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Introduction

While there is growing international and regional promotion of cultural diversity and acknowledgment of the importance of cultural heritage to the maintenance and development of individual and collective identities, the capacity of groups (and individuals) to effectively engage in its protection remains less defined. This is because international law (and international society) remains dominated by the interests and concerns of states, particularly in the field of cultural heritage. This chapter focuses on indigenous peoples’ efforts to participate in United Nations’ initiatives for the protection and promotion of intangible cultural heritage to explore the participation by non-state actors and the responses of key UN specialist agencies: UN Educational, Scientific and Cultural Organization (UNESCO), World Intellectual Property Organization (WIPO) and UN Environment Programme (UNEP), in the field.

Despite the dominance of the state in the protection of cultural heritage in international law, multilateral organisations have, in recent years, repeatedly reaffirmed the importance of cultural diversity – as ‘all cultures form part of the common heritage of all mankind’ (Art.I(3) 1966 UNESCO Principles). At the same time and within the same instruments, the international community has explicitly linked cultural diversity and human rights norms (Art.1 Universal Declaration on Cultural Diversity). The link between human rights law and cultural heritage have been most overtly explored at the international level in respect of Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (UN 1966a) and Article 27 of the International Covenant on Civil and Political Rights (ICCPR)(UN 1966b). The jurisprudence of international and regional human rights bodies has acknowledged the importance of cultural heritage to group identity particularly for indigenous peoples.1 Indigenous peoples have consistently maintained that right to self-determination applies to them and that it incorporates the right to determine how their cultures are protected, promoted and presented (Arts 3, 11-13 DRIP). This relationship between cultural diversity, the effective enjoyment of human rights relating to culture, and access to cultural heritage has been emphasised by human rights bodies and through specialist cultural heritage instruments (UN 2011a: para.58; and Art.4, Universal Declaration
on Cultural Diversity). The UN Special Rapporteur in the field of cultural rights has observed that individuals and groups have a positive right to contribute to identifying, interpreting, and developing cultural heritage, the design and implementation of policies and programmes concerning its protection, and effective participation in related decision-making processes (ibid.).

This chapter concentrates on the participation of indigenous peoples in multilateral initiatives to protect cultural heritage, with specific reference to intangible heritage. While an international instrument for the protection of intangible heritage was adopted over a decade ago, the importance of intangible heritage for indigenous peoples is evident in their work in various UN fora. I examine indigenous peoples’ interventions before UNESCO and bodies established to implement the Convention on the Safeguarding of Intangible Cultural Heritage; within WIPO in respect of ongoing moves to adopt specialist instruments on traditional knowledge and cultural expressions; and finally, within UNEP and the implementation of Article 8(j) of the Convention on Biological Diversity. They reflect indigenous peoples’ determination to engage in the implementation of specialist instruments adopted by states and more significantly, their growing push to effectively participate in the drafting and negotiation of multilateral instruments which directly impacts upon their intangible heritage. It is these latter efforts which are yielding more comprehensive and potentially lasting avenues for their effective engagement in the protection of their intangible heritage.

**UNESCO and intangible cultural heritage**

UNESCO is the UN’s specialist agency in the field of culture. Its purpose is defined as contributing to peace and security by promoting collaboration among nations through culture to facilitate respect for human rights, fundamental freedoms and non-discrimination (Art.I(1), Constitution of UNESCO). To achieve this, the organisation is mandated to conserve and protect the world’s ‘inheritance of books, works of art and monuments of history and science’ by recommending the adoption by Member States of ‘necessary international conventions’ (Art.I(2)(c)). UNESCO is an intergovernmental organisation. Membership is confined to states which are either members of the United Nations or have been admitted by recommendation of the Executive Board and two-thirds vote of the General Conference (Art.II(1),(2)). The final form of any international convention, like the Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), or the Convention for Safeguarding of the Intangible Cultural Heritage
(Intangible Heritage Convention), is determined by the Member States at the annual General Conference. States that subsequently ratify a convention, that is, States Parties govern its operation. This structure necessarily inhibits the participation of non-state actors without the consent of relevant states.³

Within the context of UNESCO, from time to time there appears to be a window that may open to permit non-state actors like indigenous peoples a role in the protection of their cultural heritage. However, experience shows that with respect to the World Heritage Convention and Intangible Heritage Convention these initiatives are often watered down in practice.

**World Heritage Convention and WHIPCOE**

Within UNESCO, the World Heritage Convention has become the focus of efforts to recognise and accommodate indigenous peoples’ rights and interests to their cultural heritage. There appears to have been no overt indigenous participation during the drafting and negotiations prior to the Convention’s adoption in 1972 and the final text does not explicitly refer to the participation of indigenous (and local) communities in respect of its implementation. Indigenous participation has been incorporated through the subsequent adoption and revision of Operational Guidelines by the World Heritage Committee. The revision of the Operational Guidelines to include ‘cultural landscapes’ and ‘living traditions’ in the selection criteria during the course of the 1990s served as an avenue by which the relationship between indigenous peoples and World Heritage sites could be acknowledged (WHC 1994: para.35-42). These changes coincided with efforts by indigenous peoples within the United Nations to craft a dedicated human rights instrument (UNWGIP 1994).

These developments paved the way for the Mirrar people’s challenge to the Australian federal government-approved expansion of a uranium mine in the World Heritage listed Kakadu National Park which laid bare the limitations of the World Heritage Convention in respect of consultation with and participation of indigenous (and local) communities. The World Heritage Committee accepted the findings of a report by its Chair and emphasised ‘the fundamental importance of ensuring thorough and continuing participation, negotiation and communication with Aboriginal traditional owners, custodians and managers’ in the conservation of the site (WHC 1998). The continued lack of consultation by the Australian government led the Mirrar community to directly request the World Heritage Committee to intervene and list the site as ‘in danger’ (Logan 2013:57).
The Mirrar’s push occurred as the World Heritage Indigenous Peoples’ Forum was lobbying the World Heritage Committee to establish the World Heritage Indigenous Peoples’ Council of Experts (WHIPCOE) as a new consultative body (Art.10(3) WHC; WHC 2001a). The International Council for the Conservation of Nature and Natural Resources (IUCN) and International Council on Monuments and Sites (ICOMOS) had facilitated the Committee’s efforts to better understand the Mirrar’s objections (Australia ICOMOS 2001 and 2000). However, these organisations are expert in the preservation and protection of the physical sites; the representation of indigenous and local communities in not their primary expertise or mandate. WHIPCOE was intended to ‘add value rather than displace’ these advisory bodies by providing a mechanism by which indigenous peoples could participate in the development and implementation of laws and policies for the protection of their intangible heritage which applied to ancestral lands designated on the World Heritage List (WHC 2001a:2-5). It was to have been made up of representatives from World Heritage sites listed as ‘cultural landscapes’ or “mixed” cultural/natural properties’ which ‘hold indigenous values’ (WHC 2001a:7). The initiative was designed as a ‘means of giving Indigenous people greater responsibility for their own affairs and an effective voice in decisions on matters which affect them’ (WHC 2001a:Annex 1, 12). The proposal did not gain the support of the majority of States Parties to the Convention, particularly those in Africa and Asia (WHC 2001b). The UN Permanent Forum on Indigenous Issues has since taken up the question of indigenous peoples’ effective participation in the World Heritage framework (Meskell 2103; Disko and Tugendhat 2014).

**Intangible Heritage Convention and Operational Directives**

Much academic discourse on the participation of non-state actors, particularly indigenous peoples, in UN processes involving cultural heritage have focussed on world heritage. Yet, multilateral initiatives for the protection intangible cultural heritage have likewise seen indigenous peoples seek effective participation in these processes. Despite the failure of the WHIPCOE proposal in the World Heritage context, it had two lasting implications for the negotiation of the Intangible Heritage Convention. Indigenous representatives challenged States and intergovernmental organisations to understand heritage holistically, by moving beyond the physical site to encompass its movable and intangible aspects; and reinforced the rights of peoples to be consulted and involved in decision-making related to their heritage. These lessons are evident in the final text, despite its limitations.
UNESCO’s normative work on intangible heritage started in 1973 with a Bolivian proposal for a protocol to protect folklore to the Universal Copyright Convention (1952). Folklore was viewed by developing countries, especially those with indigenous populations, as representing a significant component of their economies and cultural heritage. In 1978, UNESCO and WIPO formally agreed to divide their work in this field, with UNESCO examining the safeguarding of folklore from an interdisciplinary perspective and WIPO focusing on intellectual property relating to traditional knowledge (Blake 2002:19). This led to the WIPO and UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit and Other Prejudicial Actions of 1982 (Blake 2002:20-22; WIPO 1998a); and UNESCO’s Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989. The Model Provisions refer obliquely to authorisation by the ‘competent authority’ appointed by the relevant state and ‘community’ (sections 3 and 10(1)) (UNESCO and WIPO 1985). The 1989 UNESCO Recommendation, the first (non-binding) multilateral instrument to exclusively cover intangible cultural heritage, again refers to ‘a cultural community’ and their right to access their culture without fully articulating how they were to participate in the relevant decision-making processes concerning its preservation, protection and promotion (1989 Recommendation, paras A and D(b)). Criticism was levelled at its failure to fully articulate a need to obtain free, prior and informed consent to the use or exploitation intangible heritage (Weiner 1987; Posey and Dutfield 1996). Indigenous peoples were alluded to overtly or implicitly during the drafting of these instruments, but neither they nor their representatives were formally involved.

By 1999, when a joint UNESCO and Smithsonian Institute conference was held to work toward a binding instrument on intangible heritage, the international landscape had changed irrevocably. This shift was reflected in the contribution of indigenous participants and greater cognisance of indigenous concerns by delegates (UNESCO 1999). It was encapsulated in the 1992 Convention on Biological Diversity and its recognition of the interests of indigenous (and local) communities, discussed below (Art.8(j) CBD); the UN Working Group on Indigenous Populations’ 1993 draft Declaration on the Rights of Indigenous Peoples prepared with substantial indigenous input (UNWGIP 1994); and its Principles and Guidelines on the Protection of the Heritage of Indigenous Peoples (Daes 1995; Yokota and Sami Council 2006). The draft Declaration and Principles and Guidelines made clear that effective protection of the cultural heritage of indigenous peoples must be based on the principle of self-determination (Principle 2, Principles and Guidelines). Specifically it stipulated that:
‘Indigenous peoples and their representatives should enjoy direct access to all intergovernmental negotiations in the field of intellectual property rights, to share their views on the measures needed to protect their heritage through international law’ (Principle 56, Principles and Guidelines).

During the initial drafting phase of the Intangible Heritage Convention, UNESCO’s General Conference adopted its Universal Declaration on Cultural Diversity which made specific reference to the human rights of indigenous peoples (and minorities) to their cultures (Art.4 Universal Declaration). While the drafts did not specifically mention indigenous peoples, they made multiple references to the need for States Parties to the proposed instrument to ensure the participation of ‘cultural communities’ (UNESCO 2002: draft arts 3, 5, 6). The Intangible Heritage Convention, adopted in 2003, references the participation of ‘communities, groups and relevant non-governmental organizations’ in respect of identifying and defining intangible heritage on its territory for safeguarding measures (Art.11) and for States Parties to ‘ensure [their] widest possible participation’ in its management (Art.15). The only specific reference to indigenous communities, their heritage and participation in its protection in the final text occurs in the preamble. An internal evaluation of the Convention’s operation defined Articles 11(b) and 15 as ‘key to the implementation of the 2003 Convention’. It found that both States Parties and non-state actors found the Convention ‘to be a highly relevant international legal instrument’ (UNESCO 2013:iv and 40), because it encouraged ‘bottom-up approaches that involve communities, groups and individuals as central actors’ (UNESCO 2013:9). However, it also observed that community participation was one of the ‘most challenging aspects of its implementation’ (UNESCO 2013:v). It found that States Parties’ periodic reports showed ICH policy-making was largely centralised, with NGOs usually providing the bridge between governments and communities. It recommended that the Intergovernmental Committee promote increased NGO and community involvement in the development and implementation of safeguarding initiatives (UNESCO 2013:29).

The Operational Directives to the Convention, adopted and revised by the General Assembly of the States Parties, also refer to the need for consultation with and participation of communities, groups and individuals (UNESCO 2012). The ‘widest possible participation’ and ‘free, prior and informed consent’ are criteria for inscription on the In Need of Urgent Safeguarding List or the Representative List, for the purposes of awareness raising, and requests for international assistance. Rather than simply ‘sensitizing’ communities, groups and individuals to the importance of intangible cultural heritage (UNESCO 2012: para.81),
the 2014 revised Operational Directives require States Parties to raise awareness so that the ‘bearers of this heritage may benefit fully from this standard-setting instrument’ (ibid.). The Subsidiary Body established by the IGC reminded States Parties that evidence of free, prior and informed consent from the relevant community, group or individuals need to be obtained before nomination and could not be established afterwards. Further, it emphasised that ‘utmost care’ in obtaining such consent in circumstances of violent conflict to encourage dialogue and mutual respect (UNESCO 2014a:19).

The participation of communities, groups and individuals is subject to a proviso. The Intangible Heritage Convention, its Operational Directives and the reports of related committees have consistently reaffirmed the importance of ensuring that the implementation of the treaty conforms with international human rights norms (including cultural rights), and especially of vulnerable groups. The Consultative Body makes clear that because ‘communities are not monolithic and homogeneous’, States Parties must ensure ‘women’s voices’ are ‘fully represented among those providing consent’ and ‘the design and implementation of safeguarding measures’ (UNESCO 2014a:8). Also, the 2013 Evaluation Report referred to UNESCO’s responsibility under the Global Priority Gender Equality compact (UNESCO 2013:17). It found no conflict between safeguarding of intangible heritage and the requirement that traditional practices cannot violate human rights norms. Instead, it called for UNESCO and the IGC to facilitate through the participation of and negotiation with the relevant community that there is an ‘evolution/adaption of traditional cultural practices in such a way that their core value to the community is retained while any seriously discriminatory aspects are removed or neutralised’ (ibid).

As with other specialist heritage instruments, the Intangible Heritage Convention envisages a role for civil society organisations. The Operational Directive covers the accreditation of NGOs and requires that they ‘cooperate in a spirit of mutual respect’ with relevant communities, groups or individuals. NGOs can be invited by the Committee to evaluate nomination files, requests for international assistance, and safeguarding plans. The 2003 Evaluation Report observed that many NGOs felt that they were not being taken seriously by States Parties, largely because of lax accreditation criteria and the inactivity of many accredited organisations (UNESCO 2013:v). It recommended that the accreditation process be reviewed to ensure that they held the requisite experience and capacity to effectively advise the IGC (UNESCO 2013:61). The criteria for accreditation of NGOs under the Operational Directives require that they must have competence, expertise and experience in
safeguarding intangible heritage, with local, national, regional or international exposure, objectives which accorded with the Convention, cooperate ‘in a spirit of mutual respect’ with relevant communities, groups and, where appropriate, individuals, and operational capacity (including regular active membership, established legal personality under relevant domestic law, and been active for four years prior to initial accreditation) (UNESCO 2014b: para.91).

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

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted by the UNESCO General Conference in 2005, is viewed as complementary to the Intangible Heritage Convention. It originally was projected to be a vehicle for the codification of cultural rights, but became a means of promoting cultural diversity through the protection of cultural expressions, replacing what had increasingly been viewed as the failure to achieve such protection for cultural goods through the World Trade Organisation. This shift from a human rights instrument, to one more attuned to trade-related concerns moved it away from the language of intangible heritage and towards WIPO’s proposed instruments.

The Cultural Diversity Convention’s preamble acknowledges the importance of indigenous traditional knowledge to sustainable development. Likewise, it flags that indigenous peoples should have the freedom to create and disseminate their traditional cultural expressions, and access them and derive benefit from them for their development. One of its guiding principles is the ‘equal dignity of and respect of all cultures’ (Art.2(3)). It calls on States Parties to create conditions on their territory that are conducive to this end, particularly for indigenous peoples, with ‘due attention to the special circumstances and needs of women’ (Art.7(1)(a)) (UNESCO 2014c). While the Convention does not specifically provide for participation of indigenous peoples, its framework does enable the input of civil society organisations generally (Art.11) (UNESCO 2009).

**WIPO, traditional knowledge and cultural expressions**

As noted earlier, the work of UNESCO and WIPO on the legal protection of folklore, now referred to as either ‘intangible cultural heritage’ (UNESCO) or ‘traditional knowledge’ or ‘cultural expressions’ (WIPO), has been inextricably tied together for decades. The 2013 Evaluation of the Intangible Heritage Convention recommended that UNESCO strengthen its cooperation with WIPO in the area to ensure that ‘an ongoing exchange and learning between
the two organisations and their Member States’ especially in the light of WIPO’s efforts to finalise a multilateral instrument for the protection of the intellectual property rights of communities (UNESCO 2013:59). Unlike the Intangible Heritage Convention and its related statutory bodies, WIPO and the Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, tasked with developing a treaty in this field, have specifically referenced and engaged indigenous peoples in their work. However, the draft treaty has not been finalised or adopted to date. The WIPO negotiations are important for understanding: the participation of relevant communities including indigenous peoples in the development and implementation of the treaties at the supranational level; and their participation at the national and local level subsequent to their adoption.

The draft Articles on the Protection of Traditional Knowledge and the draft Articles on the Protection of Traditional Cultural Expressions prepared by the Secretariat and deliberated by the IGC in June 2014 go beyond the nebulous language of the Intangible Heritage Convention. The current drafts specifically refer to ‘indigenous peoples and local communities’ and the need for their ‘prior informed consent’ (WIPO 2014a, 2014b). This language borrows heavily from the Declaration on the Rights of Indigenous Peoples (DRIP) adopted by the UN General Assembly in 2007. Article 31 provides that indigenous peoples have the right to control their cultural heritage, traditional knowledge and traditional cultural expressions including intellectual property over it. It then calls on states in conjunction with indigenous peoples to take effective measures to recognise and protect such rights. The draft policy objectives of the proposed WIPO instrument on traditional knowledge require that states provide indigenous peoples and local communities with means to encourage and protect its creation and innovation control its use, promote equitable benefit sharing arising from its use with prior informed consent, and prevent its misuse (WIPO 2014a: Annex, 4). Similar draft objectives have been prepared in respect of the instrument on cultural expression with an additional provision covering third party rights and the public domain (ibid.).

The then Chair of the UN Permanent Forum on Indigenous Issues (UNPFII), Dalee Sambo Dorough presciently observed international trade law and intellectual property law is not properly able to fully and effectively protect indigenous peoples’ human rights and cultures (Sambo Dorough 2014:5-8). She noted that it was unlikely that the final text of the WIPO instruments covering traditional knowledge or cultural expressions would properly achieve this aim unless the drafting process complied with Article 18 DRIP, concerning indigenous
people’s right to participation in decision-making in matters which affect their rights (ibid.). Another indigenous representative pointed out that the nature of treaty law meant that any instruments were dependent on states ratifying and effectively implementing the obligations arising under them (WIPO 2014c:25). The IGC has called on states to use all means to facilitate indigenous participation including indigenous representatives as part of their delegations (WIPO 2003:77). However, this occurs rarely (WIPO 2013:3).

WIPO’s Member States have emphasised the need to facilitate and strengthen the participation of observers in the IGC’s work (WIPO 2011). The organisation’s General Rules of Procedure permit observers to take part in debates and submit proposals, amendments or motions at the invitation of the Chair (Rule 24, WIPO 1998b). From its first session, the IGC have accommodated NGOs and other organisations which do not have permanent observer status with WIPO as ad hoc observers (WIPO 2001). However, it does not go as far as initiatives by ECOSOC and the Human Rights Council (WIPO 2013:3). The organisation recognises that indigenous peoples do not necessarily organise themselves as NGOs which has been a precondition for consultative status at the United Nations (WIPO 2013:4; UN OHCHR 1996b). WIPO has also made a distinction between organisations representative of and accountable to indigenous peoples and local communities and NGOs working with or for indigenous communities and seeking to make the procedure for accreditation for the former more transparent and easily identifiable and thereby being able to access funding and invitations to present to meetings (WIPO 2013:4).

The IGC has undertaken a number of initiatives to maximise the ability of indigenous and local communities to participate effectively and in person in deliberations of these instruments. For example, a panel of representatives of indigenous and local communities of the geo-cultural regions and chaired by a representative of an indigenous or local community who meet prior to the IGC sessions and a summary report of these presentations are included in the IGC reports on their proceedings (WIPO 2013:10). Furthermore, WIPO finances administrative support for these meetings and indigenous representatives through the Indigenous Peoples’ Centre for Documentation, Research and Information (WIPO 2013:11). To financially assist accredited indigenous and local communities representatives attend and participate at the IGC, a voluntary fund was established in 2005 (WIPO 2006). The Secretariat initially provided briefings to indigenous and local community representatives concerning the IGC’s work, with this information now provided online (WIPO 2013:11-13).
These initiatives within WIPO reflect the practices being utilised within another UN agency dealing environmental protection, UNEP, which through an instrument adopted two decades ago has been an important site for indigenous engagement at the international level for the protection of their cultural heritage.

**UNEP and Article 8(j) of the Convention on Biological Diversity**

The Convention on Biological Diversity (CBD) adopted under the auspices of UNEP predates the Intangible Heritage Convention and the current WIPO initiatives. Yet, it is an important example of a multilateral environmental law instrument, which also covers intangible heritage, providing a means of participation by non-state actors including indigenous and local communities within the text itself and its subsequent elaboration through its operationalization. This is explained by the fact that the CBD was finalised in the early 1990s when the Rio Declaration on the Environment and Development was adopted, and the UN Working Group on Indigenous Populations was finalising the draft Declaration on the Rights of Indigenous Peoples. The Rio Declaration covers the participation of ‘all concerned citizens’, access to information, opportunity to participate in decision-making processes and access to justice (Principle 10). It recognises that indigenous peoples have a ‘vital role’ in environmental management and requires states recognise and support indigenous ‘identity, culture and interests’ and enable their effective participation in achieving sustainable development (Principle 22).

The CBD preamble acknowledges that ‘the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources’ (UNEP 2003:63). The States Parties to the CBD have established a number of mechanisms for the effective participation of indigenous and local communities in the meetings and operation of the treaty including an *ad hoc* open-ended Working Group on Article 8(j) and Related Provisions which is viewed as ‘a forum for dialogue between indigenous and local communities and [States] Parties, and other stakeholders’ (UNEP 2013), Voluntary Fund for Facilitating the Participation of Indigenous and Local Communities in the Convention Process (VB Trust Fund) providing financial assistance to attend and participate in meeting and related logistical support, and dedicated Traditional Knowledge Information Portal and other non-electronic modes of information dissemination (UNEP 2010a). This is augmented through the work of the International Indigenous Forum of Biodiversity, the indigenous caucus.
The participation of indigenous and local communities in the conservation and sustainable use of biological diversity is covered by Article 8(j) CBD. The work programme for Article 8(j) requires ‘just implementation’ from the local to the international level and ensures full and effective participation of indigenous and local communities (including women) throughout its implementation (UNEP 2000). To this end, and at the behest of the Conference of States Parties in the early 2000s and UNPFII, the ad hoc Working Group prepared guidelines for conducting cultural impact assessment for development proposals (UNEP 2002: Recommendation D). The Akwé: Kon Voluntary Guidelines adopted in 2004, cover effective participation of indigenous and local communities (especially women) in respect of development applications to identify and implement measures to prevent or mitigate any negative impact. Cultural, environmental and social impact assessment is integrated into a single process to recognise ‘the unique relationship’ indigenous peoples have with their land (UNEP 2004:19). Cultural impact assessment is defined as:

[A] process of evaluating the likely impacts of proposed development on the way of life of a particular group or community of people, with full involvement of this group or community of people and possibly undertaken by this group or community of people: a cultural impact assessment will generally address the impacts, both beneficial and adverse, of a proposed development that may affect, for example, the values, belief systems, customary law, language(s), customs, economy, relationships with the local environment and particular species, social organization and traditions of the affected community (UNEP 2004:14).

General considerations across all forms of impact assessment include prior informed consent from the affected indigenous and local communities, participation of women and youth (especially from indigenous and local communities), formulation of community development plans by indigenous and local communities, ownership and control of traditional knowledge, need for transparency, and review and dispute resolution procedures (UNEP 2004:25-27). However, the guidelines do provide for notification and public consultation by the development proponent, the identification of indigenous and local communities and other stakeholders, the establishment of mechanisms for their participation, agreed process of recording their concerns, sufficient resources for their participation, an environmental management plan, and identification of persons responsible for liability and redress and the establishment a review process.
Mechanisms for consultation and participation indigenous peoples are further elaborated in respect of genetic resources under the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, adopted in 2010. Not only does it acknowledge the DRIP in its preamble, it also recognises the diverse ways traditional knowledge associated with generic resources is ‘held or owned by indigenous and local communities’, their right to identify the rightful holders this knowledge within their communities, and affirms that the Protocol does not diminish or extinguish any of their existing rights. It requires that States Parties set out the criteria and processes for obtaining prior informed consent and the participation of indigenous and local communities in accessing genetic resources and associated traditional knowledge (Arts 6(1)(f) and 7). Consistent with DRIP, it requires that they take into consideration indigenous and local communities’ customary law, protocols, and procedures in respect of same (including an Access and Benefit-sharing Clearing-House) and develop in conjunction with these communities’ mechanisms to inform potential users of their obligations (Art 12). To facilitate effective indigenous and local community participation they are required to implement: awareness raising measures (e.g. regular meetings, helpdesk, dissemination of information, promotion of voluntary code in consultation with the communities, their involvement in implementation processes (Art.21)); capacity building measures; and financial mechanism and resources for implementation should prioritise the needs of these communities, especially those of women.

Following concerns raised by UNPFII, the CBD Conference of Parties also adopted a code of ethical conduct concerning the cultural heritage of indigenous peoples in 2010 (UNPFII 2003: paras 46, 55-57). Viewed as a sister instrument to the Akwé:Kon Guidelines, the Tkarihwaié:Ri Code was designed in consultation with the UNPFII and is proposed to establish a ‘new paradigm’ by promoting capacity-building for indigenous and local communities and equal partnerships with researchers and others working with them (Secretariat CBD 2011:2). It is viewed as a collaborative framework for facilitating effective indigenous participation and obtaining prior informed consent in respect of research arising from their knowledge, territories and related resource (ibid.). It reaffirms and elaborates fundamental principles contained in DRIP. It also expands upon the ‘methods’ which speak to the participation of indigenous communities, including the need to negotiate in good faith, the need to respect indigenous peoples’ decision-making structures and timelines, promotion of partnerships and cooperation, recognition of the special role of women, respect for
restriction on access and confidentiality, and sharing of information obtaining from interactions with the communities (Secretariat CBD 2011: paras 26-32).

Conclusion

This chapter has concentrated on how indigenous peoples’ participation is being engaged in respect of the negotiation of the text of treaties for the protection of cultural heritage and their implementation after their adoption. Although reference is made a key junctures to the work of indigenous communities, representatives and leaders to these ends, this has not been the focus. Nonetheless, despite this lack of elaboration it must be made clear that it is very much indigenous peoples that are pushing for these changes at the international, national and local levels. More recently, at the international level, this is driven through the work of UNPFII, the Expert Mechanism, and the Special Rapporteur on the Rights of Indigenous Peoples; all of whom have made it clear that cultural heritage and indigenous peoples’ effective participation in its protection is a priority.

Indigenous peoples’ efforts to participate in multilateral initiatives concerning intangible heritage before various UN agencies over the last two decades has had a transformative impact on how the obligations under these instruments are defined and implemented by states. As noted earlier, the protection of cultural heritage in international law continues to be defined and dominated by states. The push by indigenous peoples to effectively participate in decision-making concerning their cultural heritage continues to fundamentally alter how cultures and cultural heritage are defined, beyond a siloing of tangible, intangible, movable and immovable heritage to a holistic interpretation. Recent developments in respect of the Article 8(j) CBD, including the Akwè:Kon Guidelines, exemplify this approach. It is why indigenous peoples’ focus is not just confined to specialist cultural heritage instruments. Equally, their work in redefining and providing greater clarity to what constitutes effective participation of non-state actors and how it can be realised in practice builds on environmental law initiatives around participation and access to justice. It is important to reiterate that these twin elements of a holistic understanding of culture and heritage and the deeper and broader interpretation of participation in decision-making, accord with and reinforce indigenous peoples’ steadfast emphasis on their centrality to the full and effective enjoyment of their human rights, including their cultural rights.
**International instruments**


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There is the proviso that ‘to preserv[e] the independence, integrity and fruitful diversity of the cultures … of States Members’ UNESCO is ‘prohibited from intervening in the matters within their domestic jurisdiction’ (art.I(3), UNESCO Constitution).


It referenced the Declaration of the World Conference of Indigenous Peoples on Territory, Environment and Development, Kari-Oca, 30 May 1992; and Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, Mataatua, 18 June 1993 and the need to make the CBD mutually supportive with international agreements on intellectual property. See also UNEP 2010b, 2011.

Unlike the environmental and social impact assessment components, there is no guidance in respect of baseline studies for cultural impact assessments.

29 October 2010, entered into force 12 October 2014, UNEP/CBD/COP/DEC/X/1.

See UN 2011b; and Vrdoljak (forthcoming).

See in respect of UNPFII 2003: paras.95-105; UN 2015; and UN 2002: paras.59-71, 113(d).