THE SAFEGUARDING OF INTANGIBLE CULTURAL HERITAGE: LAW AND POLICY

A CASE STUDY OF ANGKOR

A thesis submitted in partial fulfilment of the requirements for the degree of

Doctor of Philosophy

BY

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JULY 2009
Abstract

Intangible cultural heritage (ICH) is a relatively recent addition to the corpus of international heritage law. Traditional conservation theory, which is the foundation of heritage law, has long delineated heritage only through physical manifestations such as monuments, sites and objects. Intangible heritage does not fit into these categories. To accommodate the introduction of living, non-material forms of heritage, the notion of cultural heritage, as defined in legal instruments, is undergoing a phase of re-conceptualisation. This thesis explores the shifts and divergence that have taken place within the heritage discourse to accommodate the notion of ICH. It explores the transformation of cultural heritage from its focus on tangible manifestations to a broader understanding of heritage in both tangible and intangible forms and the links between them. The conceptual development of intangible heritage reflects an intellectual shift stemming from discourse in international forums and a general criticism that monuments do not embody all forms of cultural heritage. This thesis also examines the delineation of intangible cultural heritage within heritage law and the broader discourse. It proposes to broaden the concept of ICH, as currently conceived, as a set of characteristics which constitute the concept.

This thesis further explores how legislation relating to the heritage has been drafted and how safeguarding mechanisms have been developed. The development of intangible heritage theory and ICH law is shown to have been driven substantially by the work of UNESCO. This work has culminated in the adoption of the Convention for the Safeguarding of the Intangible Cultural Heritage (2003) (ICH Convention) and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005). In addition to these binding normative instruments, intangible heritage law finds its source in soft law instruments—i.e. legal instruments that do not provide legally-binding obligations. Soft law instruments are fundamental for the role that they play in the development of legal precepts which often develop to become customary law or jus cogens. Twelve soft law instruments are identified as having made a substantial contribution to the development of ICH law. The precepts enshrined within these documents inform safeguarding measures in legislative and policy documents. This thesis presents a critical analysis of both hard and soft law
instruments. It is argued that ICH law draws upon, and finds its foundation in, three fundamental principles—the principles of cultural rights, the right to education and the right to community participation. These rights are framed, in the context of this study, as principles which developed within soft law and are further clarified within the ICH Convention.

The critical analytical approach to intangible heritage law taken in this exploration reveals a number of issues. The first issue is that the national legislative instruments, and the mechanisms for safeguarding outlined within them, are still largely founded in Western conservation theory and legal norms. This approach is not necessarily reconcilable with the notion of ICH or the local realities of Asian legal systems. The legal systems of many countries in Asia comprise not only state-based legal systems but also unofficial legal systems based on social power structures and customary/community law. The second issue is that there is a fundamental inconsistency between the international and national legal frameworks on heritage conservation. The Convention for the Safeguarding of Intangible Cultural Heritage places strong emphasis on community participation. However, legislating at the national level for the safeguarding of ICH to meet State Party obligations established by the Convention results in a top-down approach that largely transposes Western legal norms into non-Western legal contexts. On the one hand the Convention calls for bottom-up community safeguarding measures, which would incorporate local customary laws and values, and on the other it still relies heavily on top-down state legal systems. This is particularly manifested in some Asian countries where aspects of customary legal systems are themselves an element of the countries’ ICH and as such are the object of safeguarding measures, yet may be in conflict with state legal systems.

Through a practical examination of Cambodian heritage law, as applied to the Angkor World Heritage Site, this thesis indicates that the legal framework that protects Angkor is overwhelmingly focused on tangible heritage. The existing framework is largely unchanged from that of the former French administration and reflects an outdated Eurocentric notion of heritage in its physical form. The focus on the tangible has been perpetuated since the World Heritage Convention was introduced by the international emphasis placed on the preservation of the monuments. This thesis shifts
the focus to Angkor’s intangible cultural heritage. The analysis highlights a substantive gap in the legal framework and the need for a holistic management approach that incorporates the safeguarding of both the physical and the intangible cultural heritage. The thesis further explores, through the case study of Angkor, how international obligations are interpreted and implemented at a local level. The divergent ideologies of international law and policy, and of states and local communities, are further highlighted. The role of local customary systems, in the practice of intangible heritage, presents further conundrums that need to be examined.

In order to safeguard intangible heritage values a fine line must be walked between the freezing of culture, the commodification of tradition, the commercialisation of customs, the authenticity of practice, the maintenance of ethnicity and identity, the realisation of cultural rights and the politicisation of heritage. The tackling of these issues implies the need for a balance of competing forces–state and local, private and public, law and custom – and presents both challenges and opportunities for the protection of ICH. The findings presented in this thesis conclude that the safeguarding of ICH necessitates a broader approach than that inherent in the ICH Convention. It argues that further emphasis needs to be placed on local communities’ involvement in safeguarding measures. This requires a fundamental power shift and a move away from state-based regulatory frameworks as the sole means of protecting ICH. The use of localised culturally-sensitive policy approaches, which incorporate community-based legal systems and cultural rights theory, is one possible solution. This broader approach goes beyond the development of an inventory or list of intangible heritage items, nor is it based solely on legal mechanisms. Instead, the analysis of heritage law and the findings at Angkor, suggest the development of a localised culturally-sensitive mixed policy and law approach that is founded on the principles of cultural rights, community participation and education incorporating local ideologies and ‘bottom-up’ mechanisms. The thesis concludes that a full appreciation of the outstanding universal value of heritage sites requires the research, respect and safeguarding of intangible heritage. A draft policy document, which draws on these conclusions, has been developed and is put forward to contribute to the safeguarding of ICH both at Angkor and globally.
Acknowledgements

My research has been assisted by numerous institutions in both Siem Reap and Phnom Penh. In Siem Reap I have been affiliated with and used the facilities of the APSARA Authority International Documentation Centre, the Ecole Française d'Extrême Orient (EFEO), the Centre for Khmer Studies (CKS) and the University of Sydney Robert Christie Research Centre. These institutions were tremendously helpful in providing academic support, reference materials and research contacts. In Phnom Penh several organisations assisted my research programme. I also thank Reyum, UNESCO, RUFA, MoCFA and Heritage Watch.

The following academics, colleagues and associates have helped me in numerous ways throughout my thesis. I offer my sincerest thanks to Tim Winter, Christophe Pottier, Philippe Peycam, Nobuo Endo, Ang Choulean, Im Sokrithy, Damian Evans, Philippe Delanghe, Lim Bun Hok, Ek Bunta, Hong Makara, Khuon Khun Neay, Peng Syntha, Ly Daravuth, So Malay, Son Chanthoeun, Darryl Collins, Reinhart Zieger, Richard Mackay, Dougald O’Reilly, Eileen Lustig, Martin Polkinhorne, Nathan Wales, Jo Gillespie, Rowena Butland, Bess Moylan, and everyone from the Angkor Research Programme at the University of Sydney. In particular, I thank Britt Baillie, Fabienne Luco and Keiko Miura for access to their extensive research which has formed the anthropological basis for much of this thesis. I am also extremely grateful to the former APSARA Social Research Unit for access to their considerable collection of reports and field data.

I express profound gratitude to the Cambodians who invited me into their lives to witness their ceremonies, experience their traditions and share their knowledge with me. These people have a wealth of intangible cultural heritage which should be respected and acknowledged. I am truly indebted to the kindness of the Khmer communities within the Angkor World Heritage Site.

Throughout my research I am grateful to have received financial support from The University of Sydney in the form of a University Postgraduate Award (UPA) and Postgraduate Research Support Scheme (PRSS) Funding, The Australian Department of Education, Employment and Workplace Relations in the form of an Endeavour
Research Fellowship, and UNESCO through a UNESCO Fellowship in Support of Programme Priorities.

Considerable gratitude goes to my supervisors, Emeritus Professor Ben Boer and Professor Roland Fletcher. They have offered constant theoretical and practical advice. In addition they have provided valuable direction, moral and academic support, knowledge and feedback during my research. I thank them for their indispensable assistance.

I owe a deep expression of appreciation to all my friends and family who have supported me, offered encouragement and voluntarily (occasionally obligatorily) read sections of this thesis. Thanks to everyone in both Sydney and Siem Reap.
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<td>ACCU</td>
<td>Asia/Pacific Cultural Centre for UNESCO</td>
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<td>ADB</td>
<td>Asian Development Bank</td>
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<tr>
<td>APSARA</td>
<td>Autorité pour la Protection du Site et l’Aménagement de la Région d’Angkor (Authority for Protection and Management of Angkor and the Region of Siem Reap)</td>
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<tr>
<td>EFEO</td>
<td>l’Ecole Française d’Extrême Orient (French School of Asian Studies)</td>
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<td>ICC</td>
<td>International Coordinating Committee for the Safeguarding and Development of the Historic Site of Angkor</td>
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<td>ICH</td>
<td>Intangible Cultural Heritage</td>
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<td>ICHC</td>
<td>Intangible Cultural Heritage Convention (<em>2003 Convention for the Safeguarding of the Intangible Cultural Heritage</em>)</td>
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<td>ICOMOS</td>
<td>International Council on Monuments and Sites</td>
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<td>IP</td>
<td>Intellectual Property</td>
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<td>IUCN</td>
<td>International Union for the Conservation of Nature</td>
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<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organisation</td>
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<td>WH</td>
<td>World Heritage</td>
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<td>WHC</td>
<td>World Heritage Convention (<em>1972 Convention Concerning the Protection of the World Cultural and Natural Heritage</em>)</td>
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<td>WHL</td>
<td>World Heritage List</td>
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<td>WHS</td>
<td>World Heritage Site</td>
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<td>WIPO</td>
<td>World Intellectual Property Organisation</td>
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<td>ZEMP</td>
<td>1994 Zoning and Environmental Management Plan for the Angkor World Heritage Site</td>
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1. Introduction

Scanning the shelves of any academic library’s collection of books written in English on Cambodia reveals two dominant, and antithetical, focal points of interest: the ancient glories of Angkorian splendour and the horrors of the modern Khmer Rouge regime.¹

This statement suggests a deficiency in the literature on Cambodian history and heritage. While the Angkorian Khmer heritage has been researched and numerous personal accounts and academic analyses on the Khmer Rouge period have been published, very little has been produced on contemporary Khmer heritage and culture. This thesis aspires in part to address this gap and provide a substantive contribution to scholarly research on contemporary intangible cultural heritage in Cambodia, and in particular its legal aspects.

I first became aware of the wealth of intangible cultural heritage (ICH) at Angkor in December 2004. Like many other visitors to Angkor, I came for two days to see Angkor Wat. At the time I did not realise that Angkor is much more than the temple of Angkor Wat, or that I could barely scratch the surface of this amazing place in two days. Although my visit was fleeting, I had time to witness and marvel at several old women making and placing offerings at the base of a temple statue. Their manner was clearly a reflection of devout religious belief. I was intrigued. In the guide books I consulted, there was no mention of what the offerings were or why they were being made. These books only made reference to Cambodians worshipping in Buddhist Wats. I began a search for the answer that would lead me on a five year study of Angkor and its intangible cultural heritage.

During this study I learned of the significance of animism in Khmer culture and the importance of temple statues in these beliefs. Some temple statues are the physical

¹ T Winter and L. C Ollier, ‘Cambodia and the Politics of Tradition, Identity and Change’ in L. C Ollier and T Winter (eds), Expressions of Cambodia: the Politics of Tradition, Identity and Change (2006), 5. The use of ‘ancient’ in this context is not an archaeological reference to the period of ancient history which is commonly understood to have culminated around 476 A.D. The Angkorian Empire existed after this period. Ancient in this case is simply an adjective to reference a time long ago.
Chapter 1

embodiment of guardian spirits known as Neak ta. I came to realise that what I witnessed on my first visit to Angkor was the offering of traditional slar tuor to a Neak ta in order ensure the health and wellbeing of both the women’s families and the spirit. I also learned however, that the practice of beliefs is changing, that they can be in conflict with tourism and management policies and that the awareness of the intangible cultural heritage associated with the area is not widespread among visitors.

I used to visit the [Angkor Wat] temple a lot but now it is so busy. I just go when my son has a problem to pray to Neak ta Reach to make him better and for the three days of Miek month.2

Traditionally, every year in the month of Miek,3 Cambodians from villages around Angkor Wat gather in the doorway of the west gallery to perform the annual ceremony of homage to Neak ta Reach, the temple’s main guardian spirit (Neak ta).4 This ceremony exemplifies one of the intangible interactions that Cambodians have with the temples of Angkor, an ongoing tradition of worship to tutelary spirits.

In modern times, in order to conduct the ceremony, the local community must obtain permission from the management authority of Angkor, the APSARA Authority. This permission allows them to burn incense, conduct communication with the spirit via a spirit medium and play music within the temple, practices which, prior to the creation of APSARA and current permission requirements, were carried out more regularly. In recent years, to conduct the ceremony the participants have had to brave the multitudes of tourists who walk past the statue embodying Ta Reach without understanding the significance of the event. In some cases, these tourists unknowingly offend the participants in the ceremony by knocking over offerings and intruding

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2 Anecdote from a villager in Prasat Char Village. This anecdote is an example of intangible heritage associated with a major temple. It highlights the interaction that such practices have with the growth of tourism at Angkor.
3 Miek is a month in the Buddhist Cambodian calendar that is normally from the end of January until the end of February.
4 For further detail on Ta Reach see Chapter 6.
during the ceremony, which can cause distress and negative ritual-related repercussions for the Cambodians participating.\(^5\)

This event of *Neak ta* homage at Angkor represents the important role that elements of intangible cultural heritage (ICH), such as ceremonies, have in local communities. But it also draws attention to the conflicts that management frameworks and tourism can have with the practice of ICH at a popular World Heritage Site, in the process raising issues of the community’s cultural rights to carry out such ceremonies. As indicated by the anecdote above, visits to and worship of spirits at Angkor do not occur just once a year, but may also take place when a villager wants to consult a *Neak ta* for personal reasons; however, the frequency of visits is influenced by the increasing numbers of tourists.

The words of the villager from Prasat Char above are also representative of much broader issues concerning the practice of intangible cultural heritage throughout the world, and the legal protection of such heritage. Given the conflicts presented by the *Neak ta* worship at Angkor Wat, the following questions can be asked: how should this heritage be safeguarded? Do local communities perceive that these heritage elements require protection? And, is it preferable for ICH to be protected by legal frameworks, policies or non-binding guidelines,\(^6\) if at all? These questions need to be explored to understand the nature of ICH protection. This thesis draws on my detailed observations and research at Angkor to examine the role of law in the protection of ICH.

While the interactions between tangible heritage and law have been explored, very little has been written on the interaction between ICH and law. To understand this interaction, we must explore both the heritage discourse and the development of heritage law at international, regional and national levels. This thesis presents a

\(^5\) When foreigners are seen by local Cambodians as being disrespectful or insulting to a *Neak ta* it is believed that this will cause misadventure or illness, not to the foreigner, because it is not their belief or spirit, but rather to Cambodians. Similar negative effects are thought to occur when foreigners pick up or move statues before consulting the local spirits. This is elaborated on in Chapter 6.

\(^6\) Within Cambodia, local communities rarely have knowledge of legal and policy frameworks at the provincial or national level however it is still instructive to ask if they feel ICH should be protected using such measures. This is further examined in Chapter 7.
discussion of law and culture, and in doing so makes several assumptions about the role of law and the applicability and relevance of the law. In this context, it is important to recall a question posed by Richard Shweder in the *New York Times*, ‘Do we want to turn culture into a legally protected resource?’ The answer may well depend on the cultural group that is asked the question.

This thesis aims to investigate the protection of intangible cultural heritage at a World Heritage Site, examining the potential use both of legal measures stemming from the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention) and localised policy documents. The challenges of safeguarding ICH are not only applicable to Angkor; this thesis aims to provide a unique practical approach that may be drawn upon to protect ICH at other heritage sites. Thus while the following research is specific to the Angkor World Heritage Site in Cambodia, many of the theoretical issues discussed are relevant to the protection of ICH globally. The work emphasises the uniqueness and significance of Khmer culture, illuminates a side of heritage at Angkor that is often ignored and explores how heritage on a local scale interacts with international heritage law. Furthermore, the thesis also provides practical findings that may be utilised to begin to develop legislation and policy for the management and safeguarding of intangible heritage both in Cambodia and elsewhere.

To begin such an undertaking, it makes sense to first address the term intangible cultural heritage. While the use of the term, and its protection within international law, is addressed in Part I, it is appropriate to outline the principal rudiments of the term.

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1.1 The Intangible Side of Cultural Heritage

1.1.1 Cultural Heritage – From Tangible to Intangible

At a national level, cultural heritage is a term that is defined in different ways. These definitions are often a reflection of the underlying aim of the heritage policy, law or academic analysis to which they are attached. Until very recently the principal convention relating to heritage, the World Heritage Convention, was the basis upon which many national definitions were framed. Under the Convention, heritage was divided into two types: the cultural and the natural. However, under both categories, heritage required a physical manifestation. Thus, heritage was still limited to its tangible expression. As a result, the definition of heritage provided by the Convention is seen ‘to be overly restrictive, out of tune with current sensibilities, and guilty of European parochialism in the global arena’.

There is little debate over the numerous interpretations of ‘cultural heritage’. It is a term that crosses several disciplines, such as anthropology, archaeology, architecture, planning, law etc, each of which has a different understanding of the foundations of the term based on the philosophy of each discipline. Generally across these disciplines within each definition, ‘there is a tendency to focus more on tangible property, [although] intangible heritage has been receiving attention in recent years, and the definitions are becoming broader’. Ziegler states that ‘the notion of cultural heritage (patrimonio culturale) has expanded and partly replaced the term cultural property, which reflects a narrower western concept’.

Historically, cultural heritage has been labelled a ‘Western concept’. The theoretical understanding of culture and its conservation is generally considered to have

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10 Miura clearly presents this point in the foundation chapter of her doctoral thesis where she states that ‘there is generally no agreed definition of heritage… almost every cultural agency and specialist dealing with heritage has invented his or her own definition’. Keiko Miura, Contested Heritage: People of Angkor (PhD Thesis, University of London, 2004), 25.
11 Ibid.
12 Katja S. Ziegler, 'Cultural Heritage and Human Rights' (University of Oxford Faculty of Law, 2007).
developed from the preservation of historic buildings in Europe. Haftstein argues that these ‘Western precepts of conservation... are grounded in materialism and relationship to the past mediated through stone monuments’. Many early conservation charters and organisations were mandated to ensure the conservation of historic buildings, monuments and sites found predominantly in Europe. These mandates were precursors to the World Heritage Convention which, in recent years, has been criticised for its ‘Eurocentric conception of heritage and preservation’.

The call for a broadening of cultural heritage to incorporate non-tangible forms, such as oral heritage, is frequently thought to have come from non-Western nations. According to Haftstein, the call stemmed from Bolivia in the early 1970s and was pushed in recent decades by an alliance between East Asian and African developing states. He argues that the broadening of culture to incorporate intangible forms was due to UNESCO undergoing a reorientation ‘away from a European-inspired archival paradigm to an East-Asian paradigm associated with Japanese and Korean programs for ‘living human treasures’’. This paradigm shift has often been alluded to in academia, and is adopted in this thesis as a theoretical shift in the cultural heritage discourse. An alternative theoretical origin is related by Vrdoljak. Vrdoljak does not identify the movement of ICH as having come from ‘non-Western’ nations. Instead, she argues that it has developed for well over a century within European law, as part of the protection of minorities. In fact, she states that ‘European consciousness has consistently and significantly defined the development of international law in these

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13 Haftstein, above n 9, 20.
15 Haftstein, above n 9, vii.
16 Haftstein outlines that it was a letter to UNESCO from the Bolivian Ministry of Foreign Affairs and Religion in 1973 that brought attention to the overwhelming imbalance given to the protection of tangible heritage over intangible heritage. Ibid 10.
17 Ibid.
18 Deacon also argues that it was the growing influence of developing nations in East Asia and Africa within international bodies such as UNESCO which led to the reappraisal of cultural heritage and the broadening of its definition. As a consequence of the influence of these nations ‘[n]on-monumental, or intangible, heritage forms, that often dominate in developing countries, become a focus of attention’. Harriet Deacon et al, ‘The Subtle Power of Intangible Heritage: Legal and Financial Instruments for Safeguarding Intangible Heritage’ (Human Sciences Research Council, South Africa, 2004), 6.
areas'. She also observes that provisions within treaties for minority protection, developed by the League of Nations prior to the formation of UNESCO, make reference to ICH through language, and cultural and religious practices.

Whether or not heritage is seen as a Western phenomenon, I conclude that the move from an understanding of tangible heritage to one which incorporates intangible heritage has stemmed from a challenge to the traditional conservation ethos, comprising ‘the narrow physical conservation objective of restoring the “frozen past” for its commodification and for academic research’. 

Early references to cultural heritage as being more than tangible manifestations and physical conservation can be found in the 1980s. The Mexico Declaration on Cultural Policies (1982) displays a broad understanding of culture and its fundamental importance. It notes in the preamble to the Declaration that the international community represented at the Conference held in Mexico City agrees:

[\textbf{[I]}n its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.]

The Declaration further states that the:

cultural heritage of a people includes the works of its artists, architects, musicians, writers and scientists...expressions of the people’s spirituality.. It includes both tangible and intangible works through which the creativity of that people finds expression: languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries.

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22 Ibid 23.
Despite these early references to intangible forms of heritage, the incorporation of intangible heritage or the broadening of the definition of cultural heritage predominantly occurred in the 1990s. Condominas argues that the situation for intangible heritage has been very different from that of classical culture and monuments, as intangible cultural heritage has been taken into consideration only very recently, far behind that of monumental and classical heritage. His explanation is that this recent acknowledgement gives an insight into the Eurocentric perception of cultural heritage. He argues that ‘Intangible cultural heritage receives less attention because of its ephemeral character – it is not embodied in stone or set down in writing’. As a consequence of its recent articulation, the conceptualization of intangible heritage has the rather unflattering reputation of being an afterthought within the scope of cultural heritage preservation. Until recently, there has been very little effort to ensure its safeguarding and ‘conservation’.

Today, intangible cultural heritage, although still not widely comprehended outside of the heritage field, is progressively being incorporated into the cultural heritage discourse. As a result, a new conceptualization of cultural heritage is being established. The concept:

[G]oes beyond protecting tangible objects of objectively or universally recognized ‘high culture’. It also comprises individually or collectively subjectively relevant, intangible forms of cultural expressions which need not be ‘high culture’ provided that they are recognized by a community or individual ‘as part of their cultural heritage’. UNESCO further clarifies this broader understanding of cultural heritage that has moved from a concentration on the tangible to include the intangible.

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23 Ziegler, above n 12.
25 Ziegler, above n 12, 5.
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Cultural heritage is not limited to material manifestations, such as monuments and objects that have been preserved over time. This notion also encompasses living expressions and the traditions that countless groups and communities worldwide have inherited from their ancestors and transmit to their descendants, in most cases orally.

1.1.2 Intangible Heritage as Folklore

Intangible cultural heritage has also been portrayed through the term ‘folklore’. It is important to examine the standing of this term both within the field and this dissertation. A precursor to the 2003 ICH Convention was the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore. Within this document:

Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.27

Commonly, folklore is considered to consist of storytelling, riddles, dramas, songs and festivals. While these seem to characterize many important elements of ICH, and indeed this thesis finds that folklore representations are significant forms of ICH, folklore has been linked with a sub-text which has meant that the term is not widely utilised. The roots of this sub-text are found once again in the European precepts of culture and are linked to the reference made in section A of the Recommendation to ‘popular culture’. Deacon argues that ‘[t]raditional Western assessments of heritage value have emphasised high culture and monumental forms over other heritage forms’. Folklore is often comprehended as the informal traditions of a group. It has often been given less value than the more ‘formal’ heritages present in state monuments or artistic representations of ‘high’ culture. Thus historically, folklore has not always been highly valued.

27 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore.
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In her analysis of the 1989 Recommendation, Blake questioned whether the terminology of folklore was appropriate for other normative instruments dealing with cultural heritage. She concluded that the term is problematic, principally because ‘[i]ndigenous peoples regard it as a term that demeans their traditional cultural heritage and does not accurately describe it’.28 Her basis for this argument stems from submissions, particularly that made by Tora, to the 1999 Washington conference,29 which also sought to assess the 1989 Recommendation.

[T]he term “folklore” is not an acceptable term. Our culture is not “folklore” but the sacred norms intertwined with our traditional way of life – the norms that set the legal, moral and cultural values of our traditional societies. They are our cultural identity.

The term folklore has been used in the past by UNESCO, but it has been largely abandoned in favour of ICH. Blake argues that the terminological shift occurred in the late 1980s.30 However, it was first clearly indicated in 1992 when UNESCO created its intangible cultural heritage programme. UNESCO abandoned the use of folklore because it was perceived as representing popular culture rather than ancestral traditional representations. The negative connotations of the term, whether bona fide or not, have meant that it is no longer widely used in conjunction with the safeguarding of heritage. Within this thesis, in line with the current consensus, I utilise the term ICH rather than folklore. However, in no sense do I adopt the view that folklore denotes cultural forms that have any less legitimacy or value.

1.1.3 Encapsulating Intangible Heritage

It was proposed above that culture has multiple definitions. The blossoming of the ICH discourse has provided numerous explanations of intangible heritage as a sub-category of culture. Indeed, it is difficult to précis ICH in one sentence, if at all. It had been argued by Blake that ICH is ‘too vast to define effectively for the purposes of an

30 Blake, above n 28.
intangible heritage is a component of cultural heritage. Unlike tangible heritage (i.e. places or objects), it does not have a material existence; however, it is often associated with property or objects of heritage significance.
- It can include oral traditions, languages, traditional performing arts, rituals and ceremonies.
- It can include traditional knowledge such as agricultural, livelihood and environmental information.
- Intangible heritage is important to cultural identity.
- It provides living communities with a sense of continuity and a link to past generations.
- Intangible heritage has intergenerational value.
- Intangible heritage is dynamic. It may evolve and change over time.

31 Ibid.
32 Article 2(1) of the Convention states that “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and sustainable development.
33 Article 2(2) states that the “intangible cultural heritage”... is manifested inter alia in the following domains:
   a) Oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
   b) Performing arts;
   c) Social practices, rites and festive events;
   d) Knowledge and practices concerning nature and the universe;
   e) Traditional craftsmanship.
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- Intangible heritage has significance to the bearer. Thus no one form of intangible heritage is more legitimate than another.

One central premise of intangible heritage, as alluded to in the first point, and one which blurs the demarcation of tangible and intangible heritage, is that all physical manifestations of heritage have associated intangible value. Tangible heritage generally manifests complementary intangible values as stated by Chao-Ching:

Theoretically speaking, a cultural heritage without any intangible aspects does not exist... Tangible and intangible values are inseparable parts of the monuments and sites. The way of conserving tangible built form and the intangible values associated with it are in a condition of an unbroken cultural totality... Ideally, the cultural context should ensure that any further change in tangible parts of a monument will be restricted within the framework provided by its intangible values.34

Chao-Ching’s concept of the pervasive nature of ICH is adopted for this thesis. It is in fact possible to turn this proposition around to theorise that cultural heritage is principally intangible, and that, in some forms, this intangible heritage has tangible manifestations. In other words cultural heritage is first and foremost intangible in form; monuments, sites etc are tangible representations of intangible values. This approach adopts the proposition by Munjeri that ‘the tangible can only be interpreted through the intangible’.35 The approach requires a vast re-contextualisation of how heritage has commonly been perceived. As Baillie argues, the ‘false dichotomy which implies that tangible heritage is more valid than spiritual heritage must be abandoned’.36 Instead, intangible heritage should have a central position in encapsulating cultural heritage.

34 Fu Chao-Ching, 'Cultural Sensitivity towards Intangible Values in Monuments and Sites - A Comparison between Eastern Asian and Western Countries' (Paper presented at the Scientific Symposium Monument and Sites in their setting - conserving cultural heritage in changing townscapes and landscapes, Xi'an, China, 2005).
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1.1.4 Maintaining tradition – Embracing Change

A final theoretical issue that must be addressed to introduce the concept of intangible heritage is that of change. The above encapsulation of ICH proposed that the dynamic nature of intangible heritage is one of its defining characteristics. Yet, this dynamic nature and its relationship with traditional representations form an area of ambiguity in cultural theory. This ambiguity is expressed in academia through a series of commonly-posed questions. These relate to the extent traditions or representations of intangible heritage can be abandoned, reinvented, altered or manipulated for commercial or other interests, while still being safeguarded. How can competing interests in these processes be addressed? Is it possible to conserve ICH without inadvertently freezing representations of culture, allowing the recreation of expressed forms while maintaining their integrity and perhaps their authenticity? The questions surrounding these quandaries are many and the solutions have not yet manifested themselves.

The question of authenticity and recreation of traditions has been debated at the international level and within academia. It has been argued that authenticity should not be used with reference to ICH and is not an issue. The proponents of this view would find that any person could practice a form of ICH and any change they make would be acceptable. I do not adopt this approach. Rather, I argue that the use of traditions by those other than the traditional bearers of knowledge (those who have learned of the ICH by traditional means of transmission) may result in a loss of integrity. The traditional bearers of knowledge are central to this argument and their role as the practitioners of ICH is paramount and therefore their identification is required. I suggest that the issue of authenticity is clearly relevant to the practice of ICH, although it does not have the same application as that applied to monumental heritage under the World Heritage Convention. This theoretical issue, and that of the freezing of culture, is discussed further in relation to the legal protection of heritage in Chapter 4.

37 For example see Hafstein, above n 9.
The identification of the traditional holders of knowledge and practitioners of ICH is clearly linked to the recreation and reinvention of heritage. This is of particular importance as the recreation and reinvention of tradition are two central processes of continuation of ICH and the role of these processes are a key issue when attempting to safeguard heritage. The central function of traditional bearers of knowledge is also highlighted by Deacon in relation to the recreation and renewal of tradition. She argues that it is the transmission of heritage by these practitioners that is fundamental to its safeguarding and that within this process of transmission heritage may be altered, reinvented and changed.\(^{38}\) Throughout this thesis, I adopt the position that the traditional practitioners of culture, or the practicing community, have specific rights to their cultural heritage and its safeguarding. The relationship between cultural rights and ICH is discussed further in Chapter 2 and the role of communities is presented in Chapter 3.

The provision of rights to the practicing community for the safeguarding of their heritage can mean that that community may regulate how their heritage is renewed and recreated.

Representatives of the practicing communities may wish to control who may perform a particular ritual, who may make certain objects, or perform medical services, who may wear a specific headdress and so on.\(^{39}\)

The shift of power to the community also raises questions about the role of state bodies in regulating the safeguarding of ICH. Given that this thesis stresses the role of local communities in the regulation and protection of ICH, how does this accord with the legal obligations of states to implement protective measures through government institutions and what of the sovereign powers of the state to cede power to institutions to meet these obligations? Again these issues have no finite solutions. It is inappropriate for this thesis to attempt to establish how state power should be utilised, in Cambodia or elsewhere. Any recommendations or arguments put forward in this thesis are from a theoretical premise. They are intended to contribute principally to

\(^{38}\) Deacon, above n 18, 68.

\(^{39}\) Ibid 70.
the academic discourse surrounding the protection of intangible cultural heritage. While the arguments put forward may no doubt have practical applications, further analysis of governmental structure and function is necessary before more specific advice could presume to be made.

This thesis does argue, from a theoretical standpoint, for a general realignment of power to communities and a bottom-up approach to safeguarding ICH. This argument is pursued in Chapters 2, 4, 6 and 7. However, this should not be taken as a rejection of state apparatus. Legal instruments and policy documents have a necessary role in the safeguarding of ICH. A theoretical analysis of the function of these constituents within Cambodia is given in Chapter 5.

It is outside the scope of this thesis to give a practical assessment of the function of state bodies and their interaction with local communities undertaking bottom-up safeguarding measures. At present there are still relatively few countries which have developed national legislation and even fewer which have safeguarding programmes which extensively involve local communities.

1.1.5 Intangible heritage in the context of this study

In addition to outlining the conceptual background of intangible cultural heritage, it is necessary to establish the applied research component of intangible cultural heritage in this thesis. The applied component, namely the practical examination of ICH, was conducted in Cambodia. Cambodia has a vast wealth of unique cultural heritage, both tangible and intangible. Given the diversity of Cambodian intangible heritage, and the focus of this thesis on international law and its theoretical applications, a comprehensive examination or anthropological analysis of intangible heritage in Cambodia has not been attempted.

The manifestations of intangible cultural heritage presented in this thesis have been selectively chosen in both geographical location and form. Geographically, my research was focused principally in the Province of Siem Reap, specifically the area surrounding the World Heritage Site (WHS) of Angkor. The WHS of Angkor holds the central role in this dissertation. Many World Heritage Sites are included on the World Heritage List for their cultural tangible heritage. A large number of these sites
also possess unique forms of intangible heritage which have received little attention. The examination of intangible heritage at the Angkor World Heritage Site therefore has potential bearing on other WHSs both regionally and globally. The heritage of Angkor, both tangible and intangible, continues to amaze me and the more I have researched the site the more remarkable and valuable it has become for me. The location and historical context of the site are outlined below.

In terms of form, I have chosen to examine the elements of culture that are central to the daily activities of people living in the Siem Reap Province. These activities are related to the fundamental belief system of Cambodians from this Province and are often deeply intermingled with Buddhist and animistic beliefs. These forms include spiritual beliefs, communication with spirits, ceremonies, traditional healing, intangible links within the Angkorian landscape, the continuity of spiritual sites and familial and agricultural knowledge. The intangible heritage examined within the frame of this study does not extend to dance, theatre or music.

In considering the preservation, promotion, creation, transmission and practice of ICH, the breadth of this analysis is in line with the mandate of UNESCO within the field of ICH. As such it does not present an extensive analysis of the relationship between ICH and intellectual property rights, which is considered to be predominantly the mandate of the World Intellectual Property Organisation (WIPO). The protection of traditional knowledge, ownership of heritage and the economical aspects of

40 The degree to which animism is acknowledged as a fundamental element of the Khmer belief structure differs. In many cases authors do not register animism as an element, or note that it ‘to some extent intermingles with Buddhism’ (Robert K Headley Jnr, Country Study: Cambodia Society and Its Environment: The Role of Buddhism in Cambodian Life (1990) Library of Congress <http://memory.loc.gov/frd/cs/khtoc.html> at 15 July 2008) whereas others state that it is ‘deeply intermingled with the everyday practice of Buddhism’ (John Marston, Culture of Cambodia (2007) <http://www.everyculture.com/Bo-Co/Cambodia.html> at November 8 2008). It is suggested in this study that the differentiation of such practices can in some cases be impossible as they are intertwined.

41 Numerous studies have been previously conducted on these facets of Cambodian culture such as Tony Shapiro Phim, Dance: The spirit of Cambodia: A study guide about dance, ecology and history (2003).

42 This mandate is established as: ‘ensure the safeguarding of and viability of intangible cultural heritage for future generations in co-operation with communities, work to increase the awareness of intangible cultural heritage, create local, regional and international dialogue to generate respect for cultural diversity and encourage international co-operation and assistance for safeguarding programmes’. UNESCO, Intangible Heritage (2008) UNESCO <http://portal.unesco.org/culture/en/ev.php-URL_ID=34325&URL_DO=DO_TOPIC&URL_SECTION=201.html> at March 23 2009.
intellectual property are domains which intersect with intangible cultural heritage. While these issues are introduced further in Chapter 2, it is beyond the scope of this thesis to adequately address them in any detail.

The traditional culture of the Angkor area was studied through many hours of observation and with reference to numerous written sources. Throughout the 4 year period of doctoral research, I resided in Siem Reap for two and a half years. During this time I was invited to attend, participate in and observe dozens of ceremonies, including animistic spirit homage rituals, Buddhist ordination ceremonies, Buddhist annual *vossa* festivals, wedding ceremonies, familial life-stage rites, spirit divination and communication. In some cases I was invited to ceremonies outside of the Siem Reap District such as in Battambang, Phnom Penh, Kampong Som and Kampong Cham. While these ceremonies have informed my research, they are not specifically referred to. In two instances I observed forms of intangible heritage in two villages around Angkor. The first village Phum Nokor Krau (also known as Angkor Krau) is located north of Angkor Thom in the ZEMP Zone 1 of the World Heritage Site of Angkor. The second village, Phum Prasat Char is located northwest of Nokor Krau in Zone 2 of the World Heritage Site (Figure 1). These villages were selected due to the availability of previous documentation of numerous intangible heritage elements and the fact that they were known to be very old, with accepted village histories including knowledge of ancestral links to Angkorian times.

In addition to observations of intangible heritage, I consulted numerous written sources. Of particular significance were the vast numbers of Khmer language reports written by the Social Research Unit of the APSARA Authority, the Department of Demography and Development of the APSARA Authority and the Royal University of Fine Arts in Phnom Penh.

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44 ZEMP refers to the Zoning and Environmental Management Plan conducted in 1994. This plan is outlined in more detail in Chapter 5.
45 Further discussion of the APSARA Authority is found in Chapters 5 and 6.
Chapter 1

1.2 Cambodia and Angkor

1.2.1 Geographic location

Cambodia is located in Southeast Asia, within an area previously referred to as Indo-China by the French during the 18th century (Figure 2). It sits to the east and south of Thailand, south of Laos and west of Vietnam. Higham delineates Southeast Asia as encompassing the valleys of three great rivers, the Red, the Chao Praya and the Mekong. Such a means of defining the region is appropriate, as these rivers shape most aspects, be it social, economic or political, of the countries they traverse. The Mekong River passes through Cambodia from Laos as it moves to its delta in

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46 Prasat Char and Nokor Krau are circled. Zone 1 is indicated by the shaded red area. Nathan Wales (2007).
47 Charles Higham, Early Cultures of Mainland Southeast Asia (2002).
Southern Vietnam and is one of two defining fluvial systems in Cambodia (Figure 1.3).

Figure 2(a) Map of Southeast Asia c. 1907\textsuperscript{48}  (b) Map of Southeast Asia in the late 20th century.\textsuperscript{49}

\textsuperscript{48} Indicating the extent of the French colonial influence of Indochina (encompassing modern day Vietnam, Cambodia and Laos) and that of Siam (modern Thailand).

\textsuperscript{49} Milton Osborne, \textit{Southeast Asia: An Introductory History} (7 ed, 1998).
The Mekong River helps feed the major water body in Cambodia, the Tonle Sap Lake. At the Quatre Bras, just east of Phnom Penh, the Mekong, Tonle Sap, Bassac and Lower Mekong Rivers come together. In the monsoon the water volumes are so great that the Tonle Sap River reverses direction and backs up into the Tonle Sap Lake, causing the vast expansion of the lake which sits south of Siem Reap. Angkor sits in the floodplain bordered to the North by a mountain range known as the Kulen Mountains and in the South by the Tonle Sap.

1.2.2 Historical context of Angkor – The Angkorian period

The Angkorian period of Cambodian history is commonly attributed to the 8th and 15th centuries A.D. During this time; Angkor was ruled by a succession of kings

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51 Higham, above n 47, 9.
52 Chandler however establishes that in reality these dates mark neither the beginning nor the end, as there were inhabitants in the region prior to this time, and while Angkor was partially abandoned in the 15th century it was restored as a royal city in the 1570s. He also states that Angkor Wat itself was never abandoned and contains inscriptions up until 1747. David Chandler, *A History of Cambodia* (3rd ed, 2000), 4.
from Jayavarman II (~790AD) through to Srindravarman (~1330). These kings constructed state temples and palaces. Over the course of their reigns, the capital of Angkor moved several times between the Kulen mountains, Roluos, Koh Ker and the central Angkor area (Angkor Thom). The area encompassed by the Angkorian Empire, particularly at its zenith in the 12th-13th century, was vast covering parts of modern Thailand, Vietnam, Laos, Myanmar and Cambodia. There are monumental remains from the Angkorian period located throughout this area.

The capital first moved to the central Angkor area under the reign of Yashovarman in the late 9th Century. The expanse of this central area increased over the next four centuries to over 200 km² with consecutive kings building state temples honouring deities, ancestors and themselves. In addition to monuments, the kings built elaborate hydraulic and transport systems which extended throughout the Greater Angkor region. The extent of Greater Angkor is considered to have been over 1000 km² making it the largest pre-industrial low density urban complex in the world.54

Of the monuments at Angkor, those built by Suryavarman II and Jayavarman VII are worthy of particular mention. Suryavarman II constructed Angkor Wat during his reign from ~1112 to ~1150. This monument is considered to be the world’s largest religious monument.55 It is particularly remarkable because, as Groslier argues, there has been continuity of its religious function since the Angkorian period.56 Today this monument continues to have important spiritual meaning. Cambodians believe that local animistic spirits reside in and around the temple. Two Buddhist monasteries are also located within the confines of Angkor Wat.57

Jayavarman VII is credited with undertaking the largest building programme at Angkor. He constructed the city of Angkor Thom with the Bayon at its centre, along with numerous other state temples, including Ta Prohm and Banteay Kdei.

55 Freeman and Jacques, above n 53.
57 For further discussion see Chapter 6.
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Jayavarman VII is also known for his transformations of the ‘state’ religion under a banner of Mahayana Buddhism while incorporating earlier Brahmanical notions of kingship and patronage. These religious influences are thought to have been introduced from India.

The Angkor period is often described in terms of the process of Indianization. The influence of India is often believed to be the catalyst for the style and great building works of Angkor. Some early scholars speculated if Indians were directly responsible for the great temples. Parmentier’s *Guide to Angkor* begins by stating that Cambodia ‘was civilised at different times by religious and commercial emigrants from India’. However, he further notes that while ‘[i]t is thus that they [Cambodians] received their initial artistic inspiration;... they built their monuments themselves, modifying the Hindu teaching according to their own personality’. In general, it is noted that the influence of Indian ideas during the Angkorian period has sometimes been overemphasised and rather than the temples being a replica of those in India, the style or trends from the period of Angkor stem from the adaptation and interpretation of foreign ideas by the local population.

Where Indian or Chinese influence did play a major part in the development of Southeast Asian art, or religion, or political theory, stress began to be placed on the extent to which Burmese, Cambodians, Indonesians, and others adapted these foreign ideas to suit their own needs and values…. Indian artistic and architectural concepts played an important part in the development of Southeast Asian art. Yet the glories of India and Maritime Trade in Southeast Asia: a Lasting Relationship' (University of Malaya, 1983), Hermann Kulke, 'Indian Colonies, Indianization or Cultural Convergence? Reflections on the changing image of India's role in South-East Asia.' in H Schulte-Norholt (ed), *Ondersoek In Zuidoost-Asie* (1990), I.W. Mabbett, 'The 'Indianization' of Southeast Asia: Reflections on the Prehistoric Sources' (1977) 8(1) *Journal of Southeast Asian Studies* 1, M. L. Smith, "Indianization" from the Indian Point of View: Trade and Cultural Contacts with Southeast Asia in the Early First Millennium CE' (1999) 42(1) *Journal of the Economic History of the Orient* 1.
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Pagan, Angkor and the temple complexes of Java stem from their own individual character…. Southeast Asian and foreign scholars alike came to recognise that Indian and Chinese influence had been overemphasised.64

The individual character and unique characteristics of Angkorian religion, architecture and customs is an important consideration. In the ICOMOS advisory report on Angkor written prior to the listing of the site on the World Heritage List, it was noted that Khmer architecture became clearly distinct from that of the Indian sub-continent as it developed its own special characteristics.65 The distinctive elements of the Angkorian period, such as the religious amalgam of Pre-Angkorian animistic cults, Buddhism and Hinduism, are features that inform the unique ICH that is present today.

1.2.3 Decline and historical restoration of Angkor

Angkor began its decline from an occupied capital into the subsequent phase of restoration from 1430-31 when some claim it was sacked by the Siamese after a long siege.66 There is a commonly held belief that the site was abandoned following the sacking by the Thai and left to be overtaken by jungle. However, the extent to which the site was abandoned and degraded has been challenged by Ang.67 He states that the commonly held perception should be examined more closely as early western visitors to the site of Angkor, such as the Spanish and Portuguese travellers in the 16th century, noted that ‘the local inhabitants pointed out to them the site of the old Royal Palace as well as various other sites in the area’, which suggests that the site was not abandoned at this time. Furthermore, one such traveller, Diogo do Couto describes the canal system in Angkor Thom as still being serviceable, suggesting the hydrological system at Angkor had been maintained at least until the latter part of the 16th century.68 Ang argues that the area really ‘launched into its greatest decline during the

64 Osborne, above n 49.
18th century’ and that this is probably when ‘Angkor Thom underwent serious decline as well’. However, even during this period there was still occupation and use of certain areas. When the French visited in the 19th century local inhabitants again pointed out the site of the Royal Palace’.

Further, Jacques and Freeman argue that the ‘abandonment’ of Angkor should be examined further as there is really very little documentary evidence of the period. The authors state that;

[I]t is very doubtful that the kings of Angkor fled from their capital because of Thai onslaughts… in order to take up residence in Phnom Penh. It is at least as credible that, in fact, the king of Angkor never ‘abandoned’ the city, but that a descendant from a different royal lineage, or perhaps from another branch of the family which reigned at Angkor, installed himself as a rival in the Phnom Penh region which was growing in economic importance because of the burgeoning Chinese trading activity in South-East Asia.

It is often stated that early restoration of Angkor began in the late 16th century. King Satha is considered by some to be the first Khmer king to have returned to the Angkor region and taken up temporary residence at Angkor after the ‘defeat by the Thais’ in 1431 AD. It has been said that he carried out some restoration of temples and maintained Buddhist monasteries beside the temples. This view, however, is also challenged by Jacques and Freeman as a continuation of their theory of the growth of Phnom Penh.

It was the growing economic importance of Phnom Penh as a port… which endangered the power of Angkor and finally led to its downfall. It follows from this,

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69 Ibid.
70 C. M. Bhandari, Saving Angkor (1995).
71 Bhandari notes that King Satha tried to get unfinished carving works completed. He also notes that there is evidence showing that there were efforts to repair the damage done by the Thais after they conquered the area. Higham (Charles Higham, The Civilisation of Angkor (2001)) states that circa 1550, further reliefs were carved on the walls of Angkor Wat.
72 The authors note that this is the hypothesis that is put forward by academic Michael Vickery. Vickery argues that there was not a “fall of Angkor”, but rather a gradual shift of power from Angkor to two new centres, Ayutthaya and Phnom Penh-Lovek. Michael Vickery, Cambodia After Angkor: The chronicular evidence for the fourteenth to sixteenth centuries (PhD Thesis, University of Michigan, 1977), 511. Ang also stipulates that King Satha was in fact not the first king to return to Angkor instead King Ang Chan resided at Angkor earlier (pers. comm.).
that – contrary to received opinion – the ‘restoration of Angkor Wat’ may well have had nothing to do with the kings of Longvek, Satha or elsewhere. The two kings who left inscriptions at Angkor in the second half of the sixteenth century do not appear to have any links with the kings of Longvek: could they not instead have been the last, or among the last, kings of Angkor? There is also the puzzle as to why any Khmer king should wish to take up residence afresh, and provisionally, at Angkor. There is absolutely no evidence for this either in the inscriptions or in the Royal Chronicles.

From the 16th until the 19th Century several of the temples, particularly Angkor Wat, continued to have significance for local spirit worship and Buddhism, and monasteries continued to occupy the site.73 Luco suggests that during this period, pilgrimage and Buddhist religious activities, including the construction of monasteries and offering of Buddha statues, continued in Angkor.74 Angkor Wat ‘seems to have been renowned as a holy place in the sixteenth century… [and] there is no reason to believe that Angkor Wat was ever forgotten’.75 This is further suggested by the fact that in 1840, prior to the French ‘discovery’ of the site, the three towers of Angkor Wat were used on the personal seal of Queen Ang Mei.

Interest in the restoration of the temples began again after Angkor was ‘discovered’ by Frenchman Henri Mouhot, in 1860, although in fact Mouhot wasn’t the first Frenchman to visit and document Angkor. It has been stated by an earlier Frenchman who visited, Bouillevaux, that the ruins of Angkor were not in fact found by Mouhot, or any other Frenchman, for the reasons that they were never forgotten or lost.76 Regardless, since Mouhot’s documentation of Angkor, there has been increasing interest, particularly French interest, in the restoration and preservation of the Angkor

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73 These monasteries and the ancient temples continued to attract pilgrims. A Japanese pilgrim visited in the early seventeenth century and made a descriptive map of Angkor. (Higham, above n 71).
75 Jacques and Freeman, above n 68.
76 Father Charles-Emile (Abbé C.) Bouillevaux visited Angkor and published his account in 1858. Indeed Bouillevaux is thought to have been annoyed that Mouhot stated the he ‘discovered’ Angkor when it had never been lost or forgotten (Bruno Dagens, *Angkor: Heart of an Asian Empire* (1995)). It is quite a misconception that Angkor had been utterly lost before Henri Mouhot visited the temples in 1860. In 1668 a French missionary, Father Chevreuil wrote of Angkor Wat and in 1789 memoirs of Zhou Daguan were published in Paris. Zhou Daguan was part of a Chinese envoy to Angkor in the late 13th century (1296-1297). Smithies states that a translation of Zhou Daguan’s text appeared in French in 1819 published in *Nouvelles annals des voyages* Vol. III. (Michael Smithies, 'Introduction' in *Zhou Daguan: The customs of Cambodia* (2001)).
monuments. After the Mekong Exploration Commission led by Doudart de Lagrée, published its report on Angkor in 1873, the Académie des Inscriptions et Belles-Lettres demanded of France’s Minister for the Navy that serious measures be taken to preserve monuments situated in the territory henceforth protected by France. As a result, the École Française d'Extrême-Orient (EFEO) was founded in December 1898.

Chandler records that in 1863 the Cambodian king asked France to provide protection for his Kingdom and that a treaty was signed in 1864, turning Cambodia into a French protectorate. However, it was only in 1907 that Siam granted France the provinces of Battambang, Sisophon and Siem Reap. At this point the temples of Angkor were included in the French protectorate. The restoration of the temples was undertaken by the École Française d'Extrême-Orient (EFEO) which began its work in December 1907. The principal aim of this work was the restoration of the buildings to their former ‘majesty’. Indeed, this even led to the houses of Buddhist monks in the

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78 Dagens, above n 76.
79 Clémentin-Ojha and Manguin state that the 1901 Foundation Decree of the EFEO states as follows; ‘In view of the decree of 21 April 1891; in view of the recommendation given on 9 December 1898, by the Académie des Inscriptions et Belles-Lettres of the Institut de France, it is decreed:

Article 1: A permanent archaeological Mission is hereby founded in Indochina. It is placed under the authority of the Governor-General and under the scholarly control of the Académie des Inscriptions et Belles-Lettres of the Institut de France.

Article 2: Its objectives are: to carry out research on the archaeological and philological exploration of the Indochinese Peninsula, and contribute, by every means possible, to the understanding of its history, its monuments, and its languages; to contribute toward the study of the neighbouring regions and civilizations: India, China, the Malay world etc.’ (Catherine Clémentin-Ojha and Pierre-Yves Manguin, *A Century in Asia: The History of the École Française d'Extrême-Orient 1898-2006* (2007)). Further Discussion of the EFEO is found in Chapter 3.
81 Doudart de Lagrée prepared the terms of the treaty and oversaw its application in Cambodia. He also led the Mekong Exploration Commission (1866-68) which studied the temples of Angkor and the country of Cambodia.
82 The provinces had been annexed by Thailand in 1794. However, it appears that they were still generally considered to be parts of Cambodia (see Dagens above n 76). The provinces were provided to the French under the treaty of 23 March 1907.
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grounds of Angkor Wat being relocated so that the temple façade was not hidden (Figure 4 and 5).  

The French work in Cambodia was influenced by a strong colonial mentality. There was continuous emphasis on the ‘discovery’ of the temple complex by a Frenchman and their previous abandonment, despite evidence of ongoing use and contemporary religious buildings within the temple complexes. Numerous French writers and scholars maintained that there was little, if any, understanding of the historical connection between the modern Cambodian civilization and that of Angkor. For example George Cœdés wrote:

[A]t the beginning of the century one could still hear cultured Cambodians declare with sincere conviction that Angkor Wat was miraculously built, in the mists of time, by the Celestial Architect. They would listen incredulously to affirmations by Western historians that this prestigious temple had been built by their ancestors less than a millennium ago.

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84 This relocation was completed in 1910. Monks were actively utilizing Angkor when the French arrived. The Monks prayed in the gallery of a thousand Buddha’s. It was the French that relocated the monks and dictated the establishment of monasteries further away from the structure of Angkor.
85 Solange Thierry wrote in 1964 that ‘the story of the discovery of Angkor is inextricably linked to that of French Orientalism…Henri Mouhot is the ‘inventor’ of the Khmer civilization, as he was the first who, entirely by chance, discovered its monuments and fallen cities…. [Mouhot] revealed archaeological apparitions which were to pose all the problems inherent to the discovery of a lost civilization’. Solange Thierry, The Khmers (1964), 10.
86 ‘…. the languorous nonchalance of Cambodian life which is such a delight to foreign visitors, so often evoked that is has become an explorers cliché, is irreconcilable with the vision of the works of the architects, the sculptors and the labourers of Angkor’. Ibid 12.
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Figure 4 Monastery buildings in front of the North galleries of the first tier of Angkor Wat in 1909.88

Figure 5 Three huts for monks at the base of Angkor Wat before the front gallery in 1909.89

89 Ibid.
It is quite possible, however, that this quote is representative of a mix of colonial idealism along with misinterpretation of legends and stories associated with various sites, which does not preclude an understanding of the historical connection to the Angkorian period. Indeed, in recordings of family histories around Angkor families claim that their ancestors were members of the royal court or worked in the temples during the period of occupation by Angkorian kings.90

This colonial view of western discovery was not altogether created by the French. There were similar assertions about the lack of understanding of the origins of the Angkor complex and its rediscovery by Spanish and Portuguese travellers in the 16th century which have likewise been rejected. A traveller during this period is said to have noted that ‘the tradition of these gentiles is that the city [Angkor] was built by foreigners’. 91 However, this assertion is strongly disputed;

[Q]uite evidently, this was not the case, as there are inscriptions engraved in stone at approximately the same period which contradict it…some time before 1577, King Tribhuvanadityavarman… wishes that his son, the young prince, might govern Cambodia, “like the former lineage of kings which built the great capital Indrapattha and the majestic Vishnuloka as well as all strongholds within the Cambodian territory”. It is clear from this that the Khmer kings still claimed their place as successors to the kings of Angkor.92

From the time of French colonisation a process of secularization of Angkor took place.93 Baillie states that this has been effected by the way Angkor has been presented through tourism and the use of the image of Angkor Wat for the advertisement of banks, beer, cigarettes, cars and other goods. She argues that Angkor

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90 This is further discussed in Chapter 6.
91 As cited in Jacques and Freeman, above n 68, 295.
92 Ibid.
93 Note however that several of the French conservators working on Angkor during the French colonial period observed and were affected by traditional elements of intangible heritage that still existed at Angkor. This contradicts attempts to present the site as an abandoned lost civilization which it clearly was not. For example Miura states that Henri Marchal, a conservator, noted that a local guardian spirit in Angkor (Ta Pech) was causing harm to many people and as a result he ordered laborers to close ‘Ta Pech’s place’ i.e. the location where it is believed his spirit is embodied which is the south gate of Angkor Wat. Miura, above n 10, 77.
has ‘become the “lost temple” that foreigners imagined it to be, not that it is being cognitively eroded from its spiritual context’.94

Dagens states that under the EFEO’s mandate, the monuments were to be turned into a protected area, with an agent from EFEO acting as curator.95 He goes on to note that the job of the curator included administration, clearing and excavating the area, restoration work, exploration, research, and making drawings, as well as deterring looters and vandals, curbing encroachment, welcoming honoured guests, showing colleagues around and helping them to test their theories. Angkor was officially opened as a park in 1925.

Chapter 5 outlines the legal and managerial history of Angkor from the period of the French restoration until the present day. Chandler summarises the significance of the French involvement at Angkor when he asserted that ‘France’s greatest contribution to Cambodia, was probably its restoration of the temples at Yasodharapura’.96

**1.2.4 Angkor Today**

Multiple issues resound at Angkor with regard to the protection of intangible cultural heritage and cultural heritage in general. The Angkor Park as it is today appears to have followed the classical model for a heritage park as proposed by Black and Wall.

The process of creating an historical park generally involves the removal of existing people and houses surrounding the monumental remains; restoring the ruins; possible erecting a fence around the site; landscaping the grounds inside the fence or designated park area; creating a parking lot and tourist facilities; building souvenir and refreshment kiosks and renting them out to vendors; and charging an admission at the gate. The historical remains are presented in their newly created, park-like setting to an admiring public and to foreign visitors.97

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94 Baillie, above n 36, 128.
96 Chandler above n 52, 11.
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Today the most frequent term utilised for the Angkor World Heritage Site is the “Angkor Archaeological Park”. Such a title implies a sterile archaeological space containing ruins that are viewed objectively. Such a perception or reputation is far from accurate. It is, on the contrary, acknowledged and further argued in Chapter 5 that the Angkor World Heritage Site is a living cultural landscape with complex associated intangible heritage values. While it cannot be denied that the Angkor temples and surrounding areas continue to have considerable archaeological value, the contemporary site represents a complex matrix of values. The regular failure to acknowledge this ‘living’ side of Angkor has meant that the protection of ICH is often not considered.

One of the more prominent values attributed to Angkor, and one that is frequently mentioned, is that of Angkor as a symbol of Khmer identity. Mar has argued that ‘[f]or Cambodians as a whole, Angkor Wat, in particular, represents the highest spiritual value, as it is a national symbol, and has historically served as the most cherished symbol of Cambodia’s cultural identity’. While this is quite true, and is a theme that is further explored in Chapter 7, the values at Angkor are much more than nationalistic values of symbolism and cultural identity.

At times the values found at Angkor can be contradictory or at least be seen as contradictory. At the temple mount of Phnom Bakeng touristic and development values were contradictory to religious and spiritual values. There has been considerable debate at ICC meetings about the use of Angkor Wat, a religious site, for modern large-scale performances, concerts and events. These events are often seen as exploitative and driven by consumerism. The battle between economic value and

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99 Note that the legitimacy of the term “living heritage” has been questioned by Miura who argues that, “while the religious and symbolic importance of Angkor is emphasised, the socio-economic and cultural practices of local villagers have been severely restricted in recent years, to the extent that the notion of a ‘living heritage site’ sounds like a hollow slogan”. Keiko Miura, 'Conservation of a ‘living heritage site’ a Contradiction in terms? A case study of Angkor World Heritage Site' (2005) 7 Conservation and Management of Archaeological Sites 3, 3.
perceived cultural value or archaeological value has specific ramifications for the safeguarding of ICH. Issues of commercialisation and commodification of heritage are explored in Chapters 4 and 6 in relation to the protection of heritage generally and heritage at Angkor.

In other cases intangible values are simply misunderstood. It has been incorrectly stipulated that most spiritual connections at Angkor are ‘rituals of heritage’ that involve a reconstitution of the site as a modern place of worship to make people feel that the Angkor monuments, and the past they represent, are part of the nation’s heritage. This so-called invented connection seeks to make people feel that there is an continuity of tradition, leading to a tendency to present tradition as unbroken, glossing over glaring gaps and breaks in that imagined continuity. This is far from the reality of Angkor. In fact the opposite is far closer to the truth. There are many examples, such as those discussed in Chapter 6, of continuity in practices and beliefs at Angkor.

It is recognised that the framework of cultural heritage at Angkor has (as further established in ensuing chapters) emphasised archaeology and monumental restoration, while the traditions, values and daily practices of local communities have often been overlooked. While Lopez y Royo is correct in recognising that Angkor has been used by official bodies and government agencies to increase tourist consumption achieved through ‘commissioned performances of [classical Khmer] dance and music, to which the site provides not more than an ‘exotic’ backdrop’, the declaration that a ‘Hindu Angkor Wat’ was abandoned in 1431 and has been recently reclaimed as a Buddhist sanctuary by the Theravada Buddhist population of Cambodia is blatantly incorrect. Such a statement fails to acknowledge that there have been continuous animistic, spiritual and other religious links with the temples throughout the Angkor period until the present day. Such links and rituals of devotion are discussed in Chapter 6 and have been documented during the Angkorian period, during the period

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104 Lopez y Royo, above n 102.
105 It was actually the rise in the practice of Buddhism during the 13th and 14th centuries that led to the conversion of Angkor to a Buddhist monument. The conversion has certainly not been a recent event.
of Thai occupation, by numerous early western visitors to the temples and continue to be documented. To say that there has been a clear shift from Hinduism to Theravada Buddhism is also not correct, as contemporary Cambodian traditions present intermingled elements of Hinduism, Buddhism and Animism and often elements of each are performed alongside each other. This has led to a truly unique cultural heritage.

Angkor remains a spiritual place of devotion, the dynamic site of pilgrimage, teaching and reflection, and not simply an archaeological wonder for well-heeled tourists.106

This quote by Norindr illustrates that the significant intangible cultural heritage of Angkor has been recognised. Yet, despite this recognition, Sullivan notes that ‘restoration and conservation of the temple elements of Angkor and their setting remains perhaps the major priority of the international conservation efforts to this day’.107 Chapter 5 further explores this state of affairs. It seems clear that the focus on the tangible elements of Angkor, isolated from their spiritual context, has been the result of a process that began during the colonial period and was influenced by traditional conservation theory which itself developed from a focus on structures. These factors have influenced the agenda of UNESCO and APSARA. Baillie argues that ‘APSARA has not effectively articulated the contemporary religious meaning of the site to foreign tourists’108 and UNESCO has admitted that their programme of work in Cambodia has been too focused on co-ordinating restoration projects of temples rather than a holistic appreciation of tangible and intangible heritage. Currently the monumental heritage is always given priority over living heritage and as Miura argues, the key stakeholders of Angkor, the local inhabitants, are excluded from their social space, heritage and policy-making.109

108 Baillie, above n 36.
109 Miura, above n 20.
Prior actions and mandates of international restoration programmes have generally led to a phase of secularization of the Angkor temples and a decrease of respect and understanding of the spiritual associations that exist. The findings this thesis suggest that these actions predominantly reflect the ‘old conservation approach of freezing an idealized past for the interest of outsiders’. Respect for the spiritual significance of Angkor is required to ensure that there is appropriate safeguarding. This respect can be obtained through the implementation of awareness-building measures and simple restrictions, such as dress codes, at significant sites. These measures would not detract from their experience visiting the site, but instead increase their experience by developing a new appreciation for the spiritual value of the temples rather than merely their historical, architectural and archaeological value.

1.3 Conclusion

The conceptual understanding, and safeguarding of, intangible cultural heritage is an area of heritage law and theory that is evolving and will continue to evolve. This chapter has presented the conceptual foundation of ICH and defined ICH within the context of this study. The chapter has also introduced issues surrounding the protection of ICH, which will be explored further in Part I (within heritage law) and Part II (at the World Heritage Site of Angkor) of the thesis. Finally, this chapter has presented the geographic, historical and contemporary context of the Angkor WHS.

Angkor, like many other World Heritage Sites, requires an effective programme that adequately respects, safeguards, protects and promotes intangible cultural heritage. As Condominas recognises, it would be completely illusory to think that a programme like this can be introduced and run smoothly without effective legal and administrative measures. Condominas argues that legal measures can reassure the bearers of culture about their rights and shield them from victimization arising from

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110 Ibid.
111 ‘At the Silver Pagoda in Phnom Penh, visitors are required to adhere to a dress code which includes covering shoulders and legs and removing footwear. At Angkor Wat many tourists wear beach clothes, unaware that they are doing anything wrong…. Now Khmer people frequently follow the example set by westerners and many have ceased the traditional practice of entering the temple complex barefoot’. Baillie, above n 36.
112 Condominas, above n 24, 23.
incomprehension, thus enabling invigoration of intangible culture and prevent interference from authorities who may be unfamiliar with local customs.\footnote{Ibid 24.} Therefore, the examination of law and intangible cultural heritage is a necessary venture both at Angkor and on a broader scale.
PART I  Intangible Heritage Law
2. Foundations of Intangible Heritage Law and Links with Cultural Rights

2.1 Heritage Law

Modern heritage law, somewhat surprisingly, primarily finds its origins in warfare. The codification of the laws of warfare in the 20th century made provisions for the protection of cultural heritage.¹ This is seen within the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), commonly known as the Hague Convention. The Hague Convention stemmed from earlier Conventions on the Laws of War such as the Hague Conferences of 1899 and 1907. The Convention presents ‘for the first time a rudimentary form of international protection for edifices devoted to the arts and sciences and for historical monuments’.²

Concurrently to development of protocols for the protection of heritage in war, conservators established principles for the restoration of buildings. The philosophical foundations developed by architects and conservators were laid out at the 1931 Athens Conference and cemented at the Second International Congress of Architects and Technicians of Historic Monuments in Venice, 1964. From this Congress, the International Charter for the Conservation of Monuments and Sites (Venice Charter) was adopted. This Charter initiated the conceptualisation of heritage. Pickard argues that the Charter embodies the foundation of ‘an internationally accepted conservation philosophy’.³

Simultaneously with the Venice Charter there was the creation of two fundamental bodies in the conservation movement, the United Nations Educational, Scientific and Cultural Organization (UNESCO)⁴ and the International Council on Monuments and

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⁴ UNESCO was founded in 1945.
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Sites (ICOMOS). UNESCO has since this time assisted in the further conceptualisation of international heritage and heritage conservation. The work of this organisation parallels the growth of heritage theory and practice, particularly at the international level.

2.1.1 UNESCO and intangible heritage law

Since its foundation, UNESCO has acted as a catalyst within the heritage discourse. UNESCO’s programme of work includes the development and implementation of norms and standards and normative action for cultural protection. In a legal capacity, UNESCO has initiated, drafted, promoted and administered international and regional laws for the protection of cultural heritage. Birnie and Boyle state that ‘the most valuable contribution made by the UN and related international organizations... has been their ability to influence the international policy-making agenda, and to initiate or facilitate many of the most important law-making developments’. In addition to furthering the development of law, UNESCO has worked to ensure compliance, implementation and enforcement of laws by assisting member states to develop adequate national legislation and policy. UNESCO affirms that ‘[l]egal instruments enable states to more effectively protect all forms of culture’. At an international level their effectuation of normative action includes a broad range of legal instruments including declarations, recommendations and conventions. In addition to the 1954 Hague Convention mentioned above, UNESCO is responsible for five other Conventions within their programme on culture.


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5 ICOMOS was founded in 1964 following the adoption of a resolution, put forward by UNESCO, at the Second Congress of Architects and Specialists of Historic Buildings (Venice).
Chapter 2

- 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage.
- 2003 Convention for the Safeguarding of the Intangible Cultural Heritage

This chronological progression of international laws reflects the development of the concept of heritage. Intangible heritage has only recently been brought into the corpus of heritage law. It is fairly well accepted, as was illustrated in the introduction, that cultural heritage has in the past, and in some cases recently, been defined exclusively as monuments, artefacts and objects and in fewer cases as landscapes. The inclusion of intangible heritage has developed from discourse in international forums and politics and a general criticism that monuments do not embody all forms of cultural heritage. The growth of understanding of intangible heritage as a concept and important form of heritage began in the late 20th century. This was when it was recognised that globalisation could potentially lead to the loss of cultures and the loss was essentially intangible. While the general understanding of intangible cultural heritage has grown from international politics, the development of intangible heritage law has been driven by the work of UNESCO. In many ways the work of this intergovernmental organisation is viewed as a quasi-legislative process. This work has directly influenced legal developments within the field of heritage protection. UNESCO’s development of international law for intangible cultural heritage has evolved in three main phases; 1980-1989 – folklore, 1990-1999 – masterpieces and treasures, and 2000-2009 – safeguarding diversity and the intangible.

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9 Cultural landscapes have been included as a category of heritage of outstanding universal value under the 1972 World Heritage Convention since 1992. Cultural landscapes are a holistic category that allows the acknowledgement of all cultural heritage. The cultural criterion (vi) was changed to allow the listing of places on the World Heritage List that are ‘directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance’. Despite this introduction, the definition of cultural heritage under the Convention remains focused on the tangible and as such the application of the classification is limited. UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention (2008), II.A 47.
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Folklore

In 1980—at the 21st session of the General Conference—UNESCO was requested to conduct studies concerning the establishment of an international regulation for the protection of folklore. WIPO and UNESCO created a joint working group to examine the potential measures for the national protection of folklore. The recommendations of this group were formulated within the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions. While the model provisions were not widely implemented, the outcomes of the working group did urge UNESCO to further examine potential measures for the protection of folklore. UNESCO sought input from various experts in this regard. A committee of experts met in Paris in 1985 and this in turn led to the establishment in 1989 of UNESCO’s first international normative instrument regarding intangible cultural heritage, the Recommendation on the Safeguarding of Traditional Culture and Folklore. Further analysis of this document is presented in the following chapter. While, this instrument was unanimously adopted by the General Conference of UNESCO in 1989, it remained a soft law document (it did not contain legally-binding obligations for signatories) and as such, there were many issues ensuring its implementation. Hafstein contends that no specific mandate was provided to UNESCO to further develop this Recommendation or ensure its implementation.

Masterpieces and Treasures

In the early 1990s that the work of UNESCO gained a specific mandate to undertake measures for the protection of intangible heritage. In 1992 UNESCO’s Culture Sector

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11 In fact Blake explains that at the 21st session, two committees of governmental experts were established. One was to ‘define measures for safeguarding the existence, development and authenticity of folklore (under the sole auspices of UNESCO, and the other to draw up proposals for regulating the IP aspects of protection (under joint UNESCO/WIPO control)’. This allocation of functions reflects WIPO’s role in the protection of ICH. This is further discussed below. Janet Blake, ‘Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage: Elements for Consideration’ (UNESCO, 2002), 19.

12 Ibid.

adopted a new programme of work on intangible heritage\textsuperscript{14} following an evaluation of UNESCO's prior activities.\textsuperscript{15} The aims of the new programme were;

- To promote respect for intangible cultural heritage,
- Ensure recognition of the need for its preservation and transmission, and
- Acknowledge the crucial role of the practitioners and communities.

UNESCO’s programme on ‘intangible cultural heritage’ within the 1990s was predominantly focused on areas of language, traditional music and the protection of performed heritage. This is evident within the scope of four projects launched during this period; the Memory of the World, Red Book of Languages in Danger of Disappearing, Living Human Treasures and Masterpieces projects. In 1992, UNESCO launched the Memory of the World project. The project sought to ‘protect and promote humankind’s documentary heritage by taking steps in favour of preservation and accessibility’.\textsuperscript{16} The project attempted to safeguard, and develop access to, documents and other materials such as sound recordings etc that encapsulated the collective memory of the world. The 1993 UNESCO project on Languages in Danger of Disappearing similarly sought to document and collect data on endangered languages.\textsuperscript{17} UNESCO utilised the idea of a Red Book, drawing on the concept of the IUCN Red List of Endangered Species.

In 1993 UNESCO developed the Living Human Treasures project which gives recognition to the holders of outstanding artistry and skills in expressions of intangible cultural heritage.\textsuperscript{18} Under this project UNESCO developed a world list of Living Human Treasures to allow states to nominate knowledge holders. This project aimed to ensure transmission of traditional knowledge and increase self-motivation

\textsuperscript{14} Also in 1992 there was a shift in the Operational Guidelines of the 1972 UNESCO Convention on the World Natural and Cultural Heritage to encompass ‘cultural landscapes’. UNESCO, above n 9.
\textsuperscript{16} Anita Smith, 'Developing National Criteria and Guidelines to Assess the Significance of Intangible Cultural Heritage' (Cultural Heritage Centre for Asia and the Pacific, Deakin University, 2003).
\textsuperscript{18} Smith, above n 16.
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among the holders of knowledge. While the project continues to recognise important holders of cultural knowledge, the project does not directly protect the intangible cultural heritage.

The fourth project, the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity, was created in 1997. Aikawa states that in conjunction with the formation of the project, the intangible heritage programme was given one of the highest priorities within UNESCOs portfolio.19 The establishment of the Masterpieces project, and UNESCOs emphasis on this area of cultural heritage, has been accredited to the dedication of one man, Juan Goytisolo.20 Schmitt argues that it was the correspondence between Goytisolo and UNESCO regarding a site in Marrakesh that set in motion UNESCOs dedication to and focus on the safeguarding of intangible cultural heritage.21 A letter was sent to UNESCO in January 1996 on behalf of Goytisolo which sought UNESCOs assistance in the preservation of the Jemaa el Fna Square, Marrakesh, and its proclamation as ‘oral heritage of humanity’.22 Goytisolo, who was residing in Marrakesh, was concerned that the Square would be irrevocably damaged by development projects. These projects, he feared, would cause the traditional use of the Square, as a performance space for local storytellers, musicians, snake charmers and seers, to be forsaken. The dedication of Goytisolo put intangible heritage issues ‘on the agenda’ and led to the International Consultation on the Preservation of Popular Cultural Spaces, held in Marrakech in June 1997. It has been proposed that ‘the writer Juan Goytisolo has given the concept of ‘oral heritage of humanity’ a universal relevance’.23 Under the Masterpieces project, UNESCO proclaimed forms of traditional and popular cultural expressions or cultural spaces as masterpieces of the oral and intangible heritage of humanity. There were three proclamations made of masterpieces, in 2001, 2003 and 2005.24 This project was an important practical step in the re-conceptualisation of cultural heritage as it provided

19 Aikawa, above n 15.
20 Hafstein, above n 13.
22 Ibid.
23 Letter from Noriko Aikawa to the Moroccan Government cited in Schmitt. Ibid.
24 As discussed further in chapter 3, these proclamations are now listed under the ICH Convention.
‘a means of testing the validity of the concepts ... and to confront with reality in all its complexity’.

As argued previously, UNESCO’s contribution to ICH law within the last ten years has evolved in conjunction with the re-conceptualisation of heritage. In addition to the projects established in the 1990s, this re-conceptualisation has stemmed largely from the reassessment of the 1989 Recommendation (*Recommendation on the Safeguarding of Traditional Culture and Folklore*). This reassessment took place in the late 1990s. Between 1995 and 1999 eight regional seminars were convened to ‘conduct a systematic assessment of the application of the 1989 Recommendation’. After the regional seminars had taken place, a conference was organised to amalgamate the results and undertake a global assessment of the Recommendation. In June 1999 the Washington Conference, Safeguarding Traditional Cultures: A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore, was held. At the Conference, the Recommendation was found to be lacking in several areas, particularly national implementation and scope. It was suggested that governments of states submit to the UNESCO General Conference a request to examine the options for adopting a new normative instrument on the safeguarding of traditional culture and folklore.

**Safeguarding Diversity and the Intangible**

Within the last ten years UNESCO’s intangible heritage programme has broadened beyond performed representations of intangible heritage and language embodied by the projects of the 1990s, to holistic notions of cultural diversity and an all-encompassing designation of intangible heritage. This is reflected within the 2001 UNESCO Universal Declaration on Cultural Diversity. UNESCO perceived that an emphasis on cultural diversity was the key to meaningful intercultural dialogue, respect and ultimately peace. The Declaration on Cultural Diversity even suggests that the preservation of cultural diversity is necessary for the survival of humanity, in

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25 Aikawa, above n 15.
26 Blake, above n 11.
27 Aikawa, above n 15.
28 Koichiro Matsuura, prologue UNESCO Universal Declaration on Cultural Diversity.
the same way as biodiversity is necessary for the survival of the natural world. The broad scope of the Declaration incorporates references to cultural rights and the protection of cultural entities from commodification. The approach laid down within the document was the underpinning for the further normative work of UNESCO within this decade. This work included the development of two international conventions protecting cultural diversity and intangible heritage.29

In 2001 UNESCO undertook a preliminary study examining the potential for a new convention on intangible heritage. This study was framed around the notion of intangible heritage in its broadest sense and moved away from references to folklore. The study30 concluded that a new legal instrument was required to provide an adequate normative apparatus to protect all forms of cultural heritage. A convention was determined to be the most appropriate legal instrument. It was felt that a document with the same legal status as the World Heritage Convention (WHC) was necessary. It was reasoned that the ICH Convention should be developed as the WHC was inadequately representing ‘world heritage’. Deacon states that UNESCO ‘chose to develop a separate Convention for various legal and historical reasons including the difficulty of redrafting the narrow definition of cultural heritage in the WHC, which only refers to monuments, buildings and places, and of revising the criterion of outstanding universal value for inscription on the World Heritage List’. 31

2.1.2 Convention for the Safeguarding of the Intangible Cultural Heritage

The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention) is the principal international intangible heritage law document. The following section provides a contextual background for this Convention, while the next chapter presents an in-depth analysis of its content and obligations. This instrument was developed within the last decade, some 30 years since the 1972 World

29 Further analysis of the Declaration on Cultural Diversity and the Convention on the Protection and Promotion of the Diversity of Cultural Expression is provided in Chapter 3.
Heritage Convention came into force. As such, it is often stated that the background to the ICH Convention cannot be understood without reference to the World Heritage Convention, and the two Conventions are intended to work together to provide an overarching mechanism for effective conservation of both tangible and intangible heritage.\(^\text{32}\) Despite this intention, it can be argued that the creation of the ICH Convention as a separate legal heritage document has further separated the notions of tangible and intangible heritage rather than to progress towards a holistic understanding of heritage as comprising both the intangible and the tangible. This may indeed be true. A single legal instrument could ensure that heritage is protected in a holistic manner. However, it is argued in the following chapter that there are distinct complementarities between the two Conventions. Further, the intellectual development of heritage conservation as discussed previously has not been conducive to the adoption of an international normative instrument with an all-encompassing scope.

In her examination of the adoption of cultural heritage conventions by UNESCO, Blake argues that each convention ‘reflect[s] the political and/or intellectual concerns of the time at which they were developed’.\(^\text{33}\) This observation, I suggest, is applicable to the development of the ICH Convention, as it reflects an intellectual shift and concern for non-tangible heritage. Indeed the observation may be applied more generally to the heritage field and all conservation instruments and standards. The ICH Convention was drafted by meetings of experts,\(^\text{34}\) a select drafting group\(^\text{35}\) and an


\(^\text{34}\)March 2001 meeting of experts in Turin at the Round Table on Intangible Cultural Heritage; January 2002 meeting of experts in Rio de Janeiro to discuss Intangible Cultural heritage: Priority Domains for an International Convention; June 2002 expert meeting to discuss terminology and drafting of a glossary; April 2003 meeting of experts on the preliminary draft Convention for the Safeguarding of the Intangible Cultural Heritage.

\(^\text{35}\) 20-22 March 2002 first meeting of the select drafting group; 13-15 June 2002 second meeting of the select drafting group.
intergovernmental group of experts\textsuperscript{36} under directives of the Director-General of UNESCO and the decision of the General Conference of UNESCO at its 31\textsuperscript{st} Session.\textsuperscript{37} UNESCO issued such directives because it was perceived that the World Heritage List of the World Heritage Convention presented an imbalance of heritage from developed nations. This imbalance was due, UNESCO felt, to the organization’s focus on tangible heritage. It was thought that tangible forms of heritage were more prevalent in developed countries, whereas other countries had a majority of their heritage in intangible forms.\textsuperscript{38} Indeed, UNESCOs program on cultural heritage included several instruments, as outlined above, but all of these deal with tangible heritage. Therefore a public international law document that addressed intangible cultural heritage was needed.\textsuperscript{39} Kuruk states that UNESCO’s work on ICH ‘was propelled by the need to address inadequacies in the WHC’. \textsuperscript{40} However, given the background discussed above, it is likely that UNESCO was propelled by the overall inadequacies of the cultural program rather than just the WHC.

The major hurdles in the drafting of the Convention involved addressing issues of terminology, objectives and the model of the Convention.\textsuperscript{41} The experts tasked with overcoming these hurdles developed a working definition of intangible cultural heritage and a list of preliminary objectives in 2001.\textsuperscript{42} The scope of the convention was discussed in January 2002, where it was decided that lessons should be drawn from UNESCO’s Masterpieces programme. Further terminological debates took place at the meeting of experts in June 2002. The accepted definitions were included within the first preliminary draft of the convention which was prepared by the drafting group following this meeting of experts in June 2002.

\textsuperscript{36} First session was held in September 2002, second session was held in February 2003 and third session was held in June 2003.
\textsuperscript{38} Note however that this argument may be challenged using examples of the diverse ICH found in Australia, New Zealand or Canada.
\textsuperscript{39} Decision of the 31\textsuperscript{st} General Conference of UNESCO.
\textsuperscript{40} Kuruk, above n 32.
\textsuperscript{41} Aikawa, above n 15.
\textsuperscript{42} Ibid. Aikawa states that the the working definition and objectives were elaborated in 2001 at a meeting in Turin. The objectives were ‘(i) to conserve human creations that may disappear forever, (ii) to give world recognition, (iii) to strengthen identity, (iv) to enable social co-operation within and between groups, (v) to provide historical continuity, (vi) to enhance the creative diversity of humanity, and (vii) to foster enjoyment.'
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The model of the new convention was also subject to deliberation. There was a debate over the use of the WHC as the basic model for the Convention. Bedjaoui, who presided over the meeting of the experts in charge of drafting the Convention, stipulated that it is ‘a fairly common legal technique in developing international legal instruments, to seek inspiration from a “Convention-model” in order to draft another related convention’. The drafting group concluded that the success of the WHC was adequate grounds to use it as a model. As such, the central mechanism of the WHC, the list system, ‘was accepted in principle as a driving force for the ICH Convention. The model of the convention was further discussed at the first session of the Intergovernmental Meeting of Experts in September 2002. The meeting drew heavily upon the recommendations of the Istanbul Roundtable of Ministers of Culture which had been held earlier that month. The Intergovernmental Meeting concluded that the WHC should be seen as a source of inspiration but not the determining model. Despite this conclusion, analysis of the two conventions, presented in the next chapter, shows distinct similarities in the wording and style of the conventions.

The first Preliminary Draft Convention was sent to UNESCO Member States for comments in July 2002. In September 2003 the Preliminary Draft Convention was presented to the Executive Board of UNESCO. It was decided by the Executive Board that the Preliminary Draft Convention should be presented at the next UNESCO General Conference. Thus, the Draft was adopted as a UNESCO Convention without amendment at the 32nd General Conference in October 2003. The adopted Convention is divided into nine parts;

I. General Provisions,
II. Organs of the Convention,
III. Safeguarding of the intangible cultural heritage at the national level,
IV. Safeguarding of the intangible cultural heritage at the international level,
V. International cooperation and assistance,
VI. Intangible Cultural Heritage Fund,

43 Bedjaoui, above n 37.
44 Ibid.
45 Aikawa, above n 15.
46 120 votes for, 8 abstentions.
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VII. Reports,

VIII. Transitional clause, and

IX. Final clauses.

On the 20th April 2006 the Convention entered into force.\textsuperscript{47} The first General Assembly of the States Parties to the Convention took place in June 2006. As of 11th June 2009, 114 states have deposited their instrument of ratification, approval or acceptance. Table 1 below shows the graphical representation of these states. In 2008 the Intergovernmental Committee adopted the Operational Directives for the ICH Convention. These Directives intend to further clarify mechanisms and avenues for the safeguarding of ICH. The following chapter critiques possible avenues for legal protection presented through the Convention for the Safeguarding of the Intangible Cultural Heritage 2003. The Directives, along with the central principles of the Convention, State Party obligations and the safeguarding mechanism established by the Convention, are analysed and discussed in the following chapter.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Electoral Group & Group Name & Number of States Parties & Percentage of States Parties \\
\hline
Group I & Western Europe and Others & 14 & 12.28 \\
\hline
Group II & Eastern Europe & 20 & 17.54 \\
\hline
Group III & Latin America and Caribbean & 23 & 20.18 \\
\hline
Group IV & Asia & 18 & 15.79 \\
Group V(a) & Africa & 25 & 21.93 \\
Group V(b) & Arab States & 14 & 12.28 \\
\hline
TOTAL & & 110 & 100 \\
\hline
\end{tabular}
\caption{States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage (as at 11/06/2009)}
\end{table}

\textsuperscript{47}Thirty States were required to ratify the convention prior to it entering into force: Article 34. See also Mounir Bouchenaki, 'A Major Advance towards a Holistic Approach to Heritage Conservation: the 2003 Intangible Heritage Convention' (2007) 2 \textit{International Journal of Intangible Heritage} 106.
2.2 Cultural Heritage and Human Rights

2.2.1 Established Links

Human rights are universally accepted to be assets that we all possess regardless of wealth, race, religion, gender or nationality. However, cultural rights, or rights relating to cultural heritage, are not widely recognised as a common human right and some would argue that they are not equivalent to other civil, political, economic or social rights which are accepted as indispensible to human life. McGoldrick argues that ‘cultural rights are the failed Cinderella of the international human rights lexicon—pretty to picture but they don’t quite make it to the ball’. They are, as Symonides establishes, ‘neglected, underestimated, missing or forgotten, and ... treated as “poor relatives” of other human rights’. It is further argued that cultural rights are neglected in all spheres, including legal and political. Yet, these rights exist and, I maintain, they are fundamental for the protection of cultural heritage and equally indispensible for an adequate human existence.

Culture shapes an individual identity in crucial ways. The failure of the law to recognize this has resulted in injustices. Until the right to culture is understood to be a basic human right, individuals will continue to be told that they must become assimilated, that their background is “irrelevant”, and that there is only one correct way to behave.

The following section provides an introduction to the links between heritage and human rights and the conception of cultural rights. Ziegler states that ‘cultural rights are part of the body of human rights law’. She argues that the connection is made in

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Article 13 of the United Nations Charter, though the connection is established in many other additional documents. These connections are outlined below.

Cultural Rights Documents

Although it is acknowledged that cultural rights are enshrined in some of the most broadly ratified and accepted international human rights instruments, Symonides contends that ‘none of the existing human rights instruments give a full enumeration of cultural rights, and their precise content is still unclear. None of them give a definition of such fundamental notions as “culture” or “cultural identity”. These terms are rarely given precise definitions even within heritage legislation; however the nature of their formulation is central to understanding the context and content of cultural rights.

The nature and scope of cultural rights are closely tied to the term “culture”. In simple terms, the idea of culture has over the years evolved from a narrow elitist concept, which mainly referred to fine arts and literature, to a broader concept presenting culture as a process, including components such as language, religion and education. A similar development is visible in the debate on cultural rights.

Recently there have been attempts to define culture within the scope of its interface with human rights. Stamatopoulou has analysed the meaning of culture, particularly within the right to participate in cultural life. Likewise, Ziegler has examined the

53 The General Assembly shall initiate studies and make recommendations for the purpose of:
a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;
b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
meaning of ‘cultural life’ and its interaction with ‘cultural heritage’ and the right to such heritage. Symonides took a broader approach, instead focusing on the meanings of ‘culture’ and accepting an expansive anthropological view to understand cultural rights. This view meant, she contends, that an examination of cultural rights must also embrace the right to education, the right to participate in scientific progress and the right to information. The following list of cultural rights accepts an anthropological definition of culture. This is consistent with the discussion of culture presented in the previous chapter. As such, the following list of cultural rights includes the right to education and information along with other rights that may apply to a variety of human rights domains.

It is recognised that ‘cultural rights are scattered throughout a great number of instruments, both universal and regional, adopted by the United Nations, by specialized agencies and by the regional organizations’. This means that there is no single defining list of cultural rights. Some documents outline dozens of rights related to culture, whereas others simply define one right- that is the right to culture itself. The following summary outlines seven rights directly related to culture that are regularly specified in rights documents. These seven rights, I argue, are key elements of cultural rights. These rights however, are not unlimited:

The right to culture is limited at the point at which it infringes on another human right. No right can be used at the expense or destruction of another, in accordance with international law.

Under each right is a list of human rights documents which assert or define such a right. The following summary includes an assessment of 17 human rights documents.

1. Right to take part or participate in cultural life.
   a. Article 27(1). Universal Declaration of Human Rights (1948) specifies that ‘everyone has the right freely participate in the cultural life of the

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59 Katja S. Ziegler, ‘Cultural Heritage and Human Rights’ (University of Oxford Faculty of Law, 2007).
60 Symonides, above n 50.
61 Ibid.
community, to enjoy the arts and to share in scientific advancement and its benefits’.

b. Article 2(2) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) states that ‘Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life’.

c. Article 15(a) International Covenant for Economic, Social and Cultural Rights (1966) states that ‘the States Parties to the present Covenant recognize the right of everyone to take part in cultural life’.

d. The Recommendation on Participation by the Peoples at Large in Cultural Life and their Contribution to it (1976) clearly outlines the right of all people to ‘engage in creative activities with a view to the full development of their personalities, a harmonious life and cultural progress of society’.

Similar provisions are likewise made under:

e. The American Declaration of the Rights and Duties of Man (1948) - Article XIII,

f. The African Charter on Human and Peoples’ Rights (1981) - Article 17(b), and

g. The Fribourg Declaration (2007) - Article 5(a).

2. Right to cultural identity.

a. Article 3(a) of the Fribourg Declaration on Cultural Rights (2007) establishes the right to cultural identity and respect of this identity.

b. Article 1 of the Declaration on Race and Racial Prejudice (1978) states that ‘all individuals and groups have the right to be different, to consider themselves as different and to be regarded as such’.

c. Article 29(c) of the International Convention on the Rights of the Child (1989) clarifies that children have the right to learn about ‘his or her own cultural identity, languages and values’.
d. The Mexico Declaration on Cultural Policies (1982) in Article 9 provides the ‘right of each people and cultural community to affirm and preserve its cultural identity and have it respected by others’.

3. Right to religious belief and practice.
   b. Article 5 of the Universal Declaration on Cultural Diversity (2001) expresses the right to conduct cultural practices.
   c. Article 27 of the International Covenant on Civil and Political Rights (1966) provides minorities the right to profess and practice their own religion, or to use their own language. This is also established in Article 19 of the Vienna Declaration (1993).
   d. Article 2(1) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) further reiterates the right to profess and practice religion.

4. Right to cultural development
   a. Article 22 of the African Charter on Human and Peoples’ Rights (1981) establishes that all peoples have the right to ‘cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind’.
   b. The Universal Declaration on Human Rights (1948) in Article 22 also makes reference to cultural rights and development asserting that the realisation of cultural rights is indispensable for dignity and the free development of personality.
   c. Article 13 of the Universal Declaration of the Rights of Peoples (1976) states that ‘Every people has the right to speak its own language and preserve and develop its own culture, thereby contributing to the enrichment of the culture of mankind’.
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d. The Vienna Declaration (1993) affirms that all peoples have the right to freely pursue their cultural development (Article 2).
e. The Declaration of Principles of International Cultural Co-operation (1966) states that not only do people have a right to develop their culture, they also have a duty to do so (Article I(2)).

5. Right to respect/ tolerance

a. Article 2 of the Universal Declaration of the Rights of Peoples (1976) expresses that ‘Every people has the right to the respect of its national and cultural identity’.

b. The African Charter on Human and Peoples’ Rights (1981) makes reference to the enjoyment of rights in the spirit of tolerance, dialogue and consultation to contribute to the moral well-being of society. Article 5 makes clear reference to the right to the respect of the dignity inherent in a human being.

c. Article 3(b) of the Fribourg Declaration (2007) states that everyone has the right ‘To know and to have one's own culture respected as well as those cultures that, in their diversity, make up the common heritage of humanity’.

d. The Universal Declaration on Cultural Diversity (2001) in Article 4 establishes a direct link between the defence of cultural diversity and respect for human dignity.

e. Part II of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) reaffirm the right to respect of culture.

f. Article I(1) of the Declaration of Principles of International Cultural Co-operation (1966) states that ‘Each culture has a dignity and value which must be respected and preserved’.

6. Right to education
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a. Article 6 of the Fribourg Declaration (2007) outlines in detail the right to education on culture including the right to teach and receive teaching about language and other knowledge related to ‘one’s own culture and other cultures’ and the freedom to establish educational institutions.

b. The International Covenant on Economic, Social and Cultural Rights (1966) establishes that minorities have the right to be taught in the language of their choice. This contributes to the maintenance of cultural identity.

c. Article 26 of the Universal Declaration of Human Rights (1948) states ‘Everyone has the right to education’.

d. Article 17(a) of the African Charter on Human and Peoples’ Rights (1981) confirms that ‘Every individual shall have the right to education’.

7. Right to information

a. This is established under Article 9 of the African Charter of Human and Peoples’ Rights (1981)

b. The Fribourg Declaration (2007) states in Article 7 that everyone has the ‘right to free and pluralistic information that contributes to the full development of one’s cultural identity’ along with the freedom to seek, obtain and impart information.

c. European Convention of Human Rights (1950) iterates in Article 10 ‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers’.

d. Article 1 and 4 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998) guarantees the right of access to information in environmental matters. Under Article 2(3a-c)
information on landscapes and cultural sites is included in the definition of environmental information.63

Cultural rights and intangible cultural heritage

The above documents illustrate that cultural rights have a well developed place, all be it scattered, within the human rights discipline. As these cultural rights provide the right to maintain and develop a specific culture or cultural identity, they are clearly pertinent to the protection of intangible heritage.64 Blake postulates that the ‘articulation of a right to culture and the assertion of the right to cultural identity are highly relevant to the safeguarding of intangible cultural heritage essential to the continuing social and cultural identity of the group that creates and maintains it’.65 I would go further to argue that these rights are a vital requirement for the safeguarding of ICH. Intangible heritage cannot be adequately protected, created, maintained and passed from one generation to another without recognising and respecting cultural rights. Denying the cultural rights of a person is tantamount to preventing the safeguarding of ICH.

The assertion of the right to develop and safeguard cultural identity foreshadows a theoretical issue aligned with the general protection of intangible cultural heritage. The issue is that of potential conflicts with governmental policies. This is a sensitive issue but one that is necessarily implicated when promoting rights, or using a rights-based approach, in relation to safeguarding culture. Cultural rights, like all human rights, should be equally applied for all people. Thus, the right to safeguard cultural identity is a right that is available to all cultural groups even when such cultures are different from those of the cultural majority within a state. As the function of cultural rights is advocated as an essential element for the protection of ICH, the role of

63 For further discussion see Svitlana Kravchenko and John E. Bonnie, Human Rights and the Environment (2008), 221.
65 Blake, above n 11.
government policies becomes a necessary consideration. Symonides argues that there is a strong reservation by states to recognise cultural rights as they fear this may encourage the tendency towards secession and may endanger national unity.\textsuperscript{66} This issue is further addressed in Chapter 4.

2.2.2 Issues of cultural relativism

Cultural relativism has often been used as a rationale for a broad failure to address cultural rights. Stamatopoulou argues:

> The prevalent attitude among many human rights experts, including international law specialists, has been to avoid discussion of cultural rights lest the lurking issue of cultural relativism appear, implicitly or explicitly, to undermine the delicate and fragile universality concept.\textsuperscript{67}

Cultural relativism reflects the belief that a person’s behaviour and values should be understood in the context of their culture’s system of morality, politics, law etc. In its application to human rights, the understanding of cultural relativism has been linked to that of moral relativism. Some anthropologists argue that cultural relativism in its true conceptual understanding is simply a tool for examining the context of the customs and principles of a group of people.\textsuperscript{68} Yet, it has been moulded into a doctrine, applied to human rights, that advocates the significance of cultural diversity above common moral values. This, Marcus and Fischer suggest, should be more accurately known as moral relativism. Nevertheless, the doctrine of cultural relativists, as applied in the human rights discourse, asserts that ‘human values, far from being universal, vary a great deal according to different cultural perspectives’.\textsuperscript{69}

Thus, cultural relativists would propose that the application and meaning of human

\textsuperscript{66} Symonides above n 50.
\textsuperscript{67} Stamatopoulou, above n 54.
\textsuperscript{68} George Marcus and Michael M.J. Fischer, \textit{Anthropology as Cultural Critique: The Experimental Moment in the Human Sciences} (1986).
\textsuperscript{69} Diana Ayton-Shenker, 'The Challenge of Human Rights and Cultural Diversity- United Nations Background Note DPI/1627/HR' (United Nations Department of Public Information, 1995).
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rights could be interpreted differently within different cultural, ethnic or religious traditions.\textsuperscript{70}

Within the discourse on cultural rights, the concept of cultural/moral relativism has been used to stipulate that universal rights cannot exist in a culturally diverse world. As such, cultural rights should be culturally relative, not universal. Such a stipulation has, however, been subject to strong criticism:

\[ \text{T\lqhe acceptance of the right of everyone to have different cultural identities, the recognition of cultural specificities and difference is viewed sometimes as 'justification; of cultural relativism. This approach is not only wrong but is also dangerous.} \text{\textsuperscript{71}}\]

The acceptance of cultural relativism is seen to threaten the obligation of states to protect fundamental human rights. It is understood that cultural relativists would argue that as all cultural standards are relative to the belief of each culture. What may be considered as a necessary human right by some cultures, such as the right of women to education, does not necessarily apply to another. Thus, if the cultural relativism argument were accepted it would mean that the promotion and protection of human and cultural rights, such as the right to education, would be subject to state discretion and states could argue that their own cultural standards provided that the right should only the partially applied. In this way, Ayton-Shenker establishes that states could raise their own cultural norms over international law and standards.\textsuperscript{72}

This concern has been addressed within the 1993 Vienna Declaration, which states:

\[ \text{While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.} \text{\textsuperscript{73}}\]

\textsuperscript{70} Ibid.
\textsuperscript{71} Symonides, above n 55.
\textsuperscript{72} Ayton-Shenker, above n 69.
\textsuperscript{73} 1993 Vienna Declaration and Programme of Action, 5.
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The Declaration therefore acknowledges that cultural differences exist throughout the world but it asserts that certain rights, essentially those established within international law, are universal and must be protected by states irrespective of their political, economical or social systems. The Declaration and other normative measures initiated through the United Nations establish the universality of human and cultural rights. This concept of universality is considered to override that of relativism. Yet, the consensus of this belief still does not have global application. The cultural rights dialogue continues to grapple with the question of cultural relativism in different forms and in its application to cultural rights. This debate will likely continue for some time. Within this thesis, it is proposed that cultural rights are of a universal nature and should be recognised by states. Furthermore, it is argued that cultural rights facilitate the respect for cultural diversity and cultural pluralism and contribute to the safeguarding of culture.

2.2.3 The Role of WIPO in protecting cultural rights and traditional knowledge.

An important aspect of rights related to cultural heritage is that of intellectual property rights. These rights are specifically related to the protection of cultural expressions, traditional knowledge and scientific or artistic works. The organisation mandated to be responsible for this area of cultural rights is the World Intellectual Property Organisation (WIPO). WIPO is responsible for ensuring the realisation of the cultural right articulated in Article 27 (2) of the Universal Declaration of Human Rights, that ‘Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’. This responsibility is not a specific mandate of UNESCO due to a conscious decision in the 1970s to divide the area of work between the two organisations. Hafstein states that as early as 1978, WIPO and UNESCO agreed that UNESCO would concentrate on a multidisciplinary approach to the protection of cultural

74 Of course WIPO is not the only organisation that has examined this area of cultural rights; however its role is the most prominent and has the greatest potential application within the scope of this thesis topic. Others include the World Trade Organisation (WTO) with the TRIPS Agreement, the FAO and other UN agencies and programmes such as the Man and Biosphere Programme and the UN Convention on Biological Diversity.
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heritage, while WIPO would concentrate on the intellectual property aspects of protection.\(^{75}\)

An exception to this division of labour was a joint meeting conducted in 1997 at which the organisations attempted to develop an international normative instrument for the protection of folklore.\(^{76}\) Although the collaboration was not long lived,\(^{77}\) this meeting eventually lead to the creation by WIPO of an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.\(^{78}\) This Committee was responsible for providing further analysis of, and develop mechanisms for, the protection of traditional knowledge and folklore. Their work included a critique of the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions which had been adopted by WIPO in 1982. Like the early attempts by UNESCO to protect folklore, principally the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore, these Model Provisions were not widely adopted or implemented.\(^{79}\) The work of the Committee has led WIPO to develop practical guidelines and tools to assist in the protection of cultural expressions.\(^{80}\) This work by WIPO can be seen within national legal systems, for although the Model Provisions were not broadly applied by states, it is seen that the majority of countries ‘whose legislation protects aspects of intangible heritage do so within the framework of copyright and other intellectual property laws while others employ a mix of intellectual property-type protection with cultural heritage and other laws’.\(^{81}\)

\(^{75}\) Hafstein, above n 13, 15.
\(^{77}\) WIPO and UNESCO did undergo joint regional consultations on the protection of expressions of folklore in 1999 however in recent years WIPO has independently taken further steps in this area.
\(^{78}\) Created in 2000. Aikawa, above n 15.
\(^{80}\) WIPO, 'Fifth Session: Report on the toolkit for managing intellectual property when documenting traditional knowledge and genetic resources' (Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 2003).
\(^{81}\) Blake, above n 11, 43.
Cultural rights and the interface of these rights with traditional knowledge is specifically significant for practicing communities who seek to protect and preserve their heritage. WIPO recognises this important interface stating:

The cultural, environmental and economic importance of traditional knowledge has led to concerns that it should be both preserved (i.e. safeguarded against loss or dissipation) and protected (i.e. safeguarded against inappropriate or unauthorized use by others).\(^8\)

Deacon contends that while WIPO recognises both the preservation and protection elements of safeguarding traditional knowledge, their focus has been primarily on utilising intellectual property mechanisms, such as copyright, for the protection of knowledge and cultural expressions.\(^8\) This scope is argued to be too limited.\(^8\) The protection of traditional cultural expressions and knowledge requires the use of numerous mechanisms by the practicing community. This may include intellectual property regimes to protect the custodians of knowledge, but must also include other mechanisms to ensure transmission, respect and continuation of intangible heritage.\(^8\)

A broader approach within existing intellectual property regimes is needed as well. Traditional intellectual property laws protect individual ownership and creation for a particular period of time.\(^8\) These legal mechanisms do not conventionally recognise forms of custodianship, collective or partial ownership and communal authorship that are common to many indigenous and non-western societies.\(^8\) Lewinski provides that in some cultures ‘[c]ustomary law often designates specific persons or groups of persons within indigenous communities as the only custodians ... for a particular

\(^8\) As stated in Deacon, above n 17.
\(^8\) Ibid.
design, song etc’. These people, however, are not considered to have ownership over that design, song etc. Further, the scope of forms of cultural expression that require protection are much broader that those typically recognised under traditional intellectual property regimes, including not only ‘artistic and literary works’ but rituals, ideas, and collective knowledge that may change over time. For example the 1996 WIPO Copyright Treaty establishes in Article 2 that the copyright protection extended only to ‘expressions and not to ideas, procedures, methods of operation or mathematical concepts’. An understanding of the nature of such cultural expressions, i.e. their sacred, ritualistic or sensitive nature, can also be beyond the scope of conventional intellectual property rights. Blake states, for example, that the WIPO Model Provisions do not ‘cover traditional knowledge, practical know-how, spiritual or ritual elements of culture’. Zagrafos argues that there currently is not an agreed legal definition of what should comprise traditional cultural expressions under IP laws.

These insufficiencies have been acknowledged by WIPO. They were particularly noted when WIPO questioned the efficacy of IP mechanisms to protect aspects of traditional knowledge such as spiritual beliefs and languages. WIPO is revising provisions relating to the protection of cultural expressions and traditional knowledge. The two subject areas are currently been treated separately although WIPO asserts that the two sets of draft provisions are complementary, closely coordinated and together form a holistic approach for the protection of cultural and intellectual heritage of practicing communities.

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89 Blake, above n 11, 20.
92 WIPO, 'Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions/ Folklore: Information Resources' (WIPO, 2006).
Individual countries have attempted to negotiate the limited capacity of current intellectual property regimes by developing *sui generis* protection models that go beyond the scope of copyright legislation to protect the cultural expressions and traditional knowledge of practicing communities. Many of these *sui generis* models and laws attempt to prevent the non-customary use of cultural expressions that have a spiritual nature, regulate the public display of cultural expressions by outsiders, particularly when the outsiders portray such displays as authentic, and manage the exploitation of traditional cultural expressions or achievements in commercial goods.\(^{94}\) One example of a *sui generis* model is the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture.\(^{95}\) This Framework recognises ownership and ‘customary use’ of traditional expressions on the basis of customary law, provides for custodianship and collective ownership and provides protection for traditional cultural expressions in perpetuity.\(^{96}\)

As with legislation and policies developed to safeguard intangible cultural heritage, the models to protect intellectual property rights pertaining to traditional knowledge and cultural expressions are constantly evolving. The work of WIPO and individual countries are continually contributing to the evolution of mechanisms for the realisation cultural rights and the protection of cultural heritage. Cultural rights are advocated within this thesis to be a necessary component for the safeguarding of intangible cultural heritage and intellectual property rights, as a class of cultural rights, are an important aspect of safeguarding measures.

### 2.3 Conclusion

This chapter has explored the foundations of intangible heritage law and the cultural rights discourse. Through the discussion of UNESCO and WIPO involvement in the

\(^{94}\) Lewinski, above n 88.

\(^{95}\) Adopted by the Secretariat of the Pacific Community in 2002. Similar models may be found in the Philippines and India. See P. V. Valsala G. Kutty, 'National Experiences with the Protection of Expressions of Folklore/ Traditional Cultural Expressions: India, Indonesia and the Philippines' (WIPO, 2002).

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establishment of recommendations, provisions, programmes and conventions, the chapter has presented the interaction between the safeguarding of ICH and the employment of cultural rights principles. The work of UNESCO in the development of ICH discourse at an international level has been fundamental for the introduction and augmentation of safeguarding measures. The majority of their work in this field is argued to have taken place in three phases; the protection of folklore, the recognition of living human treasures and masterpieces of oral and intangible heritage, and the safeguarding of cultural diversity and intangible cultural heritage. UNESCO’s work has led to the adoption of the Convention for the Safeguarding of the Intangible Cultural Heritage and the Convention on the Protection and Promotion of the Diversity of Cultural Expression. These legal instruments are analysed in the next chapter.

The discussion of cultural rights presented in this chapter outlined seven rights pertaining to culture that are found in human rights documents. These rights are the:

1. Right to participate in cultural life.
2. Right to cultural identity.
3. Right to religious belief and practice.
4. Right to cultural development.
5. Right to respect and tolerance.
6. Right to education.
7. Right to information.

This chapter has argued that recognition and realisation of cultural rights is essential for the safeguarding of ICH. This argument is developed further in Chapter 4.
3. Analysis of the Current State of Intangible Cultural Heritage Law

Legislative protection of intangible cultural heritage (ICH), at both an international and a national level, is a relatively new phenomenon. That is not to say that intangible cultural heritage has not been highly significant for certain groups, communities, or nations earlier nor that it has not warranted protection previously. Instead, the failure to legislate at the international level for the protection of intangible cultural heritage has stemmed from the theoretical understanding of what constitutes heritage. The theoretical shift from an understanding of heritage as tangible forms to intangible manifestations has been illustrated previously. It provides important context when examining the development of intangible heritage law. It should be noted that this theoretical shift of what constitutes heritage is predominantly a ‘Western’ phenomenon. Non-material cultural elements have long been considered aspects of heritage in non-Western cultures. The shift in cultural heritage definitions may be seen as broadening the universal definition of heritage to fit more non-Western ideologies. In this light, it is often perceived by Western lawyers that intangible cultural heritage has only been ‘recently deemed entitled to legal protection at the international level’.

In this chapter, international protection measures are initially examined to establish the development of intangible heritage law. These measures are formulated in both hard and soft law documents i.e. those that contain legally binding obligations and those that do not. The following chapter then examines the way in which

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1 For an in-depth discussion of the shift in heritage theory see Chapter 1.
2 As discussed further in the Chapter 1 and 2.
4 The term ‘soft law’ has been used to describe regional and international treaties not in force, codes of practice, recommendations, guidelines, standards and declarations of principles adopted as resolutions. These are not instruments that provide binding obligations. These documents are not ‘law’ as such however in rapidly developing fields of law, including heritage law; soft law is frequently referred to and can lead to the development of established general principles of law. Birnie and Boyle state that ‘soft-law guidelines and norms manifest general consent to certain basic principles that are acceptable and practicable for both developed and developing countries... it contributes to the evolution of new international and national law’. Patricia Birnie and Alan Boyle, International Law and the Environment (2nd Edition ed, 2002), 17, 24-27.
international law concerning ICH has been articulated in domestic legal instruments within the Asian context, along with issues that occur when translating law from an international to a national situation.

3.1 International Protection Measures

Below is an exposition of the current international treaties that contribute towards the protection of ICH. The focus is principally on the Convention for the Safeguarding of the Intangible Cultural Heritage (2003). The fundamental principles, legal obligations and operational directives of these instruments are examined, along with their relationship to the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972). The other recent contributor to the international cultural heritage legislative framework, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) is also reviewed.

3.1.1 Fundamental Principles of the Intangible Cultural Heritage Convention and Central Safeguarding Measure

The ICH Convention clearly establishes the processes for the protection of intangible cultural heritage in international law. Prior to the adoption of this Convention, intangible values associated with places and objects were protected, to some degree, by the World Heritage Convention. Deacon et al. assert that ‘intangible values like social and aesthetic value have been in the WHC’s Operational Guidelines for some time, but these values have not traditionally been used to identify places for inscription [on the World Heritage Lists]’. Associative intangible values are most relevant for the category of ‘cultural landscapes’ under the WHC. This listing category was created in 1992. When listing heritage routes, ‘a specific, dynamic type

5 Hereafter known also as the Intangible Cultural Heritage Convention or ICH Convention.

6 Hereafter known as the World Heritage Convention or WHC.

7 Hereafter known as the Convention on Cultural Diversity.

8 An analysis of the structure and development of this Convention is provided in Chapter 2.

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of cultural landscape’,\textsuperscript{10} the Operational Guidelines state that its ‘intangible and symbolic dimensions’\textsuperscript{11} should be considered.

Under the 2008 Operational Guidelines of the WHC, reference to intangible values is found within the criteria for establishing ‘outstanding universal value’.\textsuperscript{12} Criteria (ii) states that a site should ‘exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design’ and criteria (v) associations with landscapes.\textsuperscript{13} Criteria (vi) is particularly associated with ICH however the World Heritage Committee ‘considers that this criterion should preferably be used in conjunction with other criteria’.\textsuperscript{14}

In addition to meeting the criteria for assessing outstanding universal value, a property must meet conditions of integrity and/or authenticity before it will be listed on the World Heritage List and once again there is reference to ICH.\textsuperscript{15} Authenticity is determined by attributing value to the heritage property which must be judged within the context to which the property belongs. The Operational Guidelines state that values may be attributed through ‘language, and other forms of intangible heritage’.\textsuperscript{16}

Although these sections of the Operational Guidelines show that there is scope to protect intangible cultural heritage within the WHC, it has been argued that there was some ‘resistance to the inclusion of intangible values in the Guidelines’.\textsuperscript{17} The perception, as previously expressed, that a separate convention was needed led ultimately to the adoption of the ICH Convention. A three-pronged approach is taken

\textsuperscript{11} Ibid, Annex 3, 24 (v).
\textsuperscript{13} This is defined under the Guidelines as an ‘example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment’. Ibid, IID 77(v).
\textsuperscript{14} Ibid, IID 77(vi).
\textsuperscript{15} Ibid, IID 78.
\textsuperscript{16} Ibid, IIE 82.
\textsuperscript{17} Deacon, above n 9.
in this chapter to analyse the ICH Convention. This approach is structured around (i) an analysis of underlying fundamental principles, (ii) the principal safeguarding measure established by the Convention (a listing process) and (iii) examination of States Parties obligations.

The fundamental principles of a Convention generally provide the basis upon which the Convention should be interpreted. This thesis proposes that the ICH Convention finds its foundations in, and draws upon, three fundamental principles. These principles are implicitly manifested throughout the Convention and I argue that these underlying implicit principles and associated ‘rights’ can be utilised to develop appropriate legislative and policy instruments to ensure the safeguarding of ICH at a national level. The first is the principle of cultural rights, the second is that of educational rights and the third is the right of community participation.18

Cultural Rights

The recognition of cultural rights and the principles of human rights are clearly stated in the Preamble to the Convention by making specific reference to human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (1966). This recognition is furthermore implicit under the definition of ICH in Article 2(1), where it states that; ‘consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments’.

Kuruk notes that ‘there was quite an animated debate in the ICH Experts Committee as the whether to associate the definition of intangible cultural heritage with human rights’.19 He argues that some traditional practices, while still legitimate as elements of intangible heritage and should be recognised as such, are contrary to human rights instruments; therefore ICH should be defined as separate from human rights principles.

18 These principles are also drawn from the body of soft law developed prior to the Convention. This body of soft law is presented below.
The view presented in this thesis is that while aspects of ICH, such as for example coming of age ceremonies which incorporate mutilation, are indeed elements of traditional culture, human rights should be linked with the definition of ICH, as such elements specified by the definition form the basis of cultural rights which are an element of human rights. Furthermore, cultural rights should not encompass those forms of ICH which are contrary to globally-accepted norms of human rights.

Educational Rights

The role of education and awareness-raising permeates the Convention from its preamble and stated purposes through to measures for the safeguarding of ICH. The preamble draws attention to the ‘need to build greater awareness, especially among the younger generations, of the importance of the intangible cultural heritage and of its safeguarding’. To meet this need, one of the purposes of the Convention is proclaimed to be to ‘raise awareness of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof’. Education forms the central subject matter of Article 14 of the Convention. This Article establishes the obligation of each State Party to:

   a) Ensure recognition of, respect for, and enhancement of the intangible heritage in society, in particular through:
      i. Educational, awareness-raising and information programmes, aimed at the general public, in particular young people;
      ii. Specific educational and training programmes within the communities and groups concerned;
      iii. Capacity-building activities for the safeguarding of the intangible cultural heritage, in particular management and scientific research; and
      iv. Non-formal means of transmitting knowledge

20 Article 1 (c).
21 Article 14 (a).
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The Article also calls upon States Parties to ‘promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage’. 22

Participatory Rights of Communities, Groups and Individuals

The focus on the involvement of communities, groups and individuals is clear in the Convention as necessary for the safeguarding of ICH. Indeed as Hafstein notes, the very definition of ICH in the Convention is subject to recognition by these groups.

[T]he question [of what is ICH] is not what experts recognize as intangible cultural heritage, it is not what ministries classify as intangible heritage, and it is not what museums or universities define as intangible heritage. The question posed to us by the Convention is what practices, representations, expressions, knowledge and skills communities, groups, and individuals recognize as their heritage. 23

This leads to the rather obvious point that to determine exactly what ICH is, there is a need to consult with local peoples and therefore they have a fundamental right to play a strong role in the implementation of the Convention. The notion of ICH belonging to communities and groups is found also within the purposes of the Convention, as it states that the purpose of the Convention is to ensure respect for the ICH of the communities, groups and individuals concerned. 24 Kurin states that the ICH Convention envisages ‘community’ as a rising, alternative holder, and centre, of power to the state. 25

The preamble of the Convention recognises ‘that communities, in particular indigenous communities, groups and in some cases individuals, play an important role in the production, safeguarding, maintenance and recreation of the intangible cultural

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22 Article 14 (c).
24 Article 1 (b).
heritage’. This is extended further in Articles 11 and 15 which obligate states to identify heritage ‘with the participation of communities, groups and relevant non-governmental organisations’\textsuperscript{26} and ‘ensure the widest possible participation of communities, groups… that create, maintain and transmit such heritage, and to involve them actively in its management’.\textsuperscript{27} The Convention also recognises customary practices of communities in relation to access to ICH under Article 13(d)(ii). Chapter 3.1 of the Operational Directives elaborates the ‘participation of communities, groups and where applicable, individuals’ in the implementation of the Convention. That Chapter implores and encourages ‘States Parties to establish functional and complementary cooperation among communities, groups and, where applicable, individuals who create, maintain and transmit intangible cultural heritage’.\textsuperscript{28} In particular, in the identification and definition of elements of ICH, the drawing up of inventories, the elaboration and implementation of programmes, projects and activities, the preparation of nomination files for inscription on the Lists or the removal/transfer of an item from a List.\textsuperscript{29}

**Central Safeguarding Measure – The Listing Process**

The foremost mechanism set forth by the Intangible Heritage Convention to safeguard heritage is the development of two lists. One as a ‘Representative List of the ICH of Humanity’ (Article 16) and the other as a ‘List of ICH in Need of Urgent Safeguarding’ (Article 17). It has been argued that the development of a list for intangible cultural heritage ‘will ensure that greater attention is paid by the global community to measures to enhance the protection of intangible cultural heritage’.\textsuperscript{30} While a list may draw attention to elements of ICH, the process of listing raises many issues which are developed further in chapter 4.

An elaboration of the listing process is provided in Chapter 1 of the Operational Directives. The nomination procedure is clarified along with the criteria for

\textsuperscript{26} Article 11 (b).
\textsuperscript{27} Article 15.
\textsuperscript{28} Chapter 3.1, 76.
\textsuperscript{29} Chapter 3.1, 77.
\textsuperscript{30} Kuruk, above n 19.
inscription. For an item to be inscribed on the representative list, the Operational Directives stipulate that it must meet all of the established criteria. The criteria are:31

R.1 The element constitutes ICH as defined in Article 2 of the Convention.
R.2 Inscription will contribute to ensuring visibility and awareness of the significance of the ICH and encourage dialogue.
R.3 Safeguarding measures are elaborated that may protect and promote the element.
R.4 The element has been nominated following the widest possible participation of the community, group or, if applicable, individuals concerned with their free, prior and informed consent.
R.5 The element is included in a national inventory of ICH.

These criteria were debated among representatives at the First Extraordinary Session of the Intergovernmental Committee held in May 2007. It was felt that the initial draft criteria were too numerous and they were thus reduced to the current number. The focus on the lists was also subject to debate. It was noted that many states felt the Representative List was primarily intended to ensure better visibility for ICH and should not be used as a means to create a hierarchy of intangible heritage.32 It was also felt that the notion of ‘outstanding universal value’ had no relevance and should not figure in the inscriptions. It is inferred here that this is due to the importance placed on the value of ICH stemming from its local context and not its universal value. The use of lists was debated, especially how to ensure that the List was indeed ‘representative’ and if nominations should be accepted in a manner to make it representative.33

An expert meeting was convened in April 2007 to examine the role of the Lists under the Convention and characterize their purpose.34 It was decided by experts at this

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31 Operational Directives 2008, 19.
33 These issues have not been resolved and will continue to be debated by State Party representatives at meetings of the Parties of the Convention.
meeting that the two lists should function independently but be equally important. The experts recognised that the items being listed are most likely to be something of ‘strong symbolic value to the nominating states’ and as such the listing process is at ‘risk of politicization’. In other words states would prioritize elements of strong symbolic value that are ‘items that represent nation-state identities’. As a means to combat this, the experts encouraged that more multi-national nominations to the Lists be supported. This is also a means to ensure dialogue between states.

The other important issue raised by the expert group was the nature of the Lists which, in their opinion, should be short, dynamic and rotating with an item of ICH being placed on a List for a fixed term and then removed. Their reasons for such an opinion were several-fold:

1. It would be easier to manage and maintain focus on new proposals for inscription.
2. It would permit many countries, groups and/or communities to get a chance to present their ICH.
3. It would ‘reinforce the idea that hierarchies between cultures or ICH must be avoided’.
4. It would ‘reflect the evolving nature of ICH’ and the items ‘would not be frozen by putting it on a list forever, but it would be recognised for a given time, during which it may change more or less’.

Despite these reasons it was also acknowledged that removal of items from a List, even if it were automatic at the end of a fixed term, would be negatively perceived by communities and states. In the 2008 Operational Directives of the ICH Convention, there is no reference to items being inscribed for a set term. Removal of an item from the Representative List is only possible when ‘the Committee determines that it no

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35 Kurin argues that this is problematic. Having a government in charge of nominations presents issues in ‘many countries around the world [where] minority cultural communities do not see government as representing their interests – particularly when it come to their living cultural traditions and their vitality as living, dynamic communities’. He further notes that ‘historically, government efforts have often been aimed at eliminating cultural practices – a native religion, a minority language, particular rites, certain instruments, and so on’. Kurin, above n 25.
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longer satisfies one or more criteria for inscription on that list’.\textsuperscript{36} In essence an item will be inscribed perpetually in the form in which it was first described.

Further, it was highlighted by the experts that there are many, potentially negative, impacts of listing, primarily coming from increased attention to the items. The impacts include the destruction or endangerment of the ICH element due to overexposure through visits to, and impacts on, the location that the ICH is associated with. Impacts may also be caused by large tourist numbers, commercialization, folklorization, political appropriation and exploitation of the ICH. The experts proposed that a plan be submitted at the time of nomination to conserve the heritage, with community participation, from such potential risks.

The nomination procedure for the Representative List within the Operational Directives does not specify such a requirement but simply requests that ‘safeguarding measures are elaborated that may protect and promote the element’.\textsuperscript{37} For nomination on the Urgent Safeguarding List the Directives require ‘safeguarding measures are elaborated that may enable the community, group or, if applicable, individuals concerned to continue the practice and transmission of the element’.\textsuperscript{38} There is no mention that this practice should not be conducted within a commercial context, to a foreign audience as purely a tourist attraction or for political purposes.

\textbf{3.1.2 States Parties Legal Obligations under the Convention}

Obligations of the States Parties to the Intangible Heritage Convention are established under Part III of the Convention relating to ‘Safeguarding of the intangible cultural heritage at the national level’. The obligations established are ‘stronger’ than those under the World Heritage Convention in the sense that there are fewer nebulous clauses. Kuruk notes however, that the words ‘shall endeavour’ in the ICH

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{36} Operational Directives 2008, 29.
\item\textsuperscript{37} Operational Directives 2008, 19 – R.3.
\item\textsuperscript{38} Operational Directives 2008, 1 – U.3.
\end{itemize}
\end{footnotesize}
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Convention do still substantially weaken the force of duties imposed on States Parties.\(^{39}\) Under Article 13 of the Intangible Heritage Convention it states;

To ensure the safeguarding, development and promotion of the intangible cultural heritage present in its territory, each State Party shall endeavour to.\(^{40}\)

a) adopt a general policy aimed at promoting the function of the intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning programmes;

b) designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory;

c) foster scientific, technical and artistic studies, as well as research methodologies, with a view to effective safeguarding of the intangible cultural heritage, in particular the intangible cultural heritage in danger;

d) adopt appropriate legal, technical, administrative and financial measures aimed at:

i. fostering the creation or strengthening of institutions for training in the management of the intangible cultural heritage and the transmission of such heritage through forms and spaces intended for the performance or expression thereof;

ii. ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage;

iii. establishing documentation institutions for the intangible cultural heritage and facilitating access to them.

This is comparable to Article 5 of the World Heritage Convention. However, that Article, as can be seen below, includes the qualifying wording ‘in so far as possible, and as appropriate for each country’.

\(^{39}\) Kuruk, above n19.

\(^{40}\) Emphasis added.
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To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:41

i. to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;

ii. to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;

iii. to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;

iv. to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and

v. to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

Connolly argues that, ‘the legal practicalities of implementing the obligations under the ICH Convention present a disincentive to its ratification’ 42 and yet she also recognises (perhaps in a contradictory manner) that there is complementarity in the intent of the WHC and the ICH Conventions, and that the WHC is currently one of the most successful international environmental legal tools in terms of number of ratifications and State Party implementation. It can be seen that there is also complementarity in the mechanisms of the Conventions. Both Conventions provide

41 Emphasis added.
for the making of inventories, an intergovernmental committee, and the listing of heritage. Not surprisingly, the terminology used in the Conventions is often similar. Under the WHC, states recognize ‘the duty of ensuring the identification, protection, conservation, presentation, and transmission to future generations of cultural and natural heritage… situated on its territory’. While under the ICH Convention, each State Party shall ‘ensure the safeguarding [i.e. identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization] of the intangible cultural heritage present in its territory’.

It can be argued that as the intent, terminology and mechanisms of the Conventions are complementary, implementation of these Conventions will also be complementary. Further, as the WHC has been widely implemented, similar levels of implementation might therefore be expected for the ICH Convention. Such an expectation however fails to take into account the nature of the subject matter of the two Conventions. The subject matter of the ICH Convention is manifestly intangible. It is;

inherently vulnerable… not always visible, and is therefore liable to be forgotten or little known; it depends on successful transmission from one generation to the next; and … the conditions by which inter-generational transmission can take place are often under threat.

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43 Under Article 11.1 of the WHC and Article 12 of the ICH Convention.
44 The Intergovernmental Committee of the WHC is known as the ‘World Heritage Committee’ and is established under Section III of the Convention (Articles 8 – 14). The Intergovernmental Committee is created under Article 5 of the ICH Convention.
45 A ‘World Heritage List’ and ‘List of World Heritage in Danger’ are provided for under Articles 11.2 and 11.3 of the WHC. A ‘Representative List of the Intangible Cultural Heritage of Humanity’ and a ‘List of Intangible Cultural Heritage in Need of Urgent Safeguarding’ are provided for under Articles 16 and 17 of the ICH Convention.
46 This can also be seen in the Articles presented above (Article 13 of the ICH Convention and Article 5 of the WHC).
47 Article 4.
48 As defined under Article 2.3.
49 Article 11 (a).
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Therefore, I would contend that it is the subject matter of the obligations of the ICH Convention that discourage ratification, rather than the nature of the obligations themselves as presented in the Convention.

The other important source of State Party obligations are the Operational Directives for the Convention. The Operational Directives were adopted by the General Assembly at its second ordinary session in June 2008. These Directives elaborate several of the obligations and operational aspects of the Convention as shown in Table 2.

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Table 2 Sections of the 2008 Operational Directives for the Intangible Cultural Heritage Convention and the corresponding relevant Articles in the Convention.
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The first chapter of the Directives provides details regarding the mechanisms to safeguard ICH at the international level, primarily those established under Section IV of the Convention.\(^{51}\) This chapter is limited to an elaboration of the listing process (Chapter 1.1 – 1.3) and the development of programmes that ‘best reflect the principles and objectives of the Convention’\(^{52}\) (Chapter 1.4).

It is important to note that the Operational Directives do not elaborate obligations for the national implementation required by Section III of the Convention (Articles 12 – 15) including those which provide obligations for policy making (13(a)), the creation of national management bodies (13(b)) and drafting of legal and administrative measures (13(d)). Nor do the Operational Directives outline the implementation or elaboration of requirements for the making of inventories (Article 12). The guidelines are limited in their scope to elaborating obligations at the international level as established in Articles 16 – 18 and operational aspects such as the use of the Heritage Fund and reporting procedures. This is a serious gap which needs to be addressed, as it could make non-compliance among States Parties at the national level more prevalent.

It may also be deduced that the Intergovernmental Committee has not as yet fulfilled its duty, articulated in Article 7(b), to ‘provide guidance on best practices and make recommendations for measures for the safeguarding of intangible cultural heritage’ as part of the preparation of operational directives for the implementation of the convention (its function established under Article 7(e)). The measures for safeguarding are not limited to those present at the international level. Clearly national measures are part of the implementation of the Convention as Article 11(a) plainly establishes that the role of States Parties to the Convention is to ‘take necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory’. Furthermore, Article 13 outlines the ‘other measures for safeguarding’ at the national level. The Intergovernmental Committee should have made recommendations on the measures presented in Articles 12 and 13.

\(^{51}\) Section IV contains Articles 16 – 18.

\(^{52}\) An elaboration of Article 18 of the Convention found in Operational Directives; chapter 1.4 paragraph 43.
The Operational Directives do not at this stage elaborate Article 12 and 13 concerning the national implementation of state obligations. The broader legal theories of translating international legal obligations into domestic legislation are examined below in chapter 4.

### 3.1.3 Analysis of UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression (2005)


The role of the Convention, according to UNESCO, is to ensure five central elements of cultural expression namely:

- Creation
- Production
- Distribution/dissemination
- Access, and
- Enjoyment.

The central principle behind the Convention is the protection of cultural diversity or the diversity of cultural expressions. UNESCO states that cultural diversity is a ‘driving force of development ... important for dialogue among civilizations and cultures, respect and mutual understanding’. The Convention is one of the ‘three

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54 These meetings included 3 meetings of independent experts and 3 intergovernmental meetings of experts.
pillars of the preservation and promotion of cultural diversity’ along with the World Heritage Convention and the Intangible Cultural Heritage Convention.56

Article 2 of the Convention outlines the guiding principles. The principles establish the essential role of human rights to guarantee diversity of cultural expression;57 the right of states to adopt policies to protect and promote diversity;58 the importance of respect for all cultures,59 international co-operation60 and cultural61 and sustainable development,62 the importance of access to information about diverse cultures63 and policies which support and promote the diversity of foreign cultures.64 These principles have been developed in soft law documents65 and in many cases are already accepted international principles. However it is significant that they are explicitly established within a legally-binding instrument. The principles aim to eliminate fundamentalism in cultural expression or beliefs and promote mutual understanding of different cultural systems.

The rights and obligations of Parties are established under Part IV of the Convention.66 These are framed as rights rather than obligations and flexible language is used such as ‘may adopt’ and ‘shall endeavour’, limiting the degree of the ‘binding obligations’. A focus is placed on co-operation and information/education. Articles 9 (information sharing and transparency), 10 (education and public awareness) and 19 (exchange, analysis and dissemination of information) focus on States Parties facilitating the use of information to promote cultural diversity, while Articles 12 (promotion of international cooperation), 14 (cooperation for development), 15 (collaborative arrangements) and 17 (international cooperation in situations of serious threat to cultural expressions) underscore the importance of collaboration in ensuring

56 Ibid.
57 Article 2.1 Principle of respect for human rights and fundamental freedoms.
58 Article 2.2 Principle of Sovereignty. It is interesting that this principle is explicitly stated as in recent years there has been debate over the erosion of the unassailable rights to state control over their territory particularly in areas of environmental law.
59 Article 2.3 Principle of equal dignity of and respect for all cultures.
60 Article 2.4 Principle of international solidarity and cooperation.
61 Article 2.5 Principle of the complementarity of economic and cultural aspects of development.
62 Article 2.6 Principle of sustainable development.
63 Article 2.7 Principle of equitable access.
64 Article 2.8 Principle of openness and balance.
65 For a description of ‘soft law’ see above, n 4.
66 Articles 5 – 19.
mutual respect and understanding of cultural expressions. This Convention ‘recognizes that everyone profits from the free flow of diverse ideas, words, and images; and encourages preservation of indigenous traditions and minority languages; and protects the cultures of rich and poor countries alike in an era of cultural homogeneity’.  

In many ways these elements are present in the ICH Convention, and it may be surmised that if there are successful measures to safeguard ICH then this will result in the maintenance of cultural diversity. However, it was felt that an independent Convention was needed. The focus on safeguarding cultural diversity as distinct from intangible heritage has developed since the 1980s. The 1982 World Conference on Cultural Policies resulted in the Mexico City Declaration on Cultural Policies. This Declaration establishes that cultural identity is the product of cultural values, beliefs and traditions forming the common heritage of mankind. Furthermore the Declaration established that the loss (neglect or destruction) of the culture of any group is a loss to mankind as a whole. The Declaration affirms that ‘cultural identity and cultural diversity are inseparable’ and that ‘the international community considers it its duty to ensure that the cultural identity of each people is preserved and protected’. The ideals of mutual respect and the equality of all cultures are established in Paragraph 9 and 46 of the Declaration. Finally, the Declaration appeals to UNESCO to continue its work to maintain the cultures of humankind.

UNESCO created a World Commission on Culture and Development which, in 1996 published a report ‘Our Creative Diversity’. This report again calls for a focus on cultural diversity and the importance of mutual respect for cultures. The role of UNESCO in striving to this end was examined in 2000. In September 2000 an expert

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68 Paragraph 4.
69 Paragraph 8.
70 Paragraph 5.
71 Paragraph 7.
72 Paragraph 46 states ‘International cultural cooperation must be based on respect for cultural identity, recognition of the dignity and value of all cultures, national independence and sovereignty, and non-intervention’.
73 The report was released by UNESCO in 1995.
committee met to examine UNESCO’s role in promoting cultural diversity in the context of globalisation. Such meetings and the reports developed as a result, have established cultural diversity as a policy area distinct from ICH. However, it should not be forgotten that the two concepts are closely interlinked and they should not be examined independently.

3.2 Soft Law

Like many areas of environmental law, intangible heritage law find its source in a number of hard and soft laws, i.e. those that are legally binding and those that are not. Soft law instruments are significant in the role that they play in the development of fundamental legal precepts which often develop to become part of customary international law or jus cogens. This thesis proposes that there are currently twelve soft law documents which have been particularly important in contributing to the development of ICH law. The precepts found within these documents are essential to inform safeguarding measures in legislative or policy documents. The documents are examined below in chronological order, which allows an assessment of documents developed prior to the ICH Convention, thus influencing its content, and those developed after.

Soft Law Developed Prior to ICH Convention

The first of the soft law documents is the 1966 UNESCO Declaration of the Principles of International Cultural Co-operation. Following on from this there have been several documents which have contributed significantly to ICH law in that they have been used to inform the drafting of the ICH Convention. These include the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore, the 2001 UNESCO Declaration on Cultural Diversity and the 2002 Istanbul Declaration. Additional soft law documents that developed prior to the ICH Convention include

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74 For a definition of soft law see above n 4.
the 1994 Nara Document on Authenticity, the 1999 Burra Charter and the 2002 Shanghai Charter.75

3.2.1 UNESCO Declaration of the Principles of International Cultural Co-operation (1966)76

Although this Declaration is short, containing only 11 Articles, it is one of the earliest international soft law documents to acknowledge the significance of cultural heritage and cultural diversity. The preamble establishes that ‘ignorance of the way of life and customs of peoples still presents an obstacle to friendship among the nations’.

The most important Article for its contribution to the development of a body of customary law relating to cultural heritage is Article 1, which makes early reference to the ‘common heritage of mankind’, a term that is now considered to be an element of customary international law or jus cogens.77 Article 1 explicitly establishes the fundamental right to culture and the importance of its preservation:

1. Each culture has a dignity and value which must be respected and preserved.
2. Every people has the right and the duty to develop its culture.
3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.

3.2.2 Recommendation on the safeguarding of traditional culture and folklore (1989)

The Recommendation on the Safeguarding of Traditional Culture and Folklore (1989) (hereafter referred to as ‘the Recommendation’) was developed as a result of studies conducted throughout the 1980s on folklore. These studies were in turn the result of a request made at the 21st Session of the General Conference of UNESCO to research the possible development of an international regulation for the protection of folklore.

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75 The ASEAN Declaration on Cultural Heritage (2000) is not examined within this section. The Declaration is analysed in Chapter 4.4.1.
76 Adopted on 4 November 1966 by the General Conference of UNESCO at its fourteenth session held in Paris.
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In 1982, UNESCO set up a Committee of Experts on the Safeguarding of Folklore. This committee made a proposal to develop the Recommendation after meeting in Paris in 1985. The proposal was presented to, and was accepted by, the General Conference in 1987. The Recommendation is the first international normative instrument for the protection of ICH and was unanimously adopted by the General Conference of UNESCO at its 25th session.

The recommendation is divided into 7 sections (A-G) in addition to the preamble. The Recommendation defines folklore in section A as:

The totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

Blake notes that the definition of folklore in the Recommendation is narrow in focus and fails ‘to take account of the social, cultural and intellectual context of the creation and maintenance of folklore and the [Recommendation makes] limited reference to traditional knowledge and indigenous heritage’. While Blake presents a valid critique, and indeed the definition is not as broad as it could have been, the definition presented by the Recommendation was an important development at the time. Furthermore, the Recommendation was still strongly founded in ‘Western’ discourses of heritage where artistic representations and the performing arts were still given more value than traditional knowledge and other representations of intangible heritage such as familial ceremonies and daily activities.

Several important elements of the Recommendation are that it notes the role of local communities by outlining that ‘Folklore ... must be safeguarded by and for the group whose identity it expresses’ and it does emphasise the importance of holders of

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79 Ibid.
knowledge and of research, education and awareness of culture. However, these holders of knowledge are not central to the measures to protect folklore and this analysis is critical of the way conservation is limited to the documentation of culture and the way in which the Recommendation implies that some cultural elements should be maintained in a static form. I argue that this can lead to the freezing of cultural elements and is contradictory to the very nature of intangible heritage in its constantly evolving nature. Overall, this thesis concurs with the findings of Blake, that the Recommendation is very general and fails to take into account the need for definitive measures that allow for the development of folklore nor does it examine the rights of holders of knowledge. Rather than the Recommendation being written for the transmitters of ICH, it appears to be ‘designed with the needs of scientific researchers and government officials in mind’. Schmitt is, likewise, very critical of the Recommendation. He states that ‘this recommendation was hardly implemented by the member states, and internal UNESCO analyses declared it to be ineffective just a few years after it was adopted’.

3.2.3 Nara Document on Authenticity (1994)

The Nara Document on Authenticity (1994) was developed under the auspices of the World Heritage Committee to the World Heritage Convention. The test for authenticity referred to within the Operational Guidelines for the Implementation of the World Heritage Convention was often debated and ‘at the suggestion of ICOMOS, the World Heritage Committee requested that the concept and application of authenticity to cultural heritage be further elaborated through international discussions among experts’. The meeting was sponsored by the government of Japan and held in Nara during November, 1994.

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80 Section D mentions the ‘protection of folk traditions and those who are the transmitters’.
81 Section E- dissemination of culture.
82 Section C- While living folklore, owing to its evolving character, cannot always be directly protected, folklore that has been fixed in a tangible form should be effectively protected.
83 Blake, above n 78.
It is recognised that ‘work on the Nara Document on Authenticity highlighted the need to move away from purely Western expert testimony in determining authenticity and to recognise the values that a cultural property represents in the eyes of the community concerned’. The emphasis is placed on interaction with local communities and their role in cultural heritage protection is clearly asserted. This position is clarified in paragraph 8 which states that, ‘responsibility for cultural heritage and the management of it belongs, in the first place, to the cultural community that has generated it’.

The examination of authenticity also provided an avenue to signify the importance of cultural diversity and intangible heritage. The first substantive section of the document (after the preamble) is dedicated to an examination of cultural diversity. It provides that ‘the diversity of cultures and heritage in our world is an irreplaceable source of spiritual and intellectual richness for all humankind’ and furthermore that ‘all cultures and societies are rooted in the particular forms and means of tangible and intangible expression which constitute their heritage, and these should be respected’. The need for cultural sensitivity when examining authenticity is provided for in paragraph 11; ‘the respect due to all cultures requires that heritage properties must be considered and judged within the cultural contexts to which they belong’. This is an important element when considering intangible cultural heritage and its protection, as ICH should be protected in accordance with the cultural context to which it belongs.

3.2.4 Burra Charter (1999)

The Burra Charter is a document adopted by ICOMOS Australia, initially in 1979, to inform policy regarding the conservation of places of cultural significance. The

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86 Deacon, above n 9.
87 Paragraph 5.
88 Paragraph 7.
89 This is clarified further in the following paragraph; paragraph 12 ‘within each culture, recognition be accorded to the specific nature of its heritage values and the credibility and truthfulness of related information sources’.
90 Further discussion on cultural sensitivity in the safeguarding of ICH is found in the following Chapter.
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document is primarily limited to place\textsuperscript{91} and tangible heritage. However, revisions made to the document have increased its scope to cover associative intangible values. Article 5.1 establishes the importance of values and that ‘Conservation of a place should identify and take into consideration all aspects of cultural and natural significance without unwarranted emphasis on any one value at the expense of others’. Under the Burra Charter ‘Conservation means all the processes of looking after a place so as to retain its cultural significance’\textsuperscript{92} which includes spiritual values.\textsuperscript{93}

The Burra Charter provides local communities with a participatory role in heritage conservation. Article 12 states that ‘Conservation, interpretation and management of a place should provide for the participation of people for whom the place has special associations and meanings, or who have social, spiritual or other cultural responsibilities for the place’. Furthermore Article 26.3 provides that ‘groups and individuals with associations with a place as well as those involved in its management should be provided with opportunities to contribute to and participate in understanding the cultural significance of the place. Where appropriate they should also have opportunities to participate in its conservation and management’. It also implies that local communities should have rights to use places which have cultural significance referring to the associations\textsuperscript{94} people have and the meanings\textsuperscript{95} people associate with places.

The Burra Charter has limited application, as it was developed principally to direct heritage managers when dealing with tangible heritage and because it is drafted within the context of a specific country. However, several key elements of the charter are present in other international and Asian heritage documents and therefore it is an

\textsuperscript{91} Article 1.1 defines place as site, area, land, landscape, building or other work, group of buildings or other works, and may include components, contents, spaces and views.

\textsuperscript{92} Article 1.4.

\textsuperscript{93} Article 1.2.

\textsuperscript{94} Article 24.1; significant associations between people and a place should be respected, retained and not obscured. Opportunities for the interpretation, commemoration and celebration of these associations should be investigated and implemented.

\textsuperscript{95} Article 24.2; Significant meanings, including spiritual values, of a place should be respected. Opportunities for the continuation or revival of these meanings should be investigated and implemented.
important contribution to the discourse on heritage management in the context of this thesis.

3.2.5 UNESCO Declaration on Cultural Diversity (2001)

In recent years policies for the protection of cultural heritage have often included paragraphs on the importance of cultural diversity and the need for acceptance and respect for all cultures. This approach is now clearly enshrined in the international heritage discourse. As Barbosa states, ‘in the perspective of the UNESCO Universal Declaration on Cultural Diversity, the protection of cultural heritage cannot be separated from the preservation of the cultural diversity of humankind’. From this it can be further concluded that the protection of cultural heritage cannot be separated from the implementation of human rights instruments as Article 4 states ‘The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms’. Article 5 clearly establishes that ‘all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms’.

In the introduction to the Declaration, Matsuura affirmed that this document ‘raises cultural diversity to the level of ‘the common heritage of humanity’’. By using the terminology associated with the World Heritage Convention and referring to what is considered by many as an element of jus cogens with erga omnes status, Matsuura seeks to increase the legitimacy and legality of the document. At the same time he acknowledges its limitations in recognising that the Declaration ‘lays down not instructions but general guidelines to be turned into ground-breaking policies by

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97 The document also confirms that ‘cultural rights are an integral part of human rights…. As defined in Article 27 of the Universal Declaration on Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights’ in Article 5.
98 This is also reaffirmed by Article 1 of the Declaration; ‘it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations’. Koichiro Matsuura, UNESCO Universal Declaration on Cultural Diversity (2002).
Member States’. In other words, Member States are not legally obligated to implement or comply with the Articles.

Despite the Declaration comprising the vast body of soft law relating to cultural heritage it contributes several important precepts (such as specifically bringing together issues of cultural heritage protection, cultural diversity, human rights and development) and reinforces many fundamental principles of heritage preservation. Although heritage protection has been the subject of international Conventions and other hard law instruments, Article 7 confirms that ‘heritage in all its forms must be preserved, enhanced and handed on to future generations’. In Article 10 the Declaration explicitly voices a growing concern surrounding the awareness that culture can become a commercial product and be exploited. It provides that ‘cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods’.

Finally the Declaration provides an Action Plan to allow states to easily implement the Articles. Objective 13 of the Action Plan outlines that Member States should formulate ‘policies and strategies for the preservation and enhancement of the cultural and natural heritage, notably the oral and intangible cultural heritage’. As a result of this Declaration, it has been concluded that ‘the value of cultural diversity was now enshrined in the 2001 UNESCO Declaration, entailing the duty to safeguard all the tangible expressions of cultural diversity within the territory of every state’.  

3.2.6 Shanghai Charter (2002)

The Shanghai Charter is an Asian soft law document relating to intangible heritage and museums. While the Charter appears limited in that it is drafted by participants from museums assembled under the auspices of ICOM (International Council of

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100 A list of precepts that this thesis argues have been developed from ICH soft law is presented below.
Museums) it still provides important developments in the understanding of intangible heritage within the context of Asia. The Charter sets out a series of guidelines which may be implemented by governments for the protection of intangible heritage not simply in relation to museums but in a wider context.

My analysis concludes that the Charter identifies globalisation as a threat to heritage in the Asia Pacific region and focuses on the role of local communities. It suggests that governments ‘[i]nitiate pilot projects that demonstrate methodologies for making inventories of intangible heritage resources through community participation’ (emphasis added). Further, the Document clearly establishes ownership of heritage by the community in paragraph 7. It encourages states to:

Develop public programs and visitor management strategies that comply with the laws, conventions and regulations dealing with the conservation of heritage resources of significance, and respect for the rules and protocols of the community groups as custodians of intangible heritage.

It also makes reference to authenticity, noting that governments should ‘ensure efforts towards the conservation, presentation and interpretation of intangible heritage in an authentic manner that is consistent with the local character’.

### 3.2.7 Istanbul Declaration (2002)

The Istanbul Declaration on Cultural Diversity was adopted by the third Round Table of Ministers of Culture in September 2002 as a result of a summit on ‘The intangible heritage: a mirror of cultural diversity’. This document was significant in informing UNESCO in the drafting of the Convention for the Safeguarding of the Intangible Cultural Heritage and brought together a collection of international positions on intangible cultural heritage. The Declaration acknowledged the role of intangible heritage in the maintenance of both cultural identity and cultural diversity.

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104 Ibid, paragraph 5.
105 Ibid, paragraph 7.
106 Ibid at paragraph 6.
107 110 countries participated in the summit and adopted the Declaration.
108 Paragraph 1; ‘The multiple expressions of intangible cultural heritage constitute some of the fundamental sources of the cultural identity of the peoples and communities as well as a wealth
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Intangible heritage is defined within paragraph 2 as constituting a ‘set of living and constantly recreated practices, knowledge and representations enabling individuals and communities, at all levels, to express their world conception through systems of values and ethical standards’.

The Declaration establishes requirements for UNESCO and Member States including:

- that governments have a duty to incorporate local communities or ‘stakeholders’ (para. 3) ‘in close collaboration with the practitioners and bearers of all expressions of intangible cultural heritage’ (para. 7 (iv))
- ‘developing policies which aim at the identification, safeguarding, promotion and transmission of the intangible cultural heritage, particularly through information and education’ (para. 7 (ii))
- ‘within the framework of the policies of each state, at the appropriate level: encourage research and documentation, develop inventories and registers, establish legislations [sic] and appropriate mechanisms of protection, ensure the dissemination, through education and awareness-raising, of the values and significance of intangible cultural heritage, foster the recognition and protection of custodians together with the transmission of knowledge and know-how’ (para 7 (iii))
- The development of an international convention for the Safeguarding of ICH (para 7 (viii))

This is the last soft law document drafted prior to the adoption of the ICH Convention. It is clear that the Declaration specifically informed the drafting of the Convention. The terminology used in the text of this Declaration is very similar to the text of the WHC and at times the same phrases are used in both documents. Many of these phrases have also been used in the drafting of the ICH Convention.
Soft Law Developed after the ICH Convention

Following the adoption of the ICH Convention in 2003, numerous regional and international meetings have led to the creation of soft law documents. These have advanced and made an important contribution to ICH law. Regional meetings of experts have led to the development of informative regional soft law instruments such as the 2004 Okinawa Declaration on Intangible and Tangible Cultural Heritage and the 2005 Hoi An Protocols for Best Conservation Practice in Asia. Other documents that have developed after the ICH Convention have attempted to incorporate tangible and intangible heritage. The 2004 Yamato Declaration addresses the integration of the ICH Convention with existing heritage law documents to ensure holistic protection measures. The 2005 Xi’an Declaration seeks to broaden the understanding of tangible heritage as protected under the WHC by understanding their setting. This is elaborated further below. The final and most recent international soft law instrument that this thesis argues has contributed to the further development of ICH law is the 2007 UN Declaration on the Rights of Indigenous Peoples.\footnote{United Nations, \textit{UN Declaration on the Rights of Indigenous Peoples} (2007) \<http://www.un.org/esa/socdev/unpfii/en/drip.html> at January 25 2009.} This Declaration is significant in solidifying the role of cultural rights in the safeguarding of heritage and, while the Declaration focuses specifically on indigenous peoples, this thesis contends that the precept of cultural rights developed here goes beyond this scope and can be situated more broadly within ICH law. Again, this argument is clarified further below.

3.2.8 Yamato Declaration (2004)

Due to the nature of the development of the international heritage discourse, i.e. that the protection of intangible cultural heritage was a secondary consideration, there have been several international meetings that have examined how to ensure holistic heritage protection. A holistic approach requires that there be integrated cultural heritage protection including both tangible and intangible heritage. The Yamato Declaration is the result of an expert meeting on integrated cultural heritage protection which took place in Japan in October 2004. It was recognised that such an international Declaration was needed to encourage co-operation between the
implementation of obligations under the Convention for the Safeguarding of the Intangible Cultural Heritage (2003) and the Convention for the Protection of the World Cultural and Natural Heritage (1972). The goal of the expert meeting was established as aiming to ‘broaden the scope of discussions and the mutual understanding and cooperation between experts of the two categories of heritages [sic]’.110

The Declaration is significant in reaffirming the solid status of intangible cultural heritage in international law following the entering into force of the ICH Convention. Paragraph 4 of the Declaration recognises ‘that safeguarding intangible cultural heritage is as important as protecting tangible cultural and natural heritage, and that the world community has come to realise that intangible cultural heritage has to be considered and safeguarded in its own right’. The Declaration also calls for ratification of the ICH Convention by UNESCO Member States in paragraph 17.

It is interesting to note that the Declaration suggests that authenticity is a complex issue when related to ICH and indeed goes as far as to say that it is not relevant when safeguarding ICH.111 UNESCO confirms that ‘the Declaration ... recognized the difficulty of applying the concept of ‘authenticity’ as used in the context of the 1972 Convention, to intangible cultural heritage as defined in the 2003 Convention’.112 The issue of authenticity and forms that ICH takes are dealt with in more detail below.113

The crux of the Declaration can be found in paragraphs 11 and 12 which reiterate the need for holistic management of cultural heritage. Paragraph 12 establishes the requirement not only for states but also for international organisations, non-governmental organisations and individuals to actively participate ‘in safeguarding cultural heritage to explore and support investigations of strategies and procedures to integrate the safeguarding of tangible and intangible heritage, and to always do so in

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111 Paragraph 8; ‘further considering that intangible cultural heritage is constantly recreated, the term ‘authenticity’ as applied to tangible cultural heritage is not relevant when identifying and safeguarding intangible cultural heritage’.
112 UNESCO, above n 110.
113 See specifically chapter 4.3.2.
close collaboration and agreement with the communities and groups concerned’. The role of communities is presented as a central element of the Declaration by UNESCO.  

UNESCO concludes that:

What was highlighted in the Yamato Declaration is the importance of safeguarding both categories of heritages [sic] in their own rights [sic], taking into account their interdependence but also their distinctive characters…. Possible integrated approaches mean, in particular, to be community-oriented, taking care of both tangible and intangible heritage, and taking into consideration particularities of the specific cultural context of communities concerned. This approach is especially important for the implementation of intangible heritage safeguarding, as it is enacted by people. Therefore, protecting circumstances to enable communities to constantly recreate their cultural expressions is crucial.  

3.2.9 Okinawa Declaration (2004)

This Declaration116 is a regional document which is the result of a forum held in Japan with participants from Thailand, Taiwan, Philippines, Japan and Cambodia on sacred spaces in Asia. The Okinawa Declaration on Intangible and Tangible Cultural Heritage reflects the views of those involved in the safeguarding of heritage in Asia. As such it is important to inform policy in Cambodia.117

The preamble to the Declaration identifies four threats to cultural heritage:

- rapidly changing social and political environments and consequent changes of cultural values, particularly in the younger generations,
- lack of awareness among decision-makers, which can lead to insensitive development programs,
- exposure to unsustainable tourism, and

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114 UNESCO, above n 110.
115 Ibid.
117 The other significant aspect of the document is that it was drafted by Ang Choulean, among others, who at the time was the Director of Culture and Research of APSARA Authority in Cambodia.
• conservation measures which give undue weight to material aspects of heritage, without adequate attention to the meaning of associated traditions, rituals and practices for the community

The Declaration focuses on the importance of awareness-raising and community participation in the safeguarding of ICH. Article 2 states that ‘Awareness-raising is best fostered by recognition of the importance of intangible cultural heritage by, among others, the international community, as this recognition empowers local communities to protect and further develop their intangible cultural heritage’ while Article 4 states that ‘actions aiming at safeguarding ... cultural heritage... need to be rooted in the values and wishes of communities or groups concerned’.

3.2.10 Xi’an Declaration (2005)

The Xi’an Declaration on the Conservation of the Setting of Heritage Structures, Sites and Areas developed from the 15th General Assembly of ICOMOS (International Council on Monuments and Sites). The document seeks to develop principles which can be applied ‘through legislation, policies, planning processes and management to better protect and conserve the world’s heritage structures, sites and areas in their settings’. The document is an important reference point for a broader approach to managing World Heritage sites which have intangible attributes of living heritage within their setting or surrounding areas, i.e. the immediate and extended environment that is part of, or contributes to, its significance and distinctive character. As such the document can be potentially very informative for World Heritage sites such as Angkor.

The document establishes the fundamental importance of intangible values that give meaning to tangible sites. Article 2 affirms that

Heritage structures, sites or areas ... derive their significance and distinctive character from their perceived social and spiritual, historic, artistic, aesthetic, natural, scientific and other cultural values. They also derive their significance and distinctive character

118 Preamble.
119 Article 1.
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from their meaningful relationships with their physical, visual, spiritual and other cultural context and settings.\footnote{More specifically it states that ‘these relationships can be the result of a conscious and planned creative act, spiritual belief, historical events, use or a cumulative and organic process over time through cultural traditions’ and ‘cultural traditions, rituals, spiritual practices and concepts as well as history, topography, natural environment values, use and other factors contribute to create the full range of a setting’s tangible and intangible values and dimensions’.}

This document also develops an understanding of the need for cultural policies and management to be culturally sensitive to the local context of that heritage. This is developed in Article 5 which states that ‘The implementation of effective planning and legislative tools, policies, strategies and practices to sustainably manage settings requires consistency and continuity in application, whilst reflecting the local or cultural contexts in which they function’. The Declaration is unique in establishing the impacts of transformation of the setting of a heritage site on its authenticity. These transformations can be to the urban or rural landscape and can include ways of life, economies and natural environment.\footnote{Article 9; ‘Incremental as well as rapid transformation of the urban or rural landscapes, the ways of life, the economies or the natural environment can substantially or irretrievably affect the authentic contribution that the setting makes to the significance of a heritage structure, site or area’.

The final section of the Declaration ensures the role of local communities in management and development strategies. It explicitly states that ‘Co-operation and engagement with associated and local communities is essential as part of developing sustainable strategies for the conservation and management of settings.’\footnote{Article 12.}
The use of education and training in this process of co-operation and the development of management plans is outlined, along with the need to take into account the tangible and intangible dimensions of settings. Uniquely, the Declaration establishes that there is shared responsibility for adequate management among professionals, institutions and local communities.

\textbf{3.2.11 UNDeclaration on the Rights of Indigenous Peoples (2007)\footnote{Adopted by United Nations General Assembly at its 61\textsuperscript{st} session in September 2007.}}

The UNDeclaration on the Rights of Indigenous Peoples was adopted in 2007 and is currently considered ‘the most comprehensive and progressive of international
instruments dealing with indigenous peoples’ rights’.\textsuperscript{124} Even while it was still in draft form the Declaration was frequently analysed in academic papers and referred to, as it has taken more than 20 years of negotiations prior to its adoption. Dodson noted that:

The draft declaration on the rights of indigenous peoples articulates the key rights of indigenous peoples and throughout emphasises two consistent and related themes. The first is our right to self-determination, the second is our right to practice, revitalise and transmit our cultures. Together these rights provide the foundation of all other rights.\textsuperscript{125}

The importance of the document lies in the fact that ‘its provisions reflect a degree of states’ \textit{opinio juris} and thus go towards establishing customary international law’.\textsuperscript{126}

The right to culture is an important element in the rights of indigenous peoples, who by their nature are generally culturally distinct. The preamble to the declaration affirms; ‘that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind’ and recognises both ‘the urgent need to respect and promote the inherent rights of indigenous peoples which derive ... from their cultures, spiritual traditions, histories and philosophies’ and that ‘respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment’. Within the Articles of the Declaration the following make reference to the safeguarding of culture and intangible heritage:

Article 8 ‘Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture’

Article 11 ‘Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature’.

\textsuperscript{126} Charters, above n 124.
Article 12 ‘Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains’.

Article 13 ‘Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons’.

Article 15 ‘Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information’.

Article 31 ‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions’.

This thesis contends that the Declaration is a fundamental element of the development of cultural rights within the human rights discourse. Cultural rights are argued in this thesis to be one of the three central principles that require adoption for the safeguarding of ICH and thus this Declaration is significant for solidifying the role of cultural rights in the safeguarding of ICH and establishing the breadth of cultural rights in relation to heritage.

3.2.12 Hoi An Protocols (2009)

The Hoi An Protocols for Best Conservation Practice in Asia were drafted to further the understanding of authenticity developed in the Nara Document within the context of Asia. However, the Protocols develop the heritage discourse beyond the notion of authenticity, as they examine intangible heritage, general protection and management
of cultural resources as well as site-specific methodologies for different classifications of heritage i.e. cultural landscapes and underwater sites.

These protocols are noteworthy in developing the principal nature of intangible heritage in Asia. The preamble of the Protocols acknowledges that within Asia tangible heritage is often simply a setting for the intangible heritage and therefore of secondary significance.\(^{127}\) The preamble also acknowledges threats to cultural heritage which are particularly significant in the context of Asia such as: dismemberment of heritage sites, with resultant loss of integrity and disenfranchisement of heritage from the traditions of community use.\(^{128}\)

Section E of the Protocols outlines the interaction between authenticity and intangible cultural heritage. The definition for intangible cultural heritage within the protocols is consistent with that drafted in Article 2 of the ICH Convention. The Protocols develop significant areas of intangible heritage conservation theory by acknowledging;

> ‘that safeguarding techniques for tangible and intangible are fundamentally different. Intangible cultural heritage is by definition not linked to specific monuments or places, but is stored in the minds of tradition bearers and communities and conserved in the continuity of practice. The techniques and methodologies employed to preserve intangible heritage must be culturally sensitive and flexible enough to make this distinction.’

The Protocols make several conclusions regarding ICH within the context of Asia. These conclusions are particularly useful and may inform other heritage documents drafted within the region. The three conclusions made were:

\(^{127}\) ‘In Asia, the physical, human-made components of the heritage are not only inextricably linked to but also arise from the natural geography and environmental setting of their respective cultures and serve as the setting for more intangible expressions of cultural traditions’.

\(^{128}\) Particularly important is the recognition that ‘Increasing globalization is resulting in a loss of traditional knowledge, particularly among the younger generations in the region. Skills which are required to create, maintain and present cultural heritage in an authentic manner are at risk. The diversity of these intangible knowledge forms must be mapped, evaluated and protected in order to support other preservation initiatives.’ (Section F).
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- The notion of authenticity is culturally relative. In much of Asia the rigorous and methodical Western analytical approach needs to be tempered with the abstract and metaphysical concepts that characterize the region.
- Conservation practitioners must not over-emphasize the authenticity of the materials or physical substance of a resource, as in the context of living cultures the absence of the tangible element does not mean that a phenomenon did not exist. ‘In a number of living cultural traditions, what makes a relic authentic is less what it was (in form) than what it did’.
- Tangible cultural expressions of cultural heritage have their origins in the expression of intangible culture. We need to look at how we can almost turn the traditional equation for cultural heritage conservation on its head and look for the expressions of intangible cultural heritage to guide us towards how we are going to preserve the tangible heritage as well.

3.3 Conclusion

This thesis contends that the body of soft law presented above has played a role in the development of fundamental legal precepts in heritage law. These precepts are likely to develop further to become part of customary international law. Indeed, some academics argue that some of the precepts established below are already recognised elements of customary law.

From the twelve soft law documents above, this thesis argues that the following precepts of ICH law have developed. These precepts are thought to be essential for the safeguarding of ICH:

i. ICH as common heritage of humankind.

ii. Cultural rights as fundamental to protect ICH.

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iii. Respect for and value of cultural diversity and all cultural expressions.
iv. Importance of holders of knowledge, their recognition and protection.
v. The essential use of education, awareness-raising and research in the safeguarding of ICH.
vi. ICH is owned and developed by the local community and therefore they have a necessary role in its safeguarding.
vii. The potential threat of commodification and commercialisation of ICH as being negative for its safeguarding.
viii. Importance of policy as a tool to protect ICH.
ix. Need for an integrated holistic approach to heritage protection incorporating both tangible and intangible heritage.

The role of these precepts is explored further both within the scope of legal protection of ICH,\textsuperscript{131} their application to the safeguarding of ICH using the example of Angkor\textsuperscript{132} and within the development of policy documents.\textsuperscript{133} The soft law precepts combine with binding international treaties to comprise the body of law for the protection of cultural heritage.

\textsuperscript{131} The issues surrounding legal protection are explored below in Chapter 4.3. Cultural rights and its role in safeguarding ICH is further expanded in Chapter 4.4.
\textsuperscript{132} Chapter 6 explores the role of these precepts in the safeguarding of ICH at a heritage site.
\textsuperscript{133} Chapter 8 presents the role of policy in the safeguarding of ICH and the integration of these precepts in a policy document.
Chapter 4

4 National Implementation of Intangible Heritage Law and Safeguarding Issues

The effectiveness of international law can often be assessed through the interpretation of legal obligations in national laws. In addition, national laws can often provide precedent for further development in international law. This chapter examines the way in which international law concerning the safeguarding of ICH has been articulated in domestic legal instruments. It was argued previously that the Operational Directives of the ICH Convention do not elaborate the articles which outline national implementation of state obligations. Thus, it is contended that it is informative to examine legal theories of translation of international law into domestic legislation. This approach can establish *modus operandi* that may be applied to the ICH Convention.

The later part of the chapter presents an analytical discussion of ICH law. Several key issues are identified from the discourse presented on the current legal framework for ICH and investigated. From this analysis, I propose a potential approach to the legal protection of intangible heritage and I conclude that cultural sensitivity is a fundamental requirement for any approach taken.

4.1 Translating International Law into Domestic Legislation

It is well understood that ‘every state is subject to international law; [and] every state governs its internal affairs by its own domestic legal system’.1 It also acknowledged that ‘the international system requires that a state meet its international obligations’2 through compliance within the domestic legal system. However, this creates a dichotomy:

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2 Ibid. Henkin acknowledges that ‘Increasingly, international agreements – notably human rights agreements – have created express obligations on states parties to modify their internal law’, 64.
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The dichotomy is implicit in the state system, international law, governing relations among autonomous, separate, independent, impermeable states, has had no obvious concern with ... the internal (municipal) law of the individual state.\(^3\)

Such a dichotomy means that the way in which such international obligations are elucidated (or indeed fail to be elucidated) in the domestic system will not be consistent. Indeed, in some cases such as those argued below in this chapter, domestic legislation should not be standard but should reflect the cultural values and political and legal systems present. In other cases differences in municipal laws, particularly within the field of constitutional law, can lead to a ‘conflict of laws’.\(^4\) Where there is a conflict of law between municipal and international law, it is clear through Article 27 of the Vienna Convention on the Law of Treaties that the obligations of international law must be met first.\(^5\) Therefore, regardless of the domestic legal system or the constitution present, there must be compliance with international legal obligations. The residual issue is one of legal translation and interpretation.

There are many issues of adapting international legal obligations for the purposes of domestic law, particularly such obligations that are supposedly representative of universal values. Law and legal systems are not globally consistent and even where legal systems are supposedly equivalent, different social and economic structures exist which result in vast differences within the legal systems of countries. With such variation it is difficult for international law to be applied consistently. As Kjer notes:

> Both in theories of language and translation and in comparative law, legal language is commonly regarded as a stable sub-system of a national language, and it is usually asserted that because of the interdependence of language, law and society, legal meanings and legal concepts cannot easily be transferred from one legal system to another and be understood by foreign lawyers.\(^6\)

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\(^3\) Ibid.


\(^5\) Article 26 states that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’. Article 27 clarifies the binding obligation by stating that; ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.

Conversely, it is debated that international law can be translated into domestic legislation because there is a basic level of common culture among all peoples despite differences in legal language, legal systems or legal concepts. However, it has been asked:

What exactly has a common culture and shared conditions of life got to do with legal translation? If the common conditions of life are meant to be the tertium comparationis that renders the transfer of legal meaning from one legal system into another possible, it must be born in mind that the distance between technical legal concepts of a specific legal system and the shared conditions of life is immense. Naturally, intercultural communication will always rely on a shared understanding of the conditions of life, but the information lost in legal translation will be enormous if that is the only thing shared.

4.1.1 Incorporation of International Provisions into Domestic Law

One of the fundamental issues with incorporating international legal provisions into the domestic framework is that:

different nations entertain different doctrines and different usages in regard to them. The jurists [and the legislature] of different countries hold opinions opposite to each other, as to some of the fundamental principles, which ought to have a universal operation; and the jurists [or legislators] of the same nation are sometimes as ill agreed among themselves.

Such conflicts are significant as ‘the national legislature is bound – constitutionally bound – to respect international law in enacting legislation.... [and] the national judiciary must give effect to international law, notwithstanding inconsistent domestic law, even domestic law of constitutional character’. How can such diverse doctrines result in systematic implementation, compliance and enforcement of international law?

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7 Deborah Cao, Translating Law (2007), 34.
8 Kjær, above n 6.
9 Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic in regard to Contracts, Rights and Remedies and especially to Marriages, Divorces, Wills, Successions, and Judgements (1 ed, 1834), 645.
10 Henkin, above n 1, 64.
Section III of the Vienna Convention on the Law of Treaties outlines how international law should be interpreted by states. Article 31 states:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

This article ensures that the interpretation of international law developed in treaties is not literal or based only on the text. Strength is given to the object and purpose of the law in addition to the text itself. This is an important consideration as ‘words in the English language are inherently ambiguous [and] the literal approach assumes that a word or a phrase has a single meaning that can be deduced solely from the language on the page’.11

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As Steyn reflects, ‘Language can never be understood divorced from its context... The true purpose is to find the contextual meaning of the language of the text’. 12 Furthermore he notes that ‘The failure to understand this fundamental principle of linguistic jurisprudence and legal logic has caused great injustices’. 13 Beyond the literal interpretation Sarkowicz defines two additional levels of interpretation:

1. Interpretation to understand the informative meaning of the text (the normative level of the text) – i.e. ‘it tells us if a legal text is a prohibition or a permission’ and,

2. Interpretation to glean an understanding of the ideological meaning of the text (the ideological level of the text) – that ‘contains all the ideas and values which are hidden in the background of a legal text and legal order’.  14 From this we identify the spirit of the law.

Sarkowicz’s ideological level of interpretation and Article 31(1) of the Vienna Convention require that a purposive approach is taken when international obligations, formulated in treaties, are translated. Such an approach looks outside the wording of the document and requires that individual states construe the meaning from simple principles stated within the document with consideration of the purpose of the treaty. This approach is not novel as it is used for statutory interpretation within the European Union.

It is evident that the levels or degrees of interpretation of international law, even when applying a purposive approach, would have implications for translation into domestic legal instruments. Subsequently the level of interpretation would result in the manner of formulation of obligations by states. The degree of interpretation that should be applied and as a result, how strictly and consistently international law should be translated into domestic legislation can, it is proposed, often depend on the area of law that is being interpreted. Arguments used for the interpretation of regional or domestic legislation across different fields of law can be applied to international law. Steyn, for

13 Ibid.
example, argues that the interpretation of legal obligations within ‘fiscal legislation may sometimes require a stricter approach than social welfare legislation’. Such sentiments are echoed by Rowlatt J, with reference to the interpretation of taxation legislation, when he stated within the judgment of The Cape Brandy Syndicate v Inland Revenue Commissioners: \[15\]

[I]n a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

It is argued in this chapter that the deeper, more purposive, levels of interpretation should be utilised in areas of law where local values are central to the existence, implementation and meaning of the law. In this respect, law that protects cultural heritage, knowledge and artistic expression should be interpreted in a way that reflects the purpose of a Convention but with reference to local ideals and values.

### 4.1.2 Implementing international laws in a culturally sensitive manner.

The purposive approach, as stated above provides that states should implement legal obligations in a manner which garners the purpose, intent and spirit of the Convention. As a result legislation from different nations may not be identical. However, they should be consistent in their implementation of the purpose of a treaty. Taking this approach is particularly significant when ‘non-Western’ nations are seeking to implement obligations that have their foundations in ‘Western concepts’. Often the terminology present in, and the ideological foundations of, international laws are not consistent and frequently are a result of discourse that has developed from ‘Western’ nations. As already shown in this thesis this phenomenon is widely recognised as being the case within the field of heritage law.\[17\]

\[15\] Steyn, above n 12.
\[16\] *The Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64, 71.
\[17\] For further discussion see Chapter 1.
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The implementation of international law into domestic legislation in countries which
do not have ‘Western political cultures’\(^{18}\) can raise particular issues when such laws
come from a body of Western legal norms. How can these legal concepts be translated
into domestic legal frameworks which are not rooted in Western legal culture in a
manner that is culturally sensitive or even culturally appropriate? Indeed, translating
legal concepts between countries with Western legal cultures is not simple.

\[E\]ven if Western societies may share a common general culture, their legal cultures
and traditions often differ significantly from one another making equivalence across
legal languages hardly achievable. This problem is, of course, even greater when
Eastern and Western cultures are concerned.\(^ {19}\)

Historically, papers examining the relationship of international and municipal law
have dealt only with the United States or European nations. Very little consideration
has been paid to the relationship of international law and its implementation in
countries outside these geographic areas. Indeed, Henkin in his discourse on the
subject regrets that his analysis is limited to the United States and Western European
nations; however his qualms are merely restricted to the fact that he is unable to
provide examples from Central or Eastern Europe.\(^ {20}\)

As suggested above, the interpretation of terminology within legal documents can be
particularly problematic when states are seeking to draft internal legislation which
would give effect to their international obligations. Within cultural heritage law there
are issues surrounding the interpretation of definitions when countries seek to meet
their international obligations through domestic instruments. Article 31 (1) of the
Vienna Convention states that ‘the ordinary meaning [is] to be given to the terms of
the treaty in their context’ and yet there is ambiguity in the meaning of terms used in a
Convention, such as culture. However, it is proposed that this is not necessarily a
devastating situation as it provides individual states, particularly those with vastly
differing notions of what encompasses culture, the ability to implement obligations,

\(^{18}\) Cao uses this term when referring to the fact that there is common heritage of Civil law and Common
law because ‘both belong to the Western legal traditions and political cultures’” Cao, above n 7, 28.
\(^{19}\) Kjær, above n 6.
\(^{20}\) Henkin, above n 1.
such as those set out under Article 13 of the ICH Convention, within their own ideological framework.\textsuperscript{21}

In addition to providing the means for a state to develop legislation which is culturally appropriate, the purposive approach to interpretation of international law maintains to some degree the notion of the impermeability of the state, state sovereignty and the principle of, or right to, self-determination. While the classical notion of individual states being impermeable entities and the inviolable notion of state sovereignty are commonly recognised to no longer exist, being subject more and more to international laws, international relations and globalisation, it is often proposed by some countries that these ideals should continue to be considered as important international norms.\textsuperscript{22}

Self-determination continues to develop as a fundamental human right and provides that people have a right to their own political and economic destiny.\textsuperscript{23} The principle of self-determination both at the state level and within the state is important when drafting cultural heritage laws and again this principle can lend itself to ensuring that laws which aim to protect intangible cultural heritage are framed with reference to the cultural values and ideology of the nation. After all, how can a law that seeks to protect culture do so without reference to how that culture is perceived and defined? Certainly it can be seen that what is epitomised as culture by some nations, such as iconic buildings, does not reflect the culture of others. A specific understanding of culture applicable to each state must be utilised and determined by each state to ensure that the ICH Convention may be implemented adequately ‘in light of its object and purpose’.\textsuperscript{24}

4.2 National Protection Measures

This section examines the domestic legislative framework which protects ICH. Deacon \textit{et al.} states that ‘most wealthy countries in the West consider intangible

\textsuperscript{21} This argument for cultural sensitivity in legal application of international law should not be confused with a cultural relativists standpoint on cultural rights. As argued previously I endorse the universality concept of human rights.


\textsuperscript{24} See above Vienna Convention on the Law of Treaties, Article 31 (1).
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heritage to be in the public domain and do not have legislative protection for expressions of folklore’, whereas ‘countries in East Asia have begun to move towards the safeguarding of their intangible heritage’. It is significant that ‘by the 1970s, governments such as those of Japan (1950), Korea (1964), Thailand (1985) and the Philippines (1973) had already adopted legal systems within their own countries for safeguarding intangible cultural resources’. For this reason the focus within this section is on the domestic legislation of Asian nations. These countries are also the most appropriate to inform potential domestic legislation in Cambodia, as particularly the neighbouring nations of Thailand and Vietnam share some aspects of cultural heritage.

4.2.1 Domestic legislation in Japan

In Japan, intangible aspects of heritage were acknowledged prior to the 1950s. However, domestic legislation to protect ICH in Japan has developed since the 1950s. This far predates the development of the concept in international discourse. This early development is emphasised by Cang as he states:

one of the early Imperial Decrees of the Meiji government (1868- 1911) called, in 1871, for the Preservation of Ancient Objects; this was subsequently followed by several laws that ordered, among other things, the preservation of shrines and temples, sites, monuments and national treasures.

Within Asia, Japan was the earliest country to include intangible cultural heritage in its legal system. This early adoption of a broader definition of cultural heritage

25 Deacon, above n 9.
26 Ibid.
27 Ibid.
29 Fu Chao-Ching, 'Cultural Sensitivity towards Intangible Values in Monuments and Sites - A Comparison between Eastern Asian and Western Countries' (Paper presented at the Scientific Symposium Monuments and Sites in their setting - conserving cultural heritage in changing townscapes and landscapes, Xi'an, China, 2005).
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highlights the different approach and understanding of heritage in different societies. The law developed in Japan is unique also in that it is a holistic law encompassing both tangible and intangible heritage.³⁰

In 1950 the Bungazai Hogo Hô was enacted. This law protected cultural properties and included a category of ‘intangible cultural properties’.³¹ The law was amended in 1954 to expand the definition of ‘intangible cultural properties’ to include items with high historical or artistic value and also included a new category of ‘intangible folk materials’.³² It is significant that under this law attention could be drawn to ‘intangible folk materials’ that required further research or documentation. However, there was not the ability to designate them or ‘list them’ as it was accepted that an intangible element ‘by nature ... changes its form along with social changes’.³³ This law was further expanded in 1975 to include important techniques for the conservation of cultural heritage, tangible and intangible.

The law defines ‘intangible cultural properties’ under Article 2 (2) as ‘Drama, music, applied art, and other intangible cultural products which are of a high historical or artistic value for our country’. Thus, under this category performing arts and craft techniques are protected. ‘Intangible folk materials’ are encompassed by Article 2 (3) and are defined as:

(i) Manners and customs related to food, clothing and housing, to occupations, to religious faiths, and to annual festivals etc.:

(ii) folk performing arts:

³⁰ Kikuchi Kensaku, ‘Safeguarding of Intangible Folk Cultural Properties’ (Paper presented at the Conference on the Study of Intangible Folk Cultural Properties, Tokyo, 2007). The law was amended in 1975 to include conservation areas and again in 1996 to include listed buildings.


³² In 1975 the law was amended and ‘intangible folk materials’ became known as ‘intangible folk cultural properties’.

³³ Amendments made in 1975 meant that ‘important intangible folk cultural properties’ could be recognised. However, these were still not limited to a listing procedure. Satoru Hyoki, ‘Safeguarding Intangible Cultural Heritage in Japan: Systems, Schemes and Activities’ (Paper presented at the Regional Meeting for the Arab States on the “Implementation of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage and Inventory Making”, Abu Dhabi, UAE, 2007).
(iii) folk skills which are indispensable to the understanding of changes in the life mode of our nation.  

Thus intangible folk materials encompass manners and customs, folk performing arts, and folk techniques. Life stage rituals, annual ceremonies, traditional building skills and agricultural practices would all be classed under this category. In addition, any ‘clothes, implements, houses and other objects used’ as part of these are also classed as folk cultural properties although they represent the tangible forms.

The Japanese legislation has been drafted in a manner that provides for cultural ideologies to be incorporated. Two such specific ideologies are the importance of regeneration and change in tradition in Japan and the importance of specific holders of knowledge in the legitimacy of an artistic expression. These are explored further below.

Japanese culture is known for its renewal of tradition. There are several examples of regeneration and development within elements of cultural heritage. Several traditional villages undergo a process of reconstruction, such as Jomon and Yayoi era settlements, without losing any of their significance or value. The sanctuary of Ise undergoes a process of shikinen-zotai or periodic rebuilding every 20 years. Cluzel states ‘the act of building traditionally depends on evoking the past and they even go as far as highlighting the memory tactics (transfer of handicrafts know-how, continuity of rebuilding works, oral transmission of legends, etc.) as a criteria for authenticity’. There has also been development among art forms. The tea ceremony changes and the introduction of a new style in 2007 ‘reflects the inventiveness that

35 Ibid Article 2 (3).
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defines and characterises tradition in Japan'. 39 There is also recognition that there is vast variation and change in cultural expressions throughout the country. 40 Under the national law on cultural properties, 41 studies may be conducted by the Agency for Cultural Affairs such as the Minzoku Bunkazai Bumpu Chosa (Studies on the Distribution of Folk Cultural Properties) to document the continual process of change. This study was carried out over 10 years at many locations and provided accurate information on intangible cultural heritage present in Japan. 42 In depth studies are required to understand the intricacies of cultural expressions.

The importance placed upon traditional holders of knowledge is a unique cultural element in Japan that is representative of their ICH. The role of the iemoto, or hereditary masters of tradition, is significant in Japan. The iemoto system has sustained many ICH forms in Japan including the three Masterpieces of Oral and Intangible Heritage of Humanity. 43 The continuity of tradition in Japanese society has been assured by the structure of the iemoto. The absolute rights of the iemoto are extensive, but they are fundamental to ICH in Japan and as such Japanese laws incorporate these elements. The role of the iemoto and the knowledge they contain are classed as ‘intangible cultural properties’ and as such are protected under domestic legislation. In addition the law provides under Article 71 for the holder of the knowledge (or holding group) to be recognised in association with the cultural element. Measures are provided under national legislation for ‘programs for the transmission and utilization of folk cultural properties’ 44 and intangible cultural properties. Furthermore, the ‘government also offers assistance in the successor training programs of important intangible folk cultural properties’. 45 These measures provide means for the continuation of traditions governed by the iemoto.

40 This is a common element of ICH in most countries.
41 Articles 74, 77 and 87.
42 Kensaku, above n 30.
43 Cang, above n 39.
44 Kensaku, above n 30.
45 Ibid.
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4.2.2 Domestic legislation in Thailand

Thailand’s 2007 constitution\(^{46}\) contains provisions for the protection of cultural heritage. Section 66 provides that:

> Persons so assembling to be a community, local community, or traditional community shall have the rights to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance and exploitation of natural resources, the environment and biological diversity in a balanced and sustainable fashion.

Thus under the Thai constitution the right to culture is a communal right rather than an individual right.\(^{47}\) In addition to being a right, the protection of cultural heritage is also established as a duty of Thai people in Section 73, which states that ‘every person shall have the duty to... protect, preserve and pass on the national arts and culture and local wisdom and conserve natural resources and the environment as provided by law’.

The constitution also establishes the role of government in the protection of cultural heritage. Chapter 5 outlines state policy directives with part 4 of this chapter containing cultural policies. Under section 80 the state shall be (5) ‘encouraging and supporting the making of researches in various disciplines of arts and sciences and disseminating all research results funded by the state;’ and (6) ‘encouraging and instilling the right awareness of national unity and learning, and instilling and making known of arts, tradition and culture of the nation as well as good value and local wisdom’. Duties and rules of local government are set out in chapter XIV within which section 289 specifies that ‘a local government organisation has the duty to

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\(^{46}\) Approved by referendum on 19\(^{th}\) August 2007.

\(^{47}\) Individual rights are provided under Part 3, section 32-38. Reference is made to cultural freedom of religion in Section 37; ‘A person shall enjoy full liberty to profess a religion, a religious denomination or creed, and observe religious precepts or commandments or exercise a form of worship in accordance with his belief; provided that it is not contrary to his civic duties, public order or good morals’.
conserve local arts, custom, wisdom and good culture of locality’. The role of education in the conservation of such cultural heritage is also established.48

The role of local government is clearly identified in the protection of cultural heritage in Thailand within policy documents and legislation. Decentralisation of government has ensured that local government is a significant element in implementing policies and protection measures. Thailand has 76 Provincial Cultural Councils, 796 District Cultural Councils and 7000 Sub-district Cultural Councils.49 These councils work with local community and implement obligations established under the Decentralization Plan and Procedure Act (2542 BE).50 A report published in 2007 entitled ‘Towards Formulation of Policies and Mechanisms of Preservation, Transmission and Protection of Traditional Cultural Expressions and Expressions of Folklore’,51 concluded that local government policies should:

- Ensure recognition of and respect for the intangible cultural heritage or traditional cultural expressions in communities through awareness-raising and capacity-building for the community leaders,
- Ensure enhancement of the ICH through specific educational and training programmes for all communities concerned,
- Build local cultural networks consisting of temples, schools, associations and groups and support technical, administrative and financial measures aimed at capacity-building activities for them,

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48 Section 289 ‘A local government organisation has the right to provide education and professional training in accordance with the suitability to and the need of that locality and participate in the provision of education and training by the state with regard to the compliance with the national education standard and system. In providing education and training under paragraph two, the local government organisation shall also have regard to the conservation of local arts, custom, wisdom and good culture’.


50 The Act, developed in 1999, specifies that local governments have the duty to preserve, revitalize and maintain their local arts, customs, knowledge and good culture.

• Create capacity-building activities for the safeguarding of the intangible cultural heritage and promote local community participation in local policy making, and
• Use local and public media to ensure recognition of, respect for, and enhancement of the intangible cultural heritage in society.

Although Thailand is not a Party to the ICH Convention, the protection of ICH in Thailand is part of the portfolio of the Office of the National Culture Commission (ONCC).\footnote{The ONCC was created in 1979 under the Ministry of Education (Act for the Establishment of the Office of the National Culture Commission B.E. 2522 (A.D. 1979) Amended in 1992) it now functions under the Ministry of Culture. It is responsible for the national cultural policy. Its website states that the national cultural policy is: Promote the preservation of Thai culture in all aspects. Propagate Thai culture of all aspects. Support folk culture of the indigenous people. Support and promote international cultural exchange. Encourage and promote cooperation between public and private sectors in cultural action.} According to Nuttee and Chaiboon the ONCC has the following obligations:\footnote{Nuttee, above n 49.}

1. To make plans and projects for the promotion and development of national cultural affairs
2. To promote, support and collaborate with government sector, state enterprises, private sector and other institutions during the process of implementing cultural undertaking affairs
3. To enhance promotion, expansion, cooperation and public relations for cultural affairs in any way beneficial to the country
4. To research, develop, revitalize, promote, transmit, enhance and exchange culture
5. To encourage individuals, groups of individuals as well as different institutions to carry out this task.

The ONCC has 4 strategies in place to fulfil its obligations namely (1) the promotion of cultural identity and diversity, (2) the enhancement of Thai values and dignity, (3) the development of capacity of Thai cultural learning sources and cultural networks and (4) strengthening capacity-building for the cultural networks. Under the first

52 The ONCC was created in 1979 under the Ministry of Education (Act for the Establishment of the Office of the National Culture Commission B.E. 2522 (A.D. 1979) Amended in 1992) it now functions under the Ministry of Culture. It is responsible for the national cultural policy. Its website states that the national cultural policy is: Promote the preservation of Thai culture in all aspects. Propagate Thai culture of all aspects. Support folk culture of the indigenous people. Support and promote international cultural exchange. Encourage and promote cooperation between public and private sectors in cultural action.
53 Nuttee, above n 49.
strategy several programmes have been carried out including research in the areas of performance and traditional craftsmanship. Under the third strategy, cultural learning resources have been developed through a program of artists. The ONCC has provided awards to national artists and used this ‘to promote the transmission and dissemination of the national artists’ works at national and international levels through the National Artists Centre.

While the ONCC works to preserve ICH through policy and local culture councils, there are not broader legal documents that ensure intangible cultural heritage is safeguarded within other government sectors, such as tourism and development, and it is often not mentioned in affiliation with cultural property. Akagawa and Sirisrisak argue that ‘in Thailand, intangible heritage is rarely integrated with physical planning, thus the local way of life, tradition, customs, etc. are being forgotten and in threat of extinction by new land use’. They also state that ‘in Thailand, intangible heritage is usually forgotten from policy on protection of cultural property’. There is currently no system for the listing of ICH within the legal framework and the National Culture Act (1942, Amended in 1943) does not make specific reference to ICH. It can be concluded that the Thai legal framework for the protection of ICH is not comprehensive.

4.2.3 Domestic legislation in Vietnam

National programmes and research on ICH have been conducted in Vietnam since the 1960s. During this decade the Vietnam Commission of Social Sciences combined with the Ministry of Culture ‘to collect and study [information] in order to promote

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54 The research and documentation project is entitled Phum Ban Phum Muang which started in 2005 and has involved researchers and local communities.
55 Nuttee, above n 49.
57 In 2005 this organization was known as the Vietnam Institute of Social Sciences.
58 Under Decision 63/2003/ND-CP of 2003 this became known as the Ministry of Culture and Information. In accordance with Decree No 185/2007/ND-CP of 25 December 2007 the Ministry of Culture and Information became the Ministry of Culture, Sports and Tourism.
the value of old traditional culture in building the modern cultural life’.\footnote{Although it is noted that this study limited as ‘the collectors and researchers of Vietnam could not be armed with modern equipment to record images or the performing arts and expressions of the intangible cultural phenomena. Many festivals, rites, folk religious practices, styles of folk art performance as well as the manipulations of traditional handicraft were only described by words or by some poor photographs’. Do Lan Phuong, ‘Preservation and Promotion of the Intangible Cultural Heritage in Vietnam (Some results and practical experiences)’ (Paper presented at the Sub-Regional Experts Meeting in Asia on Intangible Cultural Heritage: Safeguarding and Inventory-Making Methodologies, Bangkok, 2005).} Data gathered from these studies revealed that Vietnam was comprised of 54 ethnic groups belonging to different language groups including Viet-Muong, Tay-Thai, H’mong-Dzao, Mol-Khmer, Tang-Myanmar, Malayo-Polinezien and Hoa.\footnote{Ibid.}

In 1997 the State of Vietnam assigned the Ministry of Culture and Information to run the ‘national cultural program on protection and promotion of intangible cultural values’.\footnote{This institute is responsible for collecting, studying and appreciating ICH and making recommendations regarding that of Vietnam. The Institute has a database of national cultures and art heritage. Le Minh Ly, ‘Country Report Viet Nam – Governmental Mechanism and Role of the Central Government for the Safeguarding of Intangible Cultural Heritage (ICH)’ (Paper presented at the Asia/Pacific Cultural Centre for UNESCO, Training Course for Safeguarding of Intangible Cultural Heritage, Osaka and Kyoto, 2008).} This program was co-ordinated by the Vietnam Institute of Culture and Information who collaborated with provincial branches and collected the results of the program.\footnote{Ibid.} One of the key outcomes of this process was that ‘Vietnam introduced new national legislation in 2001 which will recognise and afford protection to intangible heritage’.\footnote{Deacon, above n 9.}

The preamble of the Law on Cultural Heritage reiterates the significance of the law for the many ethnics groups of Vietnam noting, ‘Vietnam’s cultural heritage is a valuable asset of the multi-ethnic Vietnamese community and a part of the cultural heritage of humanity’.\footnote{Law on Cultural Heritage (2001) Preamble.} Article 1 clearly dictates that the legislation comprehensively covers the protection of heritage, both tangible and intangible.\footnote{Cultural heritage as regulated in this Law includes both intangible and tangible cultural heritage. It comprises intellectual and material products with historical, cultural and scientific value that are passed on from generation to generation in the Socialist Republic of Vietnam’.} Intangible cultural heritage is defined in Article 4 as consisting of
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intellectual products with historical, cultural or scientific value that have been preserved by memory, writing, passed down through oral tradition, teaching, performance and all other means and forms. It includes language, writing, works of literature, art, science, oral tradition, folklore, ways of life, lifestyles, festivals, secrets of traditional handicrafts, knowledge of traditional medicine, cuisine, ethnic costumes and other forms of traditional knowledge.

The regulations established under Decree #92/2002/ND-CP (passed in November 2002) provides a more detailed definition of ICH, noting that it consists of:

a) Languages and inscriptions;
b) Artistic, literal and scientific works provided for in Article 747 of the Civil Code concerning the forms of protected works of outstanding value from the historical, cultural and scientific point of view;
c) Oral literature, including myths, proverbs, sayings, idioms, riddles, fables, folk verses, folk poetic stories, epic poems, epic songs, funeral and ritual orations, and other forms of oral literature;
d) Folk performance, including music, dances, theatres, imitation games, disguise games, fashion shows, beauty shows, folk duo singing, folk games and other forms of folk performance;
e) Life styles and ways of life manifested by codes of conduct, persona and behavior, customary laws, village charters, moral norms, behavioral protocols in the relations with ancestors, grandparents, parents, nature, funerals, weddings, naming ceremonies, actions, greetings, invitations and other customs and habits;
f) Traditional festivals, including those that raise patriotism, nature-friendly attitudes, national pride, anti-foreign aggression traditions, the honor for national heroes and heroines, eminent persons of culture, the industriousness and creativity of the people, benevolence, the thirst for freedom and happiness and a sense of community solidarity;
g) Traditional handicrafts;
h) Traditional knowledge, including that on traditional medicine and pharmacy, culinary art, natural phenomena and production know-how, military methods, (academic) artistic and literal creation, traditional costumes,
land, water, weather, climate, resources, rivers, seas, mountains, forests and other forms of knowledge.

Chapter III of the Vietnamese Law on Cultural Heritage legislates for the preservation, promotion and respect for ICH. It is noteworthy that unlike most other documents on heritage, intangible cultural heritage is examined before tangible heritage (Chapter IV). The protection of ICH is founded in the development of state policies. These are developed explicitly in Articles 21, 23 and 24 and inferred in Articles 17, 20 and 22. This is further clarified by Article 3 of the regulations established in Decree #92/2002/ND-CP (hereafter referred to as the regulations). Article 25 relates to traditional festivals and is significant because it outlines the government’s opposition to the commodification and commercialisation of culture; ‘Outdated practices and manifestations of negativity and commercialization in the organization and activities of festivals shall be abolished and opposed’. Again this stance is reiterated in Article 10 (2c) of the regulations which state ‘The following are strictly prohibited in the organization of festivals: Commercializing traditional festivals in all forms; fabricating, imposing new rituals and elements on traditional festivals’.

The importance of education and information dissemination in the safeguarding of intangible cultural heritage is recognised in Vietnam. Article 7 of the regulations establishes the responsibility of the state in ‘increasing public awareness of traditional

66 The state shall create policies and conditions to preserve and develop the spoken and written languages of all ethnicities in Vietnam.
67 The state's policies shall encourage work to survey, compile, translate, collect, classify and preserve works of literature, art, science, oral tradition and folklore of the multiethnic Vietnamese community.
68 The state's policies shall encourage work to preserve, restore and develop traditional handicrafts with particular value; research and apply knowledge of traditional medicine; preserve and promote Vietnamese cuisine; and promote traditional ethnic costumes and other forms of traditional knowledge.
69 The state shall encourage and create the conditions for organizations and individuals to carry out activities of research, collection, maintenance, communication and introduction of intangible cultural heritage in order to care for and promote the national cultural character and to enrich the treasured cultural heritage of the multiethnic Vietnamese community.
70 Responsible state authorities must apply necessary measures to preserve intangible cultural heritage and prevent threats of its misuse, loss or dying out.
71 The state and society shall preserve and promote the positive customs, ways of life and lifestyles of the nation.
72 This article elaborates the ‘state's policies on the protection and promotion of cultural heritage values’.
cultural values’ and ‘increasing the tasks of transmission of skills to younger generations, dissemination, publication, performance and revitalisation various forms of intangible cultural heritage, putting priority to those expressions that are in need of urgent protection’. Information collected by the Institute of Culture and Information has been televised twice a week on the main television channels to inform the general public about intangible culture. Phuong outlines the types of ICH disseminated:

- Festivals relating to the life of the community and production activities: Saint/God protects the community, agriculture, fishing, handicraft etc
- Rites relating to life cycle: naming of babies, becoming an adult/ a member of the community, house building, marriage, funeral etc
- Religious practices relating to the environment, exploiting natural resources, new year ceremony, ancestor worship, worshiping of heaven and earth/ saint/ god for recovering from an illness.
- Forms of folk art performance: ritual dance and song, alternative-singing, gong playing, traditional instrument playing, water puppet, dry puppet and popular opera.
- Games
- Cuisine art from different regions and knowledge in the processing of medicinal herbs.

Similar to Japanese legislation, Vietnam recognises the holders of traditional knowledge. Article 26 states that ‘The state shall show respect and preferential treatment towards artists and artisans who master and disseminate traditional arts or trade secrets of special value’. In addition Article 12 of the regulations, entitled honour and treatment of artisans and artists, specifically establishes the role of holders of traditional knowledge and provides measures for public recognition and financial assistance. Article 9 (2) of the Law on Cultural Heritage dictates that ‘the state shall protect the legal rights and interests of owners of cultural heritage. Owners of cultural heritage have the obligation to protect and promote cultural heritage’. The Vietnam Association of Folklore awards titles for artists who are acknowledged experts in traditional practices and deserve credit for transferring knowledge to the next generation. However, in 2005 Phuong stated that as there was no financial benefit in
obtaining this title, there was no salary or financial assistance for folk artists and subsidies for assisting folk performances had not been implemented.\textsuperscript{73} Despite this Phuong concludes that such programmes and ongoing studies in ICH have developed the pride and cultural self-respect of local people which in turn increases the preservation and promotion of the nation’s culture.

Under Chapter VI – Incentives, Rewards and Punitive Measures of the Law on Cultural Heritage, Article 69 states that ‘Organizations and individuals with outstanding achievements in protection and promotion of cultural heritage shall be rewarded according to the provisions of law’. Furthermore, Article 3 (2) of the regulations provides that the state will give incentives and rewards to organizations and individuals that record achievements in the protection and promotion of cultural heritage values; adopting preferential policies by both spiritual and material means toward artisans and artists who bear [sic] and disseminate traditional arts and professional know-how of special value.

One issue that is raised in regard to the implementation of domestic legislation and safeguarding programs for ICH, is that rapid changes in the socioeconomic environment mean that a large gap is being generated between the ‘old traditional culture’ and ‘contemporary culture’. This creates a gap between the instructors of culture and the followers or younger generations. Phuong notes that there is more and more a lack of followers which forms a ‘great obstacle for maintaining and restoration of intangible cultural heritage’.\textsuperscript{74} This is reiterated by Nguyen who finds that ‘the Government of Viet Nam views the identification, protection and promotion of intangible cultural heritage as vital in the present period of rapid socio-economic transformation’ noting that ‘the rapid socio-economic mechanism changes lead to the changing of cultures and are threatening to eliminate various items of intangible cultural heritage’.\textsuperscript{75} This issue is present in other Southeast Asian nations, including Cambodia, and collaboration to develop mechanisms for encouraging the continuation

\textsuperscript{73} Phuong, above n 59.
\textsuperscript{74} Phuong, above n 59, 5.
of practices and education to younger generations is needed. Within Vietnam, the
Ministry of Education and Training cooperated with the Hanoi City Committee in
2007 to establish a pilot project to integrate ICH education into the school curriculum.

Vietnam has implemented its national law and regulations through many projects
aiming to protect ICH. 76 One such project, described by Nguyen, 77 was carried out in
2003 and 2004 on the ICH of Quang Ninh Province. Research was conducted and the
continuation of practice and transmission of heritage encouraged. Forms of heritage
were documented according to the five categories established by UNESCO under
Article 2 (2) of the ICH Convention. Nguyen found that through this project ‘the
knowledge and awareness of the significance of ICH safeguarding of the community
and local authorities has been approved’. 78

4.3 Potential Impacts of Legal Protection of ICH

The examination of national laws and safeguarding mechanisms indicates that the
protection afforded to ICH within these countries often goes beyond the obligations
established by the ICH Convention. Within the frameworks that states have
implemented to safeguard the ICH in their territory, many of them emphasise the use
of policy and education. Several issues are raised within the domestic frameworks,
such as the interface between safeguarding ICH and socio-economic development and
the commercialisation of culture. These issues are explored along with further
issues—of authenticity, freezing of culture, and the politicisation of ICH—which have
been highlighted previously. The discussion draws on examples from Cambodia, to
understand the interaction with attempts at a national level to safeguard ICH.

4.3.1 Impact of preservation of ICH on development

Within developing nations, it is important to examine the potential interaction
between the implementation of international law to protect culture and the ability for

76 Ly, above n 62.
77 Nguyen, above n 75.
78 Ibid.
that country or peoples to exercise the full right to development.\textsuperscript{79} How does development interact with the protection of intangible cultural heritage? By trying to preserve a culture, are we preventing or limiting the full right to development or by undergoing development and exercising this right, is there a resultant loss of cultural heritage? The World Commission on Culture and Development recognises that ‘development presents new challenges for heritage conservation’.\textsuperscript{80}

The right to development is established by the adoption of the UN Declaration on the Right to Development in 1986.\textsuperscript{81} It is also reflected in Articles 10 and 11 of the Vienna Declaration (1993). The Vienna Declaration reaffirms the right to development ‘as a universal and inalienable right and an integral part of human rights’. It goes on to say that ‘development facilitates the enjoyment of all human rights’. This would suggest that development facilitates the enjoyment of cultural rights and greater cultural fulfilment rather than cultural degradation. However, it has also been stated that, within traditional cultures undergoing a process of development, ‘the poor are the most vulnerable to having their traditions, relationships and knowledge and skills ignored and denigrated, and experiencing development with a great sense of trauma, loss and social disconnectedness’.\textsuperscript{82} From this perspective, development may be seen as causing a loss of culture.

It is possible that development and globalisation can lead to cultural loss, and therefore, that active measures to protect intangible cultural heritage can be seen as being counter to development or the right to development.\textsuperscript{83} The World Commission on Development and Culture has sought to minimise this perceived conflict by establishing that ‘development has to be seen in terms that include cultural growth,'

\textsuperscript{79} The UN Commission on Culture and Development state that ‘the relationship between culture and development should be clarified and deepened in constructive and practical ways’. World Commission on Culture and Development, 'Our Creative Diversity' (1996), 8.
\textsuperscript{80} Ibid, 32.
\textsuperscript{82} James D. Wolfensohn, 'Statement of World Bank President' (Paper presented at the Culture Counts: Conference on Financing, Resources and the Economics of Culture in Sustainable Development, Florence, Italy, 4-7 October 1999).
the fostering of respect for all cultures and for the principle of cultural freedom’. 84
This approach seeks to ensure that culture is not lost in the process of development but that cultural growth occurs alongside development. The preamble to the Intangible Heritage Convention attempts to further the cohesion between development and heritage protection by stating that protecting intangible cultural heritage is ‘a guarantee of sustainable development’. This statement is a generalisation and there are cases where it could be felt that protecting culture and ensuring the maintenance of traditions is anti-developmental.

Within the Angkor World Heritage Site many villagers speak of enormous change. They refer to elements of their daily life as representing the ‘old culture’ or the ‘new culture’, with the new representing the new changes from the period of the United Nations Transitional Authority in Cambodia (1990s) until present, while the old culture represents most things that have persisted since before Democratic Kampuchea or the Khmer Rouge years (1970s). 85 The younger generation is seen to embrace the ‘new culture’, which includes Western dress styles, Khmer-Western pop music, health services within a standardised framework and formalised education, and perceives cultivation and maintenance of the ‘old culture’ as holding them back. Within villages fewer people visit traditional healers (kru khmer), listen or play traditional music or respect teachings from the elder yiey (grandmother) and ta (grandfather). These changes can result in a loss of cultural heritage. Apsara Authority researchers have documented that few of the members of the younger generation (less than 40 years) can recount oral histories of their village or local myths which are traditionally passed down in the process of traditional education through oral transmission from elders. 86 Additionally, many villagers only visit a kru khmer as a last resort if a hospital or health clinic service has not been able to heal their illness. In such a situation, would legislating the protection of intangible heritage, i.e. ensuring the continued use of the kru khmer’s knowledge and traditional oral education, limit

84 UN World Commission on Culture and Development, above n 79.
85 These references were found consistently among reports conducted by Apsara and personal communication with Cambodians.
86 Social Research Unit, 'Social Reports from Phum Nokor Krau, Phum Sras Srang and Phum Rohal' (APSARA Authority, 2002).
development of or access to modern health care or education and be preventing the right to a process of development?

Additionally, sometimes conflicts arise when cultural growth is part of development, and limitations are placed on this growth to safeguard traditional culture. Should cultural growth be unfettered? Within the Angkor World Heritage Site there is continued dispute over whether loudspeakers should be used during religious ceremonies around the ancient temples and in the villages. Loudspeakers have been broadly embraced by Cambodians and their use is a frequent occurrence at any important occasion or ceremony (including Buddhist ceremonies, weddings and funerals) where they are used to their maximum potential. Outside the Angkor World Heritage Site there are no limitations placed on the use of loudspeakers. However, the management authority for Angkor wishes to prevent their use as they wish to protect traditional practices, using legal measures to ban them, as a result causing tension among residents.

When formulating legislation and policy for the protection of cultural heritage, particularly intangible forms, the interaction between the maintenance of cultural elements and the influence of development must be considered. It is important to bear in mind the intentions behind protection measures such as: what is the intent behind safeguarding ICH and what is the goal of development. Is it desirable to ensure the continuation of traditional healing at the expense of modern medical techniques or can policies be developed that maintain traditional healing knowledge while developing a formalised health care system?

4.3.2 Maintaining integrity and authenticity of cultural expressions

Authenticity is recognised as a term that is commonly used with reference to heritage. The Nara Document on Authenticity (1994), numerous workshops on the integrity and authenticity of world heritage 87 and the subsequent Hoi-Ann Protocols for assuring and preserving the authenticity of heritage sites attest to this discourse.

87 See for example the International Expert Workshop on Integrity and Authenticity of World Heritage Cultural Landscapes held in Spain 2007.
However, Hafstein argues that ‘authenticity is not an issue with respect to intangible cultural heritage’. Furthermore, Connolly argues that authenticity is not a consideration for the ICH Convention as it is for the WHC, however the evidence she cites for this argument lies in the operational guidelines of the WHC. The equivalent guidelines (operational directives) for the ICH do not mention authenticity. However, this should not be used as evidence to suggest that authenticity is not pertinent. It is argued here that authenticity is an issue for ICH and the protection of ICH under the Convention.

There is little doubt that safeguarding of ICH under the Convention, through the process of placing a heritage element on the representative list, has an impact on the touristic value of the cultural element. This has been seen with the listing of the S’bek Thom (Khmer shadow puppets) on the list of Masterpieces of the Oral and Intangible Heritage of Humanity. The awareness and popularity of the artistic form within the tourism industry increased the demand for performances and there were increasingly more troupes performing without any formal training or reference to traditional presentation. Traditionally, ‘Sbek Thom performances take place three or four times during the year as a call for rain or as part of other ceremonies undertaken for the good of the community’. Currently Sbek Thom performances are conducted multiple times a week for a purely touristic purpose and there is no portrayal of its intended function. Thus the performances are taken outside of their original context and performed by groups outside the community for reasons other than those intended.

A similar pattern has occurred in recent years with Khmer folk dancing that historically was performed by trained dancers with strong influences from the Royal University of Fine Arts (RUFA) where many of the dances were choreographed. The

90 [T]he art of Sbek Thom existed largely in Siem Reap province, where it is believed to have originated’. For further background see Prince Sisowath Kola Chat, ‘Cambodian Traditions at Risk’ (Paper presented at the Globalization and Intangible Cultural Heritage, Tokyo, Japan, 2004).
91 Ibid.
demand from the growing tourism industry, particularly in Siem Reap, has resulted in the creation of numerous dance troupes operating in restaurants and hotels who mimic the dances without any training. The dances lose many of the subtle nuances that signify the traditional forms and as a result loose certain levels of integrity. The issue has been recognised by the Cambodian Ministry of Culture and Fine Arts who in 2006 established a specialist group to assess the number of dance troupes in Cambodia and the degree of formal training and authenticity of the dance forms. The intention of this assessment was to eventually set up additional training to troupes facilitated by staff from RUFA.

These examples can show that the publicity received through the listing process provided by the Convention can result in the commodification of culture and therefore threaten its authenticity. Additionally ceremonies, performances, traditional healing rituals etc. conducted for economic benefit are often presented outside of the normal circumstances for that form of ICH, thus losing some level of authenticity. For example, when an annual ceremony of homage to a local spirit, traditionally conducted on the third day of the moon in the third month of the year, is presented every Saturday for tourism purposes, the ceremony loses its central meaning of being an annual presentation of offerings and therefore it is no longer authentic. Therefore, protecting culture through a process of listing and the subsequent increase in their popularity can present pressure to perform or present cultural elements outside of their traditional setting.

When King Sisowath took members of the Royal Ballet to Paris in 1906, Pierre Loti expressed his disappointment and anger at the dislocation of Khmer dancers into a foreign setting to be displayed for novelty. He disapproved of the commodification of the performance that resulted in the sacred character of the dance being lost. Loti wrote that ‘one ought not to profane and diminish such performances by presenting them in this way devoid of their setting’. Condominas argues that the works of groups (such as traditional dance or ceremonies) should not be systematically

92 Hab Touch, Director National Museum of Cambodia, personal communication.
94 P Loti, A Pilgrimage to Angkor (1996) at 83 (Originally published in 1912 by Calmann-Lévy).
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transformed into folklore performances for tourists, or corrected according to standards of the majority group, or those of the prevailing ideology.95

The need to recognise the potential impacts of cultural protection on the authenticity and integrity of cultural heritage has been identified by the World Commission on Culture and Development which stipulated that:

Tourism is fast becoming one of the biggest industries in the world and cultural heritage provides much of its life-blood. The Commission stresses, however, that cultural heritage should not become a commodity to serve tourism but be brought into a mutually supportive relationship with it.96

Engelhardt97 summarises the issues well in the following statement;

In the rush to provide expanded facilities for the rapid increase of mass-marketed tourism, the authenticity and integrity of indigenous traditional culture are all too frequently sacrificed. Likewise, typical tourism promotional activities take the form in which complex cultural heritage is simplified, homogenized, packaged and in the end, trivialized for the quick and easy consumption of the tourist. Ironically, it is precisely the authentic traditional culture and customs that tourists, both domestic and foreign, expect to experience when they visit a heritage site. But instead of getting rich and authentic cultural insights and experiences, tourists get staged authenticity; instead of getting culture, they get kitsch.

Tourism can turn local cultures into commodities, that is, consumer items much like any other. Religious rituals, ethnic rites and festivals continue to be reduced and sanitized to conform with tourist expectations and schedules, resulting in what Robinson calls 'reconstructed ethnicity.'

When, for example, festivals are preserved for tourists without retaining their meaning and the value to the people who practice them, these festivals become false. Similarly, when national dress and rituals are retained simply for display, they lose

96 World Commission on Culture and Development, above n 79.
their significance and are no longer worth preserving. It is therefore important to safeguard the relevance and value of intangible cultural heritage as well as its manifestation (festival, rituals, etc). It is important, also, to remember that what is not authentic is not sustainable.

4.3.3 Creating a museum-like environment?

‘We should not take culture away from the people and put it into museums. A cultural tradition, after all, is a tradition of creation’.

The fluidity of intangible heritage is one of its defining characteristics and something that poses a major issue when developing a means of protecting or preserving these forms of heritage. Tangible heritage can be described, photographed, documented, archived and protected through the use of museums or galleries and the expertise of archaeologists, conversationalists and heritage managers. It is difficult to utilise these measures with intangible heritage, as it is being constantly recreated, modified or adapted. Article 1.2 of the Declaration of Principles of International Cultural Co-operation (1966) states that; ‘every people has the right and the duty to develop its culture’. This statement indicates that culture should not remain static; indeed it is our duty to allow it to change and to evolve over time. Furthermore, often there are nuances between representations of intangible heritage from different locations and it would be hard to capture the breadth of such differences adequately.

One characteristic concept behind ICH is that no one form is more legitimate than another as long as they are equally authentic. Each is an interpretation or transmission from an older generation. Although certain groups may advocate that their version of a story, dance or myth is more accurate, one form cannot be documented to the exclusion of others. Anthropologists have in the past filmed and documented aspects of intangible heritage. However, attempting to ‘preserve’ ICH through the maintenance of forms documented in the past can create a culture that is living in a sustained museum-like environment, one that is stagnant.

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Chapter 4

Some of these issues can be explored further through an examination of the use of terminology used for heritage management. Terms such as ‘preserve’, ‘protect’ and ‘conserve’, project the notion of maintaining that which is old, keeping it in an unaltered condition, preventing degradation or loss and guarding from misuse/overuse. These terms are generally not appropriate for intangible cultural heritage. Even ‘loss’ or ‘degradation’ can be a natural progression in the interpretation of culture. For example, the ceremony of chol mlop (entering the shade) in Cambodia has often been said to have vanished, however, there are aspects of the wedding ceremony that women undergo which are adaptations of chol mlop.99 Although it is generally not practiced as an extended ceremony on its own anymore, the reinterpretation to display themes of chol mlop in the wedding ceremony represents a continuation of intangible heritage. By documenting an item and preserving something based on a description you can prevent that element of intangible heritage from evolving and altering, over time creating a museum like environment. Chol mlop has been dramatically altered to meet changing lifestyles. The amalgamation with another ceremony over time may be seen as a natural progression in a developing culture.

There are ways in which culture can be recreated which maintain central themes. For example, Bertrand notes that the increasing use of popular theatre traditions in the dramatisation of spirit possession in Cambodia ‘is testimony to an imaginary reconstitution of Cambodian history through rituals and religious beliefs’.100 Modern pressures and change can often be seen as the enemy of continuing cultural traditions, but this too can encourage rather than diminish aspects of intangible heritage, as in Cambodia, ‘the increasing appearance of mediums around the major towns is testimony to the creative spiritual vitality of Cambodian society and the development of mysticism in confrontation with materialism run wild’.101 Spiritual and cultural development should not be diminished or prevented in the process of ‘preserving’ or ‘protecting’ ICH.

99 Ang Choulean, personal correspondence.
101 Ibid.
4.3.4 Governmental intervention and ICH

One of the consequences of an international normative instrument to protect ICH is that it obligates governments to implement protective measures. This transfers responsibility for heritage preservation to a national level, and requires some degree of governmental intervention. This can have negative consequences on the long term maintenance of cultural heritage depending on the state policies of each government and its political system. This is the situation with many international legal documents and ‘the implications of the various cultural heritage instruments are, of course deeply political’.102 Government intervention can also, in some cases, develop an internal conflict with the objects of the ICH Convention, which focus on providing community with ‘power’ and requiring their participation. In a sense governmental intervention is contradictory to the ‘bottom up’ approach clearly advocated by the Convention, which promotes the need to have localised mechanisms and local policy documents developed by, or in comprehensive consultation with, community groups. Hafstein argues that the protection of ICH justifies governmental intervention which would ‘restructure the practices designated and integrate vernacular culture into official administrative structures’.103

One important consideration with regard to the purpose of the convention and governmental obligations is that some governments are not happy to support power accorded to local communities. Kurin states that:

some governments assume that their own constitutional status enables them to speak for any community of their citizens or inhabitants. They see this as a matter of national sovereignty. They resent having to cede any authority to communities – especially those regarded as marginal as or lower in status than the ruling government.104

A further issue with governmental intervention is established in the way in which governments ‘choose’ which forms of ICH to protect under international law on a

103 Hafstein, above n 88.
104 Kurin, above n 25.
List. This will be dealt with further below, however it should be established that there is an issue with the prestige and attention government bodies receive after nominating an item of ICH to a List. As the Convention clearly seeks for the community to have a central role in its implementation, a way should be ensured so that the community, in addition to the state or governmental representatives, receive prestige, honour and status for an item of ICH.105 There is a risk that an item nominated for listing will be appropriated by government and used for political or touristic purposes as it is known that the item will receive attention after listing occurs.

Kurin presents arguments against government agencies being involved in the protection of ICH. He states that;

the biggest problem with government control over ICH safeguarding is one of freedom and human rights.... Important parts of ICH – such as songs of protest, epics of struggle, knowledge or traditional territorial occupation – may be seen as opposing government positions and practices. Human rights charters, particularly the International Declaration of Human Rights, seek to protect individual and communal forms of expression from onerous governmental control and regulation. Government inventories of cultural practice may seem too much like cultural registries – officialising and de-officialising cultural practice, and allowing for all sorts of misuses of information. Having the government in charge of ICH activities could create uneven relationships of power between cultural regulators and cultural practitioners, where the latter might feel there was undue intrusion into the life of their community.

Kurin also questions the expertise106 that government civil servants possess to ensure transmission, practice and safeguarding of ICH. The protection of ICH, he argues, ‘resists standardisation and runs counter to the formulaic work that is the usual province of the civil service and bureaucracy’. There could be other institutions such as universities, museums or specialist heritage companies or research bodies who could be better suited to the role of ensuring the safeguarding of ICH than government. Kurin concludes that ‘the ICH Convention... could be misused as a

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105 This issue is also discussed by Kurin. Ibid.
106 He suggests the required expertise would include training in linguistics, ethnology, ethno-musicology, folklore and ethno-sciences.
means of government control and regulation of community-based culture in the guise of actually supporting it’ but on the other hand he notes ‘that might happen anyway, with or without the Convention’. There persists the issue of how the Intergovernmental Committee will ensure that every state guarantees the safeguarding of ICH with the widest possible participation of communities without being seen as intervening with state politics and sovereign rights.

4.3.5 Choosing which forms of ICH to protect - The listing process

One of the persisting issues with the ICH Convention is the employment of heritage lists which draw attention to particular examples of ICH. The Convention provides that government bodies nominate forms of intangible heritage to the Representative List of the Intangible Cultural Heritage of Humanity and/or List of Intangible Cultural Heritage in Need of Urgent Safeguarding, potentially allowing them to ‘choose’ what forms of heritage to protect under international law. This has implications for providing governments with a means to culturally profile their nation in line with politically motivated agendas.

Logan argues that some governments promote specific types/forms of heritage to develop particular ideas of what is culturally significant. He uses the example of Australia. In this example he proposes that the current government does not wish to place any emphasis on cultural minorities or cultural diversity but instead spends vast amounts of money, and places a lot of attention, on heritage sites such as Anzac Cove. He argues that Australia promotes cultural heritage but just using a ‘carefully selected group of heritage items as the core around which it is seeking to reshape the nation in the way it wants’. A country can be seen as actively promoting and safeguarding its culture while at the same time developing a biased cultural profile or having politically driven ulterior motives.

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107 Kurin, above n 25.
108 At the time of his paper the government was liberal (conservative). Note that this government has since changed.
Logan develops the argument of governments promoting specific forms of culture as evidence of culture being seen as a threat by such governments. He states that governments with a state cultural majority\textsuperscript{110} see cultural rights as a means of potentially empowering the culturally different minority and providing a mechanism for resistance of government policies. Similarly Symonides argues that ‘among important sources of reservation concerning cultural rights… one should mention fears and suspicion of states that the recognition of the right to different cultural identities, the right of identification with vulnerable groups, in particular minorities and indigenous peoples, may encourage the tendency towards secession and may endanger national unity’.\textsuperscript{111} Following from this, it is believed that as states fear the potential impacts of cultural rights they refuse to sign instruments such as the International Convention for Intangible Cultural Heritage.\textsuperscript{112}

It is a very important issue that governments can use culture and the listing process as a political tool to culturally profile their country. This thesis maintains that the signing of the Convention is not necessarily a safeguard to such measures by Governments of marginalising minority culture or even culture that is seen as threatening or contrary to the state majority. It is argued here that instead the Convention could potentially be used as a very strong mechanism to enable the further marginalisation of groups or rather the promotion of a culture that fits the ideals of the current government by only choosing specific forms of ICH to protect or promote. This can be done through the central safeguarding tool of the Convention, which is the use of lists.

It has already been argued above that no one form of ICH is more legitimate than another. All have relevance to the person who practices that cultural heritage. However, the essence of a list is that it is selective causing some forms to be selected over others. By providing increased publicity and attention to one item through the

\begin{quote}
\textsuperscript{110} This is where the majority of the population belongs to one cultural group which is the same as that of the government.
\textsuperscript{112} Symonides notes that this fear was the reason that the introduction of cultural rights in the Charter of the United Nations was blocked during the San Francisco Conference in June 1945. Ibid.
\end{quote}
listing process, it can present the implication that some intangible forms are more important, valued or significant. This prioritisation can have negative impacts both on the item listed and those not listed. This may result in those not listed to be deemed unworthy, be seen as unimportant and fall into disuse or lose value in the eyes of practitioners.

An item that is not listed may become less respected by people. It may no longer be taught or practiced. An item that is listed may receive unregulated attention and be exploited by those outside of the community. As such, from a theoretical standpoint, it is arguable that the use of a list as a mechanism for safeguarding is generally an inappropriate approach for intangible cultural heritage.

In addition to the effect of listing on local communities, we should also consider how much input a local community has on what ICH gets listed. Is it really the local community who chooses what ICH is protected? Of course, the Convention insists that the listing process is done with the ‘widest possible participation of the community ... and with their free, prior and informed consent’ and the community should have a significant role in choosing what should be protected. The argument presented in this chapter advances the position of UNESCO in setting aside ‘a fundamental role for practicing communities in the designation of their intangible heritage’.

However, we have yet to see the extent of local level implementation of cultural heritage preservation. Indeed, the only attempt by UNESCO to prevent government use of the listing process as a political tool is to ensure the active participation of the local community. However, it is still the government of States Parties that makes applications to UNESCO as established in 1.2 of the Operational Directives. It is absolutely correct that the local community should have control over their own heritage, but it should not have to ‘choose’ what forms are important or even representative. The mechanism for safeguarding should not involve a listing process.

113 Hafstein, above n 88, x. Hafstein notes that this is ‘a role allotted to researchers and specialists under the earlier archival paradigm’.
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The final consideration with the listing process is what ‘form’ elements of ICH are listed in. In order to list something, it first must be described and elements established in writing. At least this is the process established by the intergovernmental committee in the Operational Directives under Chapter 1. The listing process outlined in Chapter 1 of the Operational Directives (and clarified in Forms ICH-01 and ICH-02) requires the documentation and description of the intangible element being nominated for inscription. Field research conducted at the Angkor World Heritage Site has shown that the practice of intangible elements differs, in some cases enormously, between provincial areas, districts, villages and even within a village. How can such variation be documented or ensure that variation is respected and understood? Documenting and describing items of ICH is a very difficult thing to do due to their fluid nature and constant recreation.

Bak’s conclusions from his research on ICH in Korea illustrate these concerns. He found that:

More often than not, intangible heritages have been orally transmitted. For this reason, variation within the heritage has been large, and the varied forms have been treated as equally meaningful diverse forms. We have often witnessed that once the heritage is recorded (as is often done for preservation purposes), the recorded version instantly acquires the aura of authenticity and the other forms are relegated to peripheral status. Homogenization, standardization, and fossilization of cultural heritage seem to be some inevitable consequences of this process.114

4.4 Protecting ICH and Human Rights: an approach to the legal protection of ICH

As outlined previously cultural rights are established as an integral part of the international human rights framework115 and are important for the maintenance of

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115 See analysis of cultural rights documents in Chapter 2. Instilled in the International Bill of Rights; Articles 22 and 27 of the Universal Declaration of Human Rights (1948), Article 15 of the International Covenant for Economic, Social and Cultural Rights (1966) and Article 27 of the International Covenant
cultural diversity and the protection of cultural heritage.\textsuperscript{116} This is clearly acknowledged within the UN Commission on Culture and Development’s report ‘Our Creative Diversity’.\textsuperscript{117} However, it is also argued by Logan that cultural rights, as a form of human rights, is a concept that is often ignored or misunderstood by scholars in the cultural heritage field and is an area that is vastly under-theorised.\textsuperscript{118} It is proposed here that cultural rights are particularly significant in ensuring the practice of, transmission of and deference for intangible cultural heritage and form the foundational precept for an approach to the legal ‘protection’ of intangible cultural heritage. This approach attempts to curtail the potential impacts of safeguarding issues as presented above.

The theory of cultural rights has often focused on the maintenance of cultural identity and the allocation of cultural rights as individual or group rights. Individual rights are globally recognised. An individual right may be the enjoyment of culture – the right to practice, transmit and control cultural heritage. Several academics have theorised that as individuals collectively form a group or community, such rights are transposed onto that group.

If globally diverse in its expression, culture is a universally present matrix shaping the range and kinds of choices people make. Any failure to recognize cultural experience as intrinsic in this way amounts to a limit upon individual freedoms. Cultural rights as individual freedoms are thus also collective rights.\textsuperscript{119}

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\textsuperscript{116} The importance of such rights in spite of arguments for cultural relativism is established in Chapter 2.

\textsuperscript{117} The report explicitly states that cultural rights are human rights and are a necessity for the maintenance of cultural diversity. UN Commission on Culture and Development. above n 79, 55.


\textsuperscript{119} Albro and Bauer, above n 111.
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Therefore, cultural rights can be seen as both an individual and a group or community right and the employment of cultural rights leads to more than the protection of cultural identity, it can reduce exploitation and cultural assimilation. Within academic discourse, the discussion of cultural rights may not be well developed; nonetheless there has been acknowledgement of their legitimate place within the human rights dialogue. However, as Renteln establishes ‘although cultural rights are crucial for the maintenance of individual and group identities, domestic legal systems have seldom afforded them official protection’.\footnote{Alison Dundes Renteln, 'Reflections on the Theory and Practice of Cultural Rights' in American Society for International Law (ed), \textit{International Cultural Law: Looking Back and Looking Ahead} (2006) 324.}

The important role that cultural rights can play in the protection of intangible heritage has been recognised before. It is been suggested by Logan\footnote{Logan, above n 102.} that ‘we might – indeed must’ use the notion of human rights when utilising the safeguarding mechanisms of the ICH Convention. Indeed, Kuruk argues that the ICH Convention is not as strong in advocating human rights as it could have been. He states that ‘the ICH Convention could have affirmed the inalienable rights of indigenous communities to their ICH’.\footnote{Kuruk, above n 18.}

This is true in the sense that cultural rights and minority rights to ICH are not specifically established nor mentioned within the Articles of the Convention. However, as the 2003 Intangible Heritage Convention is grounded in and inextricably linked with human rights as suggested by the first paragraph of the preamble and, as was argued previously, it is asserted here that cultural rights are a fundamental, although implicit, principle of the Convention.

The foremost paragraph of the Convention states that the Convention 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’. Within the International Covenant on Economic, Social and Cultural Rights it is established that everyone should be able to enjoy cultural rights. Article 1 states that ‘peoples have the right to freely pursue their cultural
development’. This article implies that culture should develop and change. Such cultural development is counter to the ‘freezing’ of culture that can result through the listing of specific documented forms of ICH.

The proposal to integrate cultural rights into heritage protection and be the foundation of legal and policy documents is not a novel concept. The precepts of cultural rights have been integrated with the protection of cultural heritage previously, as indicated by the ASEAN Declaration on Cultural Heritage (2000).

4.4.1 ASEAN Declaration on Cultural Heritage

The preamble to the ASEAN Declaration mentions that the relevant states\textsuperscript{123} are cognizant of the aspiration for:

Equal access to cultural opportunities, equal participation in cultural creativity and decision-making and deep respect for the diversity of cultures and identities in ASEAN, without distinction as to nationality, race, ethnicity, sex, language or religion.

The Declaration affirms ‘cultural rights and freedoms... and that the creative communities of human persons in ASEAN... should be the principal beneficiary of, and participate actively in the realization of these [sic] heritage, expressions and rights’ and implores states to ensure the ‘protection and promotion of ASEAN cultural heritage and cultural rights’. Furthermore the Declaration directly links these rights to intangible heritage.

The Declaration states that ‘Member Countries shall cooperate to sustain and preserve worthy living traditions and folkways and protect their living bearers in recognition of peoples’ right to their own culture’.\textsuperscript{124} In addition the Declaration provides approaches to meet this commitment:

Member Countries shall design both formal and non-formal learning programs for living traditions, both in rural and urban settings, stressing on the dignity and wisdom

\textsuperscript{123} These States are Brunei Darussalam, Cambodia, Indonesia, Lao People’s Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

\textsuperscript{124} ASEAN Declaration on Cultural Heritage, 3.
of these traditions and promoting creative diversity and alternative world views and values. Member Countries shall also endeavour to set up centers for indigenous knowledge and wisdom in communities for the documentation and promotion of traditional artistic or technical processes; and to institute a system of awards and recognition for the living bearers of worthy living traditions or human living treasures who are persons embodying the highest degree of particular cultural skills and techniques.

The focus of these approaches, i.e. on education and community-level safeguarding measures, reflects the underlying principles of the ICH Convention; however it places them within a cultural rights framework. Many of the approaches advocated in the Declaration have been implemented by Asian countries, as the discussion of Thailand, Vietnam and Japan above demonstrates, and are appropriate means of safeguarding ICH.

It is advocated in this thesis that the aim of ICH legislation should not be to create legal requirements to carry out and maintain certain practices or modes of ICH. Such legal requirements would impose potentially unreasonable burdens on members of society or the practitioners of ICH, whether these are economic burdens or take another form. Nor should legislation dictate the way that certain practices must be carried out, despite the situation, as discussed above, where there may be issues ensuring the authenticity of cultural expressions. Instead, legislation, particularly domestic legislation, aiming to conserve ICH should establish a community, group or individuals right to carry out cultural heritage practices; it should protect the rights of practitioners to their ICH and prevent exploitation. Establishing a group’s or person’s right to practice ICH includes legislating the right to access significant sites (such as temples or spiritual locations), the right to disseminate information on the cultural heritage and the right to create, access and use any items that are needed (such as musical instruments). Legislation should not dictate the occurrence or mode of a particular form of ICH (this again should be determined solely by the original

125 For a brief discussion of collective rights and cultural rights see Janet Blake, 'Some Thoughts on 'Communities', 'Groups' and 'Individuals' in International Law' (Paper presented at the UNESCO-ACCU Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage, Tokyo, Japan, 13-15 March 2006).
practitioners of that ICH) but it should emphasise (and perhaps even require) the use of education and information dissemination to increase awareness and encourage cultural practices. Finally, there should be allowance for the development of cultural elements within the community, providing for their change and variation between specific community groups.

4.5 Cultural Sensitivity and ICH Protection

Among academic analysts there is awareness that ‘different attitudes towards intangible cultural values in monuments and sites between Western and Eastern Asian countries exist which affect the preservation and conservation practice’. The interpretation of heritage conservation is very diverse among different countries and this should be reflected in legal and policy documents. It is proposed here that within Asian societies, the tangible structures of buildings are used as a medium to express spiritual beliefs which themselves are primary. This is not to say that this is never the case outside Asia; however it is particularly common in this region. Fu states that ‘in traditional societies in Eastern Asian countries, the idea of sacred was strongly presented and represented in the built environment. In order to establish a link between the human and the celestial worlds, people in the past erected temples and endowed many buildings with cosmological meaning through which they come to form the sacred part of the settlement’. These buildings and their character of sacredness are central to the social, psychological and spiritual life of the society. It may be for this reason that when some buildings fall into ruin, they lose all their value and as such complete restoration is needed to maintain the spiritual links and the health of the society. As such there are cases where;

the ideas of ‘ruins’, ‘fragmental heritage’ or ‘partially lost’ are not accepted by many people in East Asian countries... they tend to think the ‘completeness’ of the cultural

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126 Chao-Ching, above n 29.
127 Chapter 7 examines in more detail Cambodian (khmer) heritage ideologies and their relationship with law.
128 Chao-Ching, above n 29.
heritage, especially its appearance, is an absolute must and the most important matter in conservation.\textsuperscript{129}

Japan, as discussed previously, is an example where complete restoration of structures is conducted to maintain their spiritual links. It may be seen that as there are different cultural values present within different societies, the way heritage is perceived and differs in the way it should be safeguarded.

As argued above, human rights are an approach that can be utilised to protect ICH. Merry proposed that ‘in order for human rights ideas to be effective… they need to be translated into local terms and situated in local contexts of power and meaning’.\textsuperscript{130}

The same, it is argued, is also the case for cultural heritage policies. It is of utmost importance that any legislation that intends to protect the ICH of a people is culturally specific and developed by, or jointly with, the people who are affected. While laws may be drafted to meet international legal obligations, these obligations should be assimilated with local conservation ideologies. In this respect, cultural sensitivity is closely intertwined with cultural rights. It has been argued that:

[T]he protection of cultural and intellectual property is connected fundamentally with the realisation of … self determination of indigenous peoples. Traditional knowledge of values, … social organisation, managing ecosystems, maintaining harmony amongst peoples and respecting the lands is embedded in arts, songs, poetry and literature which must be learned and renewed by each succeeding generation of indigenous children. These rich and varied expressions of the specific identity of each indigenous peoples provide the required information for maintaining, developing and if necessary, restoring indigenous societies in all their aspects.\textsuperscript{131}

It is important that the people affected by cultural policies and laws are able to have a role in the control and creation of those policies and laws and in this way ensure that such policies and laws are within an appropriate cultural context.

\textsuperscript{129} Ibid.
\textsuperscript{130} Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (2006).
4.6 Conclusion

Part I of this thesis has presented the current state of international ICH law and an analytical examination of the safeguarding of ICH and issues that surround it. It is argued here that cultural sensitivity is fundamental to ensure that appropriate measures are developed to safeguard ICH. Furthermore, it is considered that the most successful measures utilise an approach based on human rights principles. These conclusions are largely founded on a theoretical assessment. As Logan points out when discussing the legal protection of ICH, ‘there remains a large gap between theory and what happens out there in the ‘real world’’. The following chapters will present the heritage law of Angkor and its ICH and will include the application, and the testing, of these theoretical arguments.

132 Logan, above n 102.
PART II  Safeguarding Intangible Cultural Heritage at Angkor
Chapter 5

5. Heritage Law and Angkor

This chapter examines heritage legislation and heritage protection in Cambodia. The analysis focuses specifically on the World Heritage Site (WHS) of Angkor. The chapter is divided into four sections. The first section presents the legal and policy approaches for protecting heritage in Cambodia. The structure of this section reflects the three main phases of heritage protection at Angkor:

i. The first phase (3.1) corresponds to the laws and policies implemented by the French from the late 19th century,

ii. The second phase (3.2) corresponds to the listing of Angkor on the World Heritage List in 1992, and

iii. The final phase (3.3) corresponds with laws and policies that have been drafted since the creation of the Angkor WHS.

In the second section of the chapter, the laws and policies outlined in the first section are critiqued and some limitations are outlined. The third section of the chapter presents a discussion of the heritage discourse within Cambodia and at Angkor. This discussion highlights that the understanding of what comprises heritage in Cambodia and at Angkor, and the need for its protection, is inconsistent with that reflected by legal and policy measures. The heritage discourse, unlike the legislation, is not focused solely on tangible heritage. In the final section of this chapter, I contend that the legal protection currently awarded to Angkor is inadequate. This contention is based on international law protecting intangible cultural heritage and the academic discourse.

5.1 Legal Aspects of Angkor Pre-World Heritage Listing

The first heritage laws to be implemented in Cambodia were drafted by the French. This occurred during the period that Cambodia was part of the French Protectorate. One of the primary rationales behind the French interest in Indochina was the mission civilisatrice which implied that:
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France bore a moral responsibility to bring its ‘superior civilization’ – western government, rational administration, education, medicine, morals, capitalist economies – to other peoples [however] this perspective, which tended toward assumptions of inferiority and racism in the colonial context, gave rise to deprecation and stereotypes of non-western cultures.¹

France felt obligated to implement French cultural ideals within Indochina. They sought to protect historical sites for themselves, as French assets, because the ‘colonial subjects were too primitive to rule themselves’.² Since the late 19th Century France controlled legal matters within Cambodia. Although laws were still passed by Royal Decree and, as such, they were signed by the Cambodian king, this was only done with the written consent of the French Resident General.³ France’s civilizing mission was particularly focused on the temple city of Angkor. Some French nationals felt that the colonialists were ‘the legitimate inheritors of this ancient Khmer civilization’.⁴

1898 Arrêté Portant règlement pour la mission archéologique d’indo-chine⁵

This Arrêté,⁶ created on 15th December 1898, was the first step taken by the French to protect and study cultural heritage. The Arrêté outlines the creation of the Permanent Archaeological Mission of Indochina. This mission was established in Saigon and its duty was:⁷

i. The philological and archaeological exploration of the Indochina peninsula.

ii. To promote knowledge of Indochina’s history, monuments and idioms.

² The French viewed Cambodians as being ‘backward’ and has been discussed previously they did not associate the lost city of Angkor or the temple sites with the modern inhabitants. As such France felt they had a legitimate right to claim this heritage as theirs, belonging to L’Indochine Française. Indeed, the French efforts to protect this heritage was seen as “French colonizing genius”. Ibid.
³ Ibid. Within Cambodia there was a national Resident General and Resident of Siem Reap who acted as administrative officials for the Protectorate.
⁴ Ibid.
⁵ Journal Officiel de l’Indo-chine, 1ère partie, 1899, 99 (BEFEO No.1 1901, 67).
⁶ An Arrêté is an ordinance, decree or by law created by the colonial administration.
⁷ Art. 2 of 1989 Arrêté.
iii. To contribute to the scholarly study of the regions and civilizations neighbouring India, China and Malaysia.

A presidential decree was passed in January 1900 to rename the Permanent Mission as the École Française d'Extrême-Orient (EFEO) or French School of the Far East. A further decree was passed in February 1900 to officially establish of the EFEO. In 1902 the EFEO moved its headquarters to Hanoi.\(^8\)

In 1907 the French Government assigned the EFEO the task of conserving the ‘Angkor archaeological site’ within the French Protectorate.\(^9\) To assist in this mission, the EFEO created the Dépôt de la Conservation d’Angkor in Siem Reap, commonly known as Angkor Conservation, in 1908. The Angkor Conservation was the French base of restoration work and heritage protection until Cambodia’s independence in 1953. Angkor Conservation houses many important freestanding statues and lintels, cornices and other Angkorian stonework that was taken from the temples for safekeeping. After 1953, the EFEO continued to be responsible for most of the restoration work at Angkor and they supervised the operations of the Angkor Conservation, although they were not based within the Angkor Conservation. They were compelled to leave their restoration activities in 1975 when war broke out.

In 1992 the EFEO re-established their base in Siem Reap and since this time they have continued many restoration projects at Angkor. They now work alongside many other international restoration teams.

**1900 French decision on cultural property in Indochina**

Arrêté du 9 mars 1900 relatif à la conservation en Indochine des monuments et objects ayant un intérêt historique ou artistique\(^10\) (Conservation of Monuments in Indochina of artistic or historic significance) was signed in Hanoi on 9th March 1900 by the director of civil affairs, Paul Doumer. The Arrêté is 23 Articles long and is

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\(^9\) By this time the Protectorate had been extended to the provinces of Siem Reap, Battambang and Sisophon. 
divided into four sections. The first section outlines the preservation of buildings and monuments. It provides for the classification of structures of artistic or historic value and provides that such structures shall not be destroyed, even in part, nor be restored, repaired or modified without permission.\(^{11}\) The second section relates to movable items. Article 10 states that these items, such as statues, of artistic or historical value will be classified by the EFEO. Article 13 clarifies the extent to which French interests appropriated Cambodian heritage as their own, as it states that objects from local, provincial or municipal areas may be restored, repaired, sold, gifted or exchanged with permission from the Governor General.

The third section of the Arrêté deals with excavations and discoveries. Article 16 states that any discovery of monuments, ruins, inscriptions or objects must be reported to the Chief Administrator. It also states that any discoveries form part of the public domain and any land shall be transferred in part or whole for public use. The final section states that no monument or object may be moved\(^{12}\) or exported\(^{13}\) without permission and cedes authority to the EFEO to oversee historic monuments and other antiquities of Indochina.\(^{14}\)

### 1908 Judicial proceedings and ‘western’ heritage management

In 1908 Jean Commaille (first European curator of EFEO, Siem Reap) sent two Vietnamese to the Resident of Siem Reap for referral to judicial proceedings. The accused had been “caught engraving their name or some inscription onto the walls of Angkor Wat with a knife”\(^{15}\). Commaille citing the 1900 French law on cultural property found that this practice was now “formally forbidden”. These actions may be suggestive of the new focus on western heritage management implemented by the French and EFEO. Such management practices also lead in 1911 to the passing of a Royal Ordinance defining perimeters around monument groups at Angkor. The Ordinance dated 31 March 1911 defined the perimeters for the ruins of Angkor.

\(^{11}\) Article, 1 and 4.  
\(^{12}\) Article 19.  
\(^{13}\) Article 20.  
\(^{14}\) Article 22.  
\(^{15}\) Penny Edwards, ‘Reading Cambodian pasts, presents and futures through graffiti’ in L. C Ollier and T Winter (eds), Expressions of Cambodia: the politics of tradition, identity and change (2006) 27.
notes that in the Ordinance a 200 meter zone of protection was classified around the most important monuments.  

This western style of management and the application of legislation for the protection of the temples is quite clear in a letter addressed to Henri Marchal (second curator at the EFEO, Siem Reap) by Résident Supérieur Helgoualch in 1922. Helgoualch urged Marchal to erect notices ‘warning the public of the legal consequences of any defacement of these protected monuments’.

This was not the first time that damage to the temples had been noted by the colonial administration. In 1903 Louis Finot wrote about damage and looting at Phnom Baset located to the north of Phnom Penh. It was not, however the general public, as Helgoualch feared, that was responsible for the damage, as Finot wrote that the pillaging was being done by European collectors.

**Early trafficking of antiquities.**

In 1923 André Malraux, along with his wife and another companion, attempted to remove 800 kg of bas reliefs from Banteay Srei. They were caught in Phnom Penh and sent before a judge. It has been said that Malraux was sentenced to three years in jail; however he never served a day of that sentence. The court also ordered the return of the bas reliefs to their original location, which was complied with. In the case, Malraux argued that the monuments were *res nullius* and therefore belonged to nobody. His argument was overruled, not because the Angkorian temple was Cambodian property but, by the fact that France had acquired ‘property rights’ over Cambodia when it became a French Protectorate. It was also argued by the prosecutor that, particularly in the Angkor region, the EFEO had catalogued and classified the

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17 Edwards, above n 15, 28.
18 Louis Finot, 'Phnom Baset' (1903) 3(3) *Bulletin de l'Ecole française d'Extrême-Orient* 63.
19 André Malraux travelled to Cambodia on an exploratory expedition. He was an author and later became France’s first Minister of Cultural Affairs.
21 Ibid.
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temples, including Banteay Srei, therefore indicating that the colonial administration knew of their existence and it could not be *res nullius*.

**1924-1926 changes to heritage law and management at Angkor**

 Possibly as a result of the increasing loss of heritage in Indochina and the high profile case of Malraux, significant changes were made to heritage legislation from 1924 to 1926. In December 1924 a Decree was passed which established authority for the application of the 1913 French law on historical monuments to Indochina. In February 1925 the decree was promulgated, officially applying the 1913 French law. The law outlines the classification and protection of historic monuments in 32 Articles. This law expands on the earlier 1900 Arrêté by establishing punishments for actions contrary to those specified.

On the 15th and 30th April 1925, further decisions were enacted for the implementation of the Decree. These included outlining the classification of historic buildings and various objects in Indochina belonging to France22 and an Arrêté regulating details for the implementation of the Decree of 23 December 1924.23

Changes were also made in 1925 and 1926 at Angkor. In October 1925 ‘a small, but clearly delimited area was officially declared as the Angkor Archaeological Park and managed’.24 This was a more specific archaeological reserve than that outlined by the 1911 ordinance. Article 1 denotes that the declaration of the Archaeological Park is designed to ‘ensure maintenance and conservation of these monuments, their guarding by assigned staff, and improved conditions for access and movement’. As a result, there was an increase in police presence at Angkor to counter the removal of objects and breakages in the temples.25 The Arrêté established permits for visiting the monuments and for painting, drawing, photographing or filming. The work of the

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22 Arrêté classant parmi les monuments historiques de l'Indochine certains immeubles et objets mobiliers divers appartenant a l’Etat français.

23 Arrêté portant réglementation de détail pour l’application du décret du 23 décembre 1924.


25 Edwards, above n 15, 28.
EFEO is again clarified in this document. Article 7 states that the programme of work including remediation, creation of access roads, forest management etc will be reviewed by the resident in agreement with the director of the EFEO. An important contribution to this Arrêté is the recognition of local communities within the delegated Angkor Park. Power is assumed to manage these communities. Article 8 provides that the ‘Resident Superior of Cambodia will decide all relevant regulations regarding the right of grazing animals, hunting rights, fishing, movement and settlement of indigenous people’.

The management of the local communities within the Park is further clarified in the 1926 Arrêté establishing the limits of the Angkor Park.

> The villages in the Angkor Park will continue to enjoy the right of fishing and cattle grazing. The animals will, however, and under penalty of fine, be kept in view.... The straying of animals on pavements and terraces of Angkor is strictly prohibited. The villages will continue their usual crops such as they exist at the date of this Order.26

Limitations are put in place within Articles 3 and 5. Article 3 establishes that hunting is prohibited in Angkor Park and Article 5 establishes that no new agriculture beyond that which already exists is allowed, along with bans on the clearing and conversion of forests and the construction or modification of roads. It should be highlighted that within the management of the Park, the land usage rights of the local communities are maintained.

1929 Amendments to Angkor regulations

A Decree dated 30 September 1929 made amendments to the ‘preserved zone’ established in 1925 and the regulations established in 1926.27 The amendments included changes to the fees charged for entrance and photography etc. It should be noted in Article 8 that there is exemption of indigenous peoples or other foreign Asians visiting Angkor ‘for a religious manner’ from paying entrance fees. Thus there must have been recognition of the religious function of the monuments. This has

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26 Article 4.
significant implications for contemporary religious values and the recognition of the longstanding spirituality of the site.

**Early management issues 1920-1950**

The 1920s saw not only the introduction of specific legislation for the protection of heritage in Cambodia by the French colonial administration, but it also saw the acknowledgement of several management issues which were to continue throughout the French administration. Today, while the era and the administrative bodies may be different, many of the same issues are evident.

After the 1925 legislation and the fixing of the park borders of the Parc d’Angkor by joint decree between the EFEO Conservator and the Resident Superior of Cambodia, new management policies were introduced. These policies included a reorganisation of the EFEO at Angkor, creation of boundary markers, establishment of a forestry reserve and the introduction of tourism management. Tourism management changes included the introduction of a guardian service, guide service and pass system. However, it was not long before the EFEO began to have issues with the management of the Parc d’Angkor. A letter from the EFEO Angkor conservator Marchal in November 1927 suggests that the EFEO is struggling to manage Angkor due to both geographical limits and the wide range of responsibilities. He writes that while it is possible to manage the temples within a defined park boundary, roads are being built outside these boundaries and tourists are visiting sites where there is no supervision and where the Park regulations do not apply. Therefore it is hard to control looting and visitor behaviour. He also implies a potential conflict between the EFEO and the Resident of Siem Reap (equivalent to the modern provincial governor) as the Resident controls the forestry service and public works.

These issues became more controversial in the early 1930s. In this period, the EFEO had several conflicts with the Resident of Siem Reap (in effect, the local authorities). The Resident of Siem Reap demanded that the EFEO restore several bridges along the road to Preah Khan, Kampong Svay via Beng Melea. However, the EFEO responded

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by noting that matters of tourism are not always in accordance with matters of archaeology. The director of the EFEO requested that there be a better understanding of the roles of people within Siem Reap.\textsuperscript{29} A second incident is recorded in 1931 where the EFEO complained to the Resident General of Cambodia that the Resident of Siem Reap consistently ignored laws and protocols relating to historical monuments. In particular, he moved an Angkorian boundary marker to a Wat in Siem Reap which was then painted. The Resident of Siem Reap argued that this was done on the request of ‘indigenous authorities’ and regardless of the Arrêté governing his power in Siem Reap province and which makes no mention that his power is decreased within the archaeological zone of Angkor. The EFEO wrote in November 1931 that while the Resident of Siem Reap had administrative powers within the park, the laws and regulations passed in the 1920s gave the EFEO jurisdiction and responsibility for built and moveable heritage. In early 1932 the Resident General of Cambodia confirmed the jurisdiction of EFEO over Angkor and reminded the Resident of Siem Reap to respect this.

Consistently the issues of theft and management arose from the late 1930s to the 1950s. The EFEO continued to have problems protecting monuments outside of the central Angkor area and mentioned several particular incidents of theft. In the 1930s forestry issues also became apparent. The EFEO wanted to impose limits on forestry practices around the monuments however they were aware of the potential impacts of such restrictions. Parmentier wrote that the EFEO should only impose a one kilometre zone preventing forestry around the monuments as the best way to ensure respect for the EFEO was to avoid decisions that appeared tyrannical.\textsuperscript{30}

1956 Bilateral treaty between France and Cambodia

In 1956 a bilateral treaty was signed that entrusted the Angkor Conservation Office to the EFEO. The treaty ensured that the EFEO maintained control over the safeguarding measures at Angkor even after Cambodia had gained independence from France in

\textsuperscript{29} EFEO Archives, Carton 37 Dossier 1909-1939 Section R.5 Subsection Conservation d’Angkor.
\textsuperscript{30} EFEO Archives, Carton 4 Monuments Historiques et Service Archaeologique 1904-1924, Dossier Service Archaeologique d’Indochine/ correspondence de M. Henri Parmentier 1927 at 1931-1932.
1953. Under the treaty, the EFEO was responsible for supervising the work of Angkor Conservation, pursuing archaeological research and maintaining the temples. The management of Angkor Conservation was conducted by both the Cambodian government and the EFEO. This duty was again renewed under a second treaty signed in 1966.31

**Heritage legislation and the Parc d’Angkor 1960-1990**

The legislation established in the 1920s to manage Angkor continued almost unchanged until Cambodia gained independence from France. Even after independence minor amendments were made to the legislation. The principal changes within the documents were the reassigning of the roles of key decision makers to the Cambodian authorities. The legislation was last revised in 1968.32

The heritage legislation was temporarily invalidated during the period of internal conflict in the 1970s. Despite the commonly-accepted phase of the Khmer Rouge regime being from 1975-1979, in fact the Khmer Rouge was active around Angkor from the early 1970s and continued to be active in the area until the 1990s.33 While the temples were used by military groups, both Khmer and Vietnamese, during this period there was reasonably minor damage done to the monuments. Greater loss was incurred by the forest resources around the temple site.

Provisions for the protection of heritage were reintroduced in the 1980s by the People’s Revolutionary Council of Cambodia. The French legal regime was a strong influence on Cambodia’s heritage legislation both directly after independence and when legislation was reintroduced after the period of internal conflict in the 1990s. It has been argued that:

> [T]he overall approach and classification system as laid out by the French remained intact. This legal heritage is evident, for example, in the People’s Revolutionary

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31 Royal Government of Cambodia, above n 20.
33 Adele Esposito and Sylvia Nam, 'Siem Reap: Urban Development in the Shadow of Angkor' (Centre for Khmer Studies, 2008).
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Council of Cambodia 1980 ‘Decree on provisions concerning the safeguarding of cultural heritage’ applicable to all moveable and immovable objects of historic or artistic value in public or private possession.34

The submission of the Royal Government of Cambodia declares that the principles of the French legal framework are also evident in Article 24 of the 1989 Constitution of the State of Cambodia, which states that ‘[t]he state shall organize the conservation of ancient monuments and antiquities, restore the various tourist sites and develop tourism and cultural relations with foreign countries’. The continuing influence of the French colonial administration is not that surprising as many Cambodian politicians, diplomats and officials were trained within a French education system and many of them received higher degrees from French institutions.

The important impact of the French cultural heritage regime in Cambodia throughout the 20th century is that it is closely aligned with Western conservation ideals and monument-focused conservation theories. This continues to resonate through Cambodia’s legal framework today, as is shown below.

Cambodia’s current legal structure is hierarchical. The following is the general outline of the hierarchy of law:35

1. Constitution
2. Laws
3. Decrees
4. Sub-Decrees
5. Ministerial Decisions
6. Circulars

During the process of World Heritage listing, and after listing, a number of legal documents at several hierarchical levels have been adopted for the preservation of cultural heritage.

34 Royal Government of Cambodia, above n 20.
5.2 World Heritage Listing

Although Angkor was first listed on the World Heritage List in Danger in late 1992, the phase of World Heritage Listing actually began in 1991 and ended in December 1995. In 1991 Cambodia ratified the UNESCO Convention concerning the Protection of the Word Cultural and Natural Heritage (1972). In 1992 Angkor was temporarily inscribed on the World Heritage List. Permanent inscription was only obtained at the 19th session of the World Heritage Committee (WHC) in December 1995 after certain specific criteria were met. In many cases, these criteria were expressly related to the drafting and adoption of legislative and other safeguarding measures for the preservation and restoration of Angkor. The WHC acknowledged that Cambodia had met 4 of the 5 criteria set out in 1992. Only the enactment of legislation had not yet been achieved. The progress of the Cambodian government was commended, but the WHC committee decided to retain Angkor on the World Heritage List in Danger. The changes to heritage law and policy throughout this phase are examined below.

During the process of the drafting and signing of the Cambodia Peace Accords in the early 1990s, a transitional authority known as the Supreme National Council (SNC) was established in Cambodia. Under the SNC, the legal framework of Cambodia was reviewed with the assistance of foreign legal advisors. Part of this review included the examination of heritage legislation. The review of cultural heritage legislation was highlighted as a result of the proposal to list Angkor on the UNESCO World Heritage List. On November 29, 1991 an aide-mémoire was drafted between UNESCO and the SNC ‘under which UNESCO would coordinate activities (bilateral and multilateral) related to the safeguarding and development of the site of Angkor’.

In 1991 at the 26th General Conference of UNESCO, the Director-General of UNESCO was requested to:

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37 Royal Government of Cambodia, above n 20.
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(a) To implement actions already initiated and to carry out, as far as possible, other activities requested by the Cambodian authorities;

(b) To establish, in collaboration with the Cambodian authorities, the appropriate international mechanism for the preservation and presentation of the Angkor site, with the assistance of experts on Angkor from various countries;

(c) To assist the Cambodian authorities in elaborating the necessary legislative action and in preparing nominations for inclusion in the World Heritage List;

(d) To assist the Cambodian authorities in their efforts to stem vandalism and looting of and illicit trafficking in items of the national cultural heritage, in application of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970);

(e) To assist the Cambodian authorities in the reinforcement of national cultural institutions and in the development of national human resources in the field of culture, in particular through appropriate training activities;

(f) To seek the required extra-budgetary funding to initiate these urgent activities as soon as possible;

(g) To develop a long-term integrated master plan for the preservation, conservation, restoration, presentation and management of the Angkor site and its monuments;

(h) To facilitate the exchange of documentation and research findings.

As a result of this Resolution, UNESCO experts reviewed the legal protection of cultural property. It is important to note that an overwhelming number of these experts were from nations with ‘Western’ heritage management frameworks, that is, frameworks based on heritage norms developed from the dominant discourse surrounding the protection of monumental heritage. This is one of the factors put forward by this thesis as contributing to the current format and content of heritage law. It will be argued further below that the current body of heritage law in Cambodia
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focuses on tangible forms of heritage to the almost total exclusion of any form of intangible heritage.\(^{39}\)

**ICOMOS Advisory Report**

Prior to the listing of the site by the World Heritage Committee, ICOMOS was asked to provide an advisory report to UNESCO outlining the criteria and requirements for inscription of Angkor. ICOMOS provided their advisory report on the nomination of the ‘Archaeological Parks of Angkor, Roluos and Banteay Srei’ in September 1992.\(^{40}\)

The report concluded that the monuments at Angkor are of great value and should be listed on the World Heritage List. However they did note with concern the political situation in Cambodia at the time and lack of site management and legislation. The report states that there ‘can be no doubt regarding the eligibility of the Angkor complex of monuments for inclusion on the World Heritage List. It has indeed been argued, with justification, that their absence devalues the list’.\(^{41}\)

ICOMOS’s final recommendation states that the procedure for inclusion on the World Heritage List should be commenced on the basis of cultural criteria i, ii, iii and iv:\(^{42}\)

(i) The Angkor complex represents the entire range of Khmer art from the 9\(^{th}\) to the 14\(^{th}\) centuries, and includes a number of indisputable artistic masterpieces (e.g. Angkor Vat, the Bayon, Banteay Srei).

(ii) The influence of Khmer art, as developed at Angkor, was a profound one over much of south-east Asia and played a fundamental role in its distinctive evolution.

(iii) The Khmer empire of the 9\(^{th}\)-14\(^{th}\) centuries encompassed much of south-east Asia and played a formative role in the political and cultural development of the region. All that remains of that civilization is its rich heritage of cult structures in brick and stone.

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\(^{39}\) This argument was first proposed in Chapter 1.


\(^{41}\) Ibid, 7.

\(^{42}\) Ibid, 8.
(iv) Khmer architecture evolved largely from that of the Indian sub-continent, from which it soon became clearly distinct as it developed its own special characteristics. Some independently evolved and others acquired from neighbouring cultural traditions. The result was a new artistic horizon in oriental art and architecture.

It is clear that the report has an explicit focus on tangible heritage. Perhaps this is not surprising, given that the mandate of ICOMOS is the conservation of monuments and sites. However, it is remarkable that the recommendations of the body should state that ‘[a]ll that remains of that [Khmer] civilization is its rich heritage of cult structures in brick and stone’ (emphasis added). The report fails to examine any contemporary intangible associations with the monuments at Angkor nor does it give any value to other forms of living heritage present at Angkor.

Sixteenth Session of the World Heritage Committee

At the Sixteenth Session of the World Heritage Committee in December 1992 Angkor was found to have ‘outstanding universal value’ and thus was temporarily inscribed\(^{43}\) on the World Heritage List.

Given the unique situation in Cambodia, which, in accordance with the Paris Accords, has been placed under the temporary administration of the United Nations since July 1991, the Committee has decided to waive some conditions required under the Operational Guidelines and, on the basis of criteria (i), (ii), (iii) and (iv), has inscribed the Angkor site, together with its monuments and its archaeological zones...on the World Heritage List.\(^{44}\)

Wager\(^{45}\) states that the monuments were inscribed on The World Heritage List based upon the following:

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\(^{43}\) As established previously Angkor obtained permanent inscription in 1995.


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(i) Angkor represents a unique artistic achievement, a masterpiece of creative genius;
(ii) It has exerted great influence over a span of time, within a cultural area of the world on developments in architecture, monumental arts and landscaping;
(iii) It bears a unique exceptional testimony to a civilization which has disappeared; and
(iv) It is an outstanding example of an architectural ensemble which illustrates a significant stage in history.

Within the Report,\(^\text{46}\) the World Heritage Committee stressed that this nomination procedure was extraordinary and was not to be taken as a precedent for other nominations. To clarify this point, the Committee established a set of criteria that had to be met before Angkor would be permanently inscribed on the World Heritage List.

In order to deal with the urgent problems of conservation quickly and effectively, the Committee has inscribed the site of Angkor on the List of World Heritage in Danger, and has requested, on the recommendation of ICOMOS, that the authorities concerned take the necessary steps to meet the following conditions:

- Enact adequate protective legislation;
- Establish an adequately staffed national protection agency;
- Establish permanent boundaries based on the UNDP project;
- Define meaningful buffer zones;
- Establish monitoring and coordination of the international conservation effort.\(^\text{47}\)

Decision on the Protection of the Cultural Heritage

In February 1993 following the review of legal documents by UNESCO experts, the SNC adopted a Decision on the Protection of Cultural Heritage.\(^\text{48}\) The articles of this Decision established a National Heritage Protection Authority of Cambodia

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\(^{46}\) UNESCO, above n 44.

\(^{47}\) Ibid 38.

\(^{48}\) The 1992 ICOMOS Advisory report states that this Decision was drafted by M. Ridha Fraoua, an international lawyer, at the request of UNESCO. ICOMOS, above n 40.
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(NHPAC). Article 1 of the Decision specified that its purpose was ‘to protect cultural property against illegal destruction, modification, alteration, excavation, alienation, exportation or importation’. Cultural property is defined in Article 4 as being ‘any work produced by human agency and any natural phenomenon of a scientific, historic, artistic or religious nature which bears witness to a certain stage in the development of a civilization or of the natural world and whose protection is in the public interest’. It is possible that a ‘work’ in this context could include intangible productions such as dance, theatre, rituals or artistic skills. However, the Articles following the definition relate specifically to movable tangible heritage and the scope of this Decision was never tested. This Decision was eventually overturned by later legislation however it was an important step for heritage legislation, as later laws were consistent with much of its content.

UNESCO Draft Plan of Action for the Programme to Protect the Cultural and Natural Heritage of the Angkor Area

In March 1993 the Director-General of UNESCO presented a Report on the Conservation of the Monuments of Angkor. Part of this document included a ‘Draft Plan of Action for the Programme to Protect the Cultural and Natural Heritage of the Angkor Area’. The Plan emphasised that ‘UNESCO is charged with coordinating all national and international efforts intended to safeguard the cultural and natural monuments of the Angkor area and to develop that area’ (emphasis added). The Plan outlines the intended monuments-based work for the safeguarding of Angkor under section III. No mention is made of any other aspect of Angkor aside from the identification, protection, conservation and presentation of monuments and the dangers to these monuments. Participation is mentioned within the Plan however, it refers exclusively to the participation of the international community in the

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49 Decision on the Protection of the Cultural Heritage, Articles 5-7.
51 See the comparison with the 1996 Law on the Protection of Cultural Heritage below.
52 Presented to the Executive Board at their 141st Session. UNESCO, ‘Report by the Director-General on the Conservation of the Monuments of Angkor (141 EX/33)’ (1993).
53 UNESCO, ‘UNESCO Draft Plan of Action for the Programme to Protect the Cultural and Natural Heritage of the Angkor Area’ (1993), Preamble.
safeguarding efforts. The local community, their values and religious use of the monuments, is never stated.

**Tokyo Declaration**

One of the conditions established by the World Heritage Committee for Angkor\(^{54}\) was the need for coordination of the international conservation effort. This condition was met in 1993. In January 1993, France and Japan held a preparatory meeting to discuss the establishment of an intergovernmental committee. It was decided that an Intergovernmental Conference would be held in Tokyo in September/October 1993 to draft the conditions for the intergovernmental mechanism. The Intergovernmental Conference led to the adoption of the Tokyo Declaration on 13\(^{th}\) October. The Declaration set out the establishment of the International Co-ordination Committee for the Safeguarding of Angkor (ICC). The foundation for the ICC meetings was provided as the Declaration stated the agreement ‘to establish, when appropriate, working groups and hold round tables composed of experts nominated by the countries and international organizations which are participants of the Committee’.\(^{55}\)

**Establishment of Protected Cultural Zones in the Siem Reap/ Angkor Region**

UNESCO stated that the listing of Angkor on the World Heritage List was subject to ‘the adoption of a zoning plan and legal framework for protection and management of the site’. This requirement led to the preparation of a Zoning and Environmental Management Plan (ZEMP). The ZEMP project was created at the end of 1992, funded by the United Nations Development Programme (UNDP) and other donors, and conducted by a team of international experts.\(^{56}\) The purpose of the plan was to:

\(^{54}\) 3.13 Criteria (e). UNESCO, above n 44.

\(^{55}\) Tokyo Declaration, 12.

\(^{56}\) Jonathan Wager, ‘Cultural Landscapes of Angkor Region, Cambodia. A Case Study of Planning for a World Heritage Site - The Zoning and Environmental Management Plan for Angkor (ZEMP)’ in Bernd von Droste, Harald Plachter and Mechtild Rössler (eds), *Cultural Landscapes of Universal Value - Components of a Global Strategy* (1995) . Wager was the ZEMP team leader. He noted that some of the 25 experts were Cambodian. However the vast majority were other nationalities and made 2 site visits during the 5 month study period, each visit being only a couple of weeks long.
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[D]elimit appropriate boundaries and zones for protection of the Angkor World Heritage Site and to recommend options for an integrated management framework which would include:

a) Long-term, sustainable and environmentally sound management strategies for the protection of the area’s archaeological, cultural and natural resource;

b) A Framework for integrating the area into the development strategy of Siem Reap Province, taking into account the impact of tourism and opportunities for employment creation, and including land-use zoning and management plans which incorporate environmental, cultural and historic and tourism/development aspects;

c) A legal framework and implementation guidelines;

d) Design of an information and decision making system for future spatial and environmental management of the site; and in a second phase;

e) Professional training for present and future national park administrators in order that they may be able to deal effectively with the complexity of managing the Angkor World Heritage Site, including the special areas of archaeological concern and ecologically sensitive zones within and outside the delimitations of the formally protected zones.57

The ZEMP report established five zones for protection at Angkor, the broadest of which comprises the Province of Siem Reap, and recommended the establishment of a management authority which was referred to as the Angkor Parks Agency. The report attempted to take a broader multidisciplinary approach to management and elements of this included an anthropological assessment of Angkor. From such an assessment, several experts within the ZEMP team made reference to local communities. Wager notes that:

[T]he location of present day villages on ancient dykes provides the continuity with Angkorian and pre-Angkorian settlement...The landscape contains numerous relict

57 Ibid.
features... which are still in use today. These elements give rise to both a relict cultural landscape and a continuing landscape of outstanding cultural significance.\textsuperscript{58}

The ZEMP Discussion Draft makes clear reference to the villages of Angkor within chapter IV – the socio-economic context, noting that they are ‘centuries old’ and the villagers have ‘historical and spiritual ties with their homelands’. Although such references are made, there is still an overwhelming focus on the cultural and natural tangible elements of Angkor throughout the ZEMP and, due to the work of multiple experts, several contradictions are present in the report. For example, some sections of the report recommend that measures should be taken to prevent the damaging land use practices in areas around the temples whereas other sections implore that traditional land use should be encouraged.

The ZEMP was given legal standing in 1994 when it was adopted in the form of a Decree.\textsuperscript{59} Following from the ZEMP report, there are several internal contradictions relating to land use and local communities within the Decree. These are mostly found within Zone 1 (the monumental sites) and Zone 2 (protected archaeological reserves). This area extends over more than 400km\textsuperscript{2} and includes over 100 villages which have existed for generations.\textsuperscript{60} Despite the presence of many ancient communities, Article 8 states that development is prohibited in zone 1 with the exception of essential development for the protection of sites. Article 17 states that within zone 1 residential uses are prohibited and residents should be relocated and given land elsewhere. And yet, Article 14 states that old, traditional rice fields should be maintained in Zone 1, and Article 16 states that in Zone 1 traditional land use should be maintained. It was argued that the ‘ZEMP needs to provide an outline for the realistic preservation of traditional culture, not just a statement of will’.\textsuperscript{61} It has not yet met this expectation.

\textsuperscript{58} Ibid, 145.
\textsuperscript{59} Kret No. 001/NS Dated May 28 1994 Establishing Protected Cultural Zones in the Siem Reap/ Angkor Region and Guidelines for their Management.
\textsuperscript{60} Im Sokrithy, 'Social Values and Community Context' in Richard Mackay and Sharon Sullivan (eds), Angkor: Heritage Values and Issues (2008).
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The ZEMP zones are still theoretically in use today although few elements of the 1994 Decree are consistently complied with, and several aspects of the Decree are no longer applicable. Chapman argues that the ZEMP falls short in the area of implementation. He states that although, following the adoption of the 1994 Decree, it has the force of law, detailed regulations and procedural rules have yet to be adopted.62

Establishment of a National Authority for the Protection and Management of Angkor

In February 1995 the Royal Decree establishing a National Authority for the Protection and Management of Angkor and the Region of Siem Reap was signed.63 The Authority is known as APSARA.64 The Authority is given responsibility for management of Angkor and tourism development within the five zones established under the ZEMP plan. Their jurisdiction is, therefore, stated to extend throughout the whole Siem Reap Province.65 It was originally designed to be an umbrella organisation overseeing the work of several ministries. Recently the Authority has been given more autonomy. It works directly with the ICC and collaborates for specific projects with other Ministries. APSARA continues to be the management body for the World Heritage Site and its current activities are discussed further below and in the following chapter.

Creation of Supreme Council on National Culture

A Royal Decree was passed in February 1995 to define the Supreme Council on National Culture (SCNC).66 This Council is said to be responsible for policy formulation in the domain of national cultural property, in particular in view of protecting and enhancing the national cultural heritage.67 The role of this Council is at present uncertain. It appears that the SCNC is no longer operating as the Ministry of

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63 Royal Decree No. NS/RKT/0295/12.
64 APSARA stands for the Autorité pour la Protection du Site et l’Aménagement de la Région d’Angkor (Authority for Protection and Management of Angkor and the Region of Siem Reap).
65 Article 2.
67 Law on the Protection of Cultural Heritage, Article 5.
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Culture and Fine Arts (established in 1996) is recognized as being responsible for the overall cultural profile of Cambodia, while national cultural policy is subject to periodic review by the Office of the Council of Ministers.

5.3 Law and Policy after World Heritage Listing

From 1996, Cambodia continued to develop its laws and policy for the protection of cultural heritage. Cambodia’s current legal framework for the protection of cultural heritage stems predominantly from the implementation, at the domestic level, of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) and the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972). After the listing of Angkor on the World Heritage List a good deal of focus was placed on the protection of the temples. Many of the instruments drawn up for this purpose drew inspiration from the World Heritage Convention and, therefore utilised the definitions that are established within that document. As many definitions of heritage in Cambodia stem from this international law, it is important to understand how they are defined. Under the World Heritage Convention, cultural heritage consists of monuments, groups of buildings and sites. It is important to note that under the definitions of these categories, intangible heritage is not mentioned.

5.3.1 Legislation/ Legal Documents

Law on the Protection of the Cultural Heritage

At the 19th Session of the WHC in December 1995 it was stated that:

A very complete corpus of laws on cultural protection and related matters drawn up with the support of UNESCO and other international partners, which have been

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68 Royal Decree no NS/RKT/0196/02 of 24 January 1996. Article 2 states that MoCFA shall administer and regulate the cultural and fine arts sectors of the Kingdom of Cambodia.
70 Hereafter ‘World Heritage Convention’ or WHC.
71 Article 1.
approved by the Council of Ministers, is expected to be enacted by the National Assembly.72

The Law on the Protection of Cultural Heritage was enacted in January 1996. It is interesting to note that even in the Preamble of the Law there is no mention of the 1993 Decision on the Protection of the Cultural Heritage, as this Law was clearly a readoption of the Decision with minor amendments and some new phrases included. However, this omission is most likely due to the fact that the only documents referred to are those created after the establishment of the Royal Government of Cambodia in November 1993. The Decision was adopted by the former SNC in February 1993.

The purpose of the Law and the definitions are only slightly altered from the 1993 Decision. Article 1 states that the ‘purpose of this law is to protect national cultural heritage and cultural property in general against illegal destruction, modification, alteration, excavation, alienation, exportation or importation’. National cultural heritage is said to comprise cultural property created or discovered on national territory73 and cultural property is considered to be:

[A]ny work produced by human agency and any natural phenomenon of a scientific, historic, artistic or religious nature which bears witness to a certain stage in the development of a civilization or of the natural world and whose protection is in the public interest.74

Article 4 further requires that specific cultural property is to be registered by sub-decree. To date there are royal decrees relating to the Angkor monuments, Ko Ker and Preah Vihear temples.

As argued above, in relation to the 1993 Decision on Protection of Cultural Heritage, it is possible that the definition of cultural property provided in Article 2 could be interpreted to comprise forms of intangible heritage. Reference can be taken from the Japanese legislation analysed previously.75 Within Japanese legislation there are

72 UNESCO, above n 36, VII.26.
73 Article 2.
74 Article 4.
75 See Chapter 4.
categories of intangible cultural properties. However, the Japanese legislation specifically outlines measures for the safeguarding of such intangible properties. The Cambodian law comprises no such measures. Furthermore, the following articles of the 1996 Law specifically relate to the classification, repair and restoration of sites and objects,\(^{76}\) the trade in antiquities\(^ {77}\) and the discovery of monuments, ruins, ancient objects, remains of inhabited sites, ancient burial sites, engravings etc.\(^ {78}\) The final sections pertain to the import and export of cultural objects.\(^ {79}\) Therefore, while the scope of the definition may incorporate ICH,\(^ {80}\) it is clear that the focus of the law is tangible heritage. This focus was specifically mentioned in the Submission on Cambodian Culture by the Royal Government of Cambodia which stated that the law had a broad scope covering tangible heritage ‘both moveables and immovable, of public or private ownership’.\(^ {81}\) No mention is made to intangible heritage. Finally, the scope and intent of the Law fail to incorporate the elements for safeguarding of ICH as established later by the ICH Convention. As such, it can be concluded that the 1996 Law is, in its current form, inadequate to provide legal protection of ICH.

**Constitutional Provisions**

The Constitution for the Royal Government of Cambodia was adopted on the 21 September 1993. The Constitution is divided into 14 chapters. Some analysts\(^ {82}\) note that the Constitution has three Articles which pertain to cultural heritage. These Articles are found under chapter VI - Education, Culture, Social Affairs.\(^ {83}\) Articles 69-71 relate in to culture.

**Article 69**

The state shall protect and promote Khmer language as required.

The state shall preserve ancient monuments, artefacts and restore historic sites.

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\(^{76}\) Articles 11-27.

\(^{77}\) Articles 31-36.

\(^{78}\) Articles 37-50.

\(^{79}\) Sections 9 and 10, Articles 51-61.

\(^{80}\) This would occur only if ‘work’ as defined by Article 4 can include intangible heritage.

\(^{81}\) Royal Government of Cambodia, above n 20.


\(^{83}\) Royal Government of Cambodia, above n 20.
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Article 70
Any offence affecting cultural and artistic heritage shall carry a severe punishment.

Article 71
The perimeter of the national heritage sites as well as heritage that has been classified as world heritage, shall be considered neutral zones where there shall be no military activity.

It has been argued that these Articles provide ‘a sound basis for legal protection’ of cultural heritage. This may not be accurate. Within these three Articles, reference is made to the protection of culture in general; however specific reference is made to intangible heritage only insofar as it encompasses the protection of language. Furthermore, the protection afforded by these Articles may not be adequate. There has been some lack of compliance of constitutional provisions in relation to heritage protection. For example, although it is counter to Article 71, there has been prolonged military presence at Preah Vihear site throughout 2008 and early 2009. The activity of military forces and military activity at Preah Vihear, both a Cambodian heritage site and a World Heritage Site, is unconstitutional. Further legislative provisions, combined with appropriate implementation and compliance, are needed to ensure that a sound basis exists for the legal protection of cultural heritage in Cambodia.

Although it is argued that additional legislative provisions are needed for the protection of cultural heritage, there are other elements of the Constitution which are worth highlighting. Beyond the Articles found under chapter VI, a broader examination of the Constitution reveals other Articles which have significance for the safeguarding of ICH. The relevant Articles are found under chapter III – The Rights and Obligations of Khmer Citizens. Article 31 stipulates that ‘[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United

84 Ibid.
85 Tension over the temple site caused an increase in military presence from July 2008. In October 2008 fire fights broke out between Thai and Khmer military forces causing injuries and fatalities on both sides. There was some reported damage to the temple structures from shrapnel. As of late January 2009 soldiers were still stationed within the temple complex. Preah Vihear News (2009) <http://prechavihear.com/> at March 5 2009.
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Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights’, Article 32 provides the right to life and Article 35 provides the right to participate actively in the social and cultural life of the nation. In addition Article 41 states ‘Khmer citizens will have freedom of expression’ however no one shall exercise this rights ‘to infringe upon the rights of others [or] to affect the good traditions of society’. Finally, Article 43 gives all Khmer citizens the right to freedom of belief and specifies that the ‘[f]reedom of religious belief and worship shall be guaranteed by the state’.

Legal Documents for Angkor

In 1997, a Sub-Decree establishing the Special Police Corps for the Protection of Cultural Heritage at Angkor was adopted. The police force is known as the Heritage Police in the Angkor area. This Sub-Decree is analysed further below with reference to management issues at Angkor.86

Other legal documents which have been adopted since the listing of Angkor relate to the operation of the APSARA Authority. The structure and function of the Authority has been addressed in two legal instruments; 1999 Royal Decree NS/RKT/0199/18 (also known as the second decree concerning APSARA) and 2008 Sub-Decree No 50 ANK/BK.87 The role of APSARA and their jurisdiction is clarified within the 1999 Decree. Article 6 specifies that the ‘APSARA Authority alone is empowered to organise any event whatsoever in the Angkor zone’ and ‘holds the exclusive right to grant building permits in the overall Angkor site’. In 2008 the Authority was restructured and the specific duties of each department are found within the Sub-Decree. The role of APSARA departments in the safeguarding of ICH since this Sub-Decree was promulgated is examined further below.88

The jurisdiction of the APSARA Authority was extended in 2004 with the recognition of the site of Koh Ker89 and the transfer of this site to the Authority. Koh Ker is

86 See Chapter 6.
87 Sub-Decree regarding the Organisation and Functioning of the Office of the Director-General of the APSARA Authority.
88 See Chapter 6.
89 Royal Decree NS/RKT/0504/070 establishing the site of Koh Ker.
located in Preah Vihear Province to the north east of Siem Reap. APSARA now has authority to create zoning, management, preservation, conservation, development and improvement plans for the site of Koh Ker.90

5.3.2 UNESCO policy

It has been illustrated previously that the work of UNESCO forms a quasi-legislative process and is a direct contributor to the process of cultural policy development. This process has informed a vast majority of Cambodia’s frameworks to protect heritage. Since the early 1990s, UNESCO has been the driving force behind the development of Cambodia’s protective legislation and policies. Through the ICC, UNESCO is instrumental in establishing and directing the programme of work of APSARA and intergovernmental projects to restore the site of Angkor. Throughout the 1990s, the mandate and views of UNESCO officers became the prevailing opinion of the heritage discourse within Cambodia. In many ways, UNESCO opinion still has significant influence on the continuing discourse. This discourse, as expressed in official documents, is presented through the ICC bi-annual meetings.

During the period after World Heritage listing, UNESCO continued the focus on the physical culture. This is evident from the wording and intent of the ICC meetings held throughout this time. Not only was there focus on the restoration of the physical, but communities were seen as a threat to the safeguarding of the monuments. In the APSARA activity report that was presented at the Plenary session of the ICC in June 2000, the UNESCO World Heritage Committee stated that it wanted to be kept informed of efforts to protect and conserve Angkor ‘so as to ensure that such undertakings necessary for the social and economic welfare of the communities do not have any adverse impact on the World Heritage values of the site’. The perception was that people from local communities, who lived and worked around the site, as they had done for many generations, were a danger to the temples. This perception,

90 Article 2.
91 Chapter 2.
92 It has been stated that during the late 20th century ‘the Culture Sector in the organisation [UNESCO] was divided between ‘physical’ and ‘non-physical’ cultural as it was called then. Priority was always given to the former. It was also manifested in the hierarchical positioning of the staff’. Keiko Miura, *Contested Heritage: People of Angkor* (PhD Thesis, University of London, 2004), 2.
perpetuated by UNESCO in the late 1990s, has lead to ‘the social and economic welfare of the local community [being] threatened by the … misconception of the World Heritage values of the site’. 93

The focus on tangible heritage of Angkor, as encapsulated by the ICC discourse, is clear within the 2003 Paris Declaration. This Declaration was drafted at the second Intergovernmental Conference for Angkor. The Declaration notes the success of the ICC to meet the UNESCO goals to preserve the site of Angkor and expresses ‘gratitude to the countries, organizations and scientific institutions that have contributed to the safeguarding of the monuments and preserving the site’ (emphasis added). 94 It is also interesting that the Declaration makes specific reference to the need to ‘direct our efforts in keeping with sustainable development’ away from such a narrow focus on the restoration of sites. As part of this redirection to a new policy area, the Parties to the Declaration ‘stress the importance of seeing to it that the local communities... are involved in the promotion of this policy in order to highlight the diversity of their tangible and intangible cultural resources’. 95

More recently, the UNESCO office in Phnom Penh has been focusing on the protection of intangible and tangible heritage, however the perception of the danger of local communities and the promotion of physical restoration by UNESCO during the 1990s resulted in several legal documents and general policies being developed that marginalised the local population. The examination of UNESCO policy, as presented through the ICC, and further analysis provided within the next chapter, indicates that there have been ongoing ramifications for the management of Angkor. This thesis concludes that it has lead to APSARA essentially sidelining, failing to consider and in some cases actively discouraging a consideration of intangible cultural heritage.

94 The Declaration of Paris 2003, 5.
95 Ibid 11.
5.3.2 Unofficial ‘laws’

Law in Cambodia is not accorded the same influence and authority as it is in many other countries. Frequently, law is not perceived to be found in a written document developed by a legislative body. Instead, law is founded by authority figures and those with status or power. This view is advocated by Miura and as she argues, it is applicable at Angkor in relation to the protection of heritage:

Concerning the law, three kinds are operating in Cambodia: state law, the ‘law of the powerful’, and customary law. In Angkor, state law has little value by itself, for the ‘law’ is in the hands of the powerful and/or authorities, who have selected whichever law or articles of a particular law suit their way of managing the site or have reinterpreted or reproduced some, while ignoring others for their own convenience.

The ‘law of the powerful man’ or the ‘law of the armed’ most of the time has no legal basis, but is imposed on the population on an irregular, opportunistic basis. Since there is no clear distinction between state and non-state activities among civil servants, the ‘law of the powerful/armed’ is the most dominant and effective ‘law’ in Cambodia.

The general population clearly understands this state of affairs and tried to adhere to customary law (including the law of spirits/ancestors and Buddhist law), on which they base their activities and judgements. Customary law is, however, increasingly in conflict with and subordinate to the ‘law of the powerful man’ and is becoming a counterdiscourse.96

The findings of this thesis reflect, to a degree, Miura’s analysis. The importance of the law of spirits and Buddhism to the people who live within the Angkor World Heritage Site is further clarified below in chapter 6. The consequence of these informal ‘laws’ is that Angkor and other heritage sites in Cambodia ‘have become advantageous sites for those who seek power, control, and authority. Their knowledge, ideas, and practices are valid and “legal”, while those of “others” are denied and “illegal”’. 97

96 Miura, above n 92, 157- 158.
97 Ibid 152.
The recognition of the limitations of state or formal laws within Cambodia has also been established by the NGO community, particularly those NGOs which advocate the role of human rights. The Asian Development Bank voices particular misgivings in the effectiveness of Cambodian laws, stating:

Establishment of the Rule of Law in Cambodia is related to the belief that paper (i.e., laws) has real power. That concept is not widely accepted in Cambodia. Rather, the belief is that paper does not have power, people have power. In other words, power comes from a person, a gun, or a government post, not laws. This idea has been historically reinforced in Cambodia with great clarity and cruelty.98

This thesis concludes that, at present, law as developed through legislative process has limitations in Cambodia. Any approach to safeguarding ICH at Angkor needs to be sensitive to this situation. This thesis argues that law can still be a valuable tool for the protection of heritage in Cambodia by establishing a fundamental framework that can be implemented and developed further at a later time. It also is a necessary requirement to meet international legal obligations. However, other measures are also needed to protect the ICH in the current political and social climate. Chapter 8 proposes the use of policy as one potential solution.

5.4 Limitations of Heritage Law and Policy

The legal documents examined above indicate an overwhelming focus on tangible heritage. Intangible heritage is excluded almost entirely. The focus on the tangible began under the French administration and continued throughout the nomination process of Angkor to the World Heritage List (WHL). The influential role of ICOMOS during the nomination procedure further led to a focus on the monuments, rather than the site of Angkor as a whole being nominated. This is despite a developing appreciation of cultural landscapes and associative values of monuments along with the introduction of cultural landscapes as a category under the WHL at the 16th session in 1992. Indeed, even when a site is declared as a cultural landscape,

there can be a focus on the tangible. Segadika reports a similar situation at Tsodilo World Heritage Site, a listed cultural landscape. He states that the evaluation report by ICOMOS failed to make recommendations for the management of intangible heritage. There was also a failure to address intangible heritage in the nomination dossier and site management plan. Likewise, a certain comparison can be drawn between the preservation of Angkor to date and the preservation of World Heritage monuments in Taiwan. Until recently,

[T]he conservation of monuments and sites was limited to the preservation and restoration of the elements of a building without taking into consideration any activities in association with the building. The result only led to many lifeless ancient-looking edifices. Some of the cultural heritage became the living-dead [sic].

The tangible focus at Angkor has, since World Heritage Listing, been perpetuated by the focus on the preservation of monuments within the ICC dialogue and UNESCO policy. The framework laid out for heritage protection during the UNTAC period by non-Cambodian UN lawyers and UNESCO experts has strongly influenced the legislative and policy documents that have been developed in the last 14 years. And, as Osborne reflects, ‘those who are the inheritors of the Western Tradition are not immediately receptive to the religious and cultural underpinnings of the societies that built Pagan and Angkor’. Segadika likewise attributes the failure to manage intangible heritage at Tsodilo WHS to the ‘rather western attitude to heritage management’. This has meant that ‘factors for monitoring intangible heritage have not been given as much emphasis as factors for the conservation and preservation of tangible heritage’.

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100 Fu Chao-Ching, 'Cultural Sensitivity towards Intangible Values in Monuments and Sites - A Comparison between Eastern Asian and Western Countries' (Paper presented at the Scientific Symposium Monuments and Sites in their setting - conserving cultural heritage in changing townscapes and landscapes, Xi'an, China, 2005).
102 Segadika, above n 99, 37.
103 Ibid.
5.4.1 Gaps in the regime protecting Angkor

The predominant preoccupation with the preservation of tangible heritage at Angkor has resulted in an inability of the legislative framework to holistically manage and safeguard the site of Angkor. Analysis of the legal documents highlights a large gap in the regime to adequately protect the World Heritage Site of Angkor. Angkor may be ‘a living museum’, yet the people and living heritage are not the subject of protection measures. The APSARA Authority has dealt almost exclusively with the management of activities within Angkor (i.e. where and how to build structures, organisation of tourist activities and vendors) and the restoration and safeguarding of the temples of Angkor, that is to say the physical fabric of Angkor. APSARA has not to date developed an adequate policy or had a consistent management framework for the safeguarding of intangible cultural heritage in the Park. APSARA has however, as will be shown below, conducted some research that has highlighted the significance and uniqueness of intangible heritage around Angkor which now needs to be translated into policy.

While APSARA continues to be the primary institutional body charged with the protection of Angkor, it should not be forgotten that many international agencies continue to have an influential role through the organ of the ICC. These organisations have most likely caused or at least had a major role in the skewed approach to protection at Angkor, such as the focus on monumental restoration and the exclusion of local communities. Yet, in recent years these organisations are now the ones to suggest that such a monument focus at heritage sites is not adequate. This can be seen through the Paris Declaration.\[104\] It has also been underscored by Miura.

International agencies concerned with the conservation and tourist promotion of heritage sites, such as UNESCO, ICCROM, ICOMOS and WTO, are also increasingly aware of the mistakes made in the past of overemphasizing the protection of monuments and sites and the promotion of quality tourism without

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\[104\] See above n 94.
paying sufficient attention to the living practices of local inhabitants and their knowledge.  

Indeed ICCROM has developed a programme to draw attention to living heritage sites; one focus of the programme is:

recognition of mistakes made in past conservation efforts for single sites, where living populations have been cleared from sites and traditional practices of land use banned and limited, thus severing communities from their heritage and limiting opportunities to provide economic gain from heritage conservation activities.

5.5 Recent Shifts in the Cambodian Heritage Discourse

Although the policy and legislative measures for the safeguarding of heritage at Angkor have to date largely failed to adequately address intangible cultural heritage, there has been a growing body of work within Cambodia recognising the wealth of intangible heritage both at Angkor and across other parts of the country.

We all are well aware that both tangible and intangible cultural heritage constitutes a harmonious whole in the national identity. These cultural assets testify to the evolution of the civilization of a nation. Cultural heritage is usually regarded as the soul of the nation. Therefore, the protection of cultural heritage should not be confined solely to the government, but also the duties of each citizen. Understanding and loving one’s own cultural heritage is the prerequisite for the protection of the heritage of one’s own ancestors. However, with 36 percent of Cambodian population living below the poverty line and 37 percent of Cambodians are actually literate, you can realize that protecting cultural heritage is Cambodia’s big challenge in the new millennium.

107 Address by Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia and Chair of the Supreme Council for Culture to the Opening Session of 11th Meeting of the UNESCO Inter-
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Research conducted on Khmer culture by researchers, such as the Saveros Pou\textsuperscript{108}, May Ebihara,\textsuperscript{109} Bernard-Philip Groslier,\textsuperscript{110} Eveline Poree-Maspero,\textsuperscript{111} Gabrielle Martel,\textsuperscript{112} Ang Choulean,\textsuperscript{113} Etienne Aymonier,\textsuperscript{114} and Adhemard Leclère\textsuperscript{115} among others,\textsuperscript{116} has revealed the incredible diversity and significance of Cambodia’s intangible cultural heritage. The reports published by these authors, along with the work of several institutions such as the Buddhist Institute,\textsuperscript{117} FOKCI,\textsuperscript{118} Commission des Mœurs et Coutumes du Cambodge\textsuperscript{119} and Reyum,\textsuperscript{120} provide substantial academic reference to the continuing importance of intangible heritage in Cambodia. In recent years this body of work on Khmer culture has been reappraised within the field of cultural heritage conservation.

At the national level, the Cambodian Ministry of Culture and Fine Arts (MoCFA) has acknowledged a specific mandate to protect Khmer culture and has focused on the promotion of the performing arts in connection with the Royal University of Fine Arts. The Ministry has been quite active in this area. In recent years, MoCFA has made it a national priority to identify surviving performing artists and ensure

\textsuperscript{112} Gabrielle Martel, 'Lovea- village des environs d'Angkor: Aspects demographiques, economiques et sociologiques du mode rural Cambodgien dans la province de Siem Reap' (EFEO, 1975).
\textsuperscript{113} Ang Choulean, \textit{Les Éttes Surnaturels dans la Region Populaire Khmère} (1986).
\textsuperscript{115} Adhemard Leclere, \textit{Cambodge: Fetes civiles et religieuses} (1917).
\textsuperscript{117} For example Buddhist Institute, \textit{Compilation of Khmer Traditional Stories} (2003); Sor Sokny, Phat Channmony Ratha and Som Vannak, \textit{Technique of Natural Dyeing and Traditional Pattern of Silk Production in Cambodia} (2007).
\textsuperscript{118} For example Ang Choulean et al, \textit{KhmeRenaissance: Information on Khmer Culture} (2007-2008).
\textsuperscript{119} For example Commission des Moeurs et Coutumes du Cambodge, 'Ceremonies des douze mois: Fetes Annuelles Cambodgiennes' (Centre de Documentation et de Recherche sur la Civilisation Khmere, 1985); Commission des Moeurs et Coutumes du Cambodge, 'Ceremonies privees des Cambodgiens' (Centre de Documentation ed de Recherche sur la Civilisation Khmere, 1985).
\textsuperscript{120} For example Reyum, \textit{Preah Chan Kaorup: A Cambodian Legend} (2001).
nationwide reconstruction of the performing arts.\textsuperscript{121} They have developed a Living Human Treasures programme.\textsuperscript{122} The work of the Ministry eventually led to the revival of many performing arts and the listing of Cambodian classical dance and Sbaek Thom under the UNESCO Masterpieces of the Oral and Intangible Heritage of Humanity programme.\textsuperscript{123} These forms of performing arts are now listed under the ICH Convention on the Representative List of the Intangible Cultural Heritage of Humanity. The MoCFA has published a research report on the Royal Ballet of Cambodia\textsuperscript{124} and has worked with UNESCO to publish an Inventory of Intangible Cultural Heritage of Cambodia.\textsuperscript{125}

The Ministry has developed a law, with the support of UNESCO, to protect the rights of artists. The 2003 Law on Copyright and Related Rights\textsuperscript{126} specifically protects the rights of authors, producers, broadcasting organisations and performers. This Law, as with the work of the Ministry, is drafted to protect the copyright and associated rights of performing arts practitioners. However, it may be possible to extend the scope of the Law to protect the rights of practitioners of other forms of ICH. It is possible to interpret the definitions within the Law to apply to the practitioners of rituals, traditional healing and other elements of ICH. Article 1 specifies that the purpose of the law is to provide for the:

rights of author, and the right related thereon with respect to works and the protection of cultural products, performance... in order to secure a just and legitimate

\textsuperscript{121} Turnbull states that between 80 and 90 percent of performing artists died in Cambodia between 1975 and 1979. R. Turnbull, 'A burned-out theater: the state of Cambodia's performing arts' in L. C Ollier and T Winter (eds), \textit{Expressions of Cambodia: The politics of tradition, identity and change} (2006), 133.
\textsuperscript{123} Note that this programme is quite distinct from the World Heritage Convention which does not incorporate forms of intangible cultural heritage, unless they are linked with a tangible element. The performing arts were \textit{not}, as stated by Turnbull, added to the World Heritage List. Ibid, 136.
\textsuperscript{124} Ministry of Culture and Fine Arts, \textit{The Royal Ballet of Cambodia} (2008).
\textsuperscript{125} As argued in the following chapter, this inventory is highly skewed towards the description of performing arts and artistic skills. Although commendable it falls short of being a representative inventory of ICH in Cambodia. UNESCO, \textit{Inventory of Intangible Cultural Heritage of Cambodia} (2004).
\textsuperscript{126} Royal Decree NS/RKM/0303/008 establishes the law.
exploitation on those cultural products, and thereby contribute to the development of culture. [sic]

A work is defined as ‘a product... which falls within the literary, scientific, artistic or musical domain’ and a performance is defined as ‘acting on stage namely dancing, musical performance, singing or delivering in other ways and means of artistic work, tradition, habit, literary, education, or science’ (emphasis added).127 Article 3 can also be interpreted to cover all forms of ICH under the ICH Convention. Article 3 specifies the forms of works which ‘shall be granted protection under this law’. It states that ‘works for which the Kingdom of Cambodia has obligation to grant protection under international treaties’ shall be granted protection under this law.128 This law has not yet been interpreted to apply to ICH outside of the specific work of authors and professional performers.

MoCFA is aware of the need to meet international obligations under the ICH Convention129 and, at least in the area of performing arts, has contributed to the heritage discourse and protection of cultural heritage. However, the Ministry has also been the subject of fierce criticism. Its programme is found to be far from adequate. It is thought to be ‘weak’, have ‘absence of transparency, vision or coherent leadership’, be ‘primarily self-serving and riddled with political cronyism’ and have a ‘bloated network of 3,000 administrators’.130 Under the Ministry, the Suramarit Theater, one of the only well-equipped performance spaces has been lost with no plans to restore it, and the Royal University of Fine Arts has suffered changes to its infrastructure and curriculum creating concern for the future of several forms of intangible heritage.

127 Article 2.
128 Article 3.1(e).
129 Hab Touch, Director of the National Museum of Cambodia under the MoCFA clearly states that the MoCFA is aware of the need to ‘with respect to all the conventions previously listed, in particular the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage of 2003... building on existing laws for the protection of cultural heritage’. He suggests that the Ministry has passed sub-decrees for the implementation of the Convention however I have found no indication that these exist. Touch, above n 122.
130 Turnbull, above n 121, 139.
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[F]orget to develop culture and identity and you remain economically poor and spiritually impoverished.. and to the world at large just another pool of cheap labour.\textsuperscript{131}

The Heritage Discourse and Angkor

It has been illustrated above that there is an overwhelming ‘fascination with the physical heritage of Angkor [that] has overshadowed attention to the local community’ and its living heritage.\textsuperscript{132} Despite this, recently there have been some academics and reports that have recognised the value of the knowledge and practices held and conducted by villagers around Angkor. Several academics have acknowledged the failure, to date, to adequately protect this living heritage. Norindr has argued that:

\begin{quote}
[T]he fascination for [the monument of] Angkor Wat may be far more costly than has been previously imagined, exceeding the millions of dollars poured into the conservation of the World Heritage Site and architectural jewel. It may also have deleterious effects on the people of Angkor, and by extension, on all Cambodians displaced from their land. When tourists travel from one temple to another, crossing small villages without even a thought for the nature of cultural production, they close their eyes to the predicament of the people who remain simply “invisible” to them or part of an exotic landscape.\textsuperscript{133}
\end{quote}

There is a growing body of work that is striving to draw attention to the ‘appreciation of minor local customs and tradition’ in order to redress the ‘critical blindness’ that Norindr points out exists of intangible heritage at Angkor.\textsuperscript{134} The work of these academics, combined with the very recent recognition by international bodies such as ICCROM and UNESCO of the need to present intangible heritage, is creating a new discourse that can herald a change in the approach to management and understanding of heritage at Angkor.

\textsuperscript{131} A quote taken from Rithy Panh in 2004. Ibid 149.
\textsuperscript{132} Miura, above n 96, 51.
\textsuperscript{134} Ibid.
As early as 1992 there was acknowledgement of the interaction of the local community with the temples and landscape of Angkor and the religious value of the site.

During recent years and especially between April 1975 and January 1989, religion was eradicated; monks were killed or deported, shrines violated, sculptures mutilated and religious artifacts destroyed. But this systematic destruction did not eliminate faith, and since 1979 veneration has been taking place in open air shrines where the local communities assemble for worship. In Angkor Wat the two pagodas to the north and south of the main temple have been repaired and monks have returned. Smaller temples have been erected in Angkor Thorn around the Bayon and to the North of Phimaneakas.\textsuperscript{135}

In 1992 when one of the first international safeguarding missions visited Angkor they reported the importance of the local community at Angkor, albeit for the benefit of visitors, stating that ‘the rebirth of religious activities within the old temple complexes and the presence of farming communities has animated the historic city and contributed greatly to the unique ambiance experienced by the visitor to Angkor today’.\textsuperscript{136} Indeed, they even recommended that specific studies for the ‘re-integration of farming and religious activities as well as studies for the protection and control of the jungle should be included as part of the Conservation Plan for Angkor’.

Miura argues that the religious activities referred to by the World Monuments Fund include local customs and traditions that are far from minor. Research conducted by Miura has shown that ‘Angkor for local villagers is a space of power where a variety of powerful forces, spirits and human, god and ogre, good and evil, encounter, interact, negotiate and struggle’.\textsuperscript{137} From this interaction of powerful forces it is found that ‘[a]ll Angkor is considered sacred and powerful, while certain temples and locales within the site have been known to be particularly powerful’.\textsuperscript{138}

\begin{flushright}
\footnotesize
\textsuperscript{135} World Monument Fund, 'Considerations for the Conservation and Presentation of the Historic City of Angkor' (1992).
\textsuperscript{136} Ibid.
\textsuperscript{137} Miura, above n 96, 74.
\textsuperscript{138} Ibid.
\end{flushright}
for example, is considered particularly powerful and has the highest spiritual value. Norodom confirms that the temples are a sacred space. She attributes this to the continuity of linkages found between the iconography of Angkor and contemporary representations of intangible heritage, such as through the re-enactment of the *Ramakerti*. Likewise, Taylor and Altenburg present linkages between past and present as being an important attribute of the significance of ICH at Angkor.

Behind and surrounding the monuments is a living landscape where people continue a way of life that has links with the people who created Angkor 1,000 years ago and to the Pre-Angkorian period settlement... Within this view of Angkor is the enduring survival of intangible values and authenticity of “traditions and techniques; location and setting; spirit and feeling” as set out in the Nara Document...Subsistence farming, religious practices, vernacular architecture, craft traditions, and trade skills provide visible evidence of continuous living in the landscape.

Drawing on this research, it may be suggested that the greatest importance of Angkor as a heritage site of ‘outstanding universal value’ comes from the perceptions of and values attributed to it by the local population. Thus it is the ICH at Angkor which needs to be safeguarded to secure the global heritage of mankind.

This conclusion is echoed by Luco who argues that ‘it is vital to save Angkor’s architectural heritage, but equally important to protect its intangible heritage: the tales, legends and place names that only local people know.’ Current work being carried out by the APSARA Authority includes identification and recording of intangible heritage in the Angkor region with the intention of safeguarding. This work ‘reinforces that Angkor is a place of living heritage, where communities provide an

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141 Taylor and Altenburg also argue that the lack of presentation of these links is disadvantageous for Angkor. Frequently there is the ‘presentation of heritage as separate dots on a map isolated from their cultural and intellectual setting... [this presentation] does conceive Angkor as material heritage of the ancient past, something to be marvelled at, but divorced from the vibrant idea of living history and heritage’. Ken Taylor and Kirsty Altenburg, 'Cultural Landscapes in Asia-Pacific: Potential for Filling World Heritage Gaps' (2006) 12(3) International Journal of Heritage Studies 267.
essential lived and enduring component of the broader heritage values of the region’. 143

Seeing the monuments without seeing their cultural context is akin to seeing leaves but not the tree. 144

This thesis proposes that the safeguarding of ICH at Angkor is a fundamental necessity for the preservation of the World Heritage Site. The following chapter provides a comprehensive analysis of the safeguarding of ICH at Angkor.

5.6 Conclusions

5.6.1. Current legal protection is inadequate

It is clear that the current legal framework at Angkor does not reflect the understanding that ‘Angkor is foremost a spiritual and religious place for both the local community and Cambodians as a whole’. 145 Rather, it can be argued that the current legal framework minimises the intangible values and emphasises the archaeological and monumental values consistent with the international western agenda of the World Heritage Convention during the 1980s and 1990s. 146 The current legal framework is a reflection of heritage ideals that are no longer considered adequate or appropriate. As has been shown above, the heritage discourse has changed, particularly over the last decade, to incorporate an appreciation of ICH. There is a need to reflect such changes within legal and policy frameworks. Furthermore, there is now a need to incorporate the ICH Convention and meet obligations established under this Convention. As Fu 147 clearly expresses:

modern inhabitants cannot travel back to the past simply by freezing the tangible original appearance of the monuments. Nostalgically looking back without taking intangible values into consideration, as many preservationists have done, is not

143 Sokrithy, above n 60.
144 Taylor and Altenburg, above n 141, 267.
145 Miura, above n 93.
146 Note that this agenda has changed recently to be more inclusive of associative values and cultural landscapes.
147 Fu, above n 100.
appropriate because the complex set of artistic, technological and socio-cultural norms, which conceived cultural heritage, have either disappeared or changed. It is important to face the fact that to preserve intangible aspects within the context of a cultural heritage is a necessity.

5.6.2 The legal framework does not incorporate international Soft law

A vast body of soft law was introduced and critiqued within Chapter 3. It was established that this body forms an important source of international heritage law and develops fundamental legal precepts that are essential to inform safeguarding measures in legislative or policy documents. The precepts established in these soft law documents are currently not incorporated within Cambodian legislation or policy documents for the safeguarding of heritage.

Nine precepts presented in chapter 3 are thought to be essential for the safeguarding of ICH. These precepts need to be included in, or at least inform, the drafting of measures to safeguard ICH. Few World Heritage Sites have as yet developed comprehensive safeguarding measures which meet international obligations and are consistent with international legal norms. The Angkor WHS has a unique opportunity to be a leading case study for the holistic safeguarding and management of heritage. It is a site of remarkable tangible and intangible heritage.

5.6.3 Unified mechanism for heritage protection

It has been found that due to the historical development of the concept of intangible heritage, the development of mechanisms for the protection and management of ICH have been treated largely as an add-on.148 This has meant that ICH has not been protected adequately or in an integrated manner with tangible heritage. In order to protect heritage, we need to take a holistic approach. The best way to do this may be to develop a new legal document that takes an integrated approach to tangible and intangible heritage. Furthermore, on an institutional level, control and management of

intangible and tangible heritage should be, if possible, within the same government agency or closely collaborating agencies. Deacon\textsuperscript{149} states that ‘[a]t an official level… the legislation and administrative processes relating to heritage place, objects and performance art (or intangible heritage) are often separated’. This is the case in Cambodia, with the Ministry of Culture and Fine Arts dealing with performing arts and APSARA dealing with Angkor. This separation is an inherent problem in the protection of the ICH of Angkor. There needs to be close collaboration between these government departments or the development of a section within APSARA that is responsible for intangible cultural heritage. The functions of the Ministry of Culture and Fine Arts and APSARA relating to intangible heritage must be aligned and integrated.

5.6.4 Implementation of protection measures

Even where appropriate and sufficient policies and laws may be in place, their implementation is required to ensure the protection of ICH. APSARA is the sole authority that has management power at Angkor. However, it should be noted that ‘other authorities and concerned parties do not fully respect the new management framework and tend to act without prior consultation with the APSARA Authority’.\textsuperscript{150} There are issues with implementation, enforcement and compliance in Cambodia which will need to be addressed to ensure the safeguarding of ICH.

5.6.5 The role of domestic legislation and policy

It is important to reflect on the notion that the development of legislation and policy within Cambodia, and the conclusions and recommendations presented in this thesis, are themselves subject to western and international philosophies of heritage and law. Despite the arguments presented above, it should be asked: does Cambodia really need national legislation or policy to protect and ensure the continuing practice of intangible cultural heritage? It is concluded that law and policy do indeed play an important role in the safeguarding of ICH. However they need to be developed within

\textsuperscript{149} Ibid.
\textsuperscript{150} Miura, above n 93.
the national framework and sensitive to local ideologies. One element of the national framework for Cambodia, as suggested above, is that laws in the current social and political climate have limitations. However the adoption of law should be a long-term endeavour. It does have a place in heritage protection, both at a domestic level as well as in meeting international legal obligations. The role of policy is addressed further in Chapter 8.

This thesis suggests that it is important to integrate intangible cultural heritage into legal documents and policy frameworks so that it is not marginalised or ignored in management procedures. Intangible cultural heritage must be integrated and understood adequately. Legal documents can ensure that this occurs at both the national and regional levels. A national legal document can protect intangible cultural heritage by;

i. Raising the profile of ICH by asserting the importance of ICH to national identity and continuity of culture.

ii. Establishing working definitions of intangible cultural heritage that are appropriate for the national context.

iii. Legislate rights of access to and practice of intangible cultural heritage.

iv. Develop requirements for the documentation of intangible cultural heritage and dissemination of documentation if appropriate.\[151\]

v. Generate necessity for locally specific policy instruments of intangible cultural heritage protection, including community involvement for identification, documentation and management.\[152\]

This thesis asserts that there are four significant aspects to consider when drafting legislation or policy documents for the protection of ICH. These are developed

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\[151\] In most cases dissemination of documentation on cultural heritage would be beneficial to the community, however there may be some situations when general dissemination is inappropriate such as providing information about secret women’s rituals to men or in some cases the wholesale dissemination of cultural practices for tourism may result in the disassociation of culture. The community should be consulted to determine if or how they would like information about their intangible heritage to be disseminated.

\[152\] It is suggested in this thesis that the understanding and application of local knowledge of intangible cultural heritage is essential. As intangible cultural heritage is so often specific to one region, only a local community can adequately identify important features and assess issues.
Chapter 5

following the analysis of international law in the previous chapter and heritage law within Cambodia.

1. The first is the importance of human rights principles in ICH;
2. The second is the fundamental notion that ICH is fluid and constantly evolving;
3. The third is that to properly ensure the protection of ICH there should be a unified mechanism for cultural heritage protection that ensures that both tangible and intangible aspects of cultural heritage are protected; and,
4. The fourth aspect is that while legislation and policy have a definite role to play, the implementation of protective measures and the modes of implementation must be considered.

Any framework to protect intangible cultural heritage, whether it be law or policy or a combination of both, and whether it is national or regional, should have its basis in human rights, principally cultural rights. Such documents should not seek to demand that a practice must be carried out or that it must remain in one particular form. It should only seek to ensure that when local people want to carry out a practice—whether it is the telling of a myth, a dance or traditional craftsmanship—then they are not prevented from doing so, as they have a right to practice their culture and a right to access the tangible elements which are critical to the heritage practice.

While policies should not certify that a practice must be carried out and transmitted, they should provide avenues for appropriate mechanisms to encourage the active recreation and transmission of ICH. Appropriate mechanisms should be determined by the local community. In the case of Angkor, this may involve utilising the tourism market to generate additional funds for cultural events.

One of the fundamental aspects of ICH is its constant change. This change is part of the development of the community. It is of utmost importance that intangible cultural

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153 This is argued to greater detail in Chapter 3. The foundation of this notion is seen in criteria (ii) of the ‘draft set of criteria for inscription on the Representative list’. ITH/06/1.COM/CONF.204/7 Item 7 of the Provisional Agenda: Criteria for inscription on the Representative List of the Intangible Cultural Heritage of Humanity. UNESCO, 2006.
Chapter 5

heritage legislation or policy does not restrict people from changing or developing.\textsuperscript{154} The aim of the protective measures suggested in this thesis are not to create a museum of cultural elements in the Angkor landscape but to identify the importance of intangible cultural heritage and develop an understanding of the threats that may disassociate people from their cultural landscape. From this we can develop policy documents to enable the practice of intangible cultural heritage.

Perhaps, the protection of Angkor should lead to a landscape similar to that of Rome described by Stille:

\begin{quote}
[T]here is nothing fussy or museum like… the past co-exists comfortably and gives way to the needs of the present.\textsuperscript{155}
\end{quote}

The description of the abundant crumbling beauty of Rome is perhaps, in a bizarre and fascinating way, analogous to the heritage of Angkor. At Angkor you may make a wrong turn while wandering around and find yourself amongst the hubbub of everyday village life or alone staring at an abandoned lintel fragment that exquisitely presents the ‘churning of the sea of milk’. Within the Angkor site, such images live alongside families, modern appliances and ancient \textit{neak ta}. This unique place with its irreplaceable tangible and intangible heritage cries out to be safeguarded for both present and future generations.

\textsuperscript{154} The Draft Criteria for Inscripti on on the Representative List of the Intangible Cultural Heritage of Humanity states that “nomination files should convince the Committee that inscription would not impede the development of the community or group concerned”. ITH/06/1.COM/CONF.204/7.

\textsuperscript{155} Alexander Stille, \textit{The Future of the Past} (2003).
6. Safeguarding Intangible Cultural Heritage at Angkor

World Heritage Sites (WHS) are subject to numerous pressures, such as site visitation, tourism and resource use, that arise from their contemporary setting. These issues shape the way that the site is managed and heritage is perceived. This chapter follows on from the historical assessment of law and Cambodian heritage to examine the contemporary setting of Angkor and its intangible cultural heritage. The chapter begins by establishing the current issues at Angkor. With this contextual background in mind, aspects of ICH are described in the second section of the chapter. Five domains of intangible heritage have been chosen, and while this is not exhaustive of the breadth of ICH which exists at Angkor, it illustrates the strong intangible associations that are present. The examples of intangible heritage described are:

- Intangible associations with tangible structures,
- Temples, spirits and daily life,
- Spirit mediums,
- Traditional healing and magic, and
- Ancestral links and agricultural knowledge.

The third section of the chapter draws upon the examples of ICH at Angkor, and the contemporary context in which they exist, to develop a methodology for their safeguarding. The methodology for safeguarding ICH, developed in Part I from a legal analysis of international intangible heritage law, is reappraised within the World Heritage Site of Angkor. This reappraisal allows for the assessment of a practical approach to safeguarding from theoretical underpinning. The reappraisal elicits several findings. The findings and further conclusions form the final sections of this chapter.
6.1 Issues at Angkor

The present issues that create impacts upon the intangible heritage of Angkor and the local population stem predominantly from changes that occurred in the early 1990s. During this time the government of Cambodia underwent elections and was recognised internationally. Angkor received World Heritage status. As a result, new laws were drafted, regulations put into place, aid organisations became involved in the country and tourism infrastructure was developed. From these changes, three main quandaries have been generated; management conflicts with local communities, rapid socio-economic development pressures and sustainable conservation measures and tourism impacts on heritage values. A final issue, the requirement to ensure the safeguarding of ICH, has arisen recently as a result of Cambodia becoming a signatory to the ICH Convention.

6.1.1 Management Conflicts

Management conflicts and restrictions first began under the French protectorate. The 1929 decree established the implementation of a preservation zone surrounding major temples within which houses were not allowed to be constructed. There was limited implementation of this restriction and only the old villages within the area of Angkor Wat, those in the vicinity of Phnom Bakeng and villages within the western baray were removed. In contrast to later regulations, the cultivation of rice, particularly within the baray and the temple moats, was encouraged as a way to control the

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1 Keiko Miura, Contested Heritage: People of Angkor (PhD Thesis, University of London, 2004). Miura argues that some current limitations imposed on villagers stem from earlier areas of conflict and contestation for local communities which result mainly from the abuse of forest resources by Vietnamese forces and then Khmer military units until the early 1990s. She notes that “logging was most intensive in 1989, just before the withdrawal of the Vietnamese”. Based on her extensive field research, she argues that the logging up until recent times has frequently been erroneously blamed on local villagers, when in fact it has been conducted by local power groups i.e the Vietnamese army, Khmer military forces or more recently the heritage police. Recent bans and limitations that are placed on villagers, such as not being allowed to utilise the remaining forest resources are legitimised by blaming local villagers for the earlier loss of forested areas. These resources were incredibly valuable to the local communities who utilised them for resin, fruits and other forest products. In addition, many of the trees had cultural value as they were inherited property from previous generations and maintained the villager’s links with the landscape and sense of identity. Miura also notes that the military is likely to have been responsible for significant looting of cultural artefacts during this time.
expansion of the forest, and local villages maintained their access and agricultural rights to their rice fields.²

In 1972 the Khmer Rouge took control of the Angkor area. A large number of villages in the Angkor area were displaced and villagers relocated to the North. Throughout the period of internal conflict, people were commonly moved throughout the landscape on a regular basis, with many families being separated and sent to different locations.³ After 1979, Luco states that ‘the people of Angkor desired to return to the land of their ancestors, to rebuild their houses, cultivate their rice fields, and live according to their traditions’ with many people returning to their old settlements closer to the temple complexes.⁴ This is consistent with similar accounts of the post-Khmer Rouge period throughout Cambodia. It was seen that generally people returned to their ancestral villages or pre-war place of residence.⁵

The second phase of management conflicts has arisen since the early 1990s, particularly following the nomination of Angkor as a World Heritage Site. Nomination of the site and subsequent rezoning of the area of Angkor in 1994⁶ meant that the land became state property and local communities lost their ownership rights. Many were again relocated to areas just to the north of Siem Reap town, however they still utilised their old rice fields which were some distance from the new village. Over time, these people slowly resettled in the old villages once more.⁷ However, their status in these areas was controversial and considered ‘illegal’ until the making of a Decision in late 2004.⁸ While villagers may have reobtained some rights, at least to reside in their ancestral villages,⁹ they have lost many other rights with the

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²Fabienne Luco, 'The People of Angkor: Between Tradition and Development' (Paper presented at the Phnom Bakheng Workshop on Public Interpretation, Siem Reap, Cambodia, 2006). Luco mentions one population of Monks who were relocated from their monastery at the top of Phnom Bakeng.
⁴Luco, above n 2.
⁵Evan Gottesman, Cambodia After the Khmer Rouge: inside the politics of nation building (2003).
⁶Decree Establishing Protected Cultural Zones in the Siem Reap/ Angkor Region and Guidelines for their Management 001/NS 1994 (Cambodia).
⁷Luco, above n 2.
⁸Decision of the Royal Government of Cambodia on determination of Standards for Utilization of land in Zones 1 and 2 of Siem Reap/ Angkor sites 70/SSR 1994 (Cambodia), art 2.
⁹While being able to reside in their villages, APSARA has placed restrictions on buildings and housing. Submissions must be made to APSARA for the construction of a new building and they must follow strict guidelines which limit the materials and design to be utilised.
implementation of numerous regulations, many of which have been mandated by the Heritage Police.

**Heritage Police and Former Site Management Decisions**

The Heritage Police at Angkor were created in 1994 and given full legal recognition in 1997.\(^{10}\) They were placed under the jurisdiction of the Ministry of the Interior and as such do not have to answer to the APSARA Authority, although technically they work in close association with APSARA. Within the sub-decree establishing the Police, Article 2.1 states that the Police should work in close collaboration with the APSARA Authority and Article 2.2 states they are obliged to ‘ensure security and public order in the Angkor region as defined by the APSARA Authority’ furthermore Article 2.9 states that they must submit reports to the APSARA Authority on a regular basis. Despite these obligations, the police still have a primary role to implement regulations assigned by the Ministry of the Interior\(^{11}\) and implement measures according to the general directives of the Ministry of the Interior.\(^{12}\)

The sub-decree states that the obligations of the police are: security of visitors,\(^{13}\) the investigation of criminal actions and investigation and suppression of acts of destruction, theft, harboring, armed robbery, buying, selling and transport of cultural and historical heritage.\(^{14}\) The sub-decree does not obligate the police to manage local populations nor does it make any reference to the activities of people within the park beyond those related directly to items of cultural heritage. It is clear that the function of the heritage police was intended to minimize and prevent looting within Angkor and ensure the safety of visitors to the site. Despite this, the heritage police have

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\(^{10}\) Sub-decree establishing the Special Police Corps for the Protection of Cultural Heritage 60/ANKR/PK 1997 (Cambodia).

\(^{11}\) Sub-decree establishing the Special Police Corps for the Protection of Cultural Heritage 60/ANKR/PK 1997 (Cambodia), art 2.12.

\(^{12}\) Sub-decree establishing the Special Police Corps for the Protection of Cultural Heritage 60/ANKR/PK 1997 (Cambodia), art 2.1.

\(^{13}\) Sub-decree establishing the Special Police Corps for the Protection of Cultural Heritage 60/ANKR/PK 1997 (Cambodia), art 2.4.

\(^{14}\) Sub-decree establishing the Special Police Corps for the Protection of Cultural Heritage 60/ANKR/PK 1997 (Cambodia), art 2.5.
Chapter 6

‘taken initiatives in “controlling” the activities of the local inhabitants and those who work in the Angkor Park’.\textsuperscript{15} Miura argues that the:

chief of the heritage police seems to have misinterpreted what the international community expect of Angkor and all the laws, some of which are no longer valid, in order to tighten its control over the activities of the local community and attempt to find justifications for it.\textsuperscript{16}

Miura establishes the marginalisation of local villages as a result of her research; she explains:

Just before the Khmer New Year in April 2000, the heritage police summoned the chiefs and vice-chiefs of villages around Angkor Thom to attend a meeting at Srah Srei; and delivered an order from the government to ban the villagers from felling trees, collecting resin or any other forest products, cultivating rice, entering Angkor Thom with any cutting instruments or catapults, releasing cows for grazing, bringing firearms or shooting in the air. Although he had assured them that the cultivation of rice fields in the moats would be allowed, the villagers of Kok Doung were forbidden to cultivate their land in the south-east moat and southern side of the east moat, which constitutes the majority of their land. Those who used to cultivate the northern side of the east moat were also banned from cultivation of the land there. There have been reports of other troubles between the police and the local inhabitants concerning the cultivation of certain land outside Angkor Thom but within the protected zone. Moreover, the logging of trees in the protected area were carried out mostly by both the Cambodian and Vietnamese military in the late 1980s, which has caused a great loss to the local community as they not only lost their own trees but also have to pay for the consequences. An important implication of the ban is that the villagers were not consulted and provided alternatives. Such action is endangering the socio-cultural continuity and cause a loss of income for the local community.

\textsuperscript{15} Keiko Miura, ‘Community Empowerment in Conservation work of Angkor Complex’ (2001) 11(1) SEAMEO Regional Centre for Archaeology and Fine Arts Journal 23. Miura finds that the police determine that the power for such decision is based on; decree no. 21 Council of Ministers on 18 march 1985, decree by Council of Ministers 1992, 22 duties of the police issues by the provincial governor on 31 Jan 1996 and sub-decree concerning 12 obligations of heritage police no. 60 issued 8 October 1997.

\textsuperscript{16} Ibid.
According to Miura, these actions by the heritage police were made independent of APSARA, indeed APSARA had no prior knowledge of the ban.\textsuperscript{17}

Miura’s observations may still be relevant at the present time. Observations made by Tashiro in 2001 within Zone 1 suggest that further injustices have occurred in that several rice fields in banned locations (such as the moat around Ta Prohm) are being cultivated by members of the heritage police.\textsuperscript{18} I would argue that many of actions banned had no direct impact on the temples and could be carried out without any negative results to the local environment or the monuments. This includes activities such as resin tapping, fishing in local ponds and the harvesting of forest fruits which had been sustainably carried out for many generations. Luco\textsuperscript{19} stated in 2006 that:

> access to natural resources has been noticeably reduced; villagers have been displaced and denied or given limited access to new lands for housing... traditional activities have been [forcibly] abandoned ... old rice fields had to be abandoned, reducing the income of many families... access to fishing resources has also been reduced with the prohibition against fishing in moats and ponds such as those in Angkor Wat and Sras Srang.

The past actions of the Heritage Police and the restrictions that their actions and ‘regulations’ have imposed upon the local community stem from the assumption of power over those living within the World Heritage Site. This position was clarified during a meeting conducted with local villagers and members of the local religious community in July 2000. Miura notes that at this meeting the chief of Heritage Police made a speech during which time he intended to:

\begin{footnotesize}
\begin{itemize}
\item Miura, above n 1, 149.
\item Tashiro records violation of the ban by heritage police at Banteay Kdei where they are allowing cattle owned by stationed heritage police to graze inside the temple walls but preventing the local villagers from doing so. Akiko Tashiro, 'Heritage conservation and local inhabitants - a case study of the Angkor Heritage Site' (2001) 18 Renaissance Culturelle du Cambodge, 238. Previously villagers were required to pay bribes to the heritage police to cultivate their land. It was found that “[w]hen some owners of rice fields in Angkor Thom refused to pay inducements, the police confiscated their land and then cultivated rice there themselves”. Keiko Miura, 'Conservation of a living heritage site' a Contradiction in terms? A case study of Angkor World Heritage Site' (2005) 7 Conservation and Management of Archaeological Sites 3.
\item Luco, above n 2.
\end{itemize}
\end{footnotesize}
demonstrate his authority over a wider public, including the religious authority, and his determination to pursue his agenda. His brazen address to and accusations of wrong-doings by monks and villagers was filled with a combination of intimidation, humiliation, verbal threats, and inducement of people to inform him about the crimes of others.20

The chief established that this police force had power over not only the local communities but also the religious community, a very strong claim for a country in which ‘[e]ven the king kneels down before a monk’.21 Within his discourse, the chief of police attempted to validate this power by establishing the international importance of Angkor and the sovereign duty of Cambodia to protect it. As Miura suggests by;

[ ]inking his discourses to the sovereign and national interests, the colonel attempted to justify his actions so as to place himself beyond personal criticism. While repeatedly referring to national and world interest, the colonel explicitly dismissed the importance of local interest.22

The above observations were made almost a decade ago. Although management philosophies may be changing the decrees outlining the limitations remain. Thus, it is an opportune time for earlier decisions to be reappraised. Since 2008, the Heritage Police and APSARA have established a closer working relationship. The recent restructuring of APSARA, and the creation of the Department of Public Order and Cooperation, has fostered this relationship. It is not clear at the present time if villagers continue to negotiate with the heritage police or if this continues to extend beyond the souvenir sellers to those engaged in the cultivation of rice. Further, recent policy shifts towards community policing may signal a new phase of site management.

APSARA and management of ICH

The Heritage Police are not the only authority that has introduced constraints and influenced management issues. APSARA through its policy instruments and through

20 Miura, above n 1, 161.
21 Ibid.
22 Ibid.
policy decisions has established restrictions on communities. Such restrictions could potentially lead to the loss of or constraints to their intangible heritage. Several restrictions have been placed upon monasteries within the World Heritage Site. Many of these restrictions have not been established in a legal document or in any official document. Restrictions have been imposed upon the pagodas that are located within the enclosure of Angkor Wat, the Angkor north monastery and the Angkor south monastery. The predecessors of these pagodas have been located within Angkor Wat for centuries and represent much of the spiritual value of Angkor Wat. Originally one pagoda was located on the Terrace of Honour but was relocated by the French to the north of the main monument. There have been further attempts to move the monasteries from Angkor Wat. However, general resistance to this by monks and locals has so far prevented it from happening.

Prevailing restrictions have placed limitations on three central aspects of monastic life including access to the monastery, ceremonial/religious activities and building to maintain the monastery. The monasteries have been isolated from the local community upon which they depend due to restricted access. In 2001 APSARA began limiting access to the monastery by motorbikes and cars. Baillie stresses the negative repercussions of this restriction as ‘the majority of regular spiritual visitors are elderly people who arrive by moto (motorcycle taxi) via the eastern causeway bearing their gifts and alms to the monastery’. With bans on motos, elderly worshippers will generally not visit the monasteries or bring offerings. As a result of the loss of visitors to the pagoda, families who have been supporting the monastery over generations begin to lose their religious associations and the monastery begins to lose some of its spiritual value. A nun from the south pagoda makes this connection stating ‘[w]hen the road is blocked... What happens to the ancestors spirits?’

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23 For a more detailed discussion of the background of these monasteries see Chapter 1.
26 Jean Me, nun south pagoda 2005 as cited in Baillie, above n 24, 61.
Chapter 6

Perhaps the most damaging of the limitations for the continuation of intangible heritage within Angkor Wat are those impacting upon ceremonies and religious activities. At times during the last decade, monks have not been allowed to conduct religious ceremonies within the galleries of Angkor Wat nor have they been allowed to mediate or learn the dharma within the temple. The ‘highly spiritual temple’\(^{27}\) is now ‘just for tourists’.\(^{28}\) Previously monks carried out teachings and religious events within the temple complex in addition to doing so within the monastery buildings. These activities are now ‘managed’ by APSARA.

I argue that these practices are fundamental to maintaining both the outstanding heritage value of Angkor and the living aspects of the WHS. However, the legitimacy of these practices has been called into question by some academics. Vickery argues that several aspects of Buddhist practice at Angkor Wat has been reconstituted or (re)invented in the post-Khmer Rouge period.\(^{29}\) While it is clear that the temples have gained renewed attention as places of Buddhist veneration recently,\(^{30}\) whether or not the activities or ceremonies are representative of ‘reconstructed ethnicity’ does not necessarily undermine their legitimacy. The argument put forward by Vickery highlights a significant issue in the conservation of intangible heritage. The issue is that of the recreation of heritage and contemporary intangible manifestations of heritage values. The concept of recreating heritage is quite foreign to the former cultural heritage paradigm centred on the preservation and maintenance of the tangible as objects from the past. Yet it is a valid and important aspect of intangible heritage. This is a necessary concept to incorporate at World Heritage Sites, particularly those such as Angkor that have undergone a revival of meaning and contemporary significance.

\(^{27}\) A monk from the northern monastery, Mao Ma states simply that “Angkor is spiritually alive”. Cited in Baillie, above n 24, 52.
\(^{28}\) Kru Chun, abbot of the north monastery, cited in Baillie, above n 24, 67. This quote continues to say that two monks who were trying to enter Angkor Wat to sit and learn the dharma “like before” were told by APSARA guards “why do you want to go to the top you can look from the outside”.
Research conducted by the author into APSARA’s current management of the monasteries has not yielded in any formal internal or external document outlining the need or desire to control religious activities within Angkor Wat for the benefit of tourism. Yet, it appears that there is a desire to construct the setting of the monuments as an ‘ancient’ landscape (as opposed to a contemporary living one) for the tourist market. Further bans and restrictions have been placed on monk ordination ceremonies\(^\text{31}\) and Khmer New Year games and festivities in Angkor Wat.\(^\text{32}\) These games are a central part of New Year celebrations—the most important annual ceremony in Cambodia (see Figures 7 and 11 below). Correspondence with APSARA conducted during my research has also indicated that other festivals, such as neak ta ceremonies, cannot be conducted within Angkor Wat without prior permission from APSARA. There does not appear to be any formal documentation establishing this restriction. Permission may be difficult for the community to obtain due to the fact that such restrictions are not formally articulated. Also, due to the complex structure of APSARA, local communities are often unsure how to proceed or to whom they should apply for permission. The imposition of limitations for spirit worship presents a significant restriction, as several important neak ta reside in Angkor Wat, as explained below.

The third set of limitations imposed upon the monasteries is limitations on the construction of structures within the monastery grounds. These have meant that local communities are no longer allowed to build stupas\(^\text{33}\) and the monks are not allowed to build new monastic houses unless they adhere to strict guidelines and obtain permission.

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\(^\text{31}\) Baillie cites a monk from the southern monastery, “Now we are no longer allowed to conduct ordinations by processing the Nag [monk candidate]. They think that would impact the tourists but it is on the ground not in the temple building. If even there are over 50 people it is not going to disrupt them because it took place on the ground where the grass is, not on the top [of the temple]”. Baillie, above n 24, 69.

\(^\text{32}\) Miura states that “dancing and playing games was banned by APSARA in 2000, according to the monks of Angkor Wat”. Miura, above n 1, 114.

\(^\text{33}\) Family stupas, which contain a family’s ashes, are an important linkage between local communities and the pagoda. The abbot of the north pagoda in Angkor Wat has stated that “the Buddhist community around the site has decreased, now they are going to … the Buddhist monasteries where they can build their stupas”. Kru Chun, 2005 as cited in Baillie, above n 24, 58.
Figure 6 Visiting Bakong during Khmer New Year

Figure 7 Khmer New Year games at Bakong, Rolous.34

34 This game involves being blindfolded and having to hit a clay pot with a long stick.
Figure 8 Participating in Khmer New Year games at Bakong.

Figure 9 A young child takes a break during Khmer New Year festivities at Wat Athvea.\textsuperscript{35}

Figure 10 Crowds at Wat Athvea during Khmer New Year.

Figure 11 Playing Leang Tien Pruck or tug-o-war at Wat Athvea.\textsuperscript{36}

\textsuperscript{35} One game is to throw talcum powder on friends and strangers.  
\textsuperscript{36} Despite their best efforts the boy’s team lost 3 times in a row.
Site Management and Local Community

Another impact of the management within the Angkor World Heritage Site is the existence of feelings of fear or apprehension. Observations made at Angkor have revealed that many villagers are frightened of the APSARA temple guards who have been known to ask them for entrance money and demand to see their ‘ticket’.\(^37\) This is a more common occurrence for people who come from distant villages. The heritage police are also known to require stall owners to pay a monthly ‘rental’ payment and children selling goods have been badgered to give a portion of their earnings. There is also a perception that guards have the capacity to fine locals for actions that are ‘against the law’. One local who conducts the noble and pious task of being a local spirit/statue guardian within Angkor Wat has been recorded as saying ‘They do not ask me if they want to fix some part. I do not know what I should say about the fixing. I have no power. If we say something wrong, I will be fined’.\(^38\) Miura has suggested that it is quite possible that the temple guards and heritage police do extract ‘fines’ from visitors to the temples and ‘taxes’ from sellers.\(^39\)

There have been some attempts since 2006 to involve the local community at Angkor in order to prevent direct conflict over management issues. APSARA has recognised that it is important to involve the community to meet the challenges of sustainable development.\(^40\) The Department of Monuments and Archaeology 2 (DMA2)\(^41\) was formed to improve the relationship between APSARA and the community.\(^42\) Khuon Khun-Neay, Deputy Director General of DMA2 recognises that

\(^{37}\) Cambodians unlike all foreign visitors are not required to purchase a ticket and are able to visit the temples whenever they like free of charge.

\(^{38}\) Cited in Baillie, above n 24, 59.

\(^{39}\) Miura argues that, “[i]t is widely know that the heritage police have been extracting money from Cambodians working in Angkor, whether they be vendors of souvenirs or drinks, caretakers of religious statues, collectors of edible ants’ nests, beggars or rice cultivators”. Miura, above n 18.


\(^{41}\) After the passing of the Sub Decree regarding the Organisation and Functioning of the Office of Director-General of the APSARA Authority (50 ANK/BK) in May 2008, this department is now called the Department of Land Planning and Habitat Management in the Angkor Park.

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[M]any communities have existed in Angkor since ancient times and continue to live in the park today. Religious and economic traditions of the villages date from the time of the monuments’ construction. To ensure that these populations can continue to live in accordance with their religious practices and customs, it is necessary to solicit the input of locals in making decisions for sustainable development and tourism in this region and to consider their values in plans for managing the social and natural environment.43

While the intentions may be sincere, generally community involvement has been in the form of management authorities supplying or asking for information rather than interactive participation. Miura argues that ‘concern over community empowerment is relatively low among conservators and managers of Angkor heritage site, who tend to concentrate on concerns relating to the protection of both cultural and natural heritage, at the expense of the local community’.44

However, this community is a fundamental requirement for ongoing realisation of the intangible heritage values of the site and the approach to management argued by Miura is, in the long term, damaging for the ‘living’ heritage site of Angkor. Jacques and Freeman stipulate that the communities hold an important role as they can be used to inform historians, ethnographers and archaeologists examining the history of Cambodia. They suggest that ‘we can imagine how things were by observing the way they are now’.45 This statement postulates that many elements of Cambodian society display continuity over time. Ang has also argued that there is strong continuity in Cambodian customs and daily life.46 This means that the community is important and their ICH should not be restricted and marginalised in order to promote the tangible cultural heritage for the benefit of tourism.

43 Khuon, above n 40.
44 Miura, above n 15.
6.1.2 Contrasts of modern development pressures against maintaining traditions

The growth of the tourism industry in Cambodia has resulted in rapid socio-economic development of Siem Reap town and surrounding areas. It can be quite difficult to comprehend this pace of development. The growth of hotels is one example to illustrate the pace. In 1992 there was only one hotel servicing visitors to Angkor. In 2002 there were 60 hotels in Siem Reap. In 2005 there were 277 hotels and guesthouses in Siem Reap. In 2009 there are closer to 400 hotels and guesthouses.

Demands of tourists have meant that there has been vast growth of facilities within the last 5 years such as internet, mobile phone coverage, satellite television and banking services. There are an increased number of stores catering to the foreign visitors. These include western pharmacies and clothing shops. In addition, in the last 12 months there has been the establishment of the first ‘Western’ fast-food franchises including Swensens®, Lucky Market Group Ltd. (Lucky Burger/ Lucky Seven/ LuckGelato/ LuckKAFê), The Pizza Company Ltd. and KFC© which were previously not available in Cambodia. Early 2009 saw the construction of the first department stores and shopping centres including the Angkor Trade Centre, The Cultural Mall and Lucky Mall. These result in a shift away from traditional shopping areas, which are typically wet markets or psa’s, and small locally-owned food stalls. This shift, at present, targets foreigners in Cambodia and wealthy Cambodians, who are enticed into ‘Western’ shopping environments. However, it is likely that the impacts on local markets will increase. The rise of tourism has also seen the construction of numerous casinos, restaurants and hotels within Siem Reap town.

These changes are collectively referred to in Cambodia as the “new culture” and have dramatic impacts on the way the local community functions. The changes can cause alterations to traditional culture. Luco argues that ‘[t]raditional knowledge is

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47 Adele Esposito and Sylvia Nam, 'Siem Reap: Urban Development in the Shadow of Angkor' (Centre for Khmer Studies, 2008).
49 A wet market is an open food market that sells live fish and reptiles as well as fruit, vegetables and meat.
disappearing with the accelerated opening of formerly conservative populations to the outside world’. Generally, the development within Siem Reap is contrasted by the traditional villages outside of the town areas including to the north around the Angkor monuments. Technological advances (particularly electronic items such as telephones, televisions, DVD players and stereo systems) have been embraced by many Cambodians both within Siem Reap and in villages and in certain cases families will take out a large loan (compared to their annual income) to purchase a television and/or mobile phone. There is increasingly greater pressure on the younger generation to access significant incomes in order to embrace the “new culture”. Luco states that “televisions can now be found in all villages [in the Angkor area] and accelerate the loss of culture”.

There is little incentive among the younger generation of Cambodians to maintain traditional culture. Traditional lifestyles are quickly disappearing in the rapid phase of development. Previously agricultural, social and familial knowledge was passed down orally from the older generations. However, ‘the thread of oral transmission had already been cut during the Khmer Rouge period [with the separation of family units and the substantial loss of the older generation] and is now neglected by the younger generation’. The loss of transmission and the need to re-establish this link has been identified by Endo. Endo developed a program attempting to reconstruct mechanisms for traditional knowledge to be taught by yiey’s (grandmothers) and ta’s (grandfathers). Further programmes are needed to emphasise the importance of knowledge that is traditionally taught orally.

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50 Luco, above n 2.
51 Ibid.
52 Ibid.
6.1.3 Influences of tourism

Angkor is Cambodia’s major tourist attraction and one of Asia’s fastest growing tourist destinations.\(^{54}\) In 1995 it was projected that Angkor would receive 300,000 – 700,000 international tourists and by 2005 there would be 1 million international visitors at Angkor. In 2007 (Jan – Nov) Cambodia received 1.76 million international visitors with 70% of these arriving into Siem Reap (Angkor).\(^{55}\) Of the total guests entering Cambodia approximately 85% will visit Angkor.\(^{56}\) In addition to international tourists, the Angkor WHS is receiving a growing market of domestic tourists. Almost 2 million tourists (international and domestic) visited the Angkor monuments in 2007. In 2007 tourism accounted for 16% of Cambodia’s GDP.\(^{57}\) The importance of this industry to Cambodia cannot be overstated. Tourism is seen as a tool for economic development and poverty reduction through human resource development.\(^{58}\)

![Figure 12 A street banner in Siem Reap (Jan 2009) stating that ‘Tourism brings Development’](image)

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\(^{56}\) Winter, above n 54, 60.

\(^{57}\) Adele Esposito and Sylvia Nam, ‘Siem Reap: Urban Development in the Shadow of Angkor’ (Centre for Khmer Studies, 2008), 40.

The specific influences of the growth of tourism at Angkor are elaborated further below. However as the subsequent quotes illustrate, this industry represents a significant issue at Angkor.

The international community is increasingly worried that tourism is adversely affecting the Angkor sites.... tourists are disrespectful of visitor temple rules and restrictions.59

Tourist developments should not be scattered around Angkor where there is a risk of negative impacts on the host population.60

It is understood by the management authority for Angkor that ‘Angkor is made up not only of temples, reservoirs and other archaeological sites but also of villages – villages that have kept Angkor alive since ancient times’. In addition, the authority recognises that the ‘rise in tourist numbers at Angkor increasingly disturbs the social

and environmental equilibrium of the Park.\textsuperscript{61} Despite these assertions it is found, as clarified further below, that (i) visitors to Angkor are not aware of the rich intangible heritage, contemporary culture and significance of Angkor\textsuperscript{62} and (ii) no attempts are made to limit the impacts of large tourism numbers on local communities and the continuation of their living heritage. In fact, examples given below show that some decisions are made that marginalise intangible heritage in order to maintain large tourist numbers.

Wager\textsuperscript{63} argues that the type of tourist can also play a part in the overall impact that tourism has at a World Heritage Site like Angkor. Wager establishes that there are three groups of tourists who visit Angkor:

(1) Those with a special interest in the archaeology, architecture, art and culture of Angkor;
(2) Tourists with a keen interest in people and places who are motivated to experience the culture of Cambodia and
(3) General interest sightseeing tourists who are attracted to Angkor because of its worldwide renown, including its World Heritage status, and travel in large groups, staying only one or two nights and making only a limited contribution to the local economy.

Despite Wager stressing that the third group should have the least priority when assessing the capacity and management of Angkor, they currently are the group that has the largest number of visitors.

At Angkor there is a trend towards mass tourism with large groups composed primarily of regional tourists. In 2007 six of the top seven market arrivals were from Asian nations including Korea, Japan, Vietnam, Taiwan, China and Thailand.\textsuperscript{64} The majority of these visitors are on package tours where the average length of stay in

\textsuperscript{61} APSARA, 'Social Issues' (2000) 3(July-December) Yashodhara.
\textsuperscript{62} It is also suggested that there are also many other unique aspects of Angkor which tourists are likewise not aware of such as the extensive water management system.
\textsuperscript{64} This represents over 60% of visitors. Ministry of Tourism, above n 55.
Siem Reap is 2 days. In other words the majority of visitors to Angkor are part of the Asian mass tourism market. Winter has found that the growth of tourism in Cambodia is likely to continue this pattern, with increasing numbers of visitors coming from the Asian region.\(^65\) Thus there is expected to be a rise in mass tourism at Angkor. This tourism trend has raised a number of concerns. Disruptions to the local communities around Angkor are thought to be exacerbated when tourism is primarily in the form of large tourist groups which visit for one or two days. It is argued that ‘[m]ass tourism has often resulted in over-development, uneven development, environmental degradation, and invasion by culturally insensitive and economically disruptive foreigners’.\(^66\)

It is noted in academic articles that mass tourist visitations to Angkor can have an impact on the intangible cultural heritage or living aspects of the Angkor World Heritage Site. Recognition of this has led the international discourse to focus on the need to implement different forms of tourism such as ‘sustainable tourism’ and ‘cultural tourism’.\(^67\) Cultural tourism:

‘attempts to bring together the cultural resources of a country with the economic benefits of tourism in a mutually beneficial relationship. It endeavours to reap the optimum social and financial rewards of tourism whilst affording protection to the cultural assets it draws upon’.\(^68\)

It may be asked, given the focus on development of cultural tourism, why Cambodian culture has not played a more prominent role in tourism or been recognised as an important element of the Angkor World Heritage Site? One reason is that, in many cases, cultural tourism is seen as being counter to mass tourism. UNESCO has recommended that in Siem Reap operators should ‘develop facilities for cultural tourism so as to prevent the onslaught of low quality mass tourism provoking

\(^{67}\) Keiko Miura, ‘From Heritage Conservation to Sustainable Development: What and How to Develop and Sustain in Angkor’ (Paper presented at the International Conference on Heritage in Asia: Converging Forces and Conflicting Values, Singapore, 8-10 January 2009).
\(^{68}\) Winter, above n 54, 60.
irreversible destruction of Angkor’s cultural and natural heritage’. While UNESCO may criticise mass tourism and seek to direct future tourism trends away from this market, the revenue from this industry is too substantial for the Cambodian government to actively discourage its growth. Winter notes that ‘[i]n recognising the Royal Government’s positive orientation towards large-scale tourism, it can thus be seen that any distinction made between ‘mass tourism’ and the more refined ‘cultural tourism’ largely remains an external imposition, primarily via the presence of UNESCO or the WTO’.

The mass tourism market, according to Wager, does not have a great deal of cultural motivation for their visit to Angkor. Instead, they come to visit because of the status that Angkor embodies as an important global destination. Assuming that this is a correct conclusion, it is argued here that, as this group dominates tourism development at Angkor, there is not the demand to promote or explain the contemporary cultural significance of the site.

Tourists are rarely presented with the modern significance of the temples, their role in important ceremonies such as Pchum Ben or the legends associated with them. One reason for this is that very little research has been done to document their modern

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70 Winter, above n 54, 64.
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significance. Callari Galli states that research is essential for the development of culturally sensitive tourism:

If we have the purpose to develop and enhance a tourism useful for improving the quality of life of both travellers and guests, we need to stress its cultural aspects: this leads to the study of cultures as basic requirements for the development of a type of cultural tourism which allow hosts and visitors to experience a rich encounter rather than a fierce antagonism or cold exploitation.

The importance of the tourism industry to Cambodia’s economy has meant that no policies are put in place that are perceived to negatively impact the potential of this source of revenue. The implications of this can be seen below in the examples provided from Angkor where any action that is perceived (correctly or not) to be impacting tourists is discouraged. One element of this conviction is that ‘APSARA has failed to articulate the contemporary religious meaning of the site entirely to foreign tourists through literature, signage or otherwise’. An explanation for this is that the contemporary religious value is deemed not to be what the tourists ‘seek’ at Angkor. In my view and experience this is not accurate, as often tourist clamour to take photos which are perceived to represent intangible heritage at Angkor (see Figure 15). Tourists however, due to the lack of signage and awareness, often do not behave in a culturally sensitive manner. As a consequence, there are already many impacts of tourism on the living aspects of the WHS. If this trend continues, there is the potential for further impacts on local communities and their livelihoods.

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71 The only substantial research was carried out by APSARA from 2002-2005 under the governance of Ang Choulean. The department responsible for this research however has since been dissolved and the research has not been utilised within the park.
72 Matilde Callari Galli, ‘Cultural analysis in development of cultural tourism: the Water Festival as a field work occasion’ (Paper presented at the 2nd National Socio-Cultural Research Congress on Cambodia, Phnom Penh, Cambodia, February 3-5 1999).
73 Baillie, above n 25, 65.
The photographer’s explanation of this photo (Figure 15) is informative of several issues at Angkor:

I made a 48 hour tourist trap exception by visiting Angkor Wat because it is Angkor Wat! A better name would be Angkorland after Disneyland therefore the way I adopted my picture taking process to the hordes of tourists was by incorporating them into my photos. It was almost impossible not to have tourists in my frames although it became a fun pastime to try to “hide” foreigners behind Buddha statues and columns while photographing among ancient Khmer ruins. Although tourists are unavoidable at world famous sites like Angkor Wat, what’s most disturbing was the loud, inconsiderate and culturally insensitive behavior displayed. But such is life. I felt sorry for the Buddhist monk in the above photo (they are gentle, shy and peaceful by nature) when I saw the photographer in the Nikon shirt physically pushing him to that spot and asking him to pray. A completely fabricated setup and pose also quite possibly culturally inaccurate because I never saw monks pray like that before.75

74 Ferenc Ecseki 2008.
The tourism industry as a whole has also contributed to the sidelining of living heritage at Angkor. Mar states that the tourism industry has participated in the cultivation of a perception that Angkor is a select number of monuments that are relics of the past. She argues that ‘culture has repeatedly been viewed by the tourism industry in the limited sense of built heritage (historical buildings, archaeology sites etc.) and cultural expression (dance, music, arts and crafts) - tending towards monumentalising culture’. Rarely do tourist agencies refer to the contemporary significance of the Angkor monuments and their religious function, nor do they emphasise the role of the landscape in the livelihoods of local Cambodians. Again this can lead to the marginalisation of the communities who live at Angkor.

When culture is presented by the industry, it is normally a form of reconstructed culture aimed at entertaining the tourist market. An example of this is seen in the production of ‘The Legend of Angkor Wat: When history comes to life’. This nightly production show is performed during the high season in front of the east facade of Angkor Wat. It is an ‘extravaganza [which seeks] to take audiences through history of Angkor Wat’s discovery [and] to follow French explorer A.H. Mouhot on a dreamlike journey through Khmer legends’. The ‘stage spectacular’ presents a fictional story based on the widely propagated false narrative that Mouhot was the first westerner to ‘discover’ Angkor. It seeks to reconstruct scenes from Angkor to entertain the visitor and present a highly fanciful world of the majestic Angkorian city. While such tourism ventures may provide ‘quality entertainment’ for tourists, it does not accurately represent the intangible heritage of Angkor. Instead, this representation of Angkor advances the belief that Angkor’s value is found only in a lost heritage of the past, rather than in a living heritage of the present.

### 6.1.4 International legal obligations

It should be constantly borne in mind that Cambodia has a requirement to meet international legal obligations to safeguard ICH. These obligations stem from

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Cambodia’s ratification of the ICH Convention in 2006. The obligations, of course, extend to ICH at Angkor. These include the identification and defining of ICH and the drawing up of an inventory of ICH with the participation of the local community.  

There is also an obligation to ensure that an appropriate institution is responsible for the safeguarding of ICH. The ICH Convention provides that this institution should adopt policies for safeguarding and ensure recognition of, respect for, and enhancement of ICH in society particularly through education and awareness-raising.

The commitment of Cambodia’s ratification of the ICH Convention is generally not understood within Cambodia. There is even less awareness within the Siem Reap district and very few members of the management authority at Angkor have any comprehension of the ICH Convention. While the WHC is widely understood, there is a need to develop awareness of the ICH Convention. As the management authority of the Angkor WHS, the APSARA Authority is the institution responsible for meeting Cambodia’s obligations to safeguard ICH at Angkor. Previously, the APSARA Authority had a department involved in cultural research and documenting ICH. However, at present only one or two members of the management authority are cognisant of the need to safeguard intangible heritage.

In order to begin to address APSARA’s responsibility to safeguard ICH, it is useful to examine the structure and functioning of the Authority. In May 2008 a Sub-decree regarding the Organisation and Functioning of the Office of Director-General of the Apsara Authority was adopted. This Sub-decree establishes the mission and tasks of the APSARA Authority along with the duties and obligations of its departments. Article 3 states that APSARA has the task to ‘assist the population of the [Angkor] park to safeguard their traditional habitat and religious constructions, especially in protected areas, while helping improve the population’s living standard’, to ‘contribute to the dissemination of knowledge and research on Khmer culture’ and ‘to promote and carry out studies on tangible and intangible Khmer culture’.

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78 Provided for in Articles 11 and 12 of the Convention. For discussion of these obligations see Chapter 3.
79 Provided for in Article 13(b).
80 Provided for in Articles 13(a) and 14.
The Sub-decree establishes that the Authority is composed of 14 departments (Figure 16).\textsuperscript{81} The departments which are assigned responsibilities related to ICH are the Department of Land Planning and Habitat Management in the Angkor Park, the Department of Cultural Development of Museums and Heritage Norms and the Department of Communication\textsuperscript{82}. These departments all have a role to play in meeting the obligations established within the ICH Convention.

\textsuperscript{81} Article 6.
\textsuperscript{82} Another department that has implications for the practice of ICH, in the form of agricultural knowledge and livelihoods, is the Department of Public Order and Co-operation. This department is responsible for centralizing data relating to forest destruction, illegal agricultural activity and forestry land grabbing and actively halting tree destruction, illegal land grabbing and illegal dwelling construction.
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Figure 16 The Structure of the APSARA National Authority
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The Department of Land Planning and Habitat Management is assigned the following tasks.\(^{83}\)

- Carry out analysis, monitoring, follow-up and action missions with regard to the existing population living in the Angkor WHS.
- Assist in cultural and ethnographic studies regarding the population living in Angkor Park.
- Assist the Communications Department in carrying out awareness activities with the local population on heritage values and on the significance of respecting this heritage.
- Conduct outreach activities to the Buddhist clergy on the values of religious heritage and the significance of safeguarding ancient buildings and existing wall paintings in monasteries.

The Department of Communication is, as implied above, assigned the general task of drafting communication campaigns aimed at school children, the general population, communities and religious authorities of Siem Reap province, in order to raise awareness of the protection and value of the World Heritage aspects of the area.\(^{84}\)

Finally, the Department of Cultural Development of Museums and Heritage Norms is to:\(^{85}\)

- Ensure a fair, transparent and profitable management of cultural, artistic and festive events organised in the Siem Reap/Angkor region.
- List inventories, catalogues and guides in compliance with universally agreed standards and recommendations.
- Ensure that International Standards for cultural heritage and in particular compliance with UNESCO Conventions are met.
- Assist in drafting regulations ruling activity management within the Angkor Park.

\(^{83}\) Outlined in Article 10.
\(^{84}\) Outlined in Article 20.
\(^{85}\) Outlined in Article 15.
In order to develop programmes to protect intangible cultural heritage at Angkor, the APSARA Authority can align these assigned duties to the safeguarding of ICH. By developing such programmes, the Authority can contribute to the safeguarding of ICH at the scale of a WHS and the national commitment of Cambodia to protect this heritage.

6.2 Intangible Cultural Heritage at Angkor

Siem Reap’s rural populations are known to be particularly conservative with respect to ancestral traditions, and a great number of archaic cultural practices that have disappeared elsewhere continue to be performed in its villages... many of these traditions are only found here, reflecting the specificity of the Angkor region’s rich historical legacy.  

6.2.1 Intangible linkages in a tangible landscape

To understand why, as argued above, that perhaps the greatest importance of Angkor as a heritage site of ‘outstanding universal value’ comes from the perceptions and values attributed by the local population, we should examine in more detail those values and some aspects of the intangible heritage of Angkor.

When examining ICH, what is being examined are cultural associations and knowledge linked with the landscape and the subsequent practice of beliefs that arise from those associations and knowledge. In this case, those practices occur in a landscape of tangible features that have their foundations during the Angkorian period (and some pre-Angkorian). However, the ICH practices and contemporary associations are the result of continuous use and understanding of the sites. Groslier indicates the continuous use around Angkor by reflecting on the way that a ‘great number of the modern villages today overlap the ancient Angkor villages, to such a

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87 This thesis does not by any means aim to present a complete examination of the ICH at Angkor, but presents instead some elements which are sufficient to support the arguments of this thesis. The depth and breadth of ICH elements at Angkor is phenomenal and while research has been completed on aspects of these, there is much scope for further examination particularly regarding agricultural knowledge, regional myths and legends, communication with spirits and traditional healing methods. Refer to Chapter 1 for a discussion of the scope of ICH within this thesis.
point that today’s Buddhist monastery is built on top of an ancient temple’. Examples of this can be seen at Wat Athvea, Bakong, Wat Cheday and Wat Neang Rup and many others across Cambodia (Figures 17 and 18). Indeed, the modern Buddhist monasteries inside Angkor Thom and Angkor Wat represent ongoing spiritual associations. Groslier further elaborates that even when a temple or location is no longer continuously used, intangible associations can still exist, as he states that even when ‘the site of the actual temple, [is] broken down and covered over by a small wood, [it] is a sacred spot…a neak ta, spirit of the place generally incarnated by a stone taken from the buried monument, is still revered here’.

Figure 17 Wat and Angkorian ruins in Kampong Cham province.

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89 Miura notes that seven monasteries in Angkor Thom have been reconstructed on ancient monastery foundations (99) and argues that these “monasteries in or near ancient sites demonstrates Cambodians’ continuing belief in the sacredness of the site”. Miura, above n 1, 88.
90 Groslier, above n 88, 62.
91 May Ebihara (1960).
In 2002 the Ministry of Culture and Fine Arts arranged for folk troupes from the north-eastern plateau to visit Angkor. When members of these troupes saw ancient bas-reliefs of their religious ceremonies they spontaneously launched into ritual songs and dances. While the circumstances of their visit may have, to a certain extent, induced this response, it demonstrated the complementary nature of the modern culture and Angkorian image. This occurrence, and comparable others which occur, represent a contemporary link to Angkor and the continuation of a culture which has elements that are similar to those present during Angkorian or even pre-Angkorian times.

Miura states that ‘one of the most important associations of the local community with Angkor is their religious and spiritual relationship with particular ancient temples and monasteries’. The significance of the Angkor site from a religious viewpoint is therefore two-fold; the spiritual associations linked to ancient monuments and the religious activities of monasteries. These should not, however, be seen as distinctly

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93 Miura, above n 18.
independent of each other as they are intricately linked in many ways. The intangible associations with these buildings are the basis for social norms of local villagers. These associations are linked with life stage ceremonies (e.g. Bous Neak) and annual ceremonies (e.g. pchum ben/Khmer new year), seasonal ceremonies (e.g. agricultural ceremonies) or monthly ceremonies (e.g holy days every lunar cycle, thgnai sil or thgnai sael).

6.2.2 Temples, spirits and daily life

For most Cambodians, animism is a fundamental element of daily life. However, it is frequently underestimated and misunderstood. In many descriptions of Cambodian religion, animism is often not even mentioned. Animism is sometimes said to constitute a philosophy rather than a religion or thought to be a primitive belief that is not as legitimate as other religions such as Buddhism. However, it cannot be denied that it is the foundational component of the Khmer belief system. It is argued in this thesis that animism comprises a fundamental, legitimate and important arrangement of religious beliefs. Furthermore, in Cambodia, this arrangement of religious beliefs is central to, and ‘cannot be dissociated from, the rest of everyday life’. Ang argues that ‘since the time of ancient Cambodia the main enduring characteristic in the elaboration of Khmer religious thought was the search for harmony between that local animistic foundation and Indian philosophic-spiritual contributions’ through Buddhism and Hinduism. The pervasiveness of animism within Khmer culture has been consistent since the pre-Angkorian period. Indeed, many aspects of the belief system are analogous to those that were carried out centuries ago. Vickery proposes

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94 Animism is the belief in souls and spiritual beings in both animate and inanimate objects.
95 See one of the seminal works which has been foundational for the understanding of animism in the anthropology discipline; Edward B Taylor, 'The Philosophy of Religion among the Lower Races of Mankind' (1870) 2(4) Journal of the Ethnological Society of London 369. Taylor theorized that animism was the minimum definition of religion. This is also presented in his book published in 1871 called 'Primitive Culture'. More recent works include John Brohm, 'Buddhism and Animism in a Burmese Village' (1963) 22(2) The Journal of Asian Studies 155, Michael M. Ames, 'Magical-animism and Buddhism: A structural Analysis of the Sinhalese Religious System' (1964) 23 The Journal of Asian Studies 21, Graham Harvey, Animism: Respecting the Living World (2005).
96 Miura, above n 1, 212.
97 Ang Choulean, 'The Place of Animism within Popular Buddhism in Cambodia- The example of the monastery' (1988) 47(1) Asian Folklore Studies 35.
that ‘the concept of local protective gods of the earth, existed, probably from prehistoric times as part of native Khmer or Mon-Khmer religion’. Chandler likewise argues that there has been continuity within the religious language used by village people since the pre-Indian era.

Khmer Spirits

The world of spirits and the roles of such spirits continue to encapsulate an important intangible association that Cambodians have with Angkorian temples and the landscape. It is clear that ‘[l]ocal people see Angkor as a sacred landscape… full of spiritual power’. There is a multifarious collection of spirits that comprise Cambodian animism (see Figure 19). It can also be said that spirits are part of a hierarchical structure, with both neak ta and parami spirits having ranks indicating their importance.

Neak ta are the most commonly referenced spirit type within Cambodian animism. They have a central and essential role in animistic beliefs. These are tutelary or terrestrial spirits that tend to be localised, as opposed to parami. They are the guardians of temples, villages, areas of land or objects such as trees. Every village in Cambodia has at least one village neak ta.

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99 Ibid, 144.
101 Miura, above n 1, 53.
Like parami, mediums (such as rup/rupt memot) interact with neak ta to seek their advice, patronage or forgiveness for inappropriate actions. Bertrand\textsuperscript{105} quotes one medium as saying:

\begin{quote}
the way of the neak ta and the way of the boramey is the same—the best neak ta can pass an exam to become boramey. Now very often they want to become boramey because they cannot find a rup in their village and there is a need to help the whole
\end{quote}

\textsuperscript{104} This diagram attempts to show the complex relationships between the spirit types. The red circles indicate spirits which are considered to cause misadventure or illness when offended. Arak, Kamauit, Preay, Praet and Besach are often thought to be malevolent and people are often quite fearful of them. The blue circles represent the house spirits and spirits of animals. Generally these spirits are harmless. The diagram also indicates some variations in phonetic transcription of spirit names. Due to the fact that there is no internationally adopted system for the transcription of Khmer there are frequently variations in spelling when authors use the Latin alphabet. There are many other phonetic transcriptions that I have come across, however I intended to present the predominant Romanised spelling of spirit names.

\textsuperscript{105} Bertrand, above n 110, 38.

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country…. The boramey have a lot of knowledge, the neak ta less, but they can change (pdo) once they study and pass their exam to become boramey.

As local spirits, neak ta have an integral function in the community and daily life of Cambodians. Field research conducted on the relationship between neak ta and traditional medicine found that:

neak taa [sic] has three roles in this community: maintainer of village and people, judge of wrong conduct, and destroyer. As the maintainer: neak taa [sic] will help people in this village as his/her children such as giving them the rain for rice field when they ask for help through ritual; as a judge: neak taa will punish someone especially woman who had inter-sexual misconduct beside traditional code of conduct; as a destroyer: neak taa [sic] will make someone sick or die because of not respecting him.106

Like most aspects of animism in Cambodia, the belief in neak ta is thought to predate both Hinduism and Buddhism. Sovath107 states that evidence of inscriptions from the late Funan period describe numerous gods such as ancestral gods and gods of the earth, which are present day neak ta. These gods are thought to have existed since prehistoric times (at least the 1st millennium BCE or earlier). He argues that;

The local religion and ritual practices during the Funan period had deep roots and existed in the society long before the arrival of Indian religion. The existence of this pre-Indian religious can be traced through many Sanskrit and Khmer texts that frequently listed names of domestic gods, the worship of supernatural beings such as spirits of the land, rice, water, mountain, forest, and ancestors [sic].108

Parami are important spirits that can be possessed by mediums. Parami can be seen as either elite or national level spirits109 such as those representing kings, senior monks, mythological figures (such as the son of Rama) or important historical figures

109 National neak ta which are not associated with a particular geographic area are sometimes considered to be parami.
such as army heroes and famous kru (masters). Parami spirits protect boats, particularly those used during the water festival\textsuperscript{110} and offerings for the spirits are placed on boats (see Figure 20).

The other significant spirit types that are respected and worshipped through animistic practices are Bangbat, Preay\textsuperscript{112}, Kmauit, besach, Arak, Preta, Meba, Cmnieng Pteah and Mrin konvil. The specific definitions of these spirits and their roles is variable within the literature and from observations made during the course of this research. It may be proposed that the understanding of the spirits differs in different locations throughout Cambodia. There appears to be natural variability due to the nature of belief in animism being based on oral transmission and local folklore. Arak are

\begin{itemize}
\item Didier Bertrand, 'The Names and Identities of the Boramey Spirits Possessing Cambodian Mediums' (2001) 60Asian Folklore Studies 31. Ang contradicts this saying it is brāy spirits which reside in racing boats. He argues that ‘the brāy resides in the boat itself, being assigned the function of a guardian, and she is “nourished” regularly’. However, it should be noted that Ang also states that brāy which are within the monastery (particularly vihar) or ‘who converted to Buddhism’ may also be known as brāy brah parami or more frequently parami. Thus, he is indicating that brāy are equivalent to parami in certain circumstances. (Ang Choulean, 'The Place of Animism within Popular Buddhism in Cambodia- The example of the monastery' (1988) 47(1)Asian Folklore Studies 35).
\item Georgina Lloyd (2007).
\item Some scholars consider Preay and Preta to be the same spirit type, with Preta just being the name in Pali. However Ebihara classifies these spirits as separate entities. Although, in her classification ‘priey’ are a type of Kmauit.
\end{itemize}

\textsuperscript{110} Didier Bertrand, 'The Names and Identities of the Boramey Spirits Possessing Cambodian Mediums' (2001) 60 Asian Folklore Studies 31. Ang contradicts this saying it is brāy spirits which reside in racing boats. He argues that ‘the brāy resides in the boat itself, being assigned the function of a guardian, and she is “nourished” regularly’. However, it should be noted that Ang also states that brāy which are within the monastery (particularly vihar) or ‘who converted to Buddhism’ may also be known as brāy brah parami or more frequently parami. Thus, he is indicating that brāy are equivalent to parami in certain circumstances. (Ang Choulean, 'The Place of Animism within Popular Buddhism in Cambodia- The example of the monastery' (1988) 47(1) Asian Folklore Studies 35).
\textsuperscript{111} Georgina Lloyd (2007).
\textsuperscript{112} Some scholars consider Preay and Preta to be the same spirit type, with Preta just being the name in Pali. However Ebihara classifies these spirits as separate entities. Although, in her classification ‘priey’ are a type of Kmauit.
sometimes referred to as evil spirits, usually female or simply as the spirits of the dead which may take on human or animal form. Arak are similar to parami and neak ta because they may be channelled by a spirit medium or rup arak.

Within literature on Cambodian animism, bangbot are not often referred to but the few references that exist exhibit a good deal of variation. Ebihara states that these spirits are similar to Arak but they do not cause illness or assume the form of a living being. Other descriptions suggest that they are spirits which inhabit water bodies, are spirits which are not very powerful or not as high ranking as neak ta or parami and spirits that may be used for everyday assistance such as predicting lottery numbers or seeking help to get a girlfriend. Baillie argues that they are guardian temple spirits that help ‘good’ people. Bangbot are also thought to be sorcerers or people who can possess spirits. The term bangbot may be used in some areas interchangeably with memot to describe spirit mediums. Due to the vast variation of descriptions related to the bangbot, it is wise to conclude that no specific description can be attributed and more research needs to be conducted about these spirits.

Preay are demonic spirits and those that died a sudden or violent, untimely or unnatural death such as women who died in childbirth. Ang argues that these are by far the most dangerous spirits in the whole Khmer animistic pantheon. Alternatively they are thought to inhabit large trees and manifest themselves as balls of fire flying between trees. Similarly, Praet like preay, are known as nasty demons as they are the spirits of dead people who committed a dreadful sin, or malevolent

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115 Ibid.
118 Ang Choulean, 'The Place of Animism within Popular Buddhism in Cambodia- The example of the monastery' (1988) 47(1) Asian Folklore Studies 35.
119 Ibid. He notes that because of the tragic death of these spirits they are the bearers of extreme impurity and formidable magical energy.
spirits who create trouble. Generally *praet* have not gone to heaven but are stuck in hell. Some *praet* are thought to have very small mouths the size of a needle.

*Kmauit* (*khmoc*) are ghosts. *Beisach* are sometimes considered a sub-category of ghosts that live on dirt and other ‘food’ that is left in the fields for them. Generally ancestral forms of *kmauit* are referred to as *kmauit mdaay* (mother ghost) or *kmauit ow-bpuk* (father ghost). *Meba* are the same as ancestral kmauit. They are ancestral spirits who look after the family and may cause illness if they witness a family member misbehaving. Most houses in Cambodia have a shrine dedicated to the *Meba* and during familial ceremonies, particularly weddings, they are given offerings and asked to bless the occasion. In addition to the shrine for *Meba*, Cambodian houses have a spirit house 121 dedicated to *Cnnieng pteah* or house spirits. These spirits are benevolent and watch over the inhabitants of the house.

Finally *Mrenh kongveal* are elf-like guardians of animals. It is generally believed that these spirits look out for the health and wellbeing of animals and ensure that they are not mistreated.

**Animism at Angkor**

Temple sites hold spiritual significance through the interactions that locals have with their *neak ta* spirit or temple guardian/patron spirit. These spirits can affect the welfare and lives of people. It is believed that every ancient temple, sacred site and village has at least one *neak ta*, with more important or larger sites holding many. Several temples are now named after *neak ta* such as Takeo, Bakong and Ta Phnom.122

The belief in *neak ta* is said to predate Hinduism and Buddhism.123 However, these elements of belief cannot be isolated from other contemporary religious beliefs such as Buddhism. It has been illustrated many times that Buddhism and Animism are

121 A small structure representing a house that sits in front of a dwelling.
123 Miura states that Hinduism practiced during the Angkor period had been incorporated into the spirit cult since the pre-Angkor period, merging the linga – shiva himself – with the *neak ta*. Miura, above n 93.
intricately linked and co-exist harmoniously in contemporary Cambodia.\textsuperscript{124} Examples of this are frequently seen, such as animistic shrines that are placed in Buddhist monasteries.\textsuperscript{125} Indeed the two religious beliefs are so intertwined, that as Ang notes, Buddhist monasteries have their own classification of \textit{neak ta} known as \textit{neak ta wat}.\textsuperscript{126} Didier, in his study of \textit{parami}, quotes a \textit{kru boramey} who is also a Buddhist monk.\textsuperscript{127}

The belief in \textit{neak ta}, or as some describe it, the ‘cult of the \textit{neak ta}’ requires the periodic appeasement of highly-localised spirits.\textsuperscript{128} These spirits, Chandler notes, are associated with features of the landscape or with predecessors\textsuperscript{129} and for ceremonial purposes they can be summoned into a boulder, statue (often a statue or stone taken from an Angkorian temple), or almost any other object. Often \textit{neak ta} have a close relationship with fertility and the soil, as is the case with \textit{Yiey Tep}, one of the principal guarding spirits of Siem Reap,\textsuperscript{130} who is often consulted and presented offerings to ensure successful relationships and high fecundity.

\textit{Neak ta Reach}\textsuperscript{131} in Angkor Wat is significant enough even for the conservationists to acknowledge.\textsuperscript{132} Indeed the broad significance of monuments in Angkor Wat was

\textsuperscript{124} See Miura, above n 1; Y Ishizawa, ‘À la Recherche des Fondements de la Culture en Asie du Sud-est et au Japon’ in A Forest and Y Ishizawa (eds), \textit{Appareils Cultuels et Appareils de Pouvoir} (1991) ; Ang Choulean, \textit{Les Êtres Surnaturels dans la Region Populaire Khmère} (1986).

\textsuperscript{125} Although Marston relates that “there is almost invariably a \textit{neak ta} shrine in a Cambodian wat”, he does not emphasise the interconnectedness of \textit{neak ta} worship and Buddhism. Instead he states that “\textit{neak ta} does not technically fit the definition of Buddhism of many Cambodians”. I would disagree with this statement as I would be surprised to find many Cambodians who do not practice elements of \textit{neak ta} worship alongside Buddhist practices. John Marston, ‘Reconstructuring ’Ancient’ Cambodian Buddhism’ (Centre for Khmer Studies, 2001).

\textsuperscript{126} Ang Choulean, ‘The Place of Animism within Popular Buddhism in Cambodia- The example of the monastery’ (1988) 47(1) \textit{Asian Folklore Studies} 55.

\textsuperscript{127} Bertrand Didier, ‘The Names and Identities of the Boramey Spirits Possessing Cambodian Mediums’ (2001) 60 \textit{Asian Folklore Studies} 31, 42.

\textsuperscript{128} See David Chandler, ‘Collected Khmer Folk-Tales, Part 8: The traditions of certain “ancestor-people”’. (1973) 61(2) \textit{Journal of the Siam Society} 219.

\textsuperscript{129} He argues that ‘\textit{nak ta}’ represent many sorts of people, including mythical ones, suggesting that most of them are not ancestors, in a genealogical sense, but predecessors.

\textsuperscript{130} Yiye Tep is located in front of the Royal palace and takes the statue form of the leper king.

\textsuperscript{131} Ta Reach has been referred to as a Royal \textit{neak ta} and as the supreme commander among \textit{neak ta} in the region. The power of Ta Reach is one of the main reasons behind the power of Angkor Wat. ‘His power’, as Miura explains ‘radiates from Angkor Wat to surrounding areas’. Miura, above n 1, 77.  

\textsuperscript{132} Warrack states that because of the religious significance of \textit{Neak ta Reach} stone conservators “decided it was necessary to speak to the local religious leader in the nearest village before we started restoring it”. It was sought to use local sandstone for the restoration, the same as that which the statue was composed, as this statue would possess the same spirits as Ta Reach. Simon Warrack, \textit{Ta Reach –}
recognised at the 14th ICC technical meeting in relation to *ta Reach*. The work of GACP to restore the image of this *neak ta* showed how conservation may be conducted with the input of the local community and respect for religious value. It may be seen as a role model for other restorations projects at Angkor.

As mentioned above, there are indirect influences of tourism on the intangible heritage at Angkor. This can be seen particularly at Angkor Wat, where tourist numbers are greatest. Conflicts arise between the behaviour of foreign (and sometimes domestic) visitors and the beliefs of local people within the temples and around statues representing *neak ta*. Miura states that *neak ta* maintain ‘the ownership of temples and sites, where they guard and watch over the conduct of people at vantage points to ensure the maintenance of social order and welfare’. Inappropriate conduct by visitors around *neak ta* statues and within the temple is therefore seen to anger the spirits who show their unhappiness by affecting the welfare and health of local villagers. The role of *neak ta* within the temple is ‘to protect the temples and sanctuary and protect or punish offenders against the ‘law of the spirit’ or social morals’. Indeed Miura further notes that *neak ta* ‘can be

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133 Simon Warrack spoke on behalf of the GACP (German Apsara Conservation Project) to outline the significance of their restoration work in Angkor wat for the religious value of the temple, statues and *neak ta*. He said it was important to acknowledge the living element of Angkor and realise that it is an important religious building. He noted that Angkor Wat is the most used building by the religious community of Angkor.

134 Miura, above n 1, 56.

135 It is important to understand the fundamental belief structure that exists whereby “the causes and effects of illnesses, death or misfortunes are perceived as affected by the world of spirits who closely observe and respond to human behaviour”. Miura, above n 1, 90. This belief structure is so strong that even in a court of law the *neak ta* have a role to assess wrongdoings. Luco states that *Neak ta* are present in law courts and oaths must be taken in front of these spirit’s statues. “Each village, each pagoda and each law court had its own spirits... Before entering the courtroom, the parties would swear an oath to tell the truth before the spirits while the Clerk of the Court witnessed the scene”. Fabienne Luco, 'Between a Tiger and a Crocodile: Management of local conflicts in Cambodia. An anthropological approach to traditional and new practices.' (UNESCO, 2002), 42.

The practice of swearing an oath to a local spirit is also mentioned by Chandler. He states that the “phrase *me sa*, with the meaning of guardian spirits in general... [is found] in an oath used in Cambodian civil trials, known as the *Pranidhan*”. David Chandler, 'Royally Sponsored Human Sacrifices in Nineteenth Century Cambodia: the cult of nak ta Me Sa (Mahisasuramardini) at Ba Phnom' (1974) 62(2) *Journal of the Siam Society* 207.

136 Miura, above n 1, 56.
regarded as the spiritual version of heritage police’,\textsuperscript{137} which provides an interesting parallel of the potential hardships imposed by such forces on the local population.

There have been several reports of villagers being struck by misadventure and illness after witnessing disrespectful behaviour and either being amused (one old woman in Angkor Wat said she had giggled once when she witnessed a tourist tripping on a mat in front of the statue representing \textit{Ta Reach}; soon after her son became seriously ill)\textsuperscript{138} or failing to then provide offerings to gain the forgiveness of the \textit{neak ta}. It was explained by one local that the spirits take out their wrath only on locals rather than on the visitors who anger them, because they are not the spirit of those visitors and it is not the role of visitors to ensure that there is appropriate conduct within the temple but rather those who worship and understand the role and power of \textit{neak ta}.\textsuperscript{139} Therefore lack of awareness and respect in visitors has deleterious effects on locals via the complex intangible belief structure intricately bound to Angkor.

Other than animism, Buddhist associations with temples are an important component of Angkor’s intangible heritage. Monastic communities such as those present at Angkor Wat, Bakong, Wat Neang Rup and Wat Athvea live within the boundaries of Angkorian temples. These pagodas are closely affiliated with their surroundings.

The values attributed to the Angkor site are not simply founded on spiritual and religious associations within the temples themselves. There are also important values that stem from familial links, agricultural practices and traditional knowledge such as the methods used for the treatment of illnesses. The local knowledge and practices are

\textsuperscript{137} Ibid, 57.
\textsuperscript{138} Luco elaborates that within Khmer culture it is generally understood and accepted that the \textit{neak ta} play an important role in preventing bad deeds. She explains that “the spirits punish those who upset the established order with their improper behaviour, such as talking too much and making fun of people and things”. Luco, above n 135.
\textsuperscript{139} I witnessed a similar situation after meeting with a spirit medium in Phum Prasat Char. The spirit medium, Yiey Kun enthusiastically explained and showed me the offerings that are presented to ancestral ghosts (\textit{kmauit mdai, kmauit ow poock}) to appease them and ensure good health after I enquired about such offerings. On a later visit to Yiey Kun she informed me that after my visit she was struck by illness due to the fact that I had not shown my respect to the spirits for viewing their offerings. My ignorance of the correct behaviour had made her sick because she was (in her eyes) the one responsible for ensuring the happiness of the spirits and should have instructed me to provide offerings. Of course, upon hearing of my ignorance, I then showed deference and provided suitable apologetic offerings both to Yeiy Kun and the ancestral spirits.
closely tied to the Angkor landscape and form part of the intangible cultural heritage of Angkor. Examples from two villages around Angkor, Prasat Char village and Nokor Krau village, to illustrate this point as provided below.

![Image of Angkor area with villages marked]

Figure 21 Villages within the Angkor World Heritage Site.

6.2.3 Spirit mediums within the Angkor landscape – examples from Prasat Char and Nokor Krau villages.

In addition to neak ta venerated in local villages, there are numerous other spirits who are respected and seen to directly respond to the behaviour of villagers by affecting their livelihood or welfare. As a result of this, there are numerous unique methods that have arisen to communicate with the spirits and appease them. In Prasat

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140 Prasat Char village and Nokor Krau village are circled. Note the Romanised spelling of the names in this map is based on the Japanese International Cooperation Agency (JICA) village survey. The red hatched area indicates zone 1 of the Angkor site and the larger area north of Siem Reap indicates zone 2.

141 Such as kamaiut (kmoch) or ghosts, arak, meba as described above. These spirits can cause harm to people as a result of particular behaviour or sometimes without reason.
Char village, many of the older women are able to communicate with spirits via practices of *rup memot*\(^{142}\) or *bowl*.\(^{143}\) *Bowl* is principally used to diagnose the cause of an illness. It involves the use of rice, incense and candles. The diviner, who is normally a woman, will call upon the spirits and ask them to indicate if they are the cause of the particular illness. An affirmative answer is determined based upon a change in the equipment being used for the *bowl*, if for example the egg moves on rice in *bowl pong muan* or the *pronak* swings and dislodges rice in *bowl pronak*, then it is concluded that the spirit is confirming that it is the cause of the illness. The spirit will then be asked what offerings need to be made to remedy the illness. A villager in Siem Reap district recalls the use of *bowl pong muan*:

People used to go see the Hora.\(^{144}\) He had powers of divination; he would read an egg to find the cause of the illness. When it had been identified, a ceremony was carried out and offerings were presented to the ancestors.\(^{145}\)

Through observations made at Prasat Char, I can confirm that *bowl pronak* is still commonly carried out. There are also anecdotal reports of *bowl kambat* (bowl with knife) being conducted in the Roluos area of Angkor.

\(^{142}\) The forms of *rup* such as *rup memot* or *rup arak* are occasions when a spirit medium is possessed by a spirit. When the spirit is being possessed it is called *chol rup* or to enter the body.

\(^{143}\) There are several types of *bowl* using different instruments. A thesis conducted by students at RUFA on life in villages to the west of Angkor state that in this area there are four types of *bowl* used: *bowl pronak* (*bowl* using a *pronak* or scissor like implement used in the making of *slar mloo*), *bowl pong muan* (*bowl* using *pong muan* or eggs), *bowl ork kam bor* and *bowl kam baat ban thu* (*bowl* using a style of knife). Tim Tyma and Dim Chhorpeada, *Six Villages which have existed for a long time in the Western area of the temples of Angkor* (Bachelor Thesis, Royal University of Fine Arts, 1999). Eisenbruch describes a different type of *bowl* (he spells ‘*bool*’) which he observed being conducted by *kru* in which “the patient kneels before the *kru* on a plank which is balanced on a bell and objects representing the five incarnations of the Buddha are laid out spatially in the cardinal directions around the bell…. The *baarea? mɔy* derived from his own guru makes the plank swivel, showing the *kru* to which ancestors of spirits and directions the family must make offerings”. Maurice Eisenbruch, ‘The Ritual Space of Patients and Traditional Healers in Cambodia’ (1992) 79(2) *Bulletin de l’École Française d’Extrême-Orient* 283.

\(^{144}\) This may be reference to a *hao-ra* or *kru tieay*, a fortune teller. Fortune tellers are called Hora in the UNESCO Inventory of Intangible Heritage of Cambodia. UNESCO, *Inventory of Intangible Cultural Heritage of Cambodia* (2004).

\(^{145}\) Mr Saron, 67, Nokor Thom Commune. As cited in Luco, above n 135, 43.
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Figure 22 Bowl pronak – one method used to communicate with spirits.

Figure 23 Some of the traditional offerings (jom and slar tuor) given to spirits in order to appease them.\textsuperscript{146}

It is found via such methods of communication that often the spirits want food offerings as they are hungry or other offerings such as incense, make-up, cigarettes

\textsuperscript{146} The offerings on the left are commonly given to \textit{mdai doem} spirits.
and traditional offerings (jom) made of local materials, such as bai sei or slar tuor.\textsuperscript{147} Miura states that ‘the placation of spirits has become one of the major preoccupations of the rural population, in order to seek balance and harmony between the two worlds and ensure wellbeing’\textsuperscript{148}

In Nokor Krau village there is a spirit medium or rup memot. Chandler states that ‘most rub nak ta seem to be old women, one to a village, and inherit their posts from relations; but some are young, some are men, and some villages have several’.\textsuperscript{149} The spirit medium in Nokor Krau village is a male and he is very well known and respected throughout the region. The medium has an important role in respecting local spirits and conducting annual homage ceremonies. In some cases the medium may be asked by a single family to conduct a ceremony in order to communicate with spirits. Often the family has a member who is ill or may be about to embark on a journey. Specific spirits may be contacted through the medium and asked to heal or provide blessings for the family. Mediums are closely associated with the belief in neak ta described above. The rup memot from Nokor Krau village conducts the annual leang neak ta ceremony for Ta Reach in Angkor Wat, in addition to the local village neak ta. Rup memot ceremonies can be quite expensive, with many offerings given to both the memot and the spirits. Offerings normally include a whole pig’s head\textsuperscript{150}, incense, slar, candles, cigarettes, rice, fruit, soft drinks or beer. For certain spirits, a family may provide perfume, make-up or clothes.

\textsuperscript{147} Slar tuor are offerings made from banana tree or coconut base. They have candles, incense and slar tree leaves. Bei sei (referred to as Baysei) are defined as being “made of a banana trunk and its leaves elaborately folded into corn-shapes and inserted into rings around the trunk that constitute odd-numbered levels from one to nine. The baysei with the respective levels have distinct names. Some of them contain raw rice. The kind and number of the baysei prepared is determined by the kind of ritual, for which it is required, but always in pairs”. (Miura, above n 1, 94) From research conducted I have found that typically bai sei have 3, 5, 7, or 9 tiers and that there are some adaptations of bai sei which do not require that there be a pair. Eisenbruch states that bai sei (spelt baays\textsuperscript{e}) are also used by Kru to call upon spirits for healing power. See below for more detail on kru. Eisenbruch, above n 143.

\textsuperscript{148} Miura, above n 1, 90-91.

\textsuperscript{149} Chandler, above n 128.

\textsuperscript{150} The origin of this offering is presented in a document from the Buddhist Institute. It is stated that during leang neak ta (translated as leon nak ta) traditionally human sacrifices were made (the paper describes one such sacrifice from Ba Phnom around 1870s), these were soon changed to buffalo sacrifices. In 1924 the paper states that people began to sacrifice a pig instead, but even this eventually stopped and in 1944 the sacrifice takes the form of an offering of cooked pork, purchased at the market. Translated by David Chandler, Brajum Rien Bren (Collected old stories) Phnom Penh, Printed 1971 (Composed in 1944) – Vol. VIII, 81-88.
Leang *neak ta* ceremonies are traditionally conducted at the location of the *neak ta* image. This means that there are conducted within Angkorian temples and adjacent to many other Angkorian features such as trapeangs.152

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151 APSARA Authority (2004).
152 An Angkorian water feature or pond.
Figure 25 *Baisai* and offerings for a ceremony in Angkor Wat.\(^{153}\)

Figure 26 *Leang Neak ta* ceremony in Wat Athvea.\(^{154}\)

\(^{153}\) APSARA Authority (2002).
\(^{154}\) APSARA Authority (2003).
6.2.4 Traditional healing and magic

In addition to mediums who communicate with spirits in the Angkor landscape, such as spirits who reside in the ancient temples, there are also traditional healers known as kru whose knowledge and practices are closely linked with the spiritual world. There are also links between kru and the Angkorian period. Eisenbruch\textsuperscript{156} presents some links between modern kru and Angkorian culture. He states that ‘the Angkorian kingdom had 102 hospitals staffed by physician-priests … and some kruu [sic] described ancient Khmer hospitals where they said that their ancestral kruu [sic] had worked, implying that they were their descendants’. He also notes that some of the known pharmaceutical products used in Angkorian hospitals (found in Angkorian inscriptions) are the same as those used by the kru today. The yantra, powerful healing and warding symbols, still used by kru, were used in Angkorian Cambodia.\textsuperscript{157} Chou Ta-Kuan (also known as Zhou Daguan), a Chinese emissary to Angkor during

\footnotesize{155 APSARA Authority (2004).} 
\footnotesize{156 Eisenbruch, above n 143.} 
\footnotesize{157 Ibid.}
the 13th century, documented the use of yantra on mental which the king inserted beneath his skin to make him invulnerable.\textsuperscript{158}

Within Nokor Krau village just north of Angkor Thom there lives a kru. This kru is known by all the villagers and is sometimes visited by people from other villages and from Siem Reap. Traditionally the kru was seen as a traditional healer who would use numerous different methods to treat his patients, including herbal medicines, magic and spirit communication. Even in circumstances where the kru insists only on the use of herbal medicines, rather than direct spirit communication, to treat illness, there remains an element of spirit worship as the kru continues to provide offerings to the spirits to gain healing power,\textsuperscript{159} ensure his herbal treatments are successful and to sustain his concentration when consulting a patient. Eisenbruch found that ‘some kruu are afraid to use mo\textsuperscript{3}n? aakum\textsuperscript{160} openly and claim only to know only how to administer traditional herbal medicines similar to Western medicine’ and suggested that this is probably due to intimidation by authorities ‘who wanted to modernise medicine at the expense of the kruu’s traditional methods’.\textsuperscript{161} I found when in Prasat Char that the villagers told me the reason why they no longer had a kru in their village was because they had been told they must use the government health system and go to the hospital to treat illness. Furthermore, the kru in Nokor Krau insisted that he only utilised herbs and other plant materials to treat illness and left the communication with spirits to the rup.\textsuperscript{162} The roles of the kru and rup or rather the use of herbal medicines and other methods of treatment for illnesses such as spirit communication, can be seen as complementary and necessary to deal with the complete scope of illnesses that one might be susceptible to. These illnesses are presented visually in the Figure below in which Eisenbruch divides the spiritual world into the ‘world of deities’ and the ‘world of demons’.

\textsuperscript{158} Zhou Daguan, \textit{A Record of Cambodia: The Land and Its People} (2007) Translated by Peter Harris.
\textsuperscript{159} Healing power is required to empower ritual objects and herbal medicines used in the treatments which are thought to be otherwise useless. Eisenbruch, above n 143, 292.
\textsuperscript{160} Ibid. Eisenbruch translates this roughly as magic.
\textsuperscript{161} Ibid, 284.
\textsuperscript{162} Ibid. It has been previously observed that it is rare to see any kind of interaction between kruu and other types of healers such as mediums, however traditionally the kru did, in addition to female mediums, communicate with the spirits and ghosts and cure patients from sorcery.
According to Eisenbruch a *kru* would treat patients for illnesses from all three worlds. However, it may be observed that due to the onslaught of modern medicine and the policies to promote this modern medicine through a government health system, the role of the *kru* is changing and apparently elements of this unique intangible heritage are being lost. The *kru* may be seen to more commonly treat a majority of illnesses from the ‘world of humans’ which ‘include disorders of brain and body, and those brought on by human intervention’. The *kru* in Nokor Krau explained that he often referred people to the provincial hospital but that they generally came back to be healed by him when western medicine failed. He gave numerous examples of non-believers of traditional methods (particularly *neak srok psar* or town people as

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163 Eisenbruch, above n 143.
164 Ibid, 286. However, it should be noted that the very nature of the belief system implies that the spiritual world can never be truly isolated from the treatment of an infliction, whether illness or misadventure, as these inflictions are thought to be brought upon primarily by a spiritual being of some form.
opposed to people from the countryside) resorting to his advice when the hospital system failed and being cured after taking his medicines.

### 6.2.5 Ancestral links and agriculture within the Angkor landscape

The final example of intangible heritage at Angkor is that of familial links with the landscape and agricultural knowledge.\(^{165}\) Spiritual and ritualistic elements of society cannot be separated from agriculture in Cambodia. Miura contends that ‘The life of the peasants is regulated according to the agricultural cycle… during the rainy season rice farmers are busy on the farm, while in the dry season they may … organise rites of passage, or engage in other kinds of [religious] activities’.\(^{166}\) This is consistent with observations conducted throughout my three years of research in Cambodia. In this way the environment is closely linked with religious aspects of Khmer life (Figure 29). During certain times in the agricultural cycle, ceremonies are done that call on the assistance of spirits such as *hau pralang srov* or the calling of the spirit of rice.\(^{167}\) The production of rice is intricately linked with the Angkorian physical features of Angkor, as the moats, barays, trapeangs and canals are utilised for rice crops as they have been for centuries.

\(^{165}\) The information presented draws upon previous field research conducted by APSARA Authority, students of the Royal University of Fine Arts and Kieko Miura.

\(^{166}\) Miura, above n1 at 103-104.

Miura gives detailed reports of familial links that continue to exist at Angkor, particularly in Angkor Thom. She states that ‘there are repeated connections between the ancestors of Angkor Krau [Nokor Krau] and the royal palace and Angkor Thom through oral stories and family inheritance’. Many of these links are related to agricultural knowledge as they stem from the ancestral ownership and use of resources. Several familial links also serve to explain the origin of names of certain features such as ponds (trapeangs) and areas of the moat of Angkor Thom. She describes the descendants of Ta Nak (grandfather Nak), who live in the villages of Nokor Krau, Phlong, Kok Beng and Kok Ta Chan. Ta Nak’s inheritance stems either from the royal family or governor of Angkor. Oral histories tell of certain agricultural resources, i.e. rice fields, resin trees or other trees, being given to villagers

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169 Miura, above n 1.
170 Ibid, 111.
171 It is reported that “some say that Ta Nak was related to the wife of Reach Angkor Yaem, whom some call the king who rules the area of the same name, while others consider him to be more like the governor of the province… Ta Nak’s father and grandfather were also said to have lived in the royal court of Angkor Thom … when Ta Nak lived in the west of Srah Srei [the women’s pond in the royal palace compound], he was said to have assisted the ‘king’s secretary’ to organise ceremonies at Angkor Wat whenever the king visited’.
by Angkorian kings in exchange for gold or for good actions. Access to these resources has been denied to villagers since 2000 in the area-wide ban within zone 1 as discussed above. As a result, there is the threat of a good deal of local knowledge being lost if such associations continue to be severed.

This threat has been identified by UNESCO. The UNESCO Report ‘Master Plan for the preservation of Angkor’ states that the people within Angkor ‘have a strong attachment to the land of their ancestors and to ancient cultural traditions’. The Report recognises that these attachments have not been taken into consideration in prior planning documents including the ZEMP. Despite the fact that this Report was written by UNESCO in 1996, the people of Angkor have continued to have their attachments inadvertently diminished by subsequent actions. This thesis stresses the importance of incorporating and respecting local knowledge and intangible heritage of the communities into broader safeguarding measures for the site. Furthermore, it is proposed that this recognition must be present at all levels of management from ensuring that local community values have a central position in ICC meeting agendas, foreign research team project plans, APSARA cross-departmental working groups and within each APSARA department. So far, intangible heritage and community values have not been seriously discussed at an ICC meeting and have rarely played a role in the work of foreign research teams or APSARA departments.

6.3 Safeguarding ICH at Angkor – Applying the principles

An approach to safeguarding ICH was formulated in Part I. This methodological approach was developed from three fundamental principles of the ICH Convention. The approach advocates that the principles can be utilised as a means to safeguard ICH. The following section presents a preliminary examination of how this approach to safeguarding ICH may be implemented at a heritage site with significant ICH. It

173 There are some exceptions, including the work of Simon Warrack at Angkor Wat for the German Apsara Conservation Project and the work of the Living With Heritage team for the University of Sydney.
174 Of course prior to the restructuring of APSARA in 1999 there was a social research department which conducted valuable research on the communities within Angkor.
section follows on from the discussion of ICH at the Angkor World Heritage Site. It also draws upon the above discussion of contemporary issues which are present at the site, many of which pose a threat to the continuation of certain forms of ICH.

The examination below is structured around the three principles of safeguarding. Each part seeks to elucidate how the particular principle is utilised for safeguarding or how measures may be developed from it. The following section is also structured to allow a future critique of the implementation of particular measures and an assessment of the success of the safeguarding measures.

### 6.3.1 Cultural Rights

This thesis contends that it is important at a heritage site of numerous conflicting stakeholders and contested heritage that local community rights to heritage are laid out in a legally binding instrument. Specific community rights to practice their heritage and have access to cultural sites will allow the continuation and transmission of beliefs and rituals. At Angkor, local rights to access and practice are clearly necessary as often tourism development is considered before the rights to the local community. The example of the monasteries in Angkor Wat is significant to illustrate this point. Local communities identify with Angkor through their intergenerational connections with the monasteries. The monasteries are the centre of the community and are critical for many important yearly and life-stage occasions. Family burial stupas are located at the monastery and often males spend time being educated at the monastery and learning the dharma as a monk. The right to practice religion is just one cultural right that is important for heritage value of Angkor in its contemporary setting.

The contemporary history of Angkor has included World Heritage listing and the establishment of safeguarding measures which have intended to preserve the site for future generations. However, the measures put in place, such as the transfer of land ownership to the state, land zoning specifications, policy decisions and the establishment of the heritage police, have often resulted in few local rights, including cultural rights, being respected. Miura argues that the bans placed on villagers have ‘not only excluded local villagers from the forest, but also denied them their cultural
Thus it can be seen that there are two key areas which must be addressed to ensure that legitimate basic rights can be exercised. The first is the recognition of cultural rights and the second is the introduction of legally-grounded usage rights. As the usage rights are linked to the continuation of livelihoods and agricultural knowledge, it is presented here that in the case of Angkor, these should be regarded as a sub-category of cultural rights.

To apply the theoretical approach of cultural rights developed within this thesis to Angkor, we must define exactly what cultural rights include and how to implement them. The approach taken here acknowledges an aspiration to ensure that the rights are implementable. In other words they need to be ones that can be clarified and easily implemented within a management, legislative or policy framework. To ensure that the rights outlined in relation to culture and heritage are implementable, this thesis follows the classical model of presenting rights as individual rights. These rights may be expressed as ‘stand-alone’ or within a community.

Human rights rhetoric often refers to, and questions, the existence and relevance of collective rights in relation to cultural matters. Donders establishes that the right to cultural identity, one of many cultural rights, can only be expressed within a community and as such it is a collective right.\(^{176}\) However, cultural identity is a very complex concept to define and as a result, it is difficult to develop guidelines to ensure that this right is not denied and may be exercised to its full potential. While the right to cultural identity is generally considered to be a collective right, it is suggested here that this right and other collective or group rights may be protected indirectly by ensuring individual rights to culture. Community and communal expressions of culture are central to cultural practice. However, I contend that by developing the right to participate as an individual within a community, or with other individuals in the community, community connections will be strengthened and thus collective rights can be addressed. In addition, it is argued that individual rights are easier to

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\(^{175}\) Miura above n 1, 213.

\(^{176}\) Cultural identity is considered “of such a collective nature that individual human rights norms would not be sufficient to protect it properly”. Yvonne Donders, 'A Right to Cultural Identity in UNESCO’ in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights*, International Studies in Human Rights (2008).
define and place within a management framework than collective rights. They are also
easier to remedy and/or provide judicial remedies for should they be violated.

Cultural Rights and the Safeguarding of ICH at Angkor

The following cultural rights need to be protected at Angkor to ensure the
safeguarding of ICH. These rights should be established within a legally-binding
document and outlined in enforceable management guidelines. These rights safeguard
ICH by ensuring the ability to practice ICH and provide the custodianship of
traditions to local communities. The rights-based approach seeks to prevent cultural
abuses and exploitation and minimise the assimilating impacts of globalisation. The
approach also enables cultural development, change and variation.

1. Every person has the right to have their cultural identity respected.

At Angkor, local communities deserve to have their cultural traditions respected both
by foreign visitors and Cambodians. This respect should include adhering to
traditional standards of conduct when in a place of cultural significance, regardless of
whether that place is inside a tourist site. At Angkor, the expected traditional
standards of conduct reflect the standards for visiting a monastery. These include
wearing appropriate clothing, respecting worshippers and religious offerings. The
recognition of respect would be expected from tourists as well as from local villagers.

2. Every person has the right to access their heritage

This right is essential at a heritage site, such as Angkor, where there are competing
actors, some of whom are excluding others. This right should extend to the right to
visit significant cultural sites for traditional ceremonies.

177 The listing of rights in relation to ICH at Angkor may be applied to other heritage sites. These
following list of cultural rights has drawn precedence from *Fribourg Declaration Cultural Rights* 2007
(Fribourg) www1.umn.edu/humanrts/instree/Fribourg%20Declaration.pdf (2007), Observatory for
diversity and cultural rights Bucharest colloquium, 'Rights to inter-cultural education and information'
(2004) and Birgitta Leander, 'Preliminary List of Cultural Rights' (Culture and Development Co-
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3. Every person has the right to participate freely in cultural life. 178

This includes the right to express culture and the freedom to exercise and develop cultural practices and to follow a way of life associated with the promotion of cultural resources.

4. Every person has the right to religious belief and practice. 179

Religion is central to the lives of people at Angkor and they should have recognised rights to practice their religion. This right includes the right to all essential elements of religious practice including the right to traditional burials and monkhood.

5. Every person has the right to education about their culture

The right to education is an essential element for the transmission and development of culture. The right to education is linked to the right to information.

6. Every person has the right to information about their culture. 180

The right to information is essential for the understanding and awareness of cultural heritage. The importance of these rights for the safeguarding of ICH at Angkor is developed further below. 181

7. Every person has the right to identify with one or several cultural communities.

8. Every person has the right to participate in the creation of public cultural policy.

178 This draws particularly from the 1976 UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It. More broadly, this right is encompassed by Article 15 of International Covenant on Economic, Social and Cultural Rights and in Article 27 of the Universal Declaration of Human Rights. The right to take part in cultural life also includes the right to religious belief and practice and the right to access cultural heritage.

179 Article 18 of the Universal Declaration of Human Rights establishes the right to religion, practice and worship.

180 This right draws on Article 19 of the International Covenant on Civil and Political Rights.

181 See section 6.3.2.
Cultural policy is most effective when it is culturally sensitive and developed locally by those whose heritage is being safeguarded. All people should have a right to the creation of policy to safeguard their own heritage.

**Usage Rights**

Usage rights need to be legally recognised at Angkor. These rights are directly related to livelihoods and oral knowledge, including agricultural knowledge and local knowledge about place names, village histories and family history. With respect to the ban on the cultivation of rice fields, many villagers feel that they have not had their rights respected. Miura found that villagers ‘are not demanding their rights to the land ownership, but only the continuation of cultivation and harvesting of rice’.\(^{182}\)

Within the Decree No. 001/NS Establishing Protected Cultural Zones in the Siem Reap/Angkor Region and Guidelines for their Management dated May 28, 1994 the continuation of such activities is actually proposed. Article 8 states that development should be allowed for the preservation of local lifestyles (within zone 2), Article 11 states that the adverse impacts of tourism on the local communities should be minimised (within zone 2), Article 14 that the old, traditional rice fields should be maintained (within zone 1) and Article 16 states that traditional land use should be maintained (within zone 1). Regardless of this Decree, the local authorities have not allowed the local livelihoods, allowed use of the land for rice paddies or pasture or ensured the practice of traditions by communities.

According to the APSARA Authority and state governing bodies, the local communities residing within the Angkor World Heritage Site have no legal right to the land that they occupy or harvest as it is categorised as state property. The legislation\(^{183}\) does not recognise customary usage or historical land title. In order for

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\(^{182}\) Ibid, 151.

\(^{183}\) The Royal Decree NS/RKT/0199/18 adopted January 22, 1999 states in Article 6 ‘the APSARA Authority holds the exclusive right to grant building permits in the overall Angkor site. Any authorizations or permits granted in disregard of the exclusive jurisdiction of the APSARA Authority shall be considered null and void. Any existing illegal building may be destroyed without compensation of the expense of the violator within 45 days from the date of notification. Zone 2, which is defined as “protected archaeological reserves” under Article 4 of Royal Decree No. 001 NS dated 28 May 1994 belongs to the inalienable public domain of the state. Any land transfers or concessions which may have been made on the land of the said zones are null and void’. 
the community to have some legally-grounded entitlement or fair use rights to the land, whether it is to access, reside or use that land, they must have formal permission or a formal agreement from the appropriate government body. In this situation, guidance might be derived from Australia’s court decisions relating to the award of native title to indigenous communities or individuals. The Australian High Court found that native title can be ‘possessed by a community or individual depending on the content of the traditional laws and customs... ranging from access and usage rights to rights of exclusive possession’.\textsuperscript{184}

More recently, some attention has been given to customary use at Angkor. However, this has been of a cursory nature and, as is explained below, fails to actually provide adequate use rights to communities. Article 2 of the Decision of the Royal Government of Cambodia No. 70/SSR dated September 16, 2004 on the determination of standards for utilization of land in zones 1 and 2 of Siem Reap/ Angkor sites specifies that

\begin{quote}
the citizens who have long been dwelling in the Zones may continue to living there [sic] without being subject to any evacuation… The residents are entitled to manage the land, in ways such as the transfer of ownership from parents to their descendants or the sale of their property to other members of the village community, in order to cope with the difficulties of life. However the sale or purchase of land by traders… and the sale or purchase of land for the purpose of establishing hotels, restaurants, karaoke parlors etc, are strictly prohibited.
\end{quote}

Furthermore, the Decision of the Royal Government of Cambodia No. 70/SSR dated September 16, 2004 on the determination of standards for utilization of land in zones 1 and 2 of Siem Reap/ Angkor sites states in Article 1 ‘All the land in Zones 1 and 2 of the Siem Reap-Angkor Sites is state public property’.

This Decision is very vague and fails to specify what length of time is meant by the phrase ‘long been dwelling’.\textsuperscript{185} This Decision has also not ensured that use rights are provided to communities, prevented local authorities from banning livelihood practices or provided adequate legal basis to argue that such rights exist.

\subsection*{6.3.2 Role of education and information}

One of the ways to access culture, and understand intangible cultural heritage, is through the enjoyment of the rights to education and information.\textsuperscript{186} In this way, the role of education and information are central both to the fulfilment of cultural rights and to the safeguarding of intangible cultural heritage. Cultural education at Angkor can provide an avenue for the transmission of cultural traditions and the teaching and training of artistic forms. Through the teaching and training of traditional cultural elements, the local communities can ensure custodianship of ICH. This is particularly important for artistic practices which have locally specific forms, such as some \textit{sbek thom} performances, which are often performed by troupes from other areas for economic benefit. Cultural education should play a role in developing respect for an individual’s culture and the cultures of others as well as developing knowledge of heritage in its diversity.

The provision of information to the general population is essential for the development of cultural awareness, cultural diversity and respect.\textsuperscript{187} The information should promote cultural diversity and the fair exercise of cultural rights. At Angkor, information dissemination is needed to promote both animistic and Buddhist ICH associated with the Angkor monuments. Of equal importance is the need to distribute

\textsuperscript{185} This point is also highlighted by Gillespie. For further illustration of issues surrounding this Decision and land law at Angkor see Josephine Gillespie, 'Regulating Ownership and Land Use at Angkor Archaeological Park, Cambodia' (in press) 15(4) \textit{International Journal of Heritage Studies} .

\textsuperscript{186} Article 3(c) of the 2007 \textit{Fribourg Declaration} states that everyone has the right ‘to access, notably through the enjoyment of the rights to education and information, cultural heritage that constitute the expression of different cultures’.

\textsuperscript{187} This is further advocated in the Recommendations to the Intergovernmental Committee by the experts of the UNESCO-ACCU meeting on Transmission and Safeguarding of Intangible Cultural Heritage through Formal and Non-formal Education. They state such measures can ‘prevent or reduce conflict between communities’ through promoting respect. UNESCO-ACCU, 'UNESCO-ACCU Expert Meeting on Transmission and Safeguarding of Intangible Cultural Heritage through Formal and Non-formal Education' (UNESCO, 2007).
information about the intangible cultural heritage associated with traditional livelihoods and agricultural traditions within the Angkor World Heritage Site. This information should be widely distributed to both Cambodian and foreign visitors. With the formation of the Department of Communication, APSARA can successfully deliver an awareness campaign for the safeguarding of cultural heritage. This could include the dissemination of pamphlets in conjunction with the ticket sales or appropriate signage throughout the World Heritage Site.

It has been argued that education and information dissemination have a specific role to play in good governance and a pluralistic democracy. For example, the Observatory for Diversity and Cultural Rights concluded that ‘amongst cultural rights, the connection between the rights to education and information is particularly important in a strategic sense as an essential factor in achieving democratic progress’.188 As such, education and information dissemination can contribute to ensuring that a fair and transparent democratic system exists in which cultural rights can be exercised by citizens. This function may have particular resonance within Cambodia and at Angkor.

The dissemination of information about the living traditions and associations that local Khmer have with the temples can raise the awareness of visitors. Such awareness can lead to respect, appreciation and interest in such traditions and associations, for example the neak ta within temples, the local rituals and the importance of the temples in a contemporary context. By developing this understanding within the tourist industry, the marginalisation of the local community and their interactions with the temples can be minimised. Such awareness can also emphasise the rights of Cambodians to their heritage.

There is however a risk that increasing awareness within the tourism industry will lead to the commercialisation of culture.189 This has already occurred to a large extent with traditional APSARA dancing and other Khmer dances which are presented nightly to tourists. It is of the utmost importance that research and subsequent

188 Observatory for diversity and cultural rights Bucharest colloquium, 'Rights to inter-cultural education and information' (2004).
189 This is further clarified in the livelihoods and tourism findings below.
education of visitors about the significance of ICH is done in a manner that is regulated by those whose heritage it is and not done by outsiders to generate profit. As Greaves notes:

Indigenous societies find themselves poked, probed and examined as never before. The very cultural heritage that gives indigenous peoples their identity, now far more than in the past, is under real or potential assault from those who would gather it up, strip away its honoured meanings, convert it to a product, and sell it. Each time that happens the heritage itself dies a little, and with it its people.190

An appropriate approach to ensuring that information dissemination is done in a sensitive manner can be drawn from the UNESCO-WIPO Model Provisions.191 The Provisions advocate that permission is required when expressions of folklore (i.e. ICH) are used with gainful intent or outside their traditional or customary context; however, no permission is needed if the use of folklore is for educational purposes. The responsibility for monitoring and ensuring the distribution of information in relation to ICH at Angkor lies largely with the Department of Communication of the APSARA Authority. The responsibilities of this Department include drafting communication campaigns to raise awareness of the value of heritage within the Angkor World Heritage Site,192 develop a cultural communication with the public about the monuments of the Siem Reap/Angkor region193 and to carry out awareness activities with the local population on heritage values and the significance of respecting this heritage.194 Of course, information dissemination and cultural education are not and should not be limited to this Department of the APSARA Authority. However, it is important to identify that they do have a specific mandate for this purpose. All communities will most likely undergo activities of cultural education and the creation, modification or consumption of cultural information. In addition other stakeholders at Angkor, such as the tourism industry, should participate

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191 Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions. In particular see Articles 3 and 4.
192 Article 20 of 2008 Sub-Decree on the Organisation and Functioning of the APSARA Authority.
193 Article 15 of 2008 Sub-Decree on the Organisation and Functioning of the APSARA Authority.
194 Article 10 of 2008 Sub-Decree on the Organisation and Functioning of the APSARA Authority.
in the distribution and perhaps the drafting and production of accurate and respectful cultural information.

6.3.3 Role of Communities

Academic literature describing local communities at Angkor often use one particular word – exclusion. The restrictions placed on communities have not been conducive to developing community participation in management. As Miura establishes, ‘the socio-economic and cultural practices of local villagers have been severely restricted in recent years, to the extent that the notion of a “living heritage site” sounds like a hollow slogan’. 195 While some departments, such as the former Department of Monuments and Archaeology 2, may be sincere in their recent attempts to involve local villages, 196 the actions of other authorities or even other departments within APSARA have excluded locals. This has meant that there is a general impression that community participation at Angkor is just given lip service without any substantive programmes to back it up. 197

Research conducted within the Angkor World Heritage Site by CCC-ADI in 2002 concluded that;

There does not appear to be any mechanisms for consultation between the rule-making authorities, those responsible for implementing the rules, and those actually subject to the rules. Without any means of consulting with people or their village leaders (or [village development committee] VDCs), there is no formal route for feedback into the management system governing Angkor Park. For example, when asked how they could solve any problems they may have with Apsara, some people said that they were afraid to protest to the authorities, some said they might go to the village chief, and others said they might try to resolve a problem by paying someone.

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196 See for example Khun-Neay Khoun, 'A Commitment to Community Engagement' (Paper presented at the Phnom Bakheng Workshop on Public Interpretation, Siem Reap, Cambodia, 2006).
197 CCC-ADI found that while APSARA teams sometimes instructed village chiefs about rules and regulations, it was left to the chiefs to then explain these to the rest of the village: Cooperation Committee for Cambodia Analyzing Development Issues Team, 'The Impact of the Tourism Industry in Siem Reap on the People who Live in Angkor Park' (2002).
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Of the three options, going to the village chief is certainly the most appropriate, even though it is not clear what links the village chiefs actually have with Apsara.198 As a result of these conclusions, the report stresses that serious governance issues need to be addressed between the resident populations of the site and APSARA.

There is a primary need to develop the role of communities at Angkor in order to safeguard their heritage and livelihoods. The World Monuments Fund has conducted two projects at Angkor (Preah Khan and Phnom Bakeng) and Sophia University has conducted restoration work at Banteay Kdei. These may be used as examples of community engagement. At Banteay Kdei, Sophia University interacted with the local community from Rohal village which is located to the north of the temple. They lead interactive site visits with 140 members of the village, including 90 adults and 50 students. These community visits were essential for a joint transfer of knowledge about the local heritage. Local villagers learned that valuable objects and statues, found at the site were being preserved at a local museum and they showed keen interest, appreciation and understanding of the heritage site.199 Sophia University intends to conduct similar community consultations several times annually.

The World Monuments Fund (WMF) has general principles which guide their projects around the world, one of which is to engage fully with the local community.200 An assessment of the work of the WMF found that ‘[d]uring their work at Preah Khan, the WMF engaged and involved the surrounding villagers in maintaining the temple and allowed for a continued spiritual life’.201 The experience of the WMF at Preah Khan led to the conclusion that the implementation of heritage protection measures should involve the local communities. These communities should be responsible for any major management decisions of heritage sites in the proximity

of their villages. Likewise, at Phnom Bakeng, it was concluded that the WMF ‘must involve the local community in this project in order to maintain the living qualities of this site.’

Systematic consultations and collaborative efforts need to be established across the Angkor World Heritage Site. These consultations need to be interactive, with both the local villagers and other parties contributing. They should not be one-sided meetings or workshops where the villagers are merely spoken to. All departments of APSARA need to move beyond the belief that community relationships are fulfilled when APSARA instructs locals on their laws and regulations pertaining to ‘safeguarding’ heritage. This is not community participation.

6.4 Findings

The following section presents the findings of my analysis of ICH and its safeguarding at Angkor. The purpose of these findings is to provide key areas which should be taken into consideration when developing future mechanisms for the safeguarding of ICH. These finding will also be of use when developing assessment methodology for the implementation, monitoring or compliance of safeguarding measures such as policy documents.

6.4.1 Use of ‘law’ to manage the living aspects of Angkor

As has been mentioned previously, the notion of ‘law’ at Angkor does not always reflect decisions founded in legislation, i.e. those developed and approved by the legislature, or by any legally-grounded document. Many decisions and bans are legitimised by the management authority simply stating that they are ‘against the law’. These illegal activities often do not have any basis in a formalised legal document or indeed, in some cases, having a foundation in a written document of any kind. However, given the role of power in Cambodian society as an important

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202 Ibid.
203 The annual APSARA reports for 2007 and 2008 establish that APSARA is fulfilling their community programme by raising ‘awareness among the general population... regarding the significance of safeguarding heritage, the laws and regulations pertaining to it and finally with the aim of establishing the necessary collaboration in this civic duty’.
indicator of supremacy, Miura contends that ‘the law, or legality, [of imposed bans or regulations] is not in question, since it means so little to the authorities and the population at large’. 204

The result of a social system that is hierarchical and has strong links between power and social status is that there are potentially situations where individuals and/or communities are exploited, manipulated and mistreated. Such situations typically occur where there is a top-down approach to management, with local communities having little knowledge of the accurate state of affairs. In order to counteract such potential situations, collaborative efforts between management bodies and local communities are necessary. A restructured bottom-up approach which utilises policy is a potential solution which will be discussed further in Chapter 8. Furthermore, there is a need to ensure that all managerial decisions are grounded in a widely-available printed policy document.

6.4.2 Impacts of globalisation/ modernisation on Cambodian culture

Globalisation is leading to cultural changes all over the world. These changes tend to be exaggerated in developing countries. The potential of globalisation to cause change in social behaviour and patterns has been recognised as a threat to the safeguarding of ICH. The Preamble to the ICH Convention states:

Recognizing that the processes of globalization and social transformation, alongside the conditions they create for renewed dialogue among communities, also give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage.

The threats have also been acknowledged within academic literature. Symonides argues that ‘the international spread of cultures has been at least as important as the

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204 Miura, above n 1. The role of local social hierarchies is discussed further in Chapter 7.
spread of economic processes’ which is often thought to be the most evident dimension of globalisation.\textsuperscript{205}

However, the impacts of globalisation are not necessarily a recent phenomenon. The loss of ‘old culture’ in Cambodia, particularly the traditional means of education, health treatments and medicine, began with the civilizing mission of France. Under the French Protectorate, new measures were implemented to ‘civilise’ Cambodians and reduce their ‘backward ways’. Ebihara’s study of life in one village in 1959-1960 revealed that several ceremonies were no longer being practiced due to modernising influences.\textsuperscript{206} According to the villagers chol mlop was last practiced in the 1920s and the last topknot ceremony was conducted around 1945.\textsuperscript{207} Despite the influence of the French colonialists, an early traveller in the 1920s suggests that French policies were not fundamentally altering older Cambodian social and political patterns which were still perceived to be exotic.\textsuperscript{208}

The process of change in Cambodia has accelerated in more recent years. These changes are due in large part to the influx of Western organisations offering education, health and other services that are implemented with aid money and perceived as helping the disadvantaged. The other large contributing factor, as outlined above, is the rise in tourism and the related infrastructure and social changes that this has brought. The embracement of ‘new culture’, as discussed above, exposes the traditional culture of villages surrounding Angkor to the influences of globalisation, homogenisation or possibly the loss of unique cultural differences.

The observations made in Cambodia throughout the duration of this research (2005-2009) once again highlight that there are rapid social changes occurring within Khmer communities. Of course, change is not necessarily a negative phenomenon and it is inappropriate to pass judgment on whether changes within Khmer communities are positive or negative. The longer-term impacts of these changes on the continuation of

\textsuperscript{207} This contrasts with some villages north of Angkor which still practice these traditional ceremonies.
\textsuperscript{208} Harry A Franck, \textit{East of Siam: Ramblings in the five divisions of French Indo-China} (1926).
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traditional elements and ICH remain to be seen and further research by Khmer academics is needed to examine this point further. It is enough at this point to reiterate that rapid change is occurring and such change (and the potential impacts of change) must be taken into account when safeguarding ICH.

6.4.3 Cambodian culture as categorised under the Convention

Within Cambodia there have previously been efforts to safeguard ICH. However, these safeguarding efforts have not comprehensively addressed ICH as it is defined under the ICH Convention. Previously, the interpretation of intangible heritage in Cambodia has predominantly been limited to items which are essentially ‘fine arts’. In 2004 the Cambodian Ministry of Culture and Fine Arts, with the support of UNESCO Phnom Penh, published an ‘Inventory of Intangible Cultural Heritage of Cambodia’.209 This book comprehensively covers performing arts, including royal ballet, popular dance, drama, music and circus, and artistic skills. The Ministry and UNESCO should be commended for their efforts to document these important aspects of Khmer culture. But, the inventory is clearly skewed to present the ‘arts’ of Cambodia, both performing arts and artistic skills.

The remaining section of the inventory ‘catalogues’ oral cultural heritage, comprising languages, oral literature, poetry, traditional moral codes, local legends, folk songs, proverbs, puzzles, fortune-tellers, shamans and animism. However, vast area of ICH comprises only 8.3% of the total inventory. As such, the sections are outlined in a very superficial manner, with most subjects being summarised in one paragraph. Numerous elements of, animistic beliefs for example, are not mentioned. Furthermore, topics such as folktale and legends are dealt with inadequately. Bunly210 has demonstrated that oral folktale narration is an incredibly complex and rich source of cultural heritage in Cambodia, with each village having unique stories to explain the names of ponds, pagodas, neak ta, the village name and neighbouring landscape features, in addition to well-known tales (Roeung Preng). It is also clear,

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when the definition of ICH under the Convention is examined, that several aspects of ICH are not mentioned at all.

Article 2.2 of the ICH Convention establishes that “intangible cultural heritage” is manifested in the following domains:

(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
(b) performing arts;
(c) social practices, rituals and festive events;
(d) knowledge and practices concerning nature and the universe;
(e) traditional craftsmanship.

The focus on the fine arts (performing arts) of Cambodia, as being representative of the countries ICH, is indicative of what forms of ICH are projected as being worthwhile and important. This is an issue which needs to be addressed. ICH is seen in all aspects of Khmer daily life. Many of these aspects are unique to Khmer culture and deserve recognition. They are just as valuable as the performing arts or artistic representations of the culture. For example the role of the different ‘healers’ within society (kru khmer (traditional healer), hora (fortune teller), chmâb/ chmob (midwife) and tmubp (sorcerer)), the local knowledge of the achar, village ceremonies and livelihood knowledge are forms of ICH which need to be documented further and promoted as important forms of ICH.

It is important to assess how intangible culture is defined under the ICH Convention. This assessment then needs to be applied to Khmer culture to inform the scope of ICH studies and safeguarding policies. This should ensure that all forms of ICH are the subject of safeguarding measures, policies and awareness-raising programmes. Future research could include the development of a second volume of the ‘Inventory of Intangible Cultural Heritage of Cambodia’ which provides detailed descriptions of

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211 Additional publications by the Ministry of Culture and Fine Arts reflects this. For example the Ministry of Culture and Fine Arts, ‘Research of the Robam Khbach Boran Khmer’ (2008) and the Ministry of Culture and Fine Arts, The Royal Ballet of Cambodia (2008). This may also be a reflection that other intangible cultural elements are not perceived as being within the domain of this Ministry.
other forms of ICH and provides additional information on the forms which were briefly described previously. There is also the potential to conduct district or commune inventories to capture the local livelihoods, ceremonies and legends of each area.

Finally, the elaboration of what constitutes intangible cultural heritage, as defined by the ICH Convention, may clarify that the daily activities of local communities, religious associations and beliefs are worthy of safeguarding and deserving of respect. Perhaps it will ensure that the less-recognised intangible heritage of Angkor is safeguarded and that traditional religious activities may once again be conducted freely and undergo further revitalisation. As the abbot of one monastery in Angkor implored, ‘Angkor Wat should be used religiously and worshipped like when the monks first came’.212

6.4.4 Community Consultation and Participation

Community participation, as discussed in Chapter 3, is argued to be one of the necessary requirements for the safeguarding of ICH. It is a strong focus throughout the ICH Convention and should be highlighted as a fundamental aspect of protection measures.213 Over the past few years at Angkor some community consultations and participatory events are conducted. Luco suggests that APSARA has begun to hold more meetings and consultations in the villages.214 However, my research indicates that such programmes are sporadic, not necessarily participatory in nature and are generally only implemented in association with a foreign project partner rather than as a standard procedure. Further emphasis on public participation and systematic involvement of the people of Angkor in the decision-making process is necessary.

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Systematic consultation with local communities can allow the community both to voice their concerns and establish important relationships that they have with the landscape and the spiritual features within the landscape. Of course, such consultations must be coupled with attempts by the management authority to incorporate community concerns and relationships into their future planning and policies. It is clearly important that the management authority must be receptive to the opinion of the community and willing to give value to feedback, regardless of whether it is positive or negative.

I agree with the position of Baillie, who states that ‘instead of discouraging traditional and local uses of the land and the sacred reasons behind this relationship between people and place, we should be fostering and nurturing a continued relationship’.215 This position may in certain scenarios be counter to the current policies of APSARA, such as the current bans on collection of forest resources. However, community consultation would, according to my research, show that these relationships are an important source of ICH and worthy of safeguarding.

6.4.5 Livelihoods, Intangible Heritage and Tourism

As indicated previously, tourism can present a significant threat to the continuation of intangible cultural heritage around the Angkor temples. Tourism has, in some areas of the Angkor Park, indirectly limited access by local Cambodians to the temples. Theoretically, Cambodians have free access to the temples of Angkor.216 However, the vast numbers of tourists that visit certain significant temples —such as the Bakeng at sunset— has meant that the local population is often too intimidated to visit or have misconceptions about their ability to access the sites, let alone perform ceremonies or rituals. Many villagers are informed that they may perform ceremonies; however they must obtain permission at least one week before they wish to visit. Such permission is needed to ensure that the ceremony will not ‘disturb’ the tourists. Often this

215 Baillie, above n 25, 72.
requirement alone is enough to prevent the continuance of ceremonies which were previously carried out to give respect to the spirits. Should an individual or group intend to seek permission, it is often unclear to whom they submit a request and how this is to be done.

With tourist numbers projected to increase, tourism will continue to impact on the ICH within the Angkor World Heritage Site. This has the potential to isolate the temples almost completely from the local Khmer people. The 2007 Regional Meeting on Safeguarding Intangible Heritage and Sustainable Cultural Tourism concluded that;

There are countless examples of how unplanned [or inadequately planned] tourism, although potentially profitable in the short term, has damaged fragile historical and cultural resources, thereby undermining their value. In the same way, unplanned tourism can erode a community’s self-image and cultural values as well. Although tourism is increasingly recognized as a potentially powerful development tool, situations frequently arise where local communities are side-lined and benefit little from the tourism in their area.217

A significant finding presented in this thesis is the erroneously-perceived conflict that exists at Angkor between local communities and tourism. The APSARA Authority perceives that the livelihood activities of the local community have negative consequences for tourism. This perceived conflict has contributed to the marginalisation of intangible culture at Angkor and a severe impact on several cultural rights. These actions can have even greater consequences by affecting the community’s sense of identity which is a central product of ICH.218 Kato argues that ‘communities’ knowledge and practices concerning nature and interactions with

218 Article 2.1 of the ICH Convention establishes that ICH ‘provides them [communities, groups and, in some cases, individuals] with a sense of identity and continuity’.
nature transmitted over generations... provide people with a sense of identity and continuity.\(^{219}\)

There are numerous examples of local managers referring to daily activities or religious activities of local communities as having negative impacts on tourists. Winter\(^{220}\) cites that monasteries surrounding Angkor Thom were described as being ‘a threat to foreign tourists’. Further, a Deputy Director General of APSARA is cited as saying ‘if you need to organize a ceremony, you must write to APSARA, some ceremonies disturb tourists’.\(^{221}\) This perception is misplaced. In fact, anecdotal evidence shows that tourists observing such activities of the local community, whether religious or daily activities, are fascinated and consider their experience of Angkor to be improved. Furthermore, by placing the perceived wishes of tourists over the local community, APSARA is denying the individuals within the communities of their cultural rights.

The belief by APSARA that local communities and their livelihoods are counter-productive to tourism appears to have developed from the early 1990s when villagers around Angkor were moved. According to the village chief of one of the relocated villagers, the government’s order was based on the conclusion that the villages would impact tourism. This led to the assertion that ‘the government apparently did not consider the villages beautiful enough for the tourists’ gaze’.\(^{222}\) Such reasoning is also used to ban water buffaloes from the moat of Angkor Wat as they were ‘forbidden on grounds of sanitation and aesthetics’.\(^{223}\) The reasoning is inherently flawed by the fact that many tourists would find it aesthetically pleasing to view water buffaloes wallowing in the moat around the temples, as it is a sight that is distinctly Cambodian.


\(^{221}\) Tep Hen cited in Baillie, above n 25, 68.


It is not only the management authority and their stance on tourism development that has caused the marginalisation of the local community. Many other actors are also involved in the development of tourism at Angkor. Many of these actors, (private companies, investors and international restoration teams) work to develop tourism while inadvertently excluding communities from their heritage. The link between restoration of monuments, tourism and impacts on local communities and intangible associations is summarised by Harding. Harding states that restored ‘buildings at tourist sites may look splendid, and the refurbishment may even be authentic down to the last detail. But the heritage that is thereby protected is severed from the lifeblood of tradition, which is its connection with the experience of everyday life’.

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224 May Ebihara (1960).
An Protocols recognise that ‘the very process of restoration and presentation for tourism purposes introduced new and more subtle threats’ to intangible heritage’. 227

Engelhardt argues that tourism developers are commonly the source of discord at heritage sites:

A major area of conflict is between the often persuasive and economically powerful operators of the tourism industry and the local communities. Local inhabitants’ traditional ways of life are threatened by tourism development that is driven by these external forces and these inhabitants can easily become side-lined as the benefits and profits of tourism development flow to external investors. Indeed, the rapid and unregulated growth of tourism has been responsible for serious social dislocations including ruthless land expropriation from ethnic minorities and erosion of their traditional ways of life, languages and arts. 228

It was argued earlier that a further consequence of tourism at heritage sites is the commodification of heritage both tangible and intangible. This is a finding which is very relevant to ICH at Angkor and a potential threat that deserves to be highlighted. Again, the Hoi An Protocols clearly establish the impacts of commodification and tourism which should be addressed at Angkor. The Protocols state:

In the process of standardizing, modifying and commodifying cultural assets for use in cultural tourism there is a serious risk of loss of authenticity. The problem is that too often the “packaging and presentation” of heritage is carried out by the tourism industry for the benefit of its members and not by those responsible for the safeguarding of cultural heritage. As a result, both the physical fabric of a heritage property and its intangible aspects are trivialized and compromised. When we promote culture for tourism we tend to make the mistake of promoting simple repetition or replication of cultural forms. The same dance is performed over and over again, repeated night after night for changing audiences of tourists. This repetition is not transmission and it results in the interruption of the process and the atrophy of

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cultural forms into marketable products. We de-contextualize ... our intangible heritage when we put on dinner dance shows and treat these expressions of art and ritual as some kind of desert for trivial consumption. This de-contextualization of our culture is a very serious problem because it destroys the authenticity of the cultural expression. Policies of preservation that have led us to look upon our cultural resources as tourism products are the reason for our relative lack of success in conservation. This is an attitude we must correct if we are ever going to succeed in placing culture where it rightfully belongs, as the foundation of development.229

Research by Mar230 has shown that the packaging and presentation of culture for tourism is occurring in Siem Reap. She indicates that performing arts are increasingly being geared to the instrumentalized needs of the tourist market where economic value is encroaching on cultural value. Mar emphasises that Khmer dance is one area that is being subject to the commodification process.

The majority of Khmer dances are ceremonial, closely associated with ritual... dance is losing its original significance as it is frequently being performed for tourist audiences in another context... trok, a religious dance for gods, a ceremonial folk dance representing a deer hunt, today [is] being performed on demand “if you have 50 dollars”. Performance in and of itself is an offering to the gods associated with religious practice, specifically derived from animist belief.

While my research has found that the threats outlined above are significant, there are mechanisms and international guidelines which can enable these threats to be addressed. The World Commission on Culture and Development stated that;

A first significant turn is taking place in relation to local ecological knowledge and traditional management practices, long perceived as obstacles to development. Indigenous ecological knowledge and traditional management practices offer

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solutions not only founded on generations of experimentation and observation, but also embedded in local systems of value and meaning.231

Although this ‘turn’ has not yet occurred at Angkor, global recognition establishes the validity of local knowledge and livelihoods as an important management tool rather than a threat that requires managing. This recognition is the first step to incorporating local livelihoods into tourism development and heritage site management.

A further mechanism for addressing these concerns is the 1999 International Cultural Tourism Charter.232 One of the objectives of this Charter is to facilitate and encourage the tourism industry to promote and manage tourism in ways that respect and enhance the heritage and living cultures of host communities.233 The Charter also advocates the involvement of host communities in the planning of tourism activities and management of tourism operators.234 As well as managing the tourism operators, it has been suggested that a ‘code of conduct of the cultural consumer’ should be developed to ensure that there is respect for cultural diversity and to address the issue of commercialisation of culture.235

From these findings and drawing on the principles found in the International Cultural Tourism Charter and the Fribourg Declaration,236 I propose the following recommendations.

All actors, either directly or indirectly involved in the tourism industry should be responsible for:

233 Note this may be interpreted, as it has been by James (P.C James, 'Human Rights, Cultural Heritage Conservation and Cultural Tourism - Conflict or collaboration?' (Paper presented at the ICOMOS Conference, Cairns, 2007)) to mean that there should be no interference with the host communities human rights or cultural rights. Therefore this document can also support the application of human rights principles within policy documents to manage tourism. This proposition has implications for Angkor, as will be discussed further in Chapter 8.
234 Principle 4.
236 Particularly Article 10 of the Fribourg Declaration.
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i. Ensuring that any goods or services supplied by or associated with the tourism sector do not impair the cultural rights of Cambodian cultural communities or cause significant negative influences on the ways of life or cultural expressions of members of these communities.

ii. Ensuring that cultural goods and services utilised by the industry that carry value, identity and meaning are conceived, produced and used in a manner that recognises, respects and promotes the cultural rights of ownership, access, transmission, practice and participation, among others, of members of the cultural community.

iii. Ensuring that other actors involved in the industry are aware of the responsibilities outlined here and actively work to meet these responsibilities.

Education and awareness-raising will play a vital role in ensuring that such responsibilities are understood in conjunction with ICH. Responsibilities will need to be explained in the context of the changes to ICH that occur in affiliation with the development of the tourism industry, such as the disruption caused by large tourist groups in sacred areas where traditional offerings are presented (e.g Neak ta Reach) particularly when those tourist groups are unaware of the significance of the site.

Finally, awareness-raising should echo the sentiment expressed by Hyoki.

Intangible Cultural Heritage is embodied, expressed, and ensured by the living people. Don’t restrict their independent activities. Think about what we can do for living with heritage, in cooperation with holders of heritage.237

6.4.6 Role of the ICC and UNESCO

The International Co-ordinating Committee for the Safeguarding and Development of the Historic Site of Angkor (ICC) and its standing secretariat, UNESCO, hold influential roles in the protection and management of the Angkor WHS. These bodies frequently direct the focus of development and restoration both within the Angkor

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World Heritage Site and, more broadly, in Siem Reap district. The ICC is composed of academics, diplomats, conservators and policy makers. The work of the ICC has been focused primarily on tangible heritage and only recently has there been a shift to incorporate sustainable development. Despite this shift, the work of the ICC is still seen as being dominated by archaeology, history and restoration, with hardly any recognition being given to the living value of Angkor or intangible heritage. In fact it seems that such topics are far from being ‘on the agenda’.

As a result of the tangible focus of the ICC, it has been criticised on several occasions. Even as early as 2001 there was recognition that the ICC should incorporate intangible values into their programme of work. At the 11th technical session of the ICC, Sophorn made the following submission.

I would also like to draw your attention to the aspect of religion in relation to the ICC’s projects. Angkor is a Mecca of Buddhism, and many visitors, both Cambodian and foreign, make pilgrimages to the site to meditate or perform rites incidental to their religion. It is imperative that the protection and promotion of Angkor include the religious dimension of our temples and pagodas. Provisions for worshiper in-take, for the practice of their rites, should be given consideration speedily. Buddhism is the state religion of Cambodia, and the temples of Angkor must be given back the religious prestige of their past. 238

Despite such suggestions, the programme of the ICC continued to be dominated by other, more tangible, subject matter. Baillie states that even the APSARA Authority criticised ‘the ICC for its lack of attention to the cultural and religious traditions of Angkor, indicating their intention to pay more heed to Cambodian ideas of petekaphoan’. 239

Miura found that:

Policy-makers’ and conservators’ disinterest [sic] or ignorance about local inhabitants, their knowledge and perceptions of Angkor, and their everyday life

239 Baillie defines petekaphoan as the Khmer term for heritage derived from Pali words for ‘paternal’ and for ‘property’. Baillie, above n 25, 3 and 50.
stands in stark contrast to the wealth of literature and research materials available on archaeology, architecture, iconography, art, history, epigraphy and geology.\textsuperscript{240}

The ICC has done little to ensure the maintenance of contemporary cultural values and intangible heritage at Angkor. Sometimes at ICC meetings broad statements are made,\textsuperscript{241} but these are often made without specific reference to management within Angkor and no specific suggestions are made to APSARA. While it is understandable that the ICC does not wish to get involved with the specific operations of APSARA, they do have a duty to preserve the heritage of Angkor. This duty is not limited only to the tangible heritage of Angkor, it also includes intangible heritage. The ICC must acknowledge this duty and come to grips with the current situation and perceived future of Angkor’s intangible cultural heritage. If the ICC is willing to emphasise the importance of this heritage and support changes to policy documents and a new legislative framework, then it is possible that in the future the ICH of Angkor can be better safeguarded. Such changes could also mean that Angkor would potentially be a leading case study for other World Heritage Sites within Asia and within a broader global context. Realistically, few to no changes will be made to respect and properly manage, let alone safeguard, ICH without the attention and backing provided by the ICC and UNESCO.

6.4.7 Role of the Monastery

The monastery can play a pivotal role in the safeguarding of ICH and the development of respect among the Cambodian community for their heritage. The monastery is known to be the centre of the community and monks hold a position of respect in society. They are the traditional managers of local communities. They are also the traditional teachers within society. Eisenbruch et al found that;

\textsuperscript{241} Baillie notes that the ‘ICC stresses that restoration of the monuments should be aimed at re-establishing “the close relationships that existed between the monuments, culture and identity”, yet, there has been no guidance on how this should take place’. Baillie, above n 24, 57.
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The monk plays 3 important roles: 1) as physical healer, 2) as mental healer, and 3) as a judge in the community... He maintains the old traditions of peoples beliefs... he is the symbol of Buddhism which Khmer people most respect and value. 242

The monastery is not only an important source of ICH; it can also enable the community to interact with authority figures to manage this heritage. At Angkor it is important that the traditional role of the monastery, as a respected institution at the heart of the community, is restored. Policies for community consultation can be established that utilise the traditional role of the monastery by asking communities to approach the monastery with concerns, suggestions and feedback.

6.5 Conclusion

Angkor is a heritage site of outstanding universal value comprised of both tangible structures and religious value, but it is also home to several communities and is the site of contested discourse surrounding the activities of these communities. Angkor is not unique in these features. Many heritage sites throughout Asia have similar scenarios. As such, research into the protection of intangible heritage at Angkor can provide valuable lessons for other heritage sites and for the application of the relatively new Convention established to safeguard ICH. The findings presented above are a first step towards the development of safeguarding mechanisms for ICH. In addition to these findings, several conclusions can be made regarding the present status of ICH at Angkor and suggested changes can be put forward.

1. Tangible heritage should not be protected without examining the associated intangible values. The intangible heritage must be seen as equally valuable and deserving of safeguarding. Likewise, intangible heritage should not be protected without examining the tangible heritage.

2. A key element for the safeguarding of ICH is respect for local identity and encouraging respect of differences between traditions across villages. 243

243 It has been acknowledged by the Cambodian Ministry of Culture and Fine Arts (MoCFA) that respect for local identity is a necessity for the protection of cultural heritage. Nouth Narang was
3. Local research by Cambodian ethnographers is needed to document the numerous ancestral links with the landscape, village associations with Angkor temples and local contemporary values. Studies from just one or two sites cannot be extrapolated across the Angkor World Heritage Site, as it is found that each village has distinct elements of ICH or unique variations.

4. In order to safeguard ICH, it is necessary to stimulate the transmission of traditional knowledge. This is a vital component, as modern cultural values or the ‘new culture’ are being rapidly integrated into Cambodian society and it is possible that this could lead to the breakdown of traditional practices i.e. the use of traditional diagnostic processes such as consultation with spirits and ghosts when one becomes sick is being replaced by visits to health clinics.

5. A fundamental requirement for the continuance of ICH is the maintenance of dialogue between the holders of traditional knowledge (i.e. those who conduct ceremonies and rituals, and ‘yiéy’ and ‘ta’) with younger generations.244

6. It is necessary to encourage the practice of ceremonies, the continuation of traditional knowledge, develop respect for presentations of culture and ensure that the community is not denied basic cultural rights.

7. It should be emphasised that historically oral histories of family associations with certain areas of land gave land use rights. In fact, oral histories did not necessarily bestow ownership rights, as ownership was generally still retained by the king. Villages should have these rights reinstated. They do not impact on the site; these people have been the managers of the site for much longer than APSARA and such land use rights are important to maintain oral histories and ancestral links with the Angkorian landscape.

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244 Future programmes could use the UNV yiéy and ta programme as a role model. See Nobuo Endo, 'Guidelines for Yiéy and Ta Groups Activities' (United Nations Volunteers, 2001).
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7. Local Communities and International Obligations

Cultural values are fundamental to the identity of a group of people. These values shape the social, economic and political patterns of the group and are the basis for the accepted frameworks of the nation, including legal frameworks. The cultural values of a specific nation or ethnic group may be inconsistent with international prevailing ideologies. If this is the case, how can international legal obligations, which encapsulate international ideologies, be incorporated into state legal frameworks? How can this be done without imposing foreign values which supersede local value systems? This can lead to a state-based legal system which is representative of international dialogue and a locally-based customary system which contains traditional value systems. The two can be conflicting. The state-based legal system is often a reflection of ‘Western’ value systems which may be totally inconsistent with traditional value systems.

In Cambodia, state law is quite distinct from local customary value systems, which include Buddhism, animism and social relationships as legitimate sources of authority. Cambodian state law, as has been established previously in this thesis, has developed from the UNTAC period in the early 1990s. This period was characterised by the involvement of international lawyers and the drafting of legal instruments which were consistent with the prevailing international ‘Western’ discourse. This state-based legal system does not incorporate Cambodian customary law i.e. informal power relationships, village social dynamics, animism and the role of the monastery. This leads to a dilemma for the safeguarding of intangible cultural heritage. Customary law embodies, and is representative of, the intangible cultural heritage of the community. The traditional value systems that comprise customary law are the subject of protection measures. Yet, this is counter to state law:

[C]ommunity based legal systems tend on the whole to be enforced through tradition, culture and – at times – religious belief systems... Traditionally, the relationship between the two systems [community-based and state-based] has been antagonistic... The hegemony of state-based legal systems is manifested in a number of ways: historic rights derived from community-based legal systems have been revoked, nationalized and, at best, reduced to permit-based rights; community historical uses
have been criminalized; community rights have been opened up to exploitation and use by persons who are typically considered outsiders by the community; community-based traditional leaders and authority systems have been invalidated and replaced by state-appointed leaders; and community enforcement systems have been invalidated and derided. The effect has been to alienate local communities from their heritage.¹

The following chapter explores how this situation may affect the protection of cultural heritage. Further, it explores if it is possible to ensure that local ideologies and traditional value systems are incorporated into protection measures for the safeguarding of intangible cultural heritage so that state-based protection measures are not antagonistic to local value systems.

7.1 Local Ideas of Preservation, Protection, Law and Intangible Heritage

Understanding local value systems is an integral aspect for the safeguarding of intangible heritage. These systems are the basis for many of the practiced forms of heritage. Locally-attributed cultural values, which are frequently distinct from nationally-attributed values and the values attributed by external visitors/academics/conservators etc, provide context for heritage features and can assist in the interpretation of heritage.² In addition, understanding local community-based legal systems and social values are a requirement for the implementation of the bottom-up approach to conservation.

Two important functional elements of Khmer society are the family unit and the village unit. The traditional function of these units needs to be incorporated into a bottom-up approach. The family unit provides support networks and traditionally played a role in the transmission of cultural heritage. The elderly members of the family, yièy and ta, are respected and were the primary educators in the family,

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passing information to children and grandchildren orally. The role of yiey and ta in ensuring the transmission of intangible cultural heritage is particularly significant. The years of war were devastating for the family unit in Cambodia. Many of the elder generation died during this period and the loss of social cohesion, combined in recent years with formalised schooling and a breakdown in the deference paid to older family members, has meant that most transmission of oral heritage has stopped or is declining. The break in the transmission of heritage was actively pursued during the Khmer Rouge years.

Pol Pot wanted to destroy everything associated with culture. He wanted to annihilate all things belonging to the past and start entirely new. Therefore, he destroyed our culture atom by atom. He wanted people to cut off all their memories of the past.³

The family unit is the fundamental unit of the Khmer social structure in the same way that a monk is the fundamental unit of a monastery. Relationships within the family unit are seen as the most important in society. Within a village, loyalty to the family unit is primary, before loyalty to the Wat, or neighbours.⁴ However, family units do have external relationships and these are primarily within a village.

7.1.1 Law and the Village

The concept of the village is central to Cambodian society. When attempting to develop policy and legislation for the protection of heritage, the village unit and the interaction of law at the local level must be examined. This is particularly applicable for ICH, as intangible heritage must be protected at the level where it is practiced and with the participation of local communities.

At the village level, particularly in rural areas, customary law is predominant. There is little influence of state law.⁵ Customary law in this sense includes the interaction of

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³ Evans Young, 'Flowers in the Forest: A talk with Chheng Pong, Minister for Information and Culture' (1990) 14(3) *Cultural Survival Quarterly* 11.
⁴ Paul Davenport, Joan Healy and Kevin Malone, 'Vulnerable in the Village: a study of Returnees in Battambang Province, Cambodia, with a Focus on Strategies for the Landless' (Lutheran World Service, UNHCR and Japan Sotoshu Relief Committee, 1995).
villagers with animism, the perceived influence that the animistic sphere has on behaviour and environmental changes and the role of the social structure in maintaining village peace. Traditionally, Cambodian villages are not administered by state-based laws but by elderly men chosen within the village, local achar, or knowledgeable members of the community such as healers. Most conflicts are resolved below the state-based legal system within local community-based legal systems which rely strongly on alternative dispute resolution mechanisms and the appeasement of local spirits. Only serious conflicts or matters that stem from a government administered body are settled within the state system. When such matters arise, they are generally settled at the lowest possible state level such as sub-district. The dominance of customary law has been consistently observed within Cambodian society for several hundred years. Chandler states that in the 1830s:

Quarrels within a village or among neighbours were settled by conciliation rather than by law... Villagers were usually “ruled” for ceremonial purposes and for the purposes of relations with higher authorities, by elderly men chosen for their agricultural skill, literacy and fair-mindedness.

Another important constituent of a village is the Buddhist wat. The wat can be an important medium for ensuring the contentment of spirits and Buddha, building merit to avoid further misfortune and a site for dispute resolution. Typically the monks may be consulted on problems within the village but they do not actively participate in the resolution of conflicts. There are however, other people associated with the wat, particularly the achar, who are actively involved in such processes. Buddhism is an important element of Cambodian culture and it is often thought to be ‘the core of people’s social cohesion’. The wat is a source of information and it can be used to disseminate information to villagers. When the information is distributed from government agencies, the wat can act as the link between the state system and the local system.

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The other main link between the state system and the local system is the village leader. While the local system of customary law is still found across Cambodia, in recent years the role of village leader has become more of a politicised position. The village head may be influenced by politics and is the point of contact for higher levels of government. In certain cases the village leader may refer conflicts to a higher level of government or endeavour to apply state laws or government policies such as promoting the use of a district medical clinic rather than a local healer. In villages where the village leader is closely aligned to political movements or in more urban environments, state-based legal systems may play a stronger role. In such cases this is often coupled with the breakdown of traditional justice mechanisms. Bräuchler argues that this breakdown is in itself a loss of cultural heritage, as dispute resolution systems are a form of cultural heritage and should be preserved.\(^\text{10}\) In her study on traditional justice mechanisms in East Timor and Indonesia, she found that the traditional justice mechanisms are culturally sensitive in a local context and normally participatory. Further, the continuation of these mechanisms ensures social relationships are maintained. These findings suggest that it is important to incorporate customary law into cultural heritage programmes. The state legal system should not be employed without consideration and examination of alternative local customary law.

One of the reasons for the reliance on customary law rather than state law is the role of power within Cambodian society. There is reluctance to take a matter to a person who is perceived to be higher in status than a villager; this includes individuals in government positions. This person will have more ‘power’ and as a result the villager will not be able to discuss openly their issues or contest the findings.\(^\text{11}\) A further reason for the dominance of customary law is the pervasive role of spirits in directing the health and welfare of the village community. In Cambodia, the very understanding of the village is linked to religious beliefs in the sense that ‘village’ can be defined by a ‘community that is bound up with the veneration of common guardian spirits (neak

\(^{10}\) Birgit Bräuchler, 'Intangible Cultural Heritage as Sites for Peacebuilding' (Paper presented at the Heritage in Asia: Converging Forces, Conflicting Values, Singapore, 2009).

\(^{11}\) See below for further discussion.
Sometimes it is thought that a quarrel between family members or the suspicious loss of livestock is caused by a cantankerous ancestral spirit or an aggrieved territorial spirit. An insult to a spirit, such as neak ta, must be solved using the appropriate offerings. The appeasement of these spirits does not relate to the state system in any sense.

This thesis argues that within Cambodia, customary law should be recognised by measures for the safeguarding of ICH. At Angkor this may be achieved by utilising traditional dispute resolution processes to resolve conflicts that arise. Such traditional processes can be given legitimacy in policy documents developed by government authority.

7.2 National Ideas of Culture

Beyond local customary beliefs and legal systems, there are nationally derived and perpetuated ideas of culture. The clearest example is cultural nationalism which projects an idealised view of the Khmer and their history. There are also social norms which are prevalent throughout Khmer culture and those encapsulated within the state education system. These include the role of power in dictating social relationships and idealised traditional behaviour developed in habitual texts, the chbab, that are legitimised through state education. These national ideas of culture are both elements of Cambodia’s cultural heritage and can influence how heritage is protected. For example, power has been a strong factor influencing what forms of heritage are protected at Angkor and how cultural elements have been managed, particularly through organs such as the heritage police.

Like local customary beliefs, nationalised culture and social norms can be inconsistent with international heritage ideologies. For example, the traditional role of power in dictating social relationships may be inconsistent with human rights principles and cultural rights. As with local beliefs, it is important to understand national ideas of culture and see how these interrelate with the protection of cultural heritage.

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7.2.1 Nationalism and Khmer culture

Angkor is frequently at the centre of Cambodian cultural nationalism. It is regularly cited to demonstrate the superiority and magnificence of the Khmer race.\(^\text{13}\) The period of the Angkorian empire is seen as the ‘peak and flourishing’ of the Khmer people while other periods of Cambodian history are described as being times of decline, destruction and darkness.\(^\text{14}\) The ideology of Angkor is used as a yardstick against which contemporary Cambodia is judged. This is clear from the references to Angkor and its glorious civilization within the Preamble of the Constitution.

We, the people of Cambodia

Accustomed to having been an outstanding civilization, a prosperous, large, flourishing and glorious nation, with high prestige radiating like a diamond,

Having declined grievously during the past two decades, having gone through suffering and destruction, and having been weakened terribly,

Having awakened and resolutely rallied and determined to unite for the consolidation of national unity, the preservation and defense of Cambodia's territory and precious sovereignty and the fine Angkor civilization, and the restoration of Cambodia into an "Island of Peace" based on a multi-party liberal democratic regime guaranteeing human rights, abiding by law, and having high responsibility for the nation's future destiny of moving toward perpetual progress, development, prosperity, and glory,

With this resolute will we inscribe the following as the Constitution of the Kingdom of Cambodia.\(^\text{15}\)

Angkor has been used as such a yardstick in previous phases of Khmer history. This was particularly the case under the Khmer Rouge regime which sought to return Cambodia to its golden days of the empire. Pol Pot often referred to himself as the


\(^{14}\) Sam-Ang Sam, 'Preserving a Cultural Tradition: Ten Years after the Khmer Rouge' (1990) 14(3) *Cultural Survival Quarterly* 43.

\(^{15}\) Preamble of the Constitution of the Kingdom of Cambodia (1993).
‘Original Khmer’ seeking to emulate the Khmer of Angkor. Edwards establishes the extent to which Angkor has been the subject of cultural nationalism.


Winter argues that by ‘claiming guardianship over an irreplaceable national heritage, each leader would use Angkor as the reference point for a national and cultural revival, a theme first introduced by the French at the beginning of the century’. The towers of Angkor have not only been used by the various state governments of Cambodia to gain legitimacy, but they have also been adopted by hundreds of commercial enterprises. These companies seek to project their Khmerness and hark back to the glorious Angkorian past as an indication of the superiority of their company or product.

The implications of the politicization and nationalism of the site of Angkor for its conservation are far-reaching. There are specific implications for the safeguarding of ICH. The national and international significance of the site is given far more worth than its local significance. In this light, it is easier to comprehend how community values are sidelined and their intangible heritage ignored. To the ruling party there is much more at stake than the safeguarding of contemporary values of the local community. For they gain legitimacy from, and perpetuate the imagery of, Angkor as a great civilization from a past era. The focus of cultural nationalism is firmly placed

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16 Penny Edwards, *Cambodge: the cultivation of a nation 1860-1945* (2007). Although Angkor was at the heart of the idealism projected by Pol Pot, he sought to eliminate all other elements of cultural heritage including religion, superstitions, animism, linguistic expressions and ethnic difference.

17 Ibid, 5.

18 Winter, above n 13, 18.

19 Ibid.
on the past and shared ancestry of the Khmer of a past time rather than the present. This conclusion is supported by the research of Miura, who cites a speech by Colonel Tan Chay to local villagers living around Angkor:

So, how could the Khmer act in an appropriate way in order to respect the honour of Angkor, which does not only belong to a few people? We have to know how to give honour to our ancestors. If the Khmer had no Angkor, nobody would recognise us.20

Miura argues that the colonel linked his speech to sovereign and national interests to gain legitimacy and explicitly dismissed the importance of local interests.21 In this way, cultural nationalism can actually be a causal factor in the loss of intangible cultural heritage. The supremacy of the national agenda has implications for the protection of cultural heritage in other parts of Asia. The government of Cambodia is not alone in ‘invoking the cultural past to validate and solidify group identity’; this is a ‘common practice in modern nationalism’ and has been seen in Indonesia, Thailand,22 Singapore, and Malaysia.23 Black and Wall found that there is tension between nationally-defined cultural identity and the local or vernacular forms of culture at Borobudur in Indonesia.24 They argue that the government wants culture which is consistent with its goals of political centralisation and control. Their goal of homogeneity is incongruent with the diverse expression of local traditions such as those at Borobudur.

### 7.2.2 Social norms and their impact on cultural protection

Khmer culture contains a variety of traditions that give rise to norms of appropriate behaviour. These include laws, customs, local precedent, cultural axioms, folklore, [and] religious texts.25

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20 Miura, above n 12, 153.
21 Ibid, 161.
24 Black and Wall, above n 22.
25 Hughes, above n 7.
Hierarchical social structures and the role of power

Power is an important attribute of social relationships within Cambodian society. The stratification of society has historically been, and continues to be, extremely important.\(^{26}\)

The all-pervasive guiding principle for Khmer social life is the notion of hierarchy. All social relations are hierarchically ordered. Such status is not exclusively a function of chronological age, but is determined as the sum of a number of dimensions including – apart from chronological age – gender, wealth, knowledge, reputation of the family, political position, employment, the character of the individual, and religious piety. The social order is felt to depend upon everyone observing the status hierarchy and keeping his/her place in it.\(^{27}\)

Power is directly linked with a person’s position in the hierarchy. Importantly, the power attributed to people with senior positions in the hierarchy overshadows any authority of the legal system. O’Neary and Nee found in their analysis that ‘those who have power do not respect the law and this means there can be abuse of the rights and freedom of people who are less important’.\(^{28}\) For cultural preservation, those with power can hold more authority than formal cultural protection measures.

The influence afforded by power often means that for the average Cambodian, power is seen in negative terms. Power is often equated with dominance, knowledge (at least perceived), corruption, wealth and exploitation. The *neak mien* (people who have) or *neak thom* (big people) can induce fear and awe. Those with power are able to do as they wish, do not have to respect the ideas or rights of those below them and expect to be obeyed. People lower in the hierarchy (i.e. those with less power) are expected to respect the role of those above them, never disagree (even if they know what is being said is wrong), be flattering, sit lower and speak carefully.\(^{29}\) Power is thus equated with being strong and powerlessness with being weak. Collins states that ‘the

\(^{26}\) O’Leary and Nee, above n 9.
\(^{27}\) Jan Ovesen, Ing-Britt Trankell and Jaokim Ojendal, ‘When Every Household is an Island: Social organisation and power structures in rural Cambodia’ (University of Uppsala and SIDA, 1996).
\(^{28}\) O’Leary and Nee, above n 9, 51.
\(^{29}\) Ibid.
Cambodian village recognizes that compared to literate city authorities, especially the police and the courts, a villager is piteously weak, and the weak always loses to the strong’. Thus, this social norm reinforces the use of local customary law within the village rather than attempting to utilise state-based legal remedies.

Traditional culture often reinforces customary ideas of society. In Cambodia, numerous proverbs, songs and folk stories reinforce the hierarchical order. There are tragic tales of those who try to go beyond their status or try to challenge convention, whereas those who show piety, respect and attempt to help others more important than themselves are generally rewarded.

\begin{quote}
Neak toich twerr, neak thom banchea, peil neak toich torva neak thom thak
Small people work, big people give orders, when the small person challenges the big person will kick.

Kluon teab kom tong, dai klay khley chhoung sra va oop phnom
A short person should not grasp something high; if your hand is short you should not try to grasp the mountain.
\end{quote}

National interests expressed through the use of state power may have negative consequences for heritage conservation. The use of state-power has led to the provision of sweeping land concessions in places which superseded local interests. The impact of such state-based decisions on local communities can be devastating. They can also have a negative outcome for the protection of cultural resources and intangible heritage as frequently it causes local communities to become dislocated and disassociated from their traditional villages. Furthermore, there is subsequent use of the land by outside interests who have no connection with, or understanding of, its symbolic and cultural value. The outsiders have little desire to protect cultural resources with which they have no connection with. This is one of the consequences outlined by Mumma of state-based legal systems imposing on community legal systems.31

30 William Collins, 'Dynamics of Dispute Resolution and Administration of Justice for Cambodian Villagers' (USAID, 1997), 52.
31 Mumma, above n 1.
Moral codes or socially-recognised codes of conduct are an important source of customary law throughout Cambodia. The title for these codes is the same as that used for modern state laws—chhbab. Those chhbab that are considered particularly significant have been incorporated into the state education system and are taught as part of the school curriculum. These are the chhbab srei or the traditional code of conduct for women and to a lesser extent the chhbab broh, the traditional code of conduct for men. These can be literally translated as the ‘women’s law’ and the ‘men’s law’ and historically have been considered legitimate traditional laws. Both chhbab are presented as oral advice from an elder to a child in the form of a melody. The chhbab srei sets out that a woman should respect and serve her husband, be patient with him and not contradict what he says. She should not speak to him as her equal and listen to him even when he is saying something bad. A woman is warned that she should not be lazy, stubborn, noisy, angry, gossip or neglect her parents. The chhbab broh sets out that the ideal behaviour of a man is to think before you act, do not be lazy, respect the elders, be thrifty, protect your property, work hard and consult your wife and children before you spend money or sell something. The chhbab warns men to stay away from gambling, women and alcohol as these will cause ‘madness’.

There is a nationalistic aspect to these codes, as they are considered to develop Khmer values and if one follows the chhbab then you are considered to be a model Khmer. They reinforce the traditional hierarchy within society. Men are ‘stronger’ than women and have a higher place in the hierarchy.

To be Khmer means to live in accordance with a certain hierarchical order of society, which can be more fully understood through an examination of the gender roles of that society. To move outside these roles is to enter the realm of chaos where, having lost what it is to be female in Khmer terms, one loses also what it is to be Khmer.32

The chhbab, particularly the code for women, still inform expected social behaviour and women often state that they feel judged against the chhbab srei. It has been

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argued by some organisations, such as the Partnership Against Domestic Violence (PADV) Cambodia, that the national endorsement and teaching of the chhbab srei prevents Cambodia from ensuring the enjoyment of all human rights. Reference is made to the ability to meet obligations under the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), particularly Article 2 (f) and Article 5 (a). These Articles establish that States Parties should:

[T]ake all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

[M]odify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles for men and women.

PADV argue that the pressure to conform to the customary laws may perpetuate domestic violence or fail to prevent it. However, it is the author’s belief that neither chhbab endorse violence.

The perception that the chhbab causes discrimination against women presents an important issue. Are traditional Cambodian values and culture compatible with international ideologies? Organisations such as PADV argue that the hierarchical structure of Cambodian society and the position of women are counter to globally accepted norms of respect and equality for women. Should all cultural elements that are conflicting with prevailing international ideologies be abandoned or does this undermine the protection of intangible cultural heritage? To what extent should cultural expression be made to conform to international norms?

7.3 International Obligations and Ideologies and their Compatibility with Cambodian Values

The conservation of intangible heritage is a complex endeavour. This chapter has already demonstrated that there are local and national cultural values that can be inconsistent both with each other and with dominant international discourse. We see
that international conservation ideals are often different or at least may not be completely compatible with those that exist in specific countries. This thesis concludes that it is highly inappropriate to simply apply mechanisms for cultural preservation which are developed in different spheres, whether these are international, regional or national, without an analysis of culture within the target nation. A document developed based on international norms or national approaches to heritage conservation is not necessarily compatible with heritage ideologies in a different country. For example the principles of the Burra Charter, particularly related to the reconstruction of heritage buildings, may not be compatible with the conservation principles in Japan where sites may be regularly rebuilt.33

The social and traditional hierarchical system of Cambodia is not necessarily compatible with international ideologies based on equality and empowerment of all people. Power and ‘empowerment’ in Cambodia are often perceived as a negative process. This is because those with power are equated with dominance, superiority and exploitation. The gaining of power is not inevitably something that local communities seek. Can ICH be safeguarded using mechanisms based on international or Western ideologies?

International law is frequently applied in diverse national legal systems and thought to be relevant globally, but this is not necessarily an appropriate situation for international laws which seek to protect culture. Clearly cultural heritage laws must not simply emulate international ideals but incorporate local culture. This may seem rather obvious and yet governments are expected to implement international laws through domestic legislation. The legislation should be consistent with the purpose of the international provisions, but without assuming that those provisions are strictly prescriptive such that local cultural concepts cannot be taken into account.

So why do international ideologies on the conservation of culture prevail commonly over local ideologies? The conservation of culture is brought into the international domain particularly through the concept of the ‘common culture of mankind’. The

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concept of common culture globalises ownership of heritage\textsuperscript{34} and creates a distinct ‘international cultural heritage’.\textsuperscript{35} It is encapsulated within the World Heritage List and more recently within the List of the Intangible Cultural Heritage of Humanity. International law protecting the common heritage, i.e. the WHC and ICH Convention, further develop international conservation ideals, along with international organisations such as UNESCO, ICOM, ICCROM and ICOMOS. These organisations develop ‘international standards ... in the cultural heritage field... imposing a common stamp on culture across the world and their policies creating a logic of global cultural uniformity’.\textsuperscript{36} The ideologies upon which these policies and laws are founded are often embodied in state legislation. Frequently, international legal principles are transposed into domestic legal systems without an analysis of their compatibility with national and local ideologies. There are few examples of attempts to incorporate international legal norms in a culturally-sensitive manner that does not undermine traditional legal systems or customs. The consequence is that in a country such as Cambodia, the state legal system may embody Western ideologies which are incompatible with local customary legal systems and may contradict social norms such as the traditional hierarchy. Taylor has previously recognised the threat of imposing foreign conservation ideologies on Asian countries. He concludes that ‘[i]n the Asian context it is critical that Western conservation canons that inform various charters are not imposed imperiously on these cultures...[the] outcome that universality of practice and imposition of standards can cause is that local values may be overwhelmed’.\textsuperscript{37}

\textsuperscript{34} Black and Wall, above n 2, 133.

\textsuperscript{35} Anastasia Strati, ‘The Implication of Common Heritage Concept on the Quest for Cultural Objects and the Dialogue between North and South’ in Jo M. Pasqualucci (ed), \textit{When the Quest for Cultural Objects Divides North from South} (1995) vol 89, 433. Strati argues that the concept of ‘international cultural heritage’ to a certain extent devalues culture by failing to understand that all culture belongs to a given people and that it will not have the same cultural, historical and spiritual importance to all people.


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With these competing international, state and local forces how is it possible to ensure the protection of ICH? It is necessary to develop an appropriate approach that is compatible with the dominant state-based legal system—a system which likely utilises international ideologies. This thesis advocates a culturally-sensitive approach to safeguarding ICH. In essence the approach requires bottom-up conservation measures integrating local customary laws.

Experience can be drawn from African nations which have often faced conflicts between state-based laws to preserve culture and local customary law. Mumma states that as ‘state-based enforcement has proven unreliable, attention has turned to integrating communities into management systems and structures that make use of community-based legal systems. This improves the effectiveness with which heritage sites are managed’. This integration, he establishes, involves reinstating historic ownership and/or historic rights for using resources, particularly land along with the reinstatement of community leaders and traditional structures that define authority. It involves ‘a fundamental shift in power relations between the central state and local communities’. Mumma concludes that state-based laws for the conservation and management of heritage need to reorientate the relationship between state-based and community-based legal systems so that the ‘two systems are brought into a relationship of complementarily and symbiosis rather than antagonism and competition’.

7.4 Cultural Sensitivity and Safeguarding Approaches

It is concluded that laws for the protection of intangible cultural heritage must be culturally specific. They must integrate local cultural ideologies. It was established above that in many countries and certainly within Cambodia, intangible heritage cannot adequately be safeguarded by relying on the application of international or western conservation approaches or the exclusive use of the state legal system. Chapman confirms that in Cambodia, the use of restrictive or protective legislation, based on Western notions for land use and historic preservation is not the best

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38 Mumma, above n 1.
39 Ibid.
approach.\textsuperscript{40} In Cambodia, it has been shown that customary law is still an important component and that state law may be avoided by local communities. Further, there is very little understanding of state law at the village level and so compliance with the state law is problematic.

As Mumma proposes, a reorientation is needed which focuses on village level customary law and traditions. The reorientation necessitates the employment of bottom-up safeguarding measures. These measures would incorporate customary law. The development of such safeguarding measures is found to be consistent with, and indeed require, the adoption of the principles of community participation, protection of cultural rights and education. Cultural rights, as has been argued previously, are particularly significant in protecting the cultural traditions of local communities. Cultural rights are now widely recognized as providing legitimate rights for the access to, and practice of, intangible cultural heritage. Utilising a framework of cultural rights can further emphasise the role of local communities in safeguarding ICH. The realisation of cultural rights can result in the ‘shift in power relations between the central state and local communities’.\textsuperscript{41}

The cultural rights framework can be a significant tool in negotiating this power shift. In most countries, human rights, including cultural rights, are recognised and incorporated into the state-based legal system. They are also globally recognised. This framework is therefore a common thread between international, state and potentially local safeguarding of ICH. It is proposed that since cultural rights are locally derived and culturally sensitive, the employment of such rights requires the reorientation of state policies to local communities. Therefore, an argument for cultural rights can be used to negotiate the conflicts between state-based law and customary law. The establishment of cultural rights within the state-based legal system can be interpreted to provide legitimacy to locally-derived traditions and customary law. At least one aspect of the Cambodian state-based legal system, the Cambodian Constitution, may


\textsuperscript{41} Mumma, above n 1.
provide for the re-orientation of cultural heritage policy to allow a bottom-up safeguarding measures and the reinstatement of cultural rights.

An examination of the Cambodian constitution can provide a means to integrate cultural rights into policy documents. Article 31 of the Constitution establishes that human rights, as outlined in the covenants and declarations on human rights, shall be respected. This includes the Covenant of Economic, Social and Cultural Rights (ICESCR). Cambodian is a State Party to the Covenant depositing its instrument of accession in May 1992. Under Article 2(1) of the ICESCR, each State Party undertakes to achieve a full realisation of rights recognised in the Covenant by the adoption of legal measures. Article 15(1) of the ICESCR stipulates that States Parties should recognise the right of everyone to take part in cultural life, while 15(2) states that steps should be taken by States Parties to ensure the conservation, development and diffusion of culture. The right to participate in cultural life is further clearly established in Article 35 of the Cambodian Constitution. The articles of the constitution may be interpreted to allow for the safeguarding of ICH through locally-developed measures. It is possible to argue that mechanisms utilising customary law are consistent with the cultural rights established.

It is suggested that it is possible to meld international legal ideologies and local ideologies, at least in the area of intangible cultural heritage protection, through the employment of a cultural rights framework. This framework allows for a re-orientation to local communities, a focus on cultural sensitivity and the employment of customary law and community participation. Through utilising this framework, that is (in most cases) already incorporated into the state system, it is possible to avoid or minimise antagonism between state-based laws and customary laws. As proposed by Ayton-Shenker, we should draw on traditional cultural values to re-enforce the application and relevance of universal human rights. 42 James takes this further suggesting that

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‘properly presented heritage conservation and cultural tourism can in fact be used to encourage the implementation of human rights’.43

7.5 Conclusion

While the cultural rights approach may be one possible way to allow for the incorporation of local belief systems and customary law in the safeguarding of ICH, it may not resolve the overarching issue of conflicts between international ideologies and local ideologies. It was established previously that the international heritage discourse evolved from specific ‘Western’ ideals.44 Many Western doctrines continue to be present in international discourses and instruments, or form the foundations for such instruments, including the World Heritage Convention and the Convention for the Safeguarding of the Intangible Cultural Heritage. These Western doctrines present in international legal documents are not necessarily compatible with traditional value systems and customary law. Therefore, not all States Parties will easily be able to translate legal obligations effectively into the domestic legal framework. Within the field of intangible heritage law there needs to be a shift to focus on the role of local customary law. Further research needs to be conducted to establish the extent of conflicts between traditional value systems, state law and international law. For the most part, this research should be applicable to the safeguarding of intangible heritage globally.

43 James, above n 33.
44 See Chapter 1 particularly the discussion on heritage discourse.
PART III  RECOMMENDATIONS AND CONCLUSION
8. Protecting Intangible Heritage through Policy

8.1 Using Policy to Ensure Protection of ICH

It was established within Part II that at the present time laws in Cambodia have compliance and enforcement limitations. It is generally informal ‘laws’, which find their authority in people with wealth, status or political position that are realistically what shapes social behaviour and ministerial decisions. The role of power in Cambodian society, explored in Chapter 7, is a significant factor which leads to this situation. In addition numerous reports have concluded that ‘laws are applied only when they are convenient for the rulers or the authorities’.\(^1\) In other words the people that hold the power. Similarly, compliance and enforcement of applied laws is rarely consistent. For these reasons alone, this thesis argues that to effectively safeguard ICH in Cambodia, a policy orientated-approach, rather than a normative approach, is required.\(^2\)

There are other reasons to advocate a policy approach to safeguard ICH.

(i) The approach is consistent with the emphasis throughout the ICH Convention on a participatory bottom-up methodology.

(ii) This approach requires policy instruments that are developed on a localised scale, rather than a national or regional scale, and thus allows for cultural sensitivity and specificity.

It is argued here that localised policy, which is formulated with authorities and in consultation with other significant parties and communities, can play an important role in local and regional intangible heritage management.

There is a growing awareness that cultural policy plays an important role in cultural heritage protection. The move towards localised policy development also portrays a shift away from the state-orientated top-down method where decisions, laws and

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2 This approach however, clearly recognises that the policy documents require that at national level, a legally-binding normative instrument in which to find authority.
policies are made by government or administrative bodies without consulting with local communities impacted by such decisions. The World Commission on Culture and Development argues that ‘cultural policies driven by nation-building objectives are being increasingly challenged by individuals and groups who may not necessarily contest this motivation, yet ask for their more immediate needs to be met first’. Increasingly there is a belief that such policies should be developed locally by people who have an intricate understanding of the issues and are themselves part of the culture. Engelhardt argues that Articles 14 and 15 of the ICH Convention echo this belief. He states that:

> [E]mphasis on participation of communities, groups and individuals [within the Convention] is a reflection of the awareness that heritage must not be preserved for its own sake, but for the benefit of the people that [sic] actively create and recreate the living cultural heritage. It is therefore vital that those people are informed, aware and have the capacity to actively participate in decision-making and activities relating to their heritage.

A cultural policy approach allows for such participation.

At present the cultural policy of Cambodia is developed nationally by the Office of the Council of Ministers and implemented by the Ministry of Culture and Fine Arts. However, similar arguments for the development of localised cultural policy have been made for Angkor. Miura advocates for ‘the development of a mechanism in which the local community is not excluded from policy making in the conservation work of the Angkor Complex, and no longer bear the brunt of the negative aspects of inappropriate conservation policies and implementation’. Similarly, Ishizawa argues

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that it should be the Cambodian people who are responsible for the protection of the cultural heritage and therefore responsible for taking the initiative in policy making.\textsuperscript{7}

Along with participation of local communities, cultural policies have the potential to provide the formulation and implementation of a rights-based approach to protecting ICH. Rarely have previous cultural policies included a significant element of cultural rights. Despite this, the argument to present such rights in policies has been put forward on a number of occasions. Article 12 of the 2007 Fribourg Declaration on Cultural Rights states that organisations should ensure cultural rights are consistently and progressively integrated into monitoring mechanisms and relevant instruments, including policy instruments. Submissions to the Cultural Commission of Scotland argued that cultural rights should be taken as a substantive starting point for cultural policies.\textsuperscript{8} Koivunen and Marsio argue that cultural rights are one important approach to cultural policy within a ‘responsibility ethic’.\textsuperscript{9} This ethic considers cultural identity, the safeguarding of cultural traditions and the realisation of cultural rights as central factors and, they argue, policy choices within this ethic revolve around accessibility, availability, participation and inclusion.\textsuperscript{10} Finally, Hamelink argues that ‘Cultural policies should stress the right to culture, cultural diversity and the role of the state in preserving and enriching the cultural heritage of society’.\textsuperscript{11} This thesis adopts such arguments and proposes that cultural rights should be a starting point from which to formulate heritage policy.

The role of national cultural policy is summarised by Deacon,\textsuperscript{12} who states:

\begin{quote}

The role of cultural policy at a national level is to establish priorities for and approaches to the promotion and protection of cultural forms within a country. A
\end{quote}

\begin{footnotes}

\textsuperscript{7} Yoshiaki Ishizawa, 'Who should be responsible for the Cultural Heritage of Cambodia?' (2004) 21 JCAS Symposium Series 187.
\textsuperscript{9} Hannele Koivunen and Leena Marsion, 'Ethics in Cultural Policy' (IFACCA, 2008).
\textsuperscript{10} Ibid.
\end{footnotes}
cultural policy may promote certain cultural practices as national priorities because of their role in forming and promoting national or regional identity. A cultural policy forms the backdrop against which heritage legislation (and other kinds of legislation) can formalise the process of defining and managing heritage.

In addition, the role of cultural policy at the local or provincial level is to elaborate specific approaches for the promotion and protection of cultural heritage in that area. These cultural policies may further clarify national cultural policy as it relates to certain cultural practices found within that region or as it directs heritage legislation. Local cultural policy may also address specific perceived threats to culture within the local area, such as tourism at specified locations or impacts of development or change to particular cultural communities and ensure rights in relation to heritage. As such, localised cultural policy has an important role to play in the application of national heritage promotion and protection obligations. Local policy can be used to develop action plans to safeguard heritage, provide a mechanism for community involvement in heritage protection and ensure a community-orientated management approach.

### 8.2 Cultural Policy in Cambodia

The ICH Convention clearly specifies that the States Parties to the Convention, such as Cambodia, must designate one or more competent bodies for the safeguarding of ICH. At present, the bodies responsible for the cultural profile in Cambodia are the Ministry of Culture and Fine Arts, the Ministry of Cults and Religion, the Autorité pour la Protection du Site et l'Aménagement de la Région d'Angkor/Siem Reap (APSARA) and the Autorité Nationale pour Préah Vihear (ANPV). The Ministry of Culture and Fine Arts is the nominated competent body responsible for the protection and development of cultural heritage, museums, performing arts, the Royal University of Fine Arts and the National Library. It covers heritage in all provincial areas of Cambodia except parts of Siem Reap Province and Preah Vihear Province. The Ministry of Cults and Religion is responsible for the spiritual aspects of culture such as the development of Buddhism. APSARA, as established in Chapter 5, was created in 1995 and is the body responsible for heritage at the Angkor World Heritage Site.
(Siem Reap Province), Beng Melea temple (Siem Reap Province) and Koh Ker temples (Preah Vihear Province). The Preah Vihear Authority was created in 2006 and is responsible for heritage at Preah Vihear temple (Preah Vihear Province). APSARA and ANPV are autonomous bodies under the aegis of the Council of Ministers.

As these bodies have already been designated to fulfil the role of cultural heritage preservation, their portfolio also includes the safeguarding of ICH within their jurisdiction. Thus, these bodies are responsible for adopting policies aimed at promoting the function of ICH in society and integrating the safeguarding of this heritage into planning programmes.\(^\text{14}\) The Fribourg Declaration states that the policies of responsible bodies, which contribute to democratic governance, should take the initiative to ensure cultural rights and the development of means of consultation and participation.\(^\text{15}\) The bodies should also train their personnel and raise public awareness regarding the generation of respect for cultural rights.

APSARA does not currently have a specific programme to safeguard ICH although, as established in Chapter 6, it is mandated to safeguard traditional habitat and religious constructions and promote and carry out studies on tangible and intangible Khmer culture. The Authority does not have any policies that promote or safeguard ICH. The draft policy document that I have developed, found in the Appendix, seeks to safeguard intangible cultural heritage in a localised culturally-sensitive manner by incorporating local ideologies and international obligations. The policy, while consistent with international law and the ICH operational guidelines, is based on the methodology for safeguarding ICH proposed in Part I of this thesis; namely utilising the principles of cultural rights, education and public participation.

The policy also seeks to be consistent with the requirements for safeguarding ICH put forward by UNESCO-ACCU (Figure 31)\(^\text{16}\) and Proschan (Figure 32).\(^\text{17}\) Both ACCU

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\(^\text{14}\) ICH Convention Article 13(a).

\(^\text{15}\) 2007 Fribourg Declaration Cultural Rights 2007 (Fribourg) www1.umn.edu/humanrts/instree/Fribourg%20Declaration.pdf at Article 9.

and Proschan establish one requirement for safeguarding as ‘Research, Documenting, Recording and Inventorying’. It has been argued previously in this thesis that the use of lists is not an ideal method of safeguarding ICH. However, it is also argued that research and an understanding of ICH is critical to ensure respect and safeguarding. There is a need to reach a compromise between the documentation of ICH and minimising the potential negative effects of this mechanism, such as the freezing of culture, the inability to encompass variation or the legitimising of one documented form of ICH over another. Deacon recognises this problem by reflecting that;

[t]he fundamental challenge to policy-makers concerned with heritage management, especially of intangible heritage, is the need to understand and respect the fluidity of cultural practices and the values attached to them while defining them, documenting them in some way and encouraging their future transmission.18

The policy in the Appendix emphasises the importance of research. While one aspect of this research could include the development of an inventory of the variation and breadth of ICH present, the inventory should not be used as a finite entity or be the sole focus of safeguarding, but be used to support education initiatives and the recognition of key holders of knowledge.

Chapter 8

**ACCU’s Three Approaches to Safeguarding ICH**

**Transmission**
To safeguard ICH, it is of primary importance to ensure its sound transmission. If the last practitioner of a certain ICH passes away without handing down his/her knowledge/skill, the heritage is lost forever. So, it is essential to create an encouraging environment for transmission and to help practitioners of both old and young generations to be aware of the significance of handing down and upholding the heritage.

**Education and Awareness**
Raising awareness of its value among the public, particularly the youth and children, is indispensable in gaining support for practitioners and tradition-bearers to practice, recreate and transmit the heritage.

**Recording and Documentation**
It greatly helps transmission of ICH to record and document ICH as precisely and comprehensively as possible. It is particularly important when it comes to those cultural expressions which are on the verge of disappearance and requires urgent measures.

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Figure 31 Asia/Pacific Cultural Centre for UNESCO Approaches to Safeguarding ICH.\(^\text{19}\)

![Diagram](image)

Figure 32 Diagrammatic Representation for Safeguarding ICH.\(^\text{20}\)

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Chapter 8

While the policy presented in the Appendix deals specifically with ICH, it is emphasised that heritage is best protected when a holistic approach is taken. This policy document should not be implemented or viewed independently from tangible heritage. The two are intricately linked. This policy should be interpreted as applying wherever possible to both tangible and intangible forms of heritage. Future efforts should develop a more comprehensive single heritage protection policy incorporating in more detail both tangible and intangible heritage. In the future this policy will also be assessed following the implementation of the review provisions.

20 Frank Proschan (2007).
Chapter 9

9. Conclusion

The conceptual elucidation of ‘cultural heritage’ manifests a constantly evolving body of theory and practice. Any study on cultural heritage concludes that the concept lacks a single defining explanation. It is a concept that has been linked to the shifting prevailing philosophies of numerous disciplines, including archaeology, conservation, heritage management, architecture and law, over time. The very nature of the concept has allowed for its broadening from a focus on tangible manifestations of culture to an inclusion of the intangible. In several disciplines, cultural heritage continues to maintain a focus on tangible structures and forms. However, a general shift has occurred that has resulted in an increasingly holistic understanding of heritage to recognise heritage in all its forms, both tangible and intangible. This may also be seen as a paradigm shift that is linked to regional heritage discourses. The re-conceptualisation of heritage can be equated with a theoretical shift from a Western European understanding of heritage to an East-Asian understanding of heritage.

In parallel with this re-conceptualisation there has been the development of means to protect intangible heritage. Such means have stemmed principally from the operation and formative programmes of UNESCO, which has been at the forefront of the international discourse surrounding cultural heritage. The dialogue, and the quasi-legislative process that has developed as a result of this dialogue, is contributing to the further advance of cultural heritage law and policy. However, this dialogue is founded in international forums. While UNESCO plays a key role in developing broad policies, the application of these policies is far from simple.

This thesis has illustrated that, within law and theory, intangible heritage is a highly complex subject. Its safeguarding requires the continuation of ancient practices and the development of these practices, as well as their transmission from one generation to the next. This in turn requires local community participation, grassroots mechanisms for the continuing education and awareness of ICH and the recognition of holders of knowledge. In other words, its safeguarding necessitates bottom-up mechanisms. Yet, its conservation within international law also requires the realisation of state obligations and the development of state-based frameworks, competent state bodies, lists of valued heritage items and domestic legislation to put
all of these processes within a legal framework. These are of course all implicit of top-down state-based mechanisms. Further dilemmas arise when it is acknowledged that Intangible heritage must be allowed to develop, change over time and be recreated as indicated above. It should not be fixed in any single form or at any particular time, and yet states are compelled to delineate representations of intangible heritage that they consider to have outstanding universal value. In order to safeguard intangible heritage, a fine line must be walked between the freezing of culture, the commodification of tradition, the commercialisation of customs, the authenticity of practice, the maintenance of ethnicity and identity, the realization of cultural rights and the politicisation of heritage. This involves a balance of competing forces, state and local, private and public, law and custom, and the tackling of complex issues. These matters have been raised several times within this thesis, both in their theoretical frame and within the context of the practical example of Angkor. Due to the relatively recent focus on the safeguarding of intangible heritage within international law, these are generally broad issues that have yet to be resolved either within the heritage discourse or within the field of heritage law.

This thesis has clarified that within the international corpus of heritage law, the Convention on the Safeguarding of the Intangible Cultural Heritage is at this point little more than the fledgling sibling of the World Heritage Convention. The Intergovernmental Committee has yet to review and revise the Operational Directives which outline the functioning and implementation of the Convention. Further States Parties have yet to fully implement the Convention and develop safeguarding measures. Over time aspects of the Convention and its operation will be modified and lessons will be learned from State Party experiences. This thesis presents one analysis that may contribute to this learning process. The examination of intangible cultural heritage at Angkor and the potential application of the objects and purpose of the ICH Convention found in this thesis represent one of the first practical analyses of this Convention. While several findings are specific to Angkor, the issues presented by the safeguarding of ICH at a World Heritage Site are common in many countries. Angkor, as a World Heritage Site with a local community, contemporary intangible significance, rich cultural heritage and tourism value, is analogous to many other monumental sites throughout Asia and other continents. In this light, the study of
Angkor can provide useful insights for the broader issues surrounding the protection of intangible cultural heritage.

A practical analysis of mechanisms to safeguard intangible heritage at Angkor has further highlighted many of the, as yet, unanswered theoretical quandaries pertaining to ICH. One quandary is that development of state-based and community-based safeguarding mechanisms drafted by States Parties to implement the Intangible Cultural Heritage Convention may be in conflict. The intangible heritage of Angkor is steeped in customary law and tradition. The informal village practice of such customs, along with their transmission and recreation, requires the participation of local communities. It is these communities which are the holders of knowledge and the key to the safeguarding of their living heritage. The focus on the role of the community is recognised within the Convention. However, the interaction between their role in the safeguarding of heritage and that of the state is not resolved. Further deliberation is required to resolve the apparent ‘internal tension’ that exists within the Convention. Within the Convention, the state is still the organ for the implementation of the Convention and is required to nominate a state body for this purpose. The state is also required to nominate forms of intangible heritage for listing under the Convention. As such, the state has the power to influence the forms of intangible heritage that are safeguarded and how safeguarding is conducted. This creates a tension with the fundamental role of the community also emphasised within the text of the Convention. The result is an unresolved power struggle between community-based safeguarding mechanisms and state-based ones. This thesis concludes, in line with UNESCO policies, that it is essential that the safeguarding of ICH incorporates the needs and desires of local community and that safeguarding measures should be developed by these communities. Thus, this matter, arising from the examination of ICH at Angkor, thus serves to highlight an issue that will no doubt be applicable in other instances of ICH.

Likewise, the examination of ICH at Angkor has illustrated that the safeguarding of ICH calls for a broader approach that builds on the mechanisms of the ICH Convention. The approach is not based on the development of an inventory or intangible heritage list nor based solely on legal mechanisms. Instead, the findings of research at Angkor have suggested that a localised culturally-sensitive policy and law
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approach that is founded on the principles of cultural rights, community participation and education are vital additional means of ensuring the safeguarding of ICH. Such an approach would need to incorporate local customary law and social structures. Therefore, this thesis advocates a bottom-up approach which necessitates a shift towards community-based safeguarding mechanisms and the role of traditional bearers of knowledge.

Traditional bearers of knowledge at Angkor include musicians, spirit mediums, healers, farmers, storytellers, monks and fortune tellers, among others. These actors are central to issues of the recreation, practice and transmission of heritage, along with the commodification, authenticity and commercialisation of intangible heritage. The interface between maintaining tradition and embracing change is a further area of quandary that is examined at Angkor. This thesis has argued that the practicing community has specific rights in relation to their intangible cultural heritage. These rights may include deciding on how culture is renewed or recreated, who should practice aspects of their heritage and when. The identification and recognition of traditional bearers is necessary for such rights to be realised. Defining the practicing community is required to allow for the ownership of such decisions in relation to the safeguarding of heritage and while this may be a trying task in some cases, this thesis contends that the local community input is advantageous for the safeguarding of ICH.

In summary, this thesis has developed a series of findings. These findings suggest:

- The utilisation of a policy approach to safeguard ICH,
- The need to recognise ICH as an asset of each culture,
- The need for ICH of local communities to be respected,
- The realisation of cultural rights as a prerequisite for the protection of intangible heritage,
- The need for meaningful community participation and community-founded educational initiatives,
- Raising awareness of intangible heritage among both domestic and international visitors to a heritage site, and
- Culturally sensitive promotion of the unique aspects of lived heritage without the commodification of that heritage.
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The first chapter of the thesis introduced the argument that ‘a cultural heritage without any intangible aspects does not exist’. It is important to remember this when safeguarding intangible cultural heritage. The tangible and the intangible should be safeguarded together and one should never be considered in isolation of the other, because in reality they are intricately linked. World Heritage Sites are lauded throughout the world for their tangible assets and of course Angkor is no exception. It is important that the protection of cultural heritage begins to provide equal opportunity for both the tangible and the intangible aspects to take centre stage. A heritage building without the protection of its meaning, history or tradition loses value. A full appreciation of the outstanding universal value of heritage sites requires that ICH be researched, respected and safeguarded. This is certainly the case for Angkor. This site is equally remarkable for its architecture, iconography, history, local traditions, animistic spirits, Buddhist wats and daily customs. The protection of all of these aspects, monumental, spiritual, historical and contemporary, can only lead to the enhancement of what is already a magnificent place and one of the wonders of humankind.

A fabulous archaeological site, this great stone skeleton is also a living place, at once the realm of divinities and a city of mortals, where everyday business is steeped in customs from a prestigious past...It is vital to save Angkor’s architectural heritage, but equally important to protect its intangible heritage: the tales, legends and place names that only local people know.¹

Appendix

Draft Policy Document

Safeguarding Intangible Cultural Heritage within the Angkor World Heritage Site and other sites under the jurisdiction of the Autorité pour la Protection du Site et l'Aménagement de la Région d'Angkor/Siem Reap

(hereafter referred to as the APSARA Authority)

Draft Policy Document

The following policy document has been drafted to contribute to the safeguarding of intangible cultural heritage at Angkor. I have developed this policy document drawing on results obtained from my analysis of international heritage law and research conducted at Angkor. This document may be utilised to establish further mechanisms for the protection of intangible cultural heritage both in Cambodia and elsewhere.

Purpose

The purposes of this policy are:

a) To recognise the right of all people to their cultural heritage, both tangible and intangible, and the duty of all people to safeguard and respect their heritage.

b) To safeguard intangible cultural heritage;

c) To raise awareness about, and ensure compliance with, UNESCO Conventions pertaining to the safeguarding of cultural heritage, both tangible and intangible. Particularly, to raise awareness within APSARA Authority and the wider public of the importance of intangible cultural heritage and Cambodia’s obligation to safeguard this heritage.

d) To ensure respect for intangible cultural heritage which forms a unique part of Cambodia’s rich heritage and is a source of national identity.

Preface

Recognising that Cambodia is a signatory to the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) and the Convention for the Safeguarding of the Intangible Cultural Heritage (2003),
Appendix

**Realising** that both these Conventions protect important elements of heritage present at Angkor and must be implemented to ensure the future of Cambodia’s unique cultural heritage,

**Accepting** that Royal Kret No NS/RKT/0295/12 dated February 19 1995 establishes a National Authority for the Protection and Management of Angkor and the Region of Siem Reap, named the APSARA Authority,

**Acknowledging** that Anukret No 50/ANK/BK dated May 9 2008 establishes that the APSARA Authority has the task to safeguard traditional habitat and religious constructions, ensure compliance with UNESCO Conventions, disseminate knowledge and research on Khmer culture, increase awareness on heritage values, develop respect for heritage and promote tangible and intangible Khmer culture,

The following policy to safeguard intangible cultural heritage is proposed:

1. **Inventory/ Research**

Research is fundamental to understanding and appreciating intangible heritage. A research programme shall be established that sets out to understand all forms of intangible cultural heritage present in areas managed by the APSARA Authority. The Cambodian intangible heritage includes, but is not limited to:

a) Local legends, stories, songs, proverbs and sayings,

b) Myths,

c) Ceremonies and rituals including those for Buddhist, animistic, social and agricultural purposes,

d) Traditional knowledge about crafts, artistic skills, instruments, medicine, healing, place names, local spirits and interaction with spirits,

e) Knowledge of agricultural practices and the histories of villages and local communities,

f) Forms of artistic representation such as murals, puppetry, kites etc and performance arts including narration of tales, theatre, drama, dance and music etc,

g) Key holders of knowledge about intangible cultural heritage such as performers, healers, spirit mediums, fortune tellers, achar, and kru etc.
Research should involve the active participation of the local community. Within each village, key members of society such as the village leader, achar, kru, monk, yeiy and ta, should be asked on a voluntary basis to share information about intangible cultural heritage. The village members should directly influence the content of any research report. All research outcomes should be provided to the village for them to disseminate.

It is recognised that there is vast variation in forms of intangible cultural heritage practiced by communities. No one form is more valid than another and any research will try to encompass and acknowledge this variation.

Any research or inventory should accept that intangible heritage changes over time. Change should be accepted as an integral element of intangible heritage and any research should clarify and incorporate this.

2. Cultural Rights

The right of an individual to culture is a globally established human right. Cultural rights shall be recognised and respected by the APSARA Authority. Any act or behaviour by any person shall not restrict or prevent an individual’s ability to realise these rights.

Within the globally accepted corpus of cultural rights all people have:

a) The right to have their cultural identity respected
b) The right to access heritage
c) The right to participate freely in cultural life
d) The right to religious belief and practice
e) The right to education about their culture
f) The right to information about their culture
g) The right to identify with one or several cultural communities
h) The right to participate in public cultural policy

The APSARA Authority respects the rights of communities that practice forms of intangible cultural heritage and will ensure that customary dispute resolution remedies are available to individuals whose rights have been violated. Anyone who, alone or as
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a member of a community, claims that their cultural rights have been violated, has access to effective dispute resolution remedies.

3. *Community and Livelihoods*

The APSARA Authority recognises that many communities around Angkor have ancient foundations and are very old. The APSARA Authority acknowledges that these communities have the right to reside in their traditional villages and shall provide certification of occupation.

These communities have strong attachment to, and associations with, the landscape and hold knowledge regarding ancestral links to this land and their livelihoods. This knowledge and associations are an important source of intangible heritage and provide communities with a sense of identity and continuity with the past. The sustainable development of communities should incorporate this aspect of intangible heritage.

Agricultural development of communities should promote the continuation of traditional livelihoods and the use of ancestral rice fields. Local agricultural knowledge and knowledge about place names, village histories and family history is directly linked to the continuation of traditional livelihoods and interactions with the landscape. The community has the right to practice this form intangible heritage and should not be prevented from continuing their traditional livelihoods.

Livelihood activities should only be altered or prevented where there is justifiable evidence that the activities are directly impacting heritage entities such as temples. When it is found that an activity causes significant impacts, the community should be consulted and provided with written evidence of the impacts. Where possible, rather than preventing the activity completely, mutually agreed measures should be implemented to minimise impacts while allowing the activity to continue.

4. *Education*

Education and information about culture are central to the safeguarding of intangible cultural heritage. Education and awareness-raising are important tools for the development of respect for intangible cultural heritage. The APSARA Authority will
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encourage the use of education and information to promote cultural diversity, cultural awareness, respect and the fair exercise of cultural rights.

The APSARA Authority will disseminate information about traditional livelihoods, important animistic and Buddhist intangible cultural heritage and other forms of intangible cultural heritage present at Angkor. The APSARA Authority will work with traditional education institutions, including monasteries, to develop programmes to increase the awareness and respect for all forms of intangible cultural heritage among the local community. The APSARA Authority will distribute information about intangible cultural heritage, as a unique and important aspect of Angkor, to visitors to the Angkor World Heritage Site.

At locations of specific value to the practice of intangible heritage, such as the locations of neak ta spirits in temples, the APSARA Authority will inform visitors and the local community through means such as signage. Such information should encourage respectful behaviour appropriate to the location in addition to explaining the elements of intangible cultural heritage.

The APSARA Authority shall also encourage the creation, development, distribution, teaching and consumption of cultural information by local communities.

5. Participation

Community participation is critical for the safeguarding of intangible cultural heritage. The APSARA Authority will endeavour to develop regular and systematic consultation with local communities in regard to the safeguarding of intangible cultural heritage. The APSARA Authority recognises that community participation is vital for the identification, documentation, research, preservation, promotion, enhancement, transmission and revitalisation of intangible cultural heritage.

The APSARA Authority will actively engage the community in the management of intangible cultural heritage by ensuring that community members are bestowed custodianship of their intangible heritage. As custodians of their intangible heritage the community will be consulted with in the creation and operation of safeguarding measures such as education programmes or the development of an inventory. The
review process for the safeguarding policy of APSARA will also require community participation.

6. **Tourism Awareness**

Angkor is a site of outstanding universal value and a world-renowned tourism destination. The value of Angkor stems from both its tangible and intangible heritage. Understanding and experiencing the intangible cultural heritage of Angkor in all its forms, including local ceremonies, traditional livelihoods, artistic representations etc, will enhance the experience of visitors. Intangible cultural heritage has a positive role to play in the development of tourism at Angkor and as such the APSARA Authority shall work towards increasing tourism awareness. Greater awareness of intangible cultural heritage will also increase the respect awarded to contemporary heritage at Angkor.

The APSARA Authority will actively engage with tourism operators to raise awareness of intangible cultural heritage and ensure that such heritage is appropriately utilised. The APSARA Authority is aware that intangible cultural heritage can be at risk of commercialisation and commodification and such processes can have negative impacts on heritage. The Authority will attempt to ensure that intangible cultural heritage is presented in an authentic manner and is not removed from its appropriate context.

The APSARA Authority shall ensure that any goods or services supplied by or associated with the tourism sector do not impair the cultural rights of Cambodian cultural communities or cause significant negative influences on the ways of life or cultural expressions of members of these communities.

The APSARA Authority shall ensure that cultural goods and services utilised by the industry that carry value, identity and meaning are conceived, produced and used in a manner that recognises, respects and promotes the cultural rights of ownership, access, transmission, practice and participation, among others, of members of the cultural community.

As custodians of their heritage, the local community should be consulted before their heritage is used by the tourism industry. The express permission of the practitioners of
intangible heritage should be sought if their intangible heritage is utilised for tourism. Measures should be taken by members of the tourism industry to ensure that the community benefits.

7. **Recognition**

In order to safeguard intangible heritage it is important to recognise holders of knowledge and thus encourage transmission, recreation and revitalisation of heritage. They are valuable members of society. The APSARA Authority will recognise the holders of knowledge and stimulate transmission of traditional knowledge. APSARA will consult with key holders of knowledge for the management of intangible cultural heritage. Special holders of knowledge may be nominated as living human treasures.

The continuance of intangible heritage depends upon the maintenance of dialogue between holders of knowledge and the younger generations. *Yiey* and *ta* have a particularly important role in safeguarding heritage and their knowledge should be revered.

8. **Practice**

It is necessary to encourage the practice of rituals and ceremonies and the continuation of traditional knowledge and livelihoods. The APSARA Authority understands that the practice of intangible heritage is an essential component for maintaining identity and enriching cultural diversity.

The continuation of ceremonies in temples, monasteries and villages maintains the rich religious value of Angkor. The APSARA Authority will work with communities to enable the practice of intangible heritage throughout their jurisdiction. The practice of intangible heritage should not require permission from outside the relevant community.

Where forms of intangible heritage are practiced in public areas, such as ceremonies inside temples, the APSARA Authority will work with the local community and visitors to ensure the least disturbance to both parties. It is recognised that the performance of intangible heritage can enhance a visitor’s experience of Angkor and as such, the practice of intangible heritage in public areas should not be seen as a
negative event. The APSARA Authority shall attempt to minimise the impacts of tourism on the practice of intangible heritage in public areas.

9. **Review**

The intangible heritage safeguarding policy of the APSARA Authority is subject to review. An annual review board shall be established. This review board will be composed of:

a) Two representatives from the monastic community in Angkor
b) Two representatives of *achar* in Angkor
c) Two representatives of *kru* of performing arts or artistic skills in Angkor
d) Two representatives of traditional healers in Angkor
e) Two village representatives who are recognised holders of knowledge
f) A representative of the Department of Land Planning and Habitat Management in the Angkor Park (APSARA)
g) A representative of the Department of Cultural Development of Museums and Heritage Norms (APSARA)
h) A representative of the Department of Communication (APSARA)

The review board should meet once a year to discuss the safeguarding and management of intangible cultural heritage within the jurisdiction of the APSARA Authority. This board can propose amendments to legal and policy instruments and monitor the effectiveness of current safeguarding mechanisms.

All communities in Angkor will be invited to make submissions to the review board stating the mechanisms undertaken to safeguard intangible cultural heritage, suggestions for the safeguarding of intangible heritage and/or contributions/alterations to the safeguarding policy.

The report of the annual review should be made publicly available.
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