with West African roots that is common in many Caribbean countries.¹⁵
- Retaining or reinstating sanctions against human rights abuses associated with ICH practice: In Tanzania, a ban on so-called ‘witchdoctors’ has recently been put in place because of the alleged role of their activities and beliefs in the murder of people with albinism for the trade in albino body parts, which lack pigment and are valued for their association with good luck and wealth.¹⁶

9. See also <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

10. <http://www.un.org/en/universal-declaration-human-rights/>

11. <http://www.unhcr.org/uk/496323761b.pdf>

12. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/cescr.aspx>

13. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

14. http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

15. The Obeah (Amendment) Act, 2013 (Jamaica)
http://www.japarliament.gov.jm/attachments/341_The%20Obeah%20%28Amendment%29%20Act,%202013.pdf

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

- Prohibiting human rights abuses in the name of culture or tradition: the Constitution of Ghana (1992, article 26) states that ‘All customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited’.
- Protecting the right to choose: In the Constitution of Kenya (2010), which incorporates international human rights instruments into national law, young people and children are expressly to be protected ‘from harmful cultural practices’ that transgress human rights (articles 53(d) and 55(d)). Legislation has been drafted to prohibit some of these cultural practices. Individuals’ rights to choose whether or not to participate in cultural practices are protected. Article 44.3, for example, states that a ‘person shall not compel another person to perform, observe or undergo any cultural practice or rite’. Customary law is subject to the provisions in the Bill of Rights in the Constitution (article 2.4).¹⁷
- Supporting community action to protect their cultural rights: In 2003, the African Commission on Human and People’s Rights found that by evicting Endorois families from their land around the Lake Bogoria area in the Rift Valley to create a game reserve for tourism, and restricting their access to the land without compensation, the Kenyan government had prevented the community from practising their pastoralist way of life, using ceremonial and religious sites, and accessing traditional medicines. ‘The Commission found that the Kenyan government had violated the Endorois’ rights to religious practice, to property, to culture, to the free disposition of natural resources, and to development, under the African Charter (Articles 8, 14, 17, 21 and 22, respectively). ... The Commission’s decision was formally approved by the African Union at its January 2010 meeting.’¹⁸
- Supporting community access to communal land on human rights grounds: Although France had made a reservation regarding Article 27 of the ICCPR on the grounds that it has no minorities, the UNHRC referred to the concept of protecting ‘family life’ (Article 17) to stop a hotel construction project on the traditional lands, including the traditional burial grounds, of a Polynesian community, arguing that their concept of the ‘tribe’ was equivalent to family.¹⁹

RELEVANT CASE STUDIES IN THE CAPACITY-BUILDING MATERIALS

Case Study 14. ICH and social development: literacy through oral poetry in Yemen
CS14-v2.0 (RU + AR: still version 1.0): [English](#)|[French](#)|[Spanish](#)|[Russian](#)|[Arabic](#)

Case Study 31. State agencies protecting the rights of indigenous groups in Brazil
CS31-v1.0: [English](#)|[French](#)|[Spanish](#)|[Russian](#)|[Arabic](#)

Case study 41: Two examples of ICH and conflict prevention/resolution
CS41-v1.0-EN: [English](#)|[French](#)|[Spanish](#)|[Arabic](#)

Case study 43: Mindusuan traditional dance performance
CS43-v1.0-EN: [English](#)|[French](#)|[Spanish](#)|[Arabic](#)

Case study 44: A shamanistic ritual and its associated ceremony
CS44-v1.0-EN: [English](#)|[French](#)|[Spanish](#)|[Arabic](#)

FURTHER INFORMATION

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17. See the Cultural Rights and Kenya’s New Constitution project <https://katibaculturalrights.com/>

18. See Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003 <http://www.escri-net.org/docs/i/1216218>.

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

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QUESTIONS TO CONSIDER

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

UNESCO THESARUS KEYWORDS

[policy making](#); [government policy](#); [intangible cultural heritage](#); [human rights](#); [humanitarian law](#)