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PRELIMINARY STUDY INTO THE ADVISABILITY OF  
DEVELOPING A NEW STANDARD-SETTING INSTRUMENT  
FOR THE SAFEGUARDING OF INTANGIBLE CULTURAL  
HERITAGE ('TRADITIONAL CULTURE AND FOLKLORE')

by  
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**DRAFT VERSION ONLY**

Preliminary Study into the Advisability of Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage  
(‘Traditional Culture and Folklore’)

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## Executive Summary

The adoption of UNESCO's 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore was a major step forward in providing formal recognition of intangible heritage and the need to safeguard it, representing the culmination of many years' work. It was also a significant conceptual development in that it was the first time that non-material aspects of cultural heritage were explicitly the subject matter of an international instrument. Identification of the content and scope of intangible heritage is a major challenge facing UNESCO and other bodies concerned with its safeguarding. It is important in this endeavour that the significance of the skill and know-how of tradition-holders, the transmission of information and the social, cultural and intellectual context of its creation and maintenance is recognised. It follows from this that the human context within which intangible heritage is created must be safeguarded as much as its tangible manifestations.

Changing geopolitical circumstances, the economic and cultural impacts of globalisation and experience gained during the ten years since the adoption of the 1989 Recommendation called for a reassessment of the 1989 Recommendation and its implementation by Member States. This provided the background to a conference held jointly by UNESCO and the Smithsonian Institution (Washington DC) in 1999 entitled *A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation*. At this conference, the significance of the 1989 Recommendation was recognised but weaknesses in its definition, scope and general approaches to safeguarding were also identified. Amongst the recommendations from this conference, was one to governments that they request UNESCO to undertake a study on the feasibility of adopting a new normative instrument for safeguarding traditional culture and folklore. As a result, a Draft Resolution was submitted to the 30<sup>th</sup> UNESCO General Conference in November 1999 requesting a preliminary study into the question.

This study has been undertaken within the context of a growing interest in many quarters in safeguarding intangible heritage. Several intergovernmental organisations – amongst them WIPO, UNEP, WTO, UNCTAD, WHO and FAO - have recently addressed questions relevant to safeguarding aspects of intangible heritage, in particular traditional (often local and indigenous) knowledge. Other parties interested in this question include organisations representing indigenous groups and other tradition-holders, NGO's working in such areas as sustainable development and environmental protection and industries that rely on traditional culture and knowledge. This increased interest has been encouraged by various factors and motives, such as a greater importance placed by the international community on demands by indigenous and tribal groups to have their heritage (in a broad sense) valued and protected. The central role that traditional knowledge has to play in preserving biological diversity and promoting sustainable development has also been recognised as has the contribution that traditional, local cultures and folklore have to make to the preservation of global cultural diversity and to cultural pluralism.

There is a growing awareness of the need to employ a broader anthropological notion of cultural heritage that encompasses intangibles (such as language, oral traditions and local know-how) associated with monuments and sites and as the social

and cultural context within which they have been created. This links up with the question of the relationship between culture and development that has become the subject of debate in various international forums. The World Commission on Culture and Development noted in its 1995 report that the notion of culture must be broadened considerably to promote pluralism and social cohesion if it is to be a basis for development. Thus, since the intangible values inherent in cultural heritage have a role to play in development, safeguarding intangible heritage is one way in which UNESCO can fulfil the mandate set out by the Commission. Intangible heritage is important to many States in both social and cultural terms and can contribute significantly to the economies of developing countries. For some States, oral and traditional culture represents the major form of cultural heritage. The contribution that intangible heritage can make to social and economic development in such societies must be understood as an important factor in considering strengthening the safeguarding of this heritage internationally.

When considering the potential development of such an instrument, it has been important to review the activities to date in various intergovernmental and other bodies – in particular UNESCO and WIPO – in relation to different aspects of intangible heritage. This has involved a reassessment of the 1989 Recommendation and its level of implementation by Member States that has shown up certain weaknesses in the text and patchy implementation. It has also included an examination of the value of intellectual property approaches for the protection of intangible heritage and an assessment of the contribution of existing international intellectual property treaties to this. The potential of *sui generis* approaches derived from intellectual property rules to plug gaps in the protection of this heritage has also been looked at and the relevance of other international treaties in areas such as biological diversity and farmers' rights has also been examined. Two aspects of intangible heritage that have hitherto been comparatively neglected in UNESCO's activities for safeguarding it are traditional and indigenous heritage. Consideration should be given to how UNESCO can address these in future activities, including the development of any future standard-setting instrument.

A division of labour gradually developed between UNESCO and WIPO in relation to traditional culture and folklore, whereby UNESCO addressed the overall question of safeguarding this heritage while WIPO dealt with intellectual property aspects of protection. This separation of roles has continued to this day. UNESCO encourages application of the 1989 Recommendation by encouraging the implementation of its measures by Member States in relation to the identification, preservation, conservation and promotion of intangible heritage. The two leading UNESCO activities designed to promote the safeguarding of intangible heritage are the 'Living Human Treasures' programme established in 1993 and the 'Proclamation of Masterpieces of Oral and Intangible Heritage' programme set up in 1998 that will soon announce the first elements to be proclaimed 'Masterpieces.' WIPO is currently considering the intellectual property related aspects of protecting traditional knowledge (of which 'expressions of folklore' are seen as sub-group) that may lead to the development of an international treaty on the subject. It is therefore important that any future UNESCO work towards developing a new standard-setting instrument for safeguarding intangible heritage should take account of this and other international deliberations (in bodies such as UNEP and UNCTAD) on the intellectual property aspects of the question. UNESCO should concentrate its efforts on providing general protective measures that promote access to existing moral and economic rights for tradition-holders. In general, UNESCO should leave the development of *sui generis*

protection of intangible heritage based on intellectual property rights to specialist agencies such as WIPO that has a specific mandate in this area.

Existing cultural heritage and intellectual property instruments are inadequate to the task of safeguarding a broad enough conception of intangible heritage and a new standard-setting instrument elaborated by UNESCO would represent a major step in plugging this gap in protection. It is also the means by which internationally agreed standards for protection can be developed along with the necessary dynamic for international co-operation in this important area. Amongst the aims and objectives of such an instrument might be revitalisation of the living creative process of traditional culture, protection of the means of transmission (including the tradition-holders themselves), adoption of customary rules and approaches for safeguarding where appropriate, prevention of the unauthorised use and distortion of expressions of intangible heritage and the recording of oral cultural traditions that are in danger of dying out. One of the most challenging aspects of this work would be the drafting of a definition of intangible heritage that is both broad enough in scope and workable. To achieve this, it will be necessary to identify the priority areas for safeguarding and to eliminate potential conflicts of interest. Furthermore, certain safeguards need to be built into a new instrument in order to avoid opposition over issues such as land rights and self-determination of minorities. It should also ensure that safeguarding the practice of traditional culture does not contravene established international human rights standards.

Various options regarding the type of instrument that could be developed by UNESCO for the safeguarding of intangible heritage have been put forward. The idea of drafting an Additional Protocol to the 1972 Convention or of revising that text has been considered and discounted by this study since it would prove as difficult to achieve as drafting a new Convention. The elaboration of a new Recommendation (in isolation) to “plug the gaps” of the 1989 Recommendation is an option that is likely to be considered only if it is felt that a new Convention should not be developed. Experience of the 1989 Recommendation, amongst others, suggests that it is an ineffective means of creating State practice compared with a Convention. It is, however, worth considering the drafting of a new Recommendation alongside a Convention in order to stimulate the development of national legislation through positive interaction between the two texts.

If the decision to be taken concerns the nature of the Convention to be developed and the type of obligations that it should impose on State Parties, there are three possible options. First, a Convention based on *sui generis* approaches to protection inspired by intellectual property rules and addressing the specific needs of intangible heritage. Second, a Convention based broadly on the principles and mechanisms of the 1972 Convention and adapted to the needs of intangible heritage and the holder communities. Third, a Convention that employs a mixture of general cultural heritage approaches to protection with the addition of some *sui generis* measures where particular gaps in protection are perceived. The second model (based on the 1972 Convention) could very usefully be accompanied by a Recommendation that sets out legal and administrative measures to be adopted nationally for safeguarding intangible heritage.

Given the current lack of national legislation and other policies for its safeguarding, such an approach is potentially very fruitful. The first type of Convention is unlikely to prove very useful since intellectual property approaches (and hence a *sui generis* system developed from IP rules) are too limited in their scope. Furthermore, such a Convention would also face fierce resistance from those

Member States that oppose any adaptation of the traditional intellectual property system that would make its negotiation an extremely lengthy and difficult process. Of the other two models of Convention, the second is one that has many advantages that are identified in this study, although its main weakness is that it would safeguard only a small number of examples of intangible heritage which may not be an appropriate approach. The more general cultural heritage Convention with some additional *sui generis* measures answers this criticism by aiming to safeguard intangible heritage in a general sense. It would, however, present a much more complex problem in terms of identifying the scope of definition of the subject of protection and the nature of the obligations to be placed on Parties. Any *sui generis* approaches to be included must be chosen carefully to avoid creating too strong an opposition to the text as a whole.



## ABBREVIATIONS

CBD	UN Convention on Biological Diversity (1992)
COP	Conference of the Parties (to the CBD)
ECOSOC	United Nations Economic and Social Council
FAO	UN Food and Agricultural Organization
GATT	General Agreement on Tariffs and Trade (WTO)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International and Comparative Law Quarterly
ICOM	International Council of Museums
ICOMOS	International Council for Monuments and Sites
ILO	International Labour Organization
Int.J.Cult.Property	International Journal of Cultural Property
J. Cult Economics	Journal of Cultural Economics
IUCN	International Union for Conservation of Nature and Natural Resources
OAS	Organization of American States
OAU	Organization of African Unity
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Commission for Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commission for Human Rights
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

## Introduction

At a conference held in Washington jointly by UNESCO and the Smithsonian Institution in June 1999,<sup>1</sup> Point 12 of the *Action Plan* was the recommendation to the governments of States that they should consider “the possible submission of a draft resolution to the UNESCO General Conference requesting UNESCO to undertake a study on the feasibility of adopting a new normative instrument on the safeguarding of traditional culture and folklore.” The Czech Republic, Lithuania, and Bolivia (supported by Bulgaria, Ivory Coast, Slovakia and Ukraine) submitted a Draft Resolution to the 30th General Conference of UNESCO<sup>2</sup> in November 1999 requesting that a preliminary study be made into the question of developing a new standard-setting instrument for the safeguarding of intangible cultural heritage. This preliminary study is based upon that Resolution and addresses the following questions.

- The need for a very clear understanding of the concept that is to be regulated by a standard-setting instrument and the type of protection to be considered.
- The scope of definition to be crafted and the legal mechanisms to be employed (the two are interrelated issues).
- The field of heritage to be protected and the delimitation/definition of the domain (expressions of folklore, traditional knowledge, artistic expressions, etc.).
- The difficulty inherent in revising or adding a Protocol to the 1972 Convention for the Protection of the World Cultural and Natural Heritage.
- The type of protection to be adopted e.g. intellectual property rights, customary laws, a *sui generis* system, general cultural heritage protection or a combination of these.
- The relevance of existing international instruments – of UNESCO and other bodies – to the protection of intangible cultural heritage.
- The wider legal implications of any measures to be included in such an instrument.
- The relevance of work of other intergovernmental bodies such as WIPO, WTO, UNEP, UNCTAD, ECOSOC, FAO, etc., to safeguarding intangible cultural heritage.
- The likely interaction between national legislation and such an international instrument.
- The way in which other programme activities of UNESCO (across all Sectors) can inform the process of developing a new instrument.
- What kind of obligations is it desirable to place on States in relation to the protection of intangible cultural heritage?
- The different *levels of obligation* of a Recommendation and a Convention.
- The value of the *process* of negotiating a new legal instrument in itself.

The following proposals have been put forward in relation to the question of developing a new standard-setting instrument for safeguarding intangible cultural heritage and will be taken into account in this study.

- Development of a new international Convention that employs a particular approach to answer the specific needs of intangible cultural heritage for protection.

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<sup>1</sup> A *Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation*, 27-30 June 1999, Washington DC.

<sup>2</sup> UNESCO Doc.30 C/DR.84.

- Revision of the 1972 World Heritage Convention (to be governed by the terms of Article 37 of the existing Convention text) and/or development of an Additional Protocol to the 1972 World Heritage Convention.
- Development of a new international Convention for the safeguarding/protection of intangible cultural heritage that takes as its model UNESCO's 1972 Convention for the Protection of the World's Cultural and Natural Heritage.
- Development of a new Recommendation that takes into account recent developments in understanding the nature of intangible cultural heritage and the legal and/or administrative measures that can be taken to safeguard it.

One of the principles underlying UNESCO's activities since 1949 has been the preservation of cultural diversity while setting international standards<sup>3</sup> and this philosophy will be key to any moves towards developing a new standard-setting instrument related to intangible cultural heritage. Recognition of 'intangible cultural heritage' as an element to be preserved is one of the most recent (and significant) developments in international cultural heritage law alongside the related notion of cultural rights as human rights.<sup>4</sup> Identifying its character has been a major challenge with the need to understand the significance of the skill of the producer, the transmission of information and the social, cultural and intellectual context of its creation and maintenance. From this it follows that the human (social and economic) context of the production of intangible heritage requires safeguarding as much as the tangible product and should be considered in evaluating existing or future protective measures.

Recognition of intangible heritage - traditional cultural heritage and folklore - as a subject for international protection has coincided with the enormous impact of economic and cultural globalisation on society throughout the world. These effects have mostly been perceived as a threat to the continued existence and practice of this heritage in its traditional forms,<sup>5</sup> although the potential of the new technologies that have driven cultural globalisation to aid in its preservation and dissemination have also been recognised.<sup>6</sup> Much has been written on the effects of globalisation,<sup>7</sup> and it is useful to note here the aspects of globalisation that are of relevance to traditional culture and folklore.

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<sup>3</sup> Protz, L.V. "International standards for cultural heritage," in UNESCO *World Culture Report* (Unesco Publishing, Paris, 1998) 222 at 222.

<sup>4</sup> See: Niec, H (ed.) *Cultural Rights and Wrongs* (UNESCO Publishing, Paris, 1998).

<sup>5</sup> The *Guidelines* for the UNESCO programme 'Living Human Treasures' cited n.426 : "Unfortunately a number of its manifestations. have already disappeared or are in danger of doing so. The main reason is that local intangible cultural heritage is rapidly being replaced by a standardized international culture, fostered not only by socio-economic "modernization" but also by the tremendous progress of information and transport techniques."

<sup>6</sup> Vinson, I. "Heritage and cyberculture," in UNESCO *op.cit.* n.3 at 243 notes that "[t]he broad and integrating anthropological conception of the heritage which has emerged in recent decades should be accentuated by the properties of networks.. which favour the integration of related fields such as performing arts, crafts, oral traditions, into the cultural heritage."

<sup>7</sup> See, for example: Featherstone, M. (ed.) *Global Culture: Nationalism, Globalization and Modernity* (Sage, London, 1990); and Friedman, J. *Cultural Identity and Global Process* (Sage, London, 1995).

- Globalisation affects almost all areas of cultural manifestation, including traditional cultural expressions.
- It threatens the continued practice of traditional culture by turning youth away from it towards a unified 'global' culture.<sup>8</sup>
- It can also be exploited to disseminate traditional cultures to a wider (even global audience) and even aid in developing new styles.
- It forces us to redefine the role of States in the cultural arena as well as the relationship of private individuals and independent organisations to government.
- It highlights the 'universalist' role of an international standard-setting instrument as a means of countering the effects of economic and cultural globalisation.<sup>9</sup>
- While globalisation may reduce the role of States by bypassing borders in many areas of economic and cultural activity, it also increases the importance of local expressions of identity in response to global pressures.<sup>10</sup>

The final point may prove significant when 'selling' a policy of valuing and safeguarding folklore to States by providing a new means for States to legitimise their role in cultural terms.<sup>11</sup> In the face of the challenge of globalism, States could be seen to foster a sense of local cultural identity within the State framework. Of course, some indigenous peoples and cultural minorities seek to challenge the State by asserting their self-determination, but generally accepting and increasing the profile of local cultural traditions is more positive for the State than not. Given that international instruments are negotiated by States, this assessment of their role is significant in the context of this study.

In 1982, the World Conference on Cultural Policies put forward a definition of "culture"<sup>12</sup> that made clear the centrality of intangible heritage. It is generally accepted that there is a need to expand our perception of cultural heritage to take account of a broader anthropological conception of culture that would involve, for example, taking account of the socio-cultural and economic contexts of monuments and sites. The religious significance of sites to local inhabitants and the importance of the language used to describe them and the

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<sup>8</sup> Perez de Cuellar, J (ed.) *Our Creative Diversity* (UNESCO Publishing, Paris, 1995) at 164: "It is therefore essential to stress that children are the carriers of cultural traditions which link them to past generations and which they must incessantly reinterpret and adapt to their own needs, forging the basis for future cultural innovations." For this reason, education systems must retain traditions such as traditional games, cooking and oral literature.

<sup>9</sup> Commentators have identified an apparent contradiction between the universalist nature of the standard-setting instruments of UNESCO and the importance of respecting cultural diversity. See: Lowenthal, D. *The Heritage Crusade and the Spoils of History* (Viking, UK, 1997) and Prott *op.cit.* n.3. However, the *Action Plan on Cultural Policies for Development* from the Intergovernmental Conference on Cultural Policies for Development, Stockholm (30 March-2 April 1998) notes "the need to take account of universal values while recognizing cultural diversity" (Preamble point 4) and that "[c]ultural diversity, being a treasure of humankind, is an essential factor of development." (Point 6 under "Principles").

<sup>10</sup> Perez de Cuellar *op.cit.* n.8 at 28: "People turn to culture as a means of self-definition and mobilization and assert their local cultural values [in the face of globalisation]. For the poorest among them, their own values are often the only thing they can assert. Traditional values, it is claimed, bring identity, continuity and meaning to their lives."

<sup>11</sup> Much as the monumental cultural and archaeological heritage have traditionally been employed by States to foster a sense of national cultural identity that legitimises the State itself.

<sup>12</sup> Mexico City, 6 Aug. 1982. "In 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 arts and letters, but also modes of life ... value systems, traditions and beliefs."

oral traditions that relate to them are also included in this. Language in general is one of the most important cultural attributes of any society and an important subject for preservation policies, linguistic diversity representing a precious asset to humanity as the storehouse of much traditional knowledge.

This also links with a growing sense of the importance of the cultural dimension in development and the concomitant assertion and enhancement of cultural identities, preservation of cultural diversity and pluralism and encouragement of creativity that are essential to it. Moves to develop international protection of intangible cultural heritage are in keeping with these developmental aspirations. In economic terms, it is useful to understand the notions of 'cultural value' and 'cultural capital' with the latter seen as the stock of cultural value embodied in an asset that may be tangible or intangible.<sup>13</sup> Intangible cultural capital comprises the set of ideas, practices, beliefs, traditions and values that create a group's cultural identity and that give rise to a flow of services that may contribute to producing future cultural goods create both its cultural and economic value. As the World Commission on Culture and Development noted in its 1995 report,<sup>14</sup> when culture is viewed as a basis for development it requires a considerable broadening of the notion of culture in a way that promotes cultural pluralism and social cohesion. In its International Agenda (Point 2.5), the Commission further calls on UNESCO, along with UNDP and other agencies, to assist countries formulate human development strategies that preserve and enrich their cultural values and ethnic heritage.

The intangible values inherent in cultural heritage thus have a role to play in development and one way that UNESCO can fulfil the Commission's mandate is to safeguard intangible cultural heritage. The work of the Creativity Sector of UNESCO with handicrafts – a material expression of traditional cultural heritage – and the economic and social development of the communities that create and maintain them is also relevant here.<sup>15</sup> Handicrafts are viewed as both traditional and contemporary in keeping with the view that traditional culture and folklore form a living culture and evolve even though based on traditional forms and know-how. In dealing with handicrafts, it is important to employ a dynamic approach of adaptation rather than conservation. This reflects the ability of many tradition-holder communities to combine tradition with modernity and their realisation that this is necessary to maintaining their identity and improving their social and economic circumstances.<sup>16</sup> In this study, both traditional knowledge<sup>17</sup> and indigenous heritage are treated in some detail as elements within the broader category of intangible heritage. This reflects the level of interest at international level over the last two decades in seeking means of protection for traditional knowledge, often local and indigenous knowledge. It is important in a survey of this kind to take account of the work of other IGO's, NGO's and other parties in area relevant to the subject of the study. However, this does not necessarily mean that a new standard-setting instrument of UNESCO must address all aspects of protecting traditional and indigenous knowledge but rather needs to identify those that are appropriate for it to treat. In reaching such a decision, both the mandate of UNESCO and a consideration

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<sup>13</sup> Throsby, D "Cultural capital," 23 *J. of Cult. Economics* (1999) 3 at p.7.

<sup>14</sup> Cited n.8.

<sup>15</sup> *Ibid* at 191: "It has been estimated that handicrafts represent almost a quarter of the micro-enterprises in the developing world, getting money directly into the hands of producers, and providing the means of empowerment to millions of people, many of them women, particularly in rural areas."

<sup>16</sup> *Ibid* at 82 – the example of the Michoacan people of Mexico is given who have achieved relative prosperity through reorganisation of their craft traditions, enabling them to spend more time on revitalising ancient rituals.

<sup>17</sup> This includes traditional medicinal, agricultural, ecological and botanical knowledge amongst its forms.

of the activities of other IGO's – particularly those related to legal instruments – will be significant factors. As this study makes clear, much of the work that UNESCO can usefully carry out in relation to indigenous heritage and traditional knowledge fall within its operational rather than its norm-creating activities.

### *The cultural rights dimension*

The issue of cultural rights is of relevance to the issue of the protection of intangible heritage and related cultural and intellectual property. The United Nations Charter makes clear its mandate to solve international problems related to economic, social and cultural and to promote human rights through international cooperation.<sup>18</sup> This has a bearing on the promotion of the cultural rights of communities whose intangible heritage is under threat through various forms of international cooperation. In discussing cultural rights, Stavenhagen<sup>19</sup> suggests three ways of viewing culture and the cultural rights that accompany them. The first view of culture as 'capital' – the accumulated material heritage of humankind or of particular human groups in its entirety – would lead to the rights of equal access to this cultural wealth and to development. The second, that it is a process of artistic and scientific creation leads to the rights of individuals freely to create cultural works and to enjoy freedom of access to them. The third view of culture as a total way of life<sup>20</sup> – a more 'anthropological' perspective – is the one most appropriate to this study since it emphasises the intangible aspects of a group's culture such as values, symbols and practices. He argues that this view of culture leads to seeing cultural rights as culture-specific with every cultural group having the right to maintain and develop their own specific culture, a right to cultural identity.<sup>21</sup> This raises difficult policy issues for governments since, by talking about cultural rights, one is also talking about the rights of groups to maintain their own distinct cultural identities and develop their cultures even when they are different from those of the cultural majority.

A further assertion of cultural rights is as the 'right to a culture' that comprises the right to maintain, develop, preserve or have access to a culture and could be expressed through the assertion of the right to restitution of a cultural or spiritual property.<sup>22</sup> Both this articulation of a right to a culture and the assertion of the right to cultural identity are highly relevant to the safeguarding of intangible heritage essential to the continuing social and cultural identity of the group that creates and maintains it. Since cultural traditions are often what provide humans with a sense of identity that can be central to their self-respect, cultural rights should lead to priority to access to and in education in these cultural traditions. The right to take part in a cultural life that is asserted in the Universal Declaration of Human Rights(1948)<sup>23</sup> and the International Covenant on Economic, Social and Cultural Rights

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<sup>18</sup> Article 1(3): "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion;"

<sup>19</sup> Stavenhagen, R. "Cultural rights: a social science perspective," in Niec *op. cit.* n.4 at pp. 4-5.

<sup>20</sup> *Ibid* at p.5: "It takes culture to mean the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups. Thus understood, culture can be seen as a coherent self-contained system of values and symbols as well as a set of practices that a specific cultural group reproduces over time..."

<sup>21</sup> Prott, L.V. "Cultural rights as peoples' rights," in Crawford, J. *The Rights of Peoples* (Clarendon Press, Oxford, 1988) 93 at p.97 notes the problematic character of the concept of cultural identity - it is difficult to define a 'people' without making reference to some form of cultural criteria while it is hard to reach a concept of culture that does not rely on the idea of a 'people' or 'group' save for some kind of 'universal' culture.

<sup>22</sup> Prott, L.V. "Understanding one another on cultural rights," in Niec *op. cit.* n.4 at p.165.

<sup>23</sup> Art 27: "1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

(1966)<sup>24</sup> can be understood as articulating the need for cultural communities to be supported in creating and maintaining their cultural traditions. Interestingly, both of these texts continue with an assertion of the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which s/he is the author. This, of course, has a bearing on the question of applying intellectual property rules to the protection of intangible heritage. The character of cultural rights is collective since they are predominantly the rights of peoples, groups or communities. The cultural rights of indigenous peoples, for example, can only be expressed in terms of collective or group rights since much indigenous knowledge and culture is collectively held by whole communities or groups within them. This can prove problematic since it runs counter to human rights in international law that are traditionally articulated as the rights of individuals. It also involves identifying the groups that are the holders of these rights and leads to discussion of ‘minorities’, ‘peoples’ and other cultural groups that are not sufficiently well defined in international law.

The Preliminary Draft Declaration of Cultural Rights (1995)<sup>25</sup> is interesting to consider in this context in its assertion of rights such as the right for respect of one’s cultural identity as an individual or as part of a group, the right for recognition of one’s culture as a contribution to the common heritage of mankind, knowledge of the cultural heritages on which one bases one’s identity and access to knowledge of different cultures that, in their diversity, constitute the common heritage of mankind.<sup>26</sup> Similar rights are set out in the Algiers Declaration (1976)<sup>27</sup> including the right of minority peoples to respect for their identity, traditions, languages and cultural heritage. The relevance of Article 27 of the ICCPR (1966) has already been discussed above in relation to the cultural integrity of indigenous peoples.

The right to cultural identity and other cultural rights are closely associated with questions of development and to the controversial notion of the right to development. Cultural development has included, in some cases, the revival of older cultural traditions that may actually have died out and local economic development is often associated with the growth of crafts industries in response to tourism. The exploitation of local traditional knowledge in agriculture and forestry, for example, can be crucial to husbanding the natural resources on which a community relies for its survival. In this way, intangible aspects of cultural heritage can play an important role in economic and social as well as cultural terms for a given society. The Action Plan from the Stockholm Conference (1998)<sup>28</sup> makes this point clear when recommending to Member States to promote cultural and linguistic diversity as well as local cultures and languages and encourage cultural diversity and traditions as part of their development strategy.

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<sup>24</sup> Art. 15: “States Parties to the present Convention recognize the right of everyone: (a) To take part in cultural life...”

<sup>25</sup> Document of a meeting of experts held in Fribourg, 23-25 March 1995 organised by UNESCO, Council of Europe, Fribourg University Institute for Interdisciplinary Ethical and Human Rights Studies and the Swiss National Commission for UNESCO. “Culture” applies to “the values, beliefs, languages, arts and sciences, traditions, institutions and ways of life by means of which individuals or groups express themselves and develop,” (Art.1(a)) and “cultural identity” applies “to all those elements of culture through which individuals or groups define and express themselves and by which they wish to be recognised” (Art.1(b)). A “cultural community is [defined as] a group of persons who, sharing the same cultural references, recognise themselves as having a common identity which they wish to preserve and develop.

<sup>26</sup> Arts. 4, 5 & 9.

<sup>27</sup> Universal Declaration of the Rights of Peoples (Algiers, 1976) – not a formal text of any intergovernmental organisation but the declaration of a group of lawyers and academics.

<sup>28</sup> *Action Plan* from the International Conference on Cultural Policies for Development, Stockholm, 1998.

## 1. A Question of Terminology and Definition

### 1.1 *'Folklore' – terminological difficulties*

In the context of this study on needs to ask whether the terminology “traditional culture and folklore” employed in the 1989 Recommendation is the one that should be used in developing a new normative instrument. At the Washington conference in 1999,<sup>29</sup> a commonly voiced criticism of the Recommendation was the inappropriateness of the use of the term ‘folklore’ to describe the range of cultural heritage for safeguarding. Indigenous peoples regard it as a term that demeans their traditional cultural heritage and does not accurately describe it.<sup>30</sup> The whole area of terminology in relation to this aspect of cultural heritage is a potential minefield and requires serious study in order to avoid falling into pitfalls that lead to unwelcome outcomes. There is, however, a degree of experience in this area as a result of the negotiation of the 1989 Recommendation and the development of related programmes that now places UNESCO in a position to grapple with this difficult question. The terminological difficulties stem even from the term “culture” itself although this has not prevented the development of a body of international law that deals with cultural heritage and cultural rights, for example. The candidates for terms to be used to identify this area of heritage include: ‘traditional’, ‘popular,’ ‘living,’ ‘oral’ and ‘intangible’ (culture) that can be used in various combinations. A further terminology found in the literature is ‘cultural and intellectual property’. The terms have the following positive and negative connotations to be taken account of:

‘Popular’ – Favoured in some Latin American countries, this term has the advantage of underlining that the culture in question is not an elite, ‘high culture.’<sup>31</sup> It tends to suggest a contemporary, urban culture and thus would exclude both ancient and rural forms of culture.

‘Traditional’ – This is a central notion in relation to the culture in question, although it can tend to suggest a static culture that does not evolve and has no dynamism, presupposing an attachment to an unchanging past. It must, therefore, be qualified in such a way as to include the idea of a living and evolving cultural tradition.

‘Living’ – This cannot, of course, be a sufficient characteristic to identify this heritage. It is, however, an element that is important to stress since much is still living and practised within the cultural communities that create and maintain it and it is a central aim of safeguarding to ensure its continued existence. It also serves to counter assumptions that traditional heritage is, by definition, a ‘dead’ heritage.

‘Oral’ – Much of the culture in question is subject to an oral form of expression and transmission and so this is also a central concept to be applied. It is not, however, inclusive of all traditional cultural forms and so should be used together with other terms that, in conjunction, create an inclusive notion.

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<sup>29</sup> Cited n. 1.

<sup>30</sup> Tora, S “A Pacific perspective,” paper presented to the Washington conference cited n. 1: “The terminology ‘folklore’ which is true for many of our indigenous cultures is not an acceptable term. Our culture is not ‘folklore’ but our sacred norms intertwined with our traditional way of life and where these norms set the legal, moral and cultural values of our traditional societies. They are our cultural identity.”

<sup>31</sup> For example, the court dances of Vietnam.



‘Intangible’- This has become the term of art for UNESCO in relation to this area of cultural heritage,<sup>32</sup> however it is problematic and must be seriously examined before it is used as the preferred terminology in any new instrument. This question is looked at in detail below.

‘Cultural and intellectual property’ – it is clear that this term is designed to make a connection between the subject of protection and the economic issues surrounding its control and exploitation (and, by extension, the adaptation of intellectual property rights for its protection). As a result, it is not to be recommended in a text that does not attempt to create a *sui generis* form of protection inspired by IPRs. The term ‘property’ has its own substantial problems when applied to any aspect of cultural heritage.<sup>33</sup>

‘Intangible cultural heritage’:

The phrase “oral and intangible heritage” is employed in the 1998 UNESCO programme ‘Masterpieces of the Oral and Intangible Heritage.’ This represents the most recent UNESCO activity in the area of safeguarding folklore and is explicitly related to the 1989 Recommendation in the document presenting the programme.<sup>34</sup> This terminological shift reflects changes in attitude towards the nature of cultural heritage that have occurred since the late 1980’s.<sup>35</sup> Previously, all existing UNESCO instruments and programmes related clearly to the protection and preservation of the material (or ‘tangible’) heritage, even if the ‘intangible’ elements may also have been implicitly recognised.<sup>36</sup> In this way, a new dichotomy between the ‘tangible’ (material) and ‘intangible’ elements of cultural heritage has developed that superficially appears attractive. For example, the legal and administrative measures traditionally taken to protect material elements of cultural heritage are not necessarily those needed for safeguarding a heritage whose most significant elements relate to particular systems of knowledge, values and the social/cultural context in which it is created.

It is, however, a false category in the sense that all material elements of cultural heritage have important intangible values associated with them that are the reason for their protection. Furthermore, it is a distinction that is unacceptable to many indigenous and local cultures that are the holders of the cultural traditions that fall into this category of ‘intangible heritage’ since it does not reflect their holistic view of culture and heritage.<sup>37</sup> It also reflects a Eurocentric view of cultural heritage that has traditionally valued monuments and sites over

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<sup>32</sup> The section that deals with its programmes being the “Intangible Heritage Unit.”

<sup>33</sup> See: Prott, L.V. & O’Keefe, P. J. “‘Cultural heritage’ or ‘cultural property’?” 1(2) *Int. J. Cult. Property* (1992) 307.

<sup>34</sup> UNESCO Doc.155 EX/15, Paris 25 Aug. 1998. This programme is aimed at selecting ‘cultural spaces’ (in the anthropological sense) and traditional or folkloric forms of cultural expression to be proclaimed ‘Masterpieces.’

<sup>35</sup> See: Prott *op.cit.* n.3.

<sup>36</sup> As early as 1956, the Recommendation on International Principles Applicable to Archaeological Excavations (New Delhi, 5 Dec. 1956) noted in the Preamble “the feelings aroused by the contemplation and study of works of the past,” a recognition of the intangible element of the cultural heritage enshrined in its meaning to people(s) beyond the object, monument or site itself.

<sup>37</sup> Tora *op.cit.* n.18: “To the Pacific, the distinction between tangible and intangible cultural heritage is not highlighted. They are considered as one, their cultural heritage.”

the intangible values associated with them.<sup>38</sup> Furthermore, the alliance of ‘oral’ with ‘intangible’ itself appears odd since oral heritage is, by definition, intangible. Given that ‘intangible’ is an extremely difficult concept to grasp and suggests a subject matter for protection that defies identifying legal measures for this, it is probably better avoided. A further drawback as a terminology is that it fails to encompass the significance of the social role of this heritage. Reference to its oral and traditional character, on the other hand, is sufficient to make clear that it includes these intangible elements. There was a proposal to include intangible heritage within the categories of protected heritage of the 1972 Convention that, although not eventually adopted, illustrates that this is a neglected aspect of cultural heritage.<sup>39</sup>

In view of the objections voiced to the use of the term ‘folklore,’ there are strong arguments against the retention of the terminology ‘traditional culture and folklore’ used in the Recommendation. It is possible to formulate some other phraseology that employs the terms ‘traditional’, ‘oral,’ ‘popular’ and/or ‘living’ in some formulation to describe this cultural heritage. Those elements not incorporated into the actual terminology used can, of course, be brought out in the definition(s) given in the text. It is a central issue in the development of a new standard-setting instrument and one that deserves debate, especially since experts from different disciplines and backgrounds will have strong arguments in support of their favoured terminology. Although the terminology used can be greatly affected by the way in which it is defined for the purposes of the text, it remains a crucial question. A poor choice of terminology can confuse those interpreting the text and may give a false impression of its subject matter and even its aims. A phrase worth considering is ‘oral and traditional cultural heritage’ since it encapsulates two fundamental aspects of this heritage while placing it within the wider body of cultural heritage law. For the purposes of this study, however, I have generally used ‘intangible heritage’ since that is the current term of art.

### *1.2 Defining the subject matter*

The definition given for ‘folklore’ in the 1989 Recommendation is the only attempt so far to define this area of heritage for a formal legal text in the cultural heritage field.<sup>40</sup> It is thus an important starting-point for considering the question of how to define the subject matter of any future instrument. The definition is as follows.

“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 social and cultural 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.”

This definition contains useful elements but suffers from a narrowness of focus does not provide a sufficiently broad definition to encompass all the aspects of ‘traditional culture and folklore’ that need safeguarding. The positive aspects of this definition that deserve noting include its reference to the “totality of tradition-based creations of a cultural

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<sup>38</sup> It is Asian States, for example, that historically have protected intangible as well as tangible aspects of their cultural heritage such as Republic of Korea, Philippines and Japan.

<sup>39</sup> Convention for the Protection of the World Cultural and Natural Heritage (16 Nov. 1972). The 1972 Convention is discussed in Section 6.

<sup>40</sup> UNESCO’s Tunis Model Law on Copyright for Developing Countries (1976) provides an extensive definition of ‘folklore’ in Art. 18 and gives a definition in Art. 2 (dealing with types of national legislation) that includes both tangible and intangible elements.

community”. This expresses two fundamental characteristics of folklore, namely that it comes out of traditional culture and that it is related to a specific cultural community. It is useful to note at this point that the notion of ‘traditional’ used in this sense does not exclude the possibility that a culture and its expressions may change and evolve over time. Concentration on the importance of folklore to the social and cultural identity of the individual or group that creates it is useful although this is clumsily expressed in its current form.<sup>41</sup> Third, inclusion of a reference to the method of transmission (“orally, by imitation or by other means”) underlines the importance of the human element in intangible heritage. However, it fails to express the centrality of the individual, group or community to the creation and maintenance of traditional culture. It does not refer to the social, cultural and intellectual context of its creation - including the values and know-how of the community involved – but only to the folklore product itself. It also fails to include the spontaneous act of creation that is as important as the product itself. Furthermore, it makes no specific reference to indigenous heritage, its reference to traditional knowledge is too limited and it does not relate to sufficient interest groups.<sup>42</sup>

It should be considered whether the model of listing possible forms that it can take at the end of the definition<sup>43</sup> is the most appropriate strategy. This inevitably concentrates on those aspects that can be easily reduced to a category while leaving out other very important elements of intangible heritage. Such listing of elements within a definition that is also of a more general nature has precedents in international cultural heritage instruments.<sup>44</sup> In the case of intangible heritage, however, it should be considered whether a definition that limits itself to the general character of its subject matter and avoids such listing is preferable. This approach would serve to guide the text towards measures that will address the needs of each aspect of heritage mentioned in terms of general principles of protection.<sup>45</sup>

When crafting the definitions for central terms in any international instrument, one needs to bear in mind both the legal implications of the definition and the need for an operational definition that will be easily applicable. Some commentators have regarded intangible heritage as an area too vast to define effectively for the purposes of an international instrument<sup>46</sup> and one that risks involving a range of legal approaches and mechanisms that are too broad to be acceptable in a single text. It is an area that encompasses both the cultural domain (in its ‘artistic’ sense) and the scientific domain (traditional scientific knowledge).<sup>47</sup>

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<sup>41</sup> It reads: “. 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;” [Section A].

<sup>42</sup> Who can include local cultural communities, NGOs, private sector craft industries, farmers etc.

<sup>43</sup> “Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.” [Section A]

<sup>44</sup> For example, UNESCO’s Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) gives a general definition of ‘cultural property’ followed by a very detailed list of categories of such property. (Art. 1).

<sup>45</sup> The 1985 meeting of Committee of Experts suggested three possible types of definition for ‘folklore’: by criteria (e.g. “based on tradition”); by listing (a non-exhaustive list of representative genres); and a “drafted” definition that “endeavours to put forward the most elegant possible formulation, but does not attempt to be exhaustive,” combining factors such as content, function and significance. See: Gruzinski *op.cit.* n.85 at 10.

<sup>46</sup> Denhez *op.cit.* n.199 at 8: “Defining non-physical heritage is as complex as any search for universal definition of human character and culture.”

<sup>47</sup> Folklore itself can be broadened beyond the concept of ‘traditional culture’ through distinguishing two types of folklore, artistic and scientific. See: Doc.UNESCO/PRS/CLT/TPC/11/3 of 30 Nov.1994 at p.12 para.41.

As the range of relevant topics, legal mechanisms and international instruments considered in this study bears out, it is certainly a vast area of great complexity that requires very careful definition. It is also clear that one has to find a balance when defining the subject of protection in such a way that it is sufficiently narrow in scope to avoid too broad a set of legal mechanisms without ignoring important aspects of this heritage. This is a challenging but not impossible task and one that the global significance of this heritage and its importance to the cultural communities merits attempting. The long and difficult process of negotiating the 1989 Recommendation<sup>48</sup> has resulted in a definition that is by no means perfect but that provides a basis from which to work. Subsequent activities related to the 1989 Recommendation as well as experience in other intergovernmental bodies have all led to a much more precise understanding of the nature of intangible heritage and will greatly inform such an endeavour. In terms of UNESCO work, the ‘Masterpieces’ programme will be particularly important in identifying the elements of this heritage that Member States regard as worthy of protection.

It is possible from this study to begin to list the general characteristics of ‘intangible heritage’ that a definition should refer to as follows.

- The spontaneous act of its creation.
- The social, cultural and intellectual contexts in which it is created.<sup>49</sup>
- That access and use is often governed by customary rules.
- The methods of transmission, particularly oral.
- That it is transmitted from generation to generation.
- That it is an evolving, living culture.
- That it is frequently collectively held.<sup>50</sup>
- That it reflects the values and beliefs of a group or society.
- Its importance to creation of identity.
- Its contribution to cultural diversity.
- Its spiritual and cultural significance.

The forms that this heritage can take are innumerable and include: traditional scientific, medicinal and ecological knowledge; techniques and know-how; symbols and designs; rituals and ceremonies; music, dance and songs; names, stories and poetry; values and belief-systems; language; and culinary traditions. Although the main subject matter of a future instrument will, of course, be intangible heritage, the material expressions of that heritage and the physical spaces associated with it are also to be included in the scope of definition.

### *1.3 Intangible heritage as a ‘universal heritage of humanity’*

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<sup>48</sup> It took 16 years in total to reach a final draft.

<sup>49</sup> McCann, A. *et al* *The 1989 Recommendation Today: a Brief Analysis* [Doc.UNESCO-SI Conf.99/INF 13] at 6 refers to a shift of emphasis amongst academic folklorists from individual items of folklore to “a more inclusive one based on the event of creation or recreation as a social act. The current academic definition of folklore is based on that act, on the knowledge and values that enable it, and on the modes of social exchange in which it is embedded.”

<sup>50</sup> This encompasses not only the idea of a heritage belonging to a given group but, for example, also to a system whereby one or more member(s) of a tribe may retain an item of that heritage without the authority to alienate or otherwise dispose of it.

The 1989 Recommendation characterises traditional culture and folklore in the Preamble as part of the ‘universal heritage of humanity’ in a manner similar to that of the 1972 Convention.<sup>51</sup> The ‘Masterpieces’ programme that is a central plank of UNESCO’s activities in this area also relies on such a characterisation of ‘oral and intangible heritage’ as the justification for its inclusion in the list. There appears to be a conceptual difficulty in valuing intangible heritage as a ‘universal heritage’ in view of its role in the construction of identity of a specific people or group in opposition to other identities.<sup>52</sup> Indeed, there is an unresolved contradiction in international law between the ‘universal’ approach to protection and one that recognises the special interest of a State, people or group to a particular element of the cultural heritage.<sup>53</sup> Writing in 1998,<sup>54</sup> Lyndel Prott noted the difficulties associated with the notion of a ‘world cultural heritage’ and the need for further study to develop and elucidate the concept.<sup>55</sup> The problem becomes more acute when applied to intangible heritage since it deals with the very aspects of heritage around which this tension between the particular and universal heritage revolves.

Prott also pointed out, however, that globalist concepts of the cultural heritage have now been adopted into legal discourse and UNESCO’s universalist task in developing standards is in parallel with such developments as well as the globalisation of the economy. It is therefore in keeping with such precedent that any instrument for safeguarding intangible heritage should employ this notion of universality. However, it is advisable that the notion of a ‘universal interest’ in protecting this heritage be stressed in order to avoid the potentially damaging implications of the term ‘common heritage of mankind’ as used in its wider sense in international law.<sup>56</sup> What is vital is that the potential contradictions of that position are taken into account and it is advisable to make reference to intangible heritage as a ‘universal heritage of humanity’ in the Preamble as a justification for protection but to avoid its use within the definition itself. In this way the specific value that this heritage has for the community is safeguarded while the need for its international protection on the grounds of preserving cultural diversity is underlined. There are also practical arguments taking great care when characterising intangible heritage as a universal heritage. There is the danger that this may be used to justify actions in relation to that heritage – such as the exploitation of

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<sup>51</sup> “ Considering that folklore forms part of the universal heritage of humanity and that it is a powerful means of bringing together different peoples and social groups and of asserting their cultural identity.” [Preamble]

<sup>52</sup> See: Crawford, J. *The Rights of Peoples* (Clarendon Press, Oxford, 1988); and Graves-Brown, P. *et al Cultural Identity and Archaeology* (Routledge, London, 1996).

<sup>53</sup> See Lowenthal, D. *The Heritage Crusade and the Spoils of History* (Viking, London, 1997) at 227: “Too much is asked of heritage. In the same breath, we commend national patrimony, regional and ethnic legacies and a global heritage shared and sheltered in common. We forget that these aims are usually incompatible.” The debate over the ‘Elgin Marbles’ typifies this problem of an element of ‘universal heritage’ that also has strong resonance for a specific cultural identity.

<sup>54</sup> Prott *op. cit.* n.3 pp.227-228.

<sup>55</sup> *Ibid* at p.228: “The precise legal implications of terms such as ‘the common cultural heritage,’ ‘world cultural heritage’ and similar phrases are not yet clear, although their use in legal instruments makes it imperative to explore the subject.”

<sup>56</sup> In this sense, it relates to the economic exploitation of common space areas such as the deep seabed and the moon. For further on the implications of this for cultural heritage, see: Blake, J “On defining the cultural heritage,” 49 *ICLQ* (2000) 61 at pp.69-71.

traditional knowledge without the authorisation of its holders<sup>57</sup> – which are deleterious to it. Indigenous and local communities are suspicious of such claims as a further appropriation or ‘colonisation’ of their heritage<sup>58</sup> and it is extremely important that UNESCO does not risk appearing to espouse such an approach to their heritage.

Such arguments do not rule out the use of the universal heritage notion altogether but rather caution great care in so doing. Indeed, it is potentially valuable to highlight the incentive for Member States to protect this heritage by emphasising their *universal interest* in doing so. The local and global can be seen as two sides to a coin whereby pressures from globalisation of culture and the economy push people to seek refuge in a local cultural identity. Taking a universalist approach may therefore be necessary to protect this heritage in the face of global cultural and economic forces that threaten it or where the State itself fails to value and safeguard it.<sup>59</sup> The fact that folklore and traditional culture may often be universal in its appeal and accessibility (in a way that much ‘high culture’ or ‘outstanding’ sites and monuments are not) and in its ability to speak across cultural borders is a further argument in favour of calling it a ‘universal heritage.’

## 2. Applying Intellectual Property Rights to Intangible Heritage

### 2.1 IPRs and the protection of ‘expressions of folklore’

Intellectual property rules are essentially individualistic and express a set of values that place a high premium on the concepts of authorship and innovation, viewed as Eurocentric and alien to the value-systems of many indigenous and local societies.<sup>60</sup> They are also based on the economic imperative to encourage creativity and innovation through the protection of economic rights. This can clearly be a highly beneficial aspect of such laws when applied to the appropriate subject and in the appropriate social and cultural context. Alikhan,<sup>61</sup> for example, points out the potential importance of such laws in encouraging economic development.

However, as shall be seen below, the premises on which IPRs have been developed are contradictory to the needs of much intangible heritage and the communities that have created and maintain it. Some of the main issues of concern in the protection of such heritage include: the reproduction of traditional crafts in overseas factories, thus damaging the cultural

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<sup>57</sup> A point made clear in both the *Suva Declaration* cited n.77 and the *Mataatua Declaration* cited n.335.

<sup>58</sup> Roht-Arriaza, N. “Of seeds and shamans: the appropriation of scientific and technical knowledge of indigenous and local communities,” in Ziff, B. & Rao, P. (eds.) *Borrowed Power: Essays on Cultural Appropriation* (1997) at 929-930: “[F]ruits of indigenous and local knowledge are tagged ‘common heritage of humanity’ rather than the evolving product of defined living communities” with the accompanying danger that it is then placed in the public domain and at risk of being freely exploited without consent, compensation or attribution.

<sup>59</sup> This effect has always been one of the stronger arguments for taking a universalist approach to protection.

<sup>60</sup> For example, the *Statement of the Bellagio Conference on Cultural Agency/Cultural Authority*, Bellagio (1993) (‘Bellagio Declaration’) which sees contemporary intellectual property law as constructed around “a notion of the author as an individual, solitary and original creator” for whom protection is reserved.

<sup>61</sup> Alikhan, S “Role of copyright in the cultural and economic development of developing countries: the Asian experience,” XXX (4) *Copyright Bulletin* (1996) 3 at p. 5: “The principal objective in the protection of intellectual property is to encourage creative activity, and to provide to the largest number of people the benefits of such an activity. An important priority in the development process is to encourage national and indigenous creation of works ... Such encouragement requires not only the recognition of creators, but also providing them with a means of obtaining a reward for their creative endeavours.”

and economic interests of the tradition-holders and their communities; the question of collective as opposed to individual ownership of the heritage (and associated collective rights); the protection of the economic interests of the producer communities; and respect for the sacred and secret nature of certain aspects of this heritage, particularly that of indigenous peoples.

*Copyright law* is the form of intellectual property protection most widely applied to folklore. However, it has certain characteristics that render it an inappropriate form of protection.<sup>62</sup> These include the following:

“Artistic and literary works” – these are the subject of copyright rules and it is an inappropriate category for much intangible heritage with copyright protection extending only to forms and not to ideas. What this points to is that the nature of this heritage renders it very difficult to protect through copyright mechanisms since much of it relates to aspects of knowledge, ways of doing etc

Originality – it is essential under copyright law to show that the work in question was original. This is an inappropriate requirement to apply to the majority of folklore and traditional culture which, by its very nature, has been developed over generations on the basis of traditional knowledge and practices. Furthermore, there exists the problem of derivative works or transformations of works.

Individual author – it must also be shown that the work is that of an identifiable individual author. This is problematic for intangible heritage where an individual author is often difficult to identify and which is often of a collective character. Although it may be possible to identify an individual author in the case of some expressions of intangible heritage, this remains in contradiction with the basic character of such heritage. It also raises the issue of authorisation processes that will be more complicated to deal with when the rights are collectively held. Furthermore, it fails to address the protection of the underlying values, know-how and traditions of which these are expressions.

Fixation – it is a fundamental principle of copyright that ideas and themes are not protected but only the form itself. Thus it is a fundamental requirement that the heritage in question be reduced to material form or ‘fixed.’ Clearly, this renders copyright protection an inappropriate mechanism for oral traditions that exist only in the collective and individual memories of the cultural community such as music, dance, songs, poetry, stories, technical know-how, rituals etc.

Duration of protection – copyright protection usually extends for a period between twenty-five and fifty years after the death of the author, after which period the protected form is then part of the public domain. Given the great religious, social and cultural significance for the cultural community of much folklore and traditional culture,<sup>63</sup> it is essential that whatever protection is extended to such heritage is granted in perpetuity in order to prevent it from

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<sup>62</sup> Ficsor, M. “1967, 1982 and 1984: attempts to provide international protection for folklore by intellectual property rights,” in report of the *UNESCO-WIPO World Forum on the Protection of Folklore (Phuket Report)*, Phuket, Thailand, 8-10 April, 1997 (UNESCO-WIPO, 1998) 213 at 216: “It seems that copyright law is not the right means for protecting expressions of folklore.”

<sup>63</sup> This is particularly true of indigenous heritage.

lapsing into the public domain after a period of time.<sup>64</sup> Since this heritage may be of ancient origins and passed down through generations, no fixed period of protection will be sufficient.

Exclusivity of rights granted – the rights granted under copyright law are exclusive to the identified author. The concept of exclusivity of rights over traditional cultural heritage is one that is frequently incompatible with the customs of the community within which it originates. This is particularly true of indigenous and tribal peoples whose custom involves group or community ownership of traditional art forms and cultural practices. This, as Daes points out,<sup>65</sup> is theirs to share with other peoples if and when they wish.

Ownership – Customary law often does not include any distinct right of ownership that is equivalent to the ‘Western’ legal concept of property upon which copyright rules are predicated. The ‘ownership’ of Aboriginal heritage, for example, is governed by a complex system of obligations and artists operate within this system and according to strict traditional rules. The form of control over this heritage by the cultural community is frequently viewed as akin to custodianship, and the cultural expression in question is not a commodity or property but rather representative of the values and interrelations affecting the community.<sup>66</sup>

Fair use exception – this allows for parody or pastiche where such re-interpretation is viewed as fair dealing under copyright rules. Thus, a sacred symbol could be used as the “inspiration” for a new work of art without the need for authorisation. This is obviously desirable in encouraging and fostering creativity in a general sense, but is inimical to the needs of many communities whose traditional cultural heritage is employed in this way and, indeed, to the heritage itself. It has been suggested that industrial design laws (see below) could be extended to deal with this failing in the copyright legislation. Denhez<sup>67</sup> suggests that it might be easier to refer to the use of traditional materials (such as a particular clay or reed only found in a certain geographical location) allied with style as a form of protection against such pastiche.

This is not to deny that there are aspects of copyright law as well as other intellectual property rules that offer some limited protection to various elements of intangible heritage. These can certainly be of value, but the protection they offer is patchy and does not add up to the comprehensive system that would be needed as the basis of any new international instrument. An important protection afforded by the copyright system is enshrined in:

Moral rights – these are the non-economic rights enshrined in copyright law and comprise the rights to attribution of source and integrity as covered by the Berne Convention and the 1982 Model Provisions (both discussed below). These comprise the right to preserve integrity of the work, the right to withdraw or divulge it and the right to be acknowledged as the author of the work. These seem to answer concerns relating to the desire for the source (community

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<sup>64</sup> Ficsor *op.cit.* n.62 points out that the legislation of Congo, Ghana and Sri Lanka for the protection of folklore explicitly state that protection is in perpetuity.

<sup>65</sup> Daes, E-I *Protection of the Heritage of Indigenous People* (UN New York & Geneva, 1997) at paras.24 & 25.

<sup>66</sup> Daes *ibid* at para.26: “Indeed, indigenous peoples do not view their heritage in terms of property at all – that is, something which has an owner and is used for the purpose of extracting economic benefits – but in terms of community and individual responsibility ... For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights.”

<sup>67</sup> Denhez, M. “Follow-up to the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore,” in *Phuket Report* cited n.62 at 195.



and/or geographical place) of a traditional form to be correctly attributed when it is exploited and for the integrity of that form (in keeping with its origins) to be respected and protected.

The rights known as *industrial property rights* can also offer some limited protection to aspects of intangible heritage and their advantageous elements should be taken account of in addressing the protection of intangible heritage.

Trademarks<sup>68</sup> – these can be of use in terms of ensuring correct attribution, prevention of distortion and compensation and have the advantage of not being of limited duration. However, they are only applicable in relation to the commercial exploitation of intangible heritage and thus do not address the important area of the problem of commodification of such heritage against the wishes of the cultural community of origin. Trademark law is mainly useful in cases where there is a potential confusion in the consumer over the source of goods and services or there is false attribution of the goods in question. It would not, for example, address the problem of significant distortion of the cultural expression that is a major problem with the commercial exploitation of intangible heritage.

Industrial design protection – traditional symbols and artistic motifs as well as clan and tribal names would be eligible for such protection. However, its duration is limited (often only 15 years) and may be inadequate for the protection of designs of particular spiritual or cultural significance where it is more important to protect the integrity of the design rather than its commercial value.

Appellations of origin<sup>69</sup> – indications of geographical origin can be employed to verify the authenticity of a product (as with fine wines) and could be employed to protect the typical products of a particular indigenous, local or other cultural communities.

Patent protection – much consideration has been given to the use of patents for the protection of traditional (often indigenous) knowledge in areas such as medicinal plants, agricultural methods and genetic resources.<sup>70</sup> There are, however, certain requirements for the issuing of patents that limit their usefulness for the protection of traditional knowledge: patents apply only where ‘novelty’ and an ‘inventive step’ can be shown which is difficult with knowledge transferred from one generation to another<sup>71</sup> - the concept of the ‘inventor’ is alien in terms of such knowledge; rights are granted to individuals or corporations and not to cultures or peoples; and patents are of limited duration with the patented knowledge entering the public domain on their expiry. An important proposal in relation to the patenting of traditional and indigenous knowledge is the requirement for proof that prior informed consent has been obtained where a patent application that uses such knowledge is concerned.<sup>72</sup>

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<sup>68</sup> The main international treaty governing trademarks and industrial designs is the Paris Convention for the protection of Industrial Property (1883) with several revisions including at Stockholm (1967) and amended in 1979 (Paris Union).

<sup>69</sup> The main international treaty governing appellations of origin is the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958) revised at Stockholm (1967) and amended in 1979 (Lisbon Union).

<sup>70</sup> This discussed further in Section 4 on Traditional Knowledge.

<sup>71</sup> The patent granted in the US for laboratory-acquired derivatives of the Neem seed that has been used for centuries in India as a natural pesticide (but not eligible for patenting as such) is an example of this.

<sup>72</sup> See, for example, discussion on traditional knowledge and the Convention on Biological Diversity in Section 5.

Trade secrets – in industry as well as among indigenous and local communities there is the difficulty of protecting ‘know-how’ and trade secrets and this is achieved through secrecy and the protection of such information. It is open to indigenous and local peoples to keep part of their traditional knowledge secret unless divulged on the basis of licensing arrangements that provide for confidentiality, appropriate use and economic compensation for the community of origin. Trade secrets can only be protected in this way if they have the potential for commercialisation and so, again, this would not protect the knowledge and information that a community does not wish to be known for spiritual or cultural reasons.

For these reasons, thinking has tended towards consideration of the type of proposals – based largely on concepts employed in IP protection – that can be developed as the basis of a *sui generis* form of protection for traditional culture and folklore. Elements that have been suggested for such *sui generis* national legislation and/or international protection include.

- The recognition of traditional forms of ownership through a contractual or legislative arrangement that delegates an officially recognised body the right to determine who should be the ‘author’ (in copyright terms) and granted the right to exercise control over and derive economic benefit from a traditional cultural form.
- A prohibition placed on non-traditional uses of secret sacred material and on debasing, destructive or mutilating uses.
- Economic compensation paid to traditional owners of folklore for any commercial exploitation, including punitive damages for unauthorised exploitation.
- The obligation for respect of attribution of source and other moral rights relating to traditional cultural heritage such as the prevention of distortion.
- A requirement for informed prior consent in patent applications relating to the exploitation of traditional knowledge.

## 2.2 Historical background

The earliest form of protection afforded to intangible heritage both internationally and nationally levels was through the use of copyright mechanisms. Much of the impetus for seeking to protect it through copyright laws, other intellectual property rights (IPRs) or modified versions of these (in some form of *sui generis* regime) has been in response to the negative impacts of commercialisation. Commercialisation *per se* need not be a negative influence where it is in keeping with the wishes of and to the benefit of the cultural group concerned. However, it is often perceived as ignoring the interests of the relevant cultural community and as distorting the cultural expression in question.<sup>73</sup> The spectacular development of new technologies and the related new means of exploiting and disseminating folklore along with other artistic works have made such abuses more widespread in recent years. Folklore is a living and functioning tradition in many developing countries that plays an important role in their economy and may be their major form of cultural heritage. In industrialised countries, on the other hand, folklore is generally viewed as belonging in the public domain and so there is resistance in such States to the idea of extending the protection beyond that already afforded by classical IPRs.

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<sup>73</sup> As Ficsor *op.cit* n.62 states at 215: “Folklore is commercialized without due respect for the cultural and economic interests of the communities in which it originates. And, in order to adapt it better to the needs of the market, it is often distorted or mutilated. At the same time, no share returns from its exploitation to the communities who have developed and maintained it.”

At the Diplomatic Conference of Stockholm in 1967 for the revision of the Berne Convention for the Protection of Literary and Artistic Works, the first specific attempt was made to provide for the international protection of expressions of folklore through the use of copyright law. It was decided that the conceptual and definitional difficulties relating to folklore as a subject for protection made it impossible to elaborate a new Convention at that time. As a result, a new article was added to the Berne Convention (Article 15 4(a) of the Stockholm and Paris Acts of 1967 and 1971) providing some guidelines for the protection of folklore.<sup>74</sup> This article does not make specific reference to folklore, despite the remit to the Working Group to find a suitable place for a provision dealing with folklore in the Convention.<sup>75</sup> At this time, various States adopted national legislation based on copyright mechanisms to protect expressions of folklore.<sup>76</sup> In 1976, UNESCO adopted the Tunis Model Law on Copyright for Developing Countries, with a specific article dedicated to the protection of national folklore (Article 6).<sup>77</sup> In 1977, the Convention concerning African Intellectual Property (Bangui text) was adopted by the African Intellectual Property Organization. This text, revised in 1991, dedicates part of its Annex VII to the protection of folklore: (i) through copyright, and (ii) through the protection and promotion of cultural heritage. It treats “creations of folklore” as a separate category from the artistic and literary works traditionally protected by copyright and, interestingly, makes reference to its creation by communities rather than a single author.

In 1973, the Government of Bolivia requested that UNESCO examine the question of drafting a Protocol be added to the Universal Copyright Convention (adopted in 1952; amended in 1971) for the protection of the popular arts and cultural patrimony of all nations. This request was passed on to the Cultural Sector of UNESCO in 1975 for further study of all aspects related to the protection of folklore on the grounds that it was a question of much broader scope than simply a copyright issue.<sup>78</sup> In 1979, UNESCO and the World Intellectual Property Organisation (WIPO) formally agreed to conduct a joint study on both the cultural aspects of safeguarding folklore and the application of copyright and intellectual property law to its protection. A joint Working Group was convened in 1980 to consider draft model (national) legislation for protecting ‘expressions of folklore’ as well as international measures. It was felt that the legal protection of folklore could be promoted at national level by a model law that should allow also for protection through existing copyright mechanisms and neighbouring rights and should pave the way for sub-regional, regional and international protection of expressions of folklore.

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<sup>74</sup> This will be discussed later in relation to the Berne Convention in general.

<sup>75</sup> *Commentary* to the Model Provisions at p.5: “It is only the legislative history of the provision that indicates that folklore was (also) intended to be covered.”

<sup>76</sup> These included: Papua New Guinea and Tunisia in 1967; Bolivia in 1968; Chile and Morocco in 1970, Algeria and Senegal in 1973, Kenya in 1975.

<sup>77</sup> Section 1(2)(ix) also protects “works of applied art, whether handicrafts or produced on an industrial scale” under copyright rules; the inclusion of this provision reflects the importance of handicrafts to many developing States.

<sup>78</sup> A Committee of Experts on the Legal protection of Folklore was set up by the Director-General in 1977 to conduct a complete examination of all the issues related to the protection of folklore. The Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention took the view in 1977 that: “... the problem [of protection of folklore] has many aspects ... All these aspects are interdependent and call for a global study on the protection of folklore which is being dealt with on an interdisciplinary basis within the framework of an overall and integrated approach by Unesco. Nevertheless, special efforts should be made to find solutions to the problem of the intellectual property aspects of the legal protection of folklore...” cited in *Commentary* at pp.6-7.

In 1978, UNESCO and WIPO formally agreed an approach to the international protection of folklore whereby UNESCO would examine the question of its safeguarding on an interdisciplinary basis<sup>79</sup> while WIPO would concentrate on the intellectual property (IP) aspects of protection.<sup>80</sup> This distinction between the intellectual property aspects of folklore protection and the wider issues of protection led to the eventual development of the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit and Other Prejudicial Actions, adopted by both UNESCO and WIPO, and UNESCO's 1989 Recommendation. The former provided for IP-type protection of expressions of folklore while the latter addressed the safeguarding of "traditional Culture and folklore" from an interdisciplinary stand-point.<sup>81</sup> A joint UNESCO/WIPO Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions was drafted in 1984 but was never adopted as a formal text by either organisation. This draft Convention would have created an obligation on States to protect folklore and this was rejected by the industrialised States on the basis of: philosophical objections to protecting a communal heritage; the low importance for them of folklore; and the problem of protecting internationally a heritage that may be common to several States. The strategy of UNESCO since 1984 in this area has been to encourage states to develop national legislation to protect folklore. Few countries, however, have so far adopted national legislation on the basis of the 1982 Model Provisions.

### 2.3 1982 Model Provisions

The title given to the Model Provisions<sup>82</sup> reflects the fact that they are designed to provide intellectual property-type protection to *expressions of folklore* and were never intended to provide more general protection of this heritage. Thus they face the objection that they address only a part of the problem of safeguarding folklore by concentrating on the use of IPRs as a tool for protection. They provide for a *sui generis* system of protection that is based on the following three principles:<sup>83</sup> that its subject matter is the commonly held heritage of a community; reciprocity between national legislation and international law; and that the economic uses of such heritage can be protected by law while its social uses cannot. Folklore is seen as part of social identity and thus the aim of its protection is to safeguard it against loss, prejudicial distortion, illicit appropriation and illegitimate exploitation. Traditional artistic expressions are viewed as a common heritage of humanity and thus free for appropriate social use and protection is thus instituted against harmful distortions, misrepresentation or the falsification of origin. Such a protection regime is thus designed to monitor exploitation carried out for economic purposes and to generate income that can be

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<sup>79</sup> *Possibility of Establishing an International Instrument for Protection of Folklore* [Doc.B/EC/IX/11-IGC/XR. 1. 15] [(1975) prepared by UNESCO stated at 7: "the problem [of protecting folklore] was of a cultural nature and, as such, went beyond the bounds of copyright" and thus concerned issues such as identification, conservation and preservation. An Expert Committee on the Legal protection of Folklore that met in Tunis in 1977 concluded also that the question required interdisciplinary examination under the sole auspices of UNESCO.

<sup>80</sup> Two Committees of Governmental Experts were established by General Conference at its 21<sup>st</sup> Session (1980): one 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).

<sup>81</sup> Addressing issues of definition, identification, preservation, conservation, promotion and protection.

<sup>82</sup> Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit and Other Prejudicial Actions (1982).

<sup>83</sup> Interview with Mr Salah Abada, Chief, Copyright Division of UNESCO.

used in the safeguarding of folklore.<sup>84</sup> The Preamble notes that the dissemination of expressions of folklore can lead to the improper exploitation of a nation's cultural heritage and that any abuse (commercial or otherwise) or distortion of folklore harms the cultural and economic interests of the nation.

One difficulty in adapting IPRs to the protection of folklore lies in the definitions used for the subject of protection. In this text 'expressions of folklore' are defined as 'productions' comprising characteristic elements of the traditional artistic heritage, implying their authenticity as well as the community's recognition of them as such. No attempt is made in the Model Provisions to define 'folklore' itself. This also signals their difference from 'works' (that are the subject of copyright protection) but limits them to the artistic heritage, only one aspect of intangible heritage. They do not, for example, cover traditional knowledge, practical know-how, spiritual or ritual elements of culture etc. The "expressions" are divided into verbal expressions, expressions through musical sounds, expressions through actions and those that are incorporated into a tangible object. Only the final category needs to be reduced to a physical form. The community-based aspect of expressions of folklore is emphasised, as that which is created by a community or adopted by one and developed and maintained by it through generations. It is irrelevant whether it has been developed collectively or by an individual author – a clear departure from copyright rules – as long as it reflects the traditional artistic expectations of the community.

Expressions of folklore are to be protected against "illicit exploitation and other prejudicial actions." Illicit exploitation is characterised as any utilisation in violation of those that are subject to authorisation when made with gainful intent and outside the traditional or customary context (such as the publication and reproduction of copies; and the public recitation of a performance).<sup>85</sup> The Model Provisions would not therefore prevent indigenous and local groups from using their traditional cultural heritage in traditional and customary ways and developing it through continuous evolution. The *Commentary*<sup>86</sup> to the Model Provisions makes clear that a system of prior authorisation was considered preferable to one relying on checks on the utilisation of expressions of folklore. Certain exceptions, such as their use for educational purposes, are allowed in Section 4. Section 5 sets out the requirement to acknowledge the source in publications and other communications to the public of identifiable expressions of folklore by citing the community and/or geographic place from which it originated. Section 6 deals with the offences of: non-compliance with the requirement to acknowledge source; unauthorised utilisation; deception (or "passing off"); and distortion. Violation of the first and commission of the last two actions constitute the "other prejudicial actions" referred to in the title.

The available sanctions are set out in Sections 7 ("Seizure and Other Actions") and 8 ("Civil Remedies"); Section 9 provides for the designation of the "competent authority" for authorisation of utilisation and Section 10 sets out the procedure to be followed. It is possible under Section 9 that the competent authority designated should be the community itself, acting in the capacity of the owner of the expressions of folklore<sup>87</sup> to be authorised and

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<sup>84</sup> Views of Mr Abada reported in, "UNESCO/WIPO Regional Consultations on the Protection of traditional and Popular Culture (Folklore)," in XXXIII (4) *Copyright Bulletin* (1999) 35 at 58

<sup>85</sup> Section 3. The 'traditional context' is its proper artistic context based on continuous usage by the community while the 'customary context' is in accordance with the practices and everyday life of the community.

<sup>86</sup> *Commentary* at p.18.

<sup>87</sup> It should be noted that the term "owner" is avoided since ownership of folklore expressions will be treated differently in different States. For example, it might be seen as the property of the nation or as owned by the traditional community in which it evolved.

Section 10 allows for applications to be made orally. Section 12 deals with the relation of the Model Provisions to other forms of protection such that anything that is covered by the terms of any other laws and international treaties as well as the Model Provisions should be protected under both. This allows, therefore, for protection under copyright law, performers' and other neighbouring rights, laws protecting recordings of folklore expressions, industrial property law, cultural heritage law and the relevant international treaties.<sup>88</sup> Section 13 on "Interpretation" is based on a fundamental principle of *sui generis* protection of intangible heritage – that the community that created and maintains it should be free to use and develop it without authorisation and that no such use can be viewed as distortion as long as the community sanctions it. Section 14 deals with the protection of folklore expressions in foreign countries on the principle of reciprocity or on the basis of international treaties and other agreements. The idea behind this was for the Model provisions to pave the way towards a system of regional and international protection.<sup>89</sup>

A draft treaty on the subject<sup>90</sup> was presented to a Group of Experts on the question of providing international protection for expressions of folklore. The consensus, however, was that it was premature to establish an international treaty on the subject since there was insufficient experience relating to their protection at national level and, in particular, of the application of the Model Provisions.<sup>91</sup> The main problems identified by this Group of Experts were: a lack of appropriate sources for identification of expressions of folklore to be protected, especially in developing countries; and the lack of workable mechanisms for the protection of those that are found in several countries of origin. The latter is a particularly complex issue that raises questions such as which State's mechanisms would be the competent authority to authorise utilisation of folklore expressions? What happens where one State accedes to the treaty and another does not? How can regional co-operation between States be organised in relation to common expressions of folklore? It was felt that appropriate answers to these questions should be found at regional level before embarking on an international treaty for the protection of expressions of folklore.

#### 2.4 Existing international protection of folklore through IPRs

There are several international treaties relating to different aspects of international property protection that can be applied to intangible heritage, but these are generally limited in their scope and effect.<sup>92</sup> The two instruments with most relevance in this area are the Universal Copyright Convention (UNESCO, 1952) and the Berne Convention (Paris Act 1971) which provide for international protection of literary and artistic works through copyright law.

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<sup>88</sup> Such as: Universal Copyright Convention (1952); Rome Convention (1966); Berne Convention (1971), especially Art.15(4); Paris Convention (1975); and the UNESCO Convention on the World Cultural and Natural Heritage (1972).

<sup>89</sup> As is stated in the *Commentary* at 29: "... a number of experts stressed that international measures are an indispensable means of extending the protection of expressions of folklore of a given country beyond the borders of that country. In this context, the possibility of developing intergovernmental cultural or other appropriate agreements, so as to cover also reciprocal protection of expressions of folklore, should likewise be considered."

<sup>90</sup> UNESCO/WIPO Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1984).

<sup>91</sup> Ficsor *op.cit.* n.62 at 223

<sup>92</sup> For example, in the *Commentary* at p.5: "In any case and at least so far, legal protection of folklore by copyright laws and treaties does not appear to have been particularly effective or expedient."

Treaties dealing with copyright protection include:

The Universal Copyright Convention (1952, revised 1971) (UNESCO/WIPO)

The Universal Copyright Convention (UCC), jointly administered by UNESCO and WIPO, provides for the protection of literary and artistic works through the application of copyright rules. The UCC can be invoked for the protection of intellectual expressions of folklore through the application of national treatment as foreseen by Article II (3).<sup>93</sup> However, as it has been shown above, the value of copyright rules for safeguarding intangible heritage is limited.

The Berne Convention (1967 and 1971 Acts) (WIPO)

The Berne Convention<sup>94</sup> provides international standards for harmonising the copyright rules of State Parties and can grant legal protection for many forms of artistic expression, such as music, dance, painting and sculpture. The subject matter of this Convention is “literary and artistic works” and the definition is relatively broad,<sup>95</sup> allowing for certain expressions of traditional culture and folklore to be covered. Its protection is based on the principles of minimum standards whereby the copyright protection offered nationally should not be less than that set out in the Convention and national treatment.<sup>96</sup> Protection is also provided for performers of literary or artistic works through the application of ‘neighbouring rights’.<sup>97</sup> The moral rights of authors are granted protection<sup>98</sup> that goes some way to answer the needs of expressions of folklore to be protected against distortion.

The Convention<sup>99</sup> offers the possibility of international protection of expressions of folklore under Article 15(4) and applies to the “unpublished works of an unknown author” who is a national of a country of the Union. The State in question should designate the competent authority to represent the author and to enforce his rights in other countries of the Berne Union.<sup>100</sup> However, only one notification has so far been deposited with WIPO by any State (by India in 1996) designating a national authority to protect the unpublished works of authors whose identity is unknown. The maximum duration of protection is the life of the author plus 50 years.<sup>101</sup> Article 2 permits Parties to decide whether a work must be ‘fixed’ in

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<sup>93</sup> Abada, S “UNESCO’s Recommendation and the prospects for the international protection of folklore,” in *Phuket Report* cited n. 121 at p. 226.

<sup>94</sup> Berne Convention for the Protection of Literary and Artistic Works (1886) with several revisions including at Stockholm (1967) and Paris (1971) and amended in 1979 (Berne Union). On 15 July 2000, there were 160 States Parties, of which the majority are party to the Paris Act.

<sup>95</sup> It covers “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression” and includes “dramatic or dramatico-musical works; choreographic works ... works of drawing, painting, architecture, sculpture, engraving” (Art.1(1)).

<sup>96</sup> Art. 5.

<sup>97</sup> Art. 11 covers the authorisation rights of authors of dramatic and musical works, including their performance.

<sup>98</sup> Art. 6bis(1) reads: “Independently of the author’s economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.”

<sup>99</sup> Cited n. 88.

<sup>100</sup> Art. 15(4)(a) reads: “In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.”

<sup>101</sup> Art. 7.

a physical form before it can be granted copyright protection. This is important since the requirement of fixation is clearly problematic in the case of oral cultural expressions that are repeated and frequently evolving. The 1971 amendment of the Convention allows Parties to designate a ‘competent authority’ to control the licensing, use and protection of national folklore. If a State has enacted legislation specifically for the protection of ‘folklore’ – which few States have so far done<sup>102</sup> – then the authority responsible for folklore could carry this out.

### WIPO Copyright Treaty (1996)

The WIPO Copyright Treaty<sup>103</sup> recognises in the Preamble “the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and economic developments.” It also states as its aim “to develop and maintain the rights of authors in their literary and artistic works in a manner as effective and uniform as possible.”

Its status is as a special agreement within the terms of Article 20 of the Berne Convention and so applies only to Parties of that Convention and has no connection with any other treaty. Furthermore, nothing in this treaty derogates from existing obligations of Parties to that Convention.<sup>104</sup> Its relevance to the protection of traditional culture and folklore should be understood in this light. The statement of the principle that “[c]opyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts”<sup>105</sup> makes explicit the limitations of copyright protection in that it extends only to artistic and literary expressions. In general, it does not appear to offer much additional protection for intangible heritage except in terms of better enforcement through the provisions relating to enforcement of the rights granted, including those that may be granted to folklore expressions under the Berne Convention.<sup>106</sup>

Treaties dealing with neighbouring rights include:

### The Rome Convention (1961) (WIPO)

The Rome Convention<sup>107</sup> sets out minimum standards for the protection of performers and producers of phonograms through the principle of national treatment.<sup>108</sup> These can provide a reasonably useful means of protecting a limited range of expressions of folklore through what are known as ‘neighbouring rights.’ The ‘performers’ to which the Rome Convention applies are defined as those who perform literary or artistic works<sup>109</sup> and so it does not clearly relate to intangible heritage. However, since the Rome Convention sets out

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<sup>102</sup> Bolivia, Chile and Lithuania are some that have.

<sup>103</sup> Adopted by WIPO Diplomatic Conference 2-20 Dec.1996. Neither the WIPO Copyright Treaty (1996) nor the WIPO Performances and Phonograms Treaty (1996) is currently in force. The former had 19 ratifications, signatories and accessions and the latter has 16 on 15 July 2000.

<sup>104</sup> Art. 1(1) and (2).

<sup>105</sup> Art. 2.

<sup>106</sup> Art. 15(4).

<sup>107</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Rome 26 Oct.1961. On 15 July 2000, there were 67 States Parties to the Convention.

<sup>108</sup> Art. 2

<sup>109</sup> Art. 3(a):” ‘Performers’ means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.”



*minimum* standards,<sup>110</sup> it is open for States to include the performers of traditional culture and folklore in the definition of ‘performers’ that, on the basis of national treatment, would extend to foreign performers as well. In this way, where traditional or folk tales, dance, stories, instrumental music, songs etc. are performed live and the protection of performers is extended to the expressions themselves – as in many countries – then the performances of such expressions would also be protected. The protection it offers shall not prejudice any protection otherwise provided to performers<sup>111</sup> and thus allows for additional and specific protection of performers of traditional culture and folklore. This protection is, however, limited in scope since it does not provide protection against unauthorised performance or fixation of such traditional cultural forms and is an indirect form of protection.

#### WIPO Performances and Phonograms Treaty (1996)

This treaty is designed to be applied in tandem with the Rome Convention and nothing in it derogates from the obligations of Parties to that Convention, nor should it affect in any way the copyright protection of literary and artistic works.<sup>112</sup> “Performers” are defined in a similar wording to that of the Rome Convention but with the significant addition of “expressions of folklore” to the type of performance covered. Thus its provisions are explicitly to be applied to performers of expressions of folklore as well as those who perform literary and artistic works. Protection under this treaty is provided to nationals of Parties and to those nationals of other Parties who meet the criteria for eligibility under the Rome Convention.<sup>113</sup> The moral rights of performers, identified as the performer of any live performance that is fixed, to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation are protected.<sup>114</sup> The duration of such moral rights should be at least until the expiry after his death of the economic rights granted to the performer.<sup>115</sup> Performers are granted also economic rights to their unfixed performances, giving them the exclusive right of authorising their broadcasting or communication to the public and their fixation.<sup>116</sup> Further rights granted to performers the exclusive rights of authorising: the direct or indirect reproduction of their performances fixed in phonograms;<sup>117</sup> and the making available of originals and copies of these fixed performances to the public.<sup>118</sup>

The 1994 TRIPS Agreement below deals with both copyright rules and neighbouring rights while the 1989 Recommendation is a general text for the safeguarding of folklore that makes reference to the use of IP rules as a form of protection.

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<sup>110</sup> Art. 7 (1) sets out that the protection provided to performers by the Convention “shall include the possibility of preventing” certain acts that are listed in points (a) – (c).

<sup>111</sup> Art. 21.

<sup>112</sup> Art. 1(1) & (2).

<sup>113</sup> Art. 3. National treatment for those regarded as nationals of other Parties is guaranteed under Art. 4 “with regard to the exclusive rights specifically granted in this treaty.”

<sup>114</sup> Art. 5(1) and (2).

<sup>115</sup> Art. 17 sets out the minimum period of protection granted to performers under this treaty as a period of 50 years from the time that the performance was fixed.

<sup>116</sup> Art. 6.

<sup>117</sup> Art. 7.

<sup>118</sup> Art. 8.

### The 1989 Recommendation (UNESCO)

Section F on the “Protection of folklore” characterises folklore as constituting “manifestations of intellectual creativity,” whether individual or collective, which deserve protection similar to that afforded to other intellectual productions.<sup>119</sup> It argues that such protection “has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions.”<sup>120</sup> It calls upon Member States to draw the attention of the authorities to the work of UNESCO and WIPO in this area, in particular the 1982 Model Provisions. In terms of remuneration, the 1989 Recommendation seeks to create a system whereby the creators and interpreters of folklore would be treated in an equivalent manner to copyright-holders. In the spirit of the Recommendation, all foreign folklore should be safeguarded every time that expressions of folklore are publicly exploited in a manner that involves the economic or moral rights attaching to them. Although this section suggests that various IPRs have potential for offering protection to intangible heritage, it also makes it clear that this can only provide limited protection from improper use and exploitation.<sup>121</sup>

### 1994 TRIPS Agreement (WTO)

The TRIPS Agreement of the WTO<sup>122</sup> is discussed in further detail below in relation to traditional knowledge, however it also has a broader relevance to traditional culture and folklore in provisions dealing with copyright, neighbouring rights and national treatment. The TRIPS Agreement is based on the substantive obligations contained in the Berne and Paris Conventions, adding higher standards in certain areas.<sup>123</sup> It was designed to harmonise IPR standards as they apply to trade in order to encourage international trade and provide it with a more secure basis.<sup>124</sup> This objective must be taken into account when judging the impact of the TRIPS Agreement on traditional culture and folklore. The level of protection through copyright and neighbouring rights offered under TRIPS is thus reduced and determined essentially by reference to the economic rights afforded by the Berne Convention and, by implication, the Rome Convention. Furthermore, the economic rights are granted only in the context of achieving the objectives of TRIPS and not for the sake of protection *per se*.

As far as copyright is concerned, it is compulsory for Member States to comply with Articles 1 to 21 of the Berne Convention (including the Paris Act), with the important exception of Article 6bis that deals with the moral rights of the author.<sup>125</sup> Thus Member

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<sup>119</sup> Section F (a) reads: “regarding the ‘intellectual property’ aspects: [Member States should] call attention to the important work of Unesco and WIPO in relation to intellectual property, while recognizing that this work relates to only one aspect of folklore protection and that the need for separate action in a range of areas to safeguard folklore is urgent;”

<sup>120</sup> Section F “Protection of folklore,” introductory paragraph.

<sup>121</sup> Section F(a) gives the important proviso that “this work relates to only one aspect of folklore protection and that the need for separate action in a range of areas to safeguard folklore is urgent.”

<sup>122</sup> *Agreement on Trade-related Aspects of Intellectual Property Rights* of the Uruguay Round of GATT.

<sup>123</sup> Part I sets out general principles, in particular that of national treatment; Part II deals with different types of IPRs, such as copyright, trademarks, geographical indications, industrial designs, patents and trade secrets.

<sup>124</sup>: “Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to international trade.” (Preamble)

<sup>125</sup> Art.9(1).

States must establish the economic rights as set out in the Berne Convention, apply that legislation to the categories of works set out in Article 2 of the Paris Act, respect the nationality treatment and limit exceptions to those allowed by the Paris Act. Certain neighbouring rights of performers are protected in TRIPS,<sup>126</sup> allowing them to prevent the following acts without their authorisation: the fixation and subsequent reproduction of their unfixed performance; and the broadcasting and communication to the public of their live performance. The period of protection granted is 50 years from the time of the performance or its fixation.

One of its main benefits is that it places an obligation on WTO Member States to provide the holders of the economic rights related to copyright, neighbouring rights and industrial property rights with the various legal means set out in Part III to ensure the enforcement of these rights. However, its failure to protect the moral rights of authors of literary and artistic works is a significant one as far as intangible heritage is concerned since it is this aspect of copyright law that is of most relevance to the needs of the creators of that heritage. It is an industrial copyright that is enforced by TRIPS and not a copyright on creation. Another point worth noting here is that those States with concerns over the protection of folklore and traditional knowledge have generally concentrated their energies on action within WIPO rather than the WTO on these issues.<sup>127</sup>

### *2.5 National and regional protection based on IPRs?*

In Europe and the great majority of industrialised countries, the tendency is to place expressions of folklore within the public domain and beyond the reach of intellectual property rules. The majority of industrialised States operate what might be called a 'legislative void' as far as folklore is concerned with it falling into the public domain and facing the multiple threats of distortion, appropriation etc. that this implies. Developed States are thus marked by a relative absence of any specific legislation for the protection of folklore or its expressions. Certain States, however, including Finland, Sweden, Norway, Canada, Australia, New Zealand and the US have laws aimed specifically at protecting of the cultural heritage of their native peoples. Developing countries – especially African States - have generally been much more active in extending legal protection to folklore and this has mainly been done through the application of copyright rules.<sup>128</sup> The adoption of specific legislation has been influenced by several regional and international texts, including: the revision of the Berne Convention in Stockholm in 1967; the Tunis Model Law on Copyright for Developing Countries (1976); the

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<sup>126</sup> Art. 14; no reference is made to the Rome Convention.

<sup>127</sup> From an interview with Mr H Wager and Ms T-L Tran Wasescha of the Intellectual Property Division of WTO. The calls for a review of Art. 27(3)(b) concerning the patenting of genetic resources and traditional knowledge discussed at the TRIPS Council in Geneva in July 2000 are the exception to this. One proposal here is to deal with traditional knowledge and folklore together under the review procedure allowed for in Art. 71(1).

<sup>128</sup> A non-exhaustive list of such countries in chronological order includes: Tunisia (1966 and 1994); Bolivia (1968 and 1992); Chile (1970); Iran (1970); Morocco (1970); Algeria (1973); Senegal (1973); Kenya (1975 and 1989); Mali (1977); Burundi (1978); Ivory Coast (1978); Sri Lanka (1979); Guinea (1980); Barbados (1982); Cameroon (1982); Columbia (1982); Congo (1982); Madagascar (1982); Rwanda (1983); Benin (1984); Burkina Faso (1984); Central African Republic (1985); Ghana (1985); Dominican Republic (1986); Zaire (1986); Indonesia (1987); Nigeria (1988 and 1992); Lesotho (1989); Malawi (1989); Angola (1990); Togo (1991); Niger (1993); and Panama (1994).

Convention concerning African Intellectual Property (Bangui text) of the African Intellectual Property Organization (1977)<sup>129</sup> and the Arab Copyright Convention.

Some of this national legislation relates to the protection of “works of folklore,” thus treating it as a standard subject of copyright law, others refer simply to “folklore” and the laws of China and Chile are aimed at “expressions of folklore” on the model of the Model Provisions. Algeria and Morocco have definitions of the subject of protection that conform closely to that given in Article 15(4) of the Berne Convention (Stockholm and Paris Acts). In other cases, the legislation differentiates “folklore” from “literary and artistic works” (the classic subject of copyright law) in terms of characteristics such as: that it is a traditional cultural heritage passed on through generations; or that it is the product of the impersonal creativity of members of a community or other group. Notably, the legislation of Rwanda and Benin include aspects of traditional knowledge in their definitions, such as the know-how relating to producing medicines or textiles and agricultural techniques. This approach is of particular significance given the increasing concern at international level to find mechanisms to protect traditional knowledge through some *sui generis* system based on IP protection.<sup>130</sup> There are also some States currently developing legislation in this area. Examples from the Pacific Region include:<sup>131</sup> Vanuatu is considering developing joint protection for copyright and traditional culture; Fiji plans to amend its legislation in all areas governing IPRs to introduce specific measures to protect traditional culture and folklore where possible; Papua New Guinea, Tonga and Samoa are committed to framing a specific system of protection based on copyright law. China is currently preparing a new law inspired by the 1982 Model Provisions.<sup>132</sup> The Philippines Indigenous Peoples’ Rights Act (1997)<sup>133</sup> requires *inter alia* fostering respect for and the flowering of indigenous artistic expressions and traditional knowledge. Thus there is a certain amount of State practice at national level for the protection of folklore (or its “works” or “expressions”) through copyright-based regimes or those that more closely resemble an IPR-inspired form of *sui generis* protection or an even more innovative approach (as in the cases of Rwanda and Benin). The Model Provisions, however, have not been adopted in full into any national legislation and it can be argued that there is still a lack of sufficient State practice relating to such a *sui generis* system of protection to justify the development of international protection along similar lines.

## 2.6 A new international instrument? UNESCO/WIPO co-operation and activities

The first issue to address in seeking to develop an international instrument is the scope of such an instrument. Will it be aimed at protecting all aspects of intangible heritage (including traditional knowledge) or be limited to the intellectual expressions of such heritage – akin to the “expressions of folklore” of the Model Provisions? In this section, the discussion will be limited to the question of an instrument that protects the intellectual expressions of traditional culture and folklore using IPR mechanisms or a *sui generis* system derived from them. The latter has been the approach taken by UNESCO and WIPO in their joint work on

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<sup>129</sup> This text (of a regional body) has had a substantial influence, in particular annex VII as revised in 1999 devoted to literary and artistic property. This introduces two approaches to protection: through copyright and cultural heritage protection.

<sup>130</sup> As Ficsor *op. cit* n.62 points out at 215: “The protection of such elements is obviously alien to the purposes and structure of copyright.”

<sup>131</sup> Cited in “UNESCO-WIPO Regional Consultations on the Protection of Traditional and Popular Culture (Folklore),” XXXIII (4) *Copyright Bulletin* (1999) 35.

<sup>132</sup> “UNESCO-WIPO Regional Consultations on the Protection of Traditional and Popular Culture (Folklore),” XXXIII (4) *Copyright Bulletin* (1999) 50.

<sup>133</sup> RA 8371 of 1997 cited in *ibid*.

the 1982 Model Provisions and in subsequent deliberations from the mid-1990's onwards. Such an instrument would essentially be concerned with identifying the content of these intellectual expressions; identifying the rights of 'owners' over such expressions (although identification of the 'owners' themselves can prove problematic); and regulating their exploitation both nationally and overseas. The most difficult area to tackle would be in developing the criteria for identifying folklore that is common to several regional States. As the basis for developing a *sui generis* regime of protection, a series of minimum rights (in a similar form to the Berne and Rome Conventions set out minimum standards of protection) must be identified. These could include: recognising traditional (customary) forms of collective ownership and communal authorship; including moral as well as economic rights (as do the Model Provisions); preventing the unauthorised registration of sacred and culturally significant symbols and words as trademarks; requiring proof of prior informed consent in patents that employ traditional knowledge; and providing protection in perpetuity.

Abada<sup>134</sup> suggests that a long debate will be needed in order to clarify all the complex issues of the question before it will be possible to develop an international instrument on the subject. However, recent work by WIPO in the area of traditional knowledge and expressions of folklore (see below) has moved this question further on and may offer a more effective model for adapting IPRs to the protection of intangible heritage. What is now being called for is a far more far-reaching *sui generis* system than that offered in the 1982 Model Provisions that will cover traditional knowledge as well as expressions of folklore. This would involve framing new specific measures for protecting traditional knowledge that go beyond the existing IPR system.<sup>135</sup>

#### UNESCO-WIPO World Forum (Phuket)

Preparation of the two WIPO treaties adopted in 1996<sup>136</sup> served to reintroduce the question of international protection of folklore through IPR-related approaches into international debate. This renewed interest led to the UNESCO-WIPO World Forum held at Phuket (Thailand) in 1997.<sup>137</sup> In the Phuket Plan of Action,<sup>138</sup> the following statement was made: "The participants were of the view that at present there is no international standard protection for folklore and that the copyright regime is not adequate to ensure such protection." It was suggested that closer regional and international co-operation would be vital to the successful establishment of a new international standard for the protection of folklore and it was proposed that UNESCO and WIPO "pursue their efforts to ensure an effective and appropriate international regime for the protection of folklore." Following this Forum, the study of legal protection of traditional culture and folklore was greatly expanded. A sub-regional symposium was held at Noumea<sup>139</sup> that included in the *Actions Agreed* developing and enhancing existing cultural and IP protection legislation to ensure the protection of traditional cultural heritage from misappropriation. They also requested UNESCO and WIPO to develop model *sui generis* laws on the protection of traditional

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<sup>134</sup> Abada *op. cit.* n.93 at 232: "un debat approfondi, forcement de longue duree, est necessaire pour eclairer tous les aspets de cette problematique, identifier les choix a retenir et tirer les consequences qui s'imposent quant au domaine du folklore a proteger at a la nature et a l'etendue d'un eventuel instrument international assurant cette protection."

<sup>135</sup> This is discussed further in Section 4.6 dealing with WIPO's work on traditional culture and IPRs.

<sup>136</sup> WIPO Copyright Treaty (1996) and WIPO Performance and Phonograms Treaty (1996).

<sup>137</sup> *UNESCO-WIPO World Forum on the Protection of Folklore*, Phuket, Thailand, 8-10 April, 1997.

<sup>138</sup> From which both the US and UK governments have disassociated themselves.

<sup>139</sup> *The Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands – Draft Report*, symposium held at Noumea, 15-19 Feb.1999.

knowledge and expressions of indigenous cultures. Four Regional Consultations (see section below) were also held in 1999 jointly by UNESCO and WIPO.

#### UNESCO-WIPO Regional Consultations (1999)

In 1999, four UNESCO-WIPO Regional Consultations on the Protection of Expressions of Folklore were held in Quito (Latin America and Caribbean), Hanoi (Asia-Pacific), Tunis (Arab States) and Pretoria (Africa). The regional consultation process sought to clarify: the nature and extent of existing international protection of folklore; the extent to which the 1982 Model Provisions remain a valid document and what other approaches need to be explored “in the light of the evolution of the perception of the role of this heritage in social life”<sup>140</sup>; how to organise regional and sub-regional co-operation on the question of identification and ownership (origination) of trans-boundary expressions of folklore; and measures to develop a fair and effective system of international protection for artistic expressions of folklore and traditional knowledge.

In these regional consultations, several general points were noted concerning the importance of folklore, the threats it faces and the measures currently taken to safeguard it. They noted growing international recognition of the socio-economic value of expressions of folklore and their increasing commercial exploitation,<sup>141</sup> that folklore is indispensable for the development, perpetuation and dissemination of cultural heritage in general<sup>142</sup> and adequate protection to ensure that cultural diversity is necessary in the face of globalisation.<sup>143</sup> It was felt that important elements of traditional knowledge and folklore are being and will continue to be lost in the absence of a proper legal protection mechanism at national and international levels.<sup>144</sup> At national level, this may require a *sui generis* form of legal protection and the 1982 Model Provisions “provide an adequate framework for future work.”<sup>145</sup> Existing IPR regimes are inadequate to address all of the issues involved in the protection of traditional knowledge and folklore.<sup>146</sup> The need to develop the means and resources for the urgent tasks

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<sup>140</sup> WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore, Pretoria, 23-25 March 1999. *Resolution* at p. 45. [Doc. WIPO-UNESCO/FOLK/AFDR/99/1] 25 March 1999]

<sup>141</sup> WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for Latin America and the Caribbean, Quito 14-16 June 1999. *Recommendation* (Introduction). [Doc. WIPO-UNESCO/FOLK/LAC/99/1, 16 June 1999]

<sup>142</sup> *Resolution* cited n. 140 (Preamble) in which the important potential of expressions of folklore for the socio-economic and cultural development of the African continent was also noted.

<sup>143</sup> *Recommendation* cited n. 141 (Introduction).

<sup>144</sup> WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for Countries of Asia and the Pacific, Hanoi, 21-23 April 1999 *Resolutions* at Point 3 [Doc. WIPO-UNESCO/FOLK/ASIA/99/1, 23 April 1999]. View echoed at WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for Arab Countries, Tunis, 25-26 May *Recommendation* at Point 6 [Doc. WIPO-UNESCO/FOLK/ARAB/99/1, 10 June 1999] and at the Pretoria meeting cited n. 140 (Preamble): “... the lack of legal protection of expressions of folklore at regional level and beyond is detrimental to the preservation and maintenance of the integrity of expressions of folklore.”

<sup>145</sup> Pretoria meeting cited n. 140 (Preamble) also Tunis meeting cited n. 144 (Observations). The Hanoi meeting cited n. 144 stated in Point 7: “Effective protection of traditional knowledge and folklore at national and international levels requires *sui generis* legislation ... [with the Model Provisions as] ... an appropriate starting point, but further work is required to take into account the technological, legal, social, cultural and commercial developments ... [since 1982] ... Such work should take into account the common elements and distinct characteristics of traditional knowledge and folklore, in order to evaluate whether protection for both forms of cultural heritage can effectively be provided under a single legislative framework, or whether work on each should proceed separately but with equal urgency and commitment.”

<sup>146</sup> Hanoi meeting cited n. 144 (Point 4).

of inventorying, identifying, conserving, preserving and disseminating folklore and the importance of sufficient financial and other resources to carry out such work was stressed.<sup>147</sup> Such measures – that comprise the main body of the 1989 Recommendation text – are fundamental to developing national or international legal protection.

In their recommendations to governments, the following actions and measures were promoted:<sup>148</sup> the establishment of appropriate national structures to ensure the protection of expressions of folklore as a strategy for cultural development; sufficient resources made available for the preservation, conservation, documentation, development and legal protection of traditional knowledge and folklore; support of communities that are responsible for the creation, maintenance, custodianship and development of traditional knowledge and folklore; involvement of the communities in raising awareness of the value of expressions of folklore and their protection; establishment of national and regional documentation centres for folklore; and creation or strengthening of national legislation for the protection of expressions of folklore, including their adaptation to take into account the 1982 Model Provisions.<sup>149</sup> There was need for wide-ranging consultation at international level<sup>150</sup> and governments should develop regional strategies for the exercise and management of rights in traditional knowledge and folklore and for the support of tradition-holder communities.<sup>151</sup>

A debate amongst experts on traditional knowledge and folklore, the communities that create it and other interested groups should also be initiated aimed, ultimately, at “the formulation of a legal mechanism for protection of traditional knowledge and folklore at national and international level.”<sup>152</sup> UNESCO and WIPO should continue their work in relation to the international protection of expressions of folklore and establish a Standing Committee to study and implement the means for strengthening such protection.<sup>153</sup> This will require a *sui generis* form of binding legal protection at national and international levels<sup>154</sup> that is adapted to the nature and function of such heritage and that the IP system cannot address.<sup>155</sup> UNESCO and WIPO were also asked for increased assistance to developing countries in legal and technical expertise, training in the identification, documentation and conservation of traditional knowledge and folklore, the provision of necessary equipment and resources and increased budgetary resources to ensure effective protection of expressions of folklore.<sup>156</sup>

## Handicrafts

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<sup>147</sup> Tunis meeting cited n. 144.

<sup>148</sup> At various regional consultations – many proposed at two or more.

<sup>149</sup> At the Tunis meeting cited n. 144 it was stressed also that such national legislation should “have positive implications on [sic] development and economy.” (Point 2 of “Recommendations to Governments”).

<sup>150</sup> Hanoi meeting cited n. 144 (Point 12), “to bridge the gaps in the perception of traditional knowledge and folklore and their protection, as viewed by developing and developed countries”

<sup>151</sup> *Ibid* (Point 3).

<sup>152</sup> *Ibid* (point 2).

<sup>153</sup> “[T]aking due account of the similarities and differences between traditional knowledge and expressions of folklore.” Quito meeting cited n. 141 (“Recommendations to UNESCO and WIPO”); Hanoi meeting cited n. 144 (Point 3).

<sup>154</sup> Hanoi meeting cited n. 144 (Point 3). The Pretoria meeting cited n. 195 in its “Recommendations to UNESCO and WIPO” also stated: “That work towards the protection of expressions of folklore and traditional knowledge should be taken in parallel, taking into account the common elements, as well as the distinct characteristics and social functions of each.

<sup>155</sup> The elaboration of an international convention for the protection of expressions of folklore is also explicitly called for at the Tunis meeting cited n. 144 (“Recommendations to IGOs” at Point 5).

<sup>156</sup> At the Hanoi and Tunis meetings cited n. 144 and the Pretoria meeting cited n. 140.

The Creativity Division of UNESCO works with handicrafts – a material expression of traditional cultural heritage – and with the economic and social development of the communities that create and maintain them. In dealing with handicrafts, it is important to take on board the economic and social as well as the cultural aspects of the question<sup>157</sup> using an approach of adaptation rather than conservation i.e. a more dynamic one.

In terms of the legal protection of handicrafts, the Creativity Sector favours presenting a variety of legal options (that are mainly taken from IPR approaches) to craftspeople, beneficiaries, governments etc. to choose from in order to identify best practice and what works in the different contexts. These are addressed primarily at the need to protect the originality of the product (through trademarks and appellations of origin) and to protect the professional designation of the producers as ‘artisan’ and ‘craftsperson’.<sup>158</sup> Economic issues addressed include raw materials, taxation systems, export tariffs and the aim of creating a special category for handicrafts within the World Customs Organization.<sup>159</sup> Based on the understanding that different approaches will be better adapted to different social, economic, legal and cultural environments, the development of a single model law for all States to base legislation on is not favoured.

### **3. The 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore**

#### *3.1 Background to the 1989 Recommendation*

Historically, the earliest attempts to provide international protection for folklore (as it was termed) started with interest in applying copyright rules for this end.<sup>160</sup> Between 1973 and 1978, three intergovernmental meetings on cultural policy were convened by UNESCO,<sup>161</sup> all three calling for UNESCO’s help in preserving popular traditions as part of cultural heritage protection. The Comparative Programme on Intangible (Non-physical) Cultural Heritage was launched in 1976<sup>162</sup> to promote appreciation of and respect for cultural identity, including different traditions, ways of life, languages and cultural values. UNESCO sent out a “Questionnaire on the Protection of Folklore” to Member States in 1979 with the purpose of evaluating the current situation of folklore in Member States with a view to developing further measures to ensure its authenticity and prevent distortion.<sup>163</sup> This questionnaire addressed the five areas of protection regarded as indissociable by a study

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<sup>157</sup> It should be noted here that UNESCO is uniquely placed amongst IGOs to address all these aspects under the terms of its mandate.

<sup>158</sup> It is interesting to see how this can be linked with the Living Human Treasures programme of the ITH Unit.

<sup>159</sup> It is estimated that craft items comprise 5-6% of all world trade and thus are economically significant particularly for many developing States.

<sup>160</sup> The Universal Copyright Convention (1952) could provide indirect protection for folklore in Art.I by allowing for its protection in national legislation. The issue of international protection of folklore through copyright was also discussed at the Stockholm (1967) and Paris (1971) conferences for revision of the Berne Convention. These are set out in Section 2.1.

<sup>161</sup> In Yogyakarta (1973), Accra (1975) and Bogota (1978)

<sup>162</sup> 19<sup>th</sup> Session of General Conference within Programme Resolution 4.111

<sup>163</sup> Sherkin, S *A Historical Study on the Preparation of the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore* [Doc. UNESCO-SI Conf.99/INF.3] at p.9.



presented in 1977 to the Committee of Experts the legal protection of folklore – its definition, identification, conservation, preservation and utilisation.

In 1982, UNESCO set up a Committee of Experts on the Safeguarding of Folklore and a special Section for the Non-physical Heritage was established. A meeting of the Committee of Governmental Experts on the Safeguarding of Folklore was convened in 1985 in Paris to carry out an interdisciplinary study of the possible range and scope of general regulations for the safeguarding of folklore. They decided to develop a set of international standards in a Recommendation. This form of text was chosen over that of a Convention since it is a more flexible instrument containing general principles that Member States are invited to adopt through legislative, administrative or other means. It was decided to base this on an interdisciplinary approach to folklore that addressed the issues of definition, identification, conservation, preservation and utilisation of folklore. Certain infrastructural approaches were also to be looked into such as establishing an international register of folklore and developing a standard typology of folklore. It was felt that the intellectual property aspects of the international protection of folklore – to be addressed jointly with WIPO – should only be dealt with after the question of the international protection of folklore had been clarified through the Recommendation text.

In 1987, General Conference adopted the Resolution proposing that an international instrument on safeguarding folklore be prepared in the form of a Recommendation and a Special Committee of Governmental Experts was set up in that year to prepare a final draft. They produced the definitive draft text of UNESCO's Recommendation on the Safeguarding of Traditional Culture and Folklore that was adopted by the General Conference at its 25th session in 1989. Comments by Member States on the first draft of the Recommendation include some that remain pertinent today, namely the absence of any reference to spiritual culture, the need to revive and popularise the living creative process of folklore, the importance of protecting the cultural communities that create and maintain folklore, that folklore should be viewed as an evolving and not a static phenomenon with an important contemporary social role and the need to distinguish protection of those engaged in the reproduction of folklore from that extended to the community by virtue of an inalienable or traditional right. These all remain significant issues in the consideration of any future instrument that UNESCO may develop for safeguarding intangible cultural heritage.

### *3.2 Analysis of the 1989 Recommendation*

General principles (Preamble): The 1989 Recommendation<sup>164</sup> sets out certain general principles that are worth noting when drafting any future instrument on the subject. The reference to folklore's "economic, cultural and political importance, its role in the history of the people, and its place in contemporary culture" recognises the need to safeguard the cultural community itself as well as the cultural traditions it creates or maintains. Recognition of "the danger it faces from multiple factors" is open-ended and allows for new dangers from changing social and economic factors (such as technological advances) to be taken into account in the future.<sup>165</sup> Reference to folklore as "an integral part of the cultural heritage and living culture" is important in expressing the living rather than static nature of folklore and its embeddedness in the social and cultural context in which it is created. Such general principles

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<sup>164</sup> Recommendation on the Safeguarding of Traditional Culture and Folklore, Paris 16 Nov. 1989.

<sup>165</sup> The Preamble to the 1972 Convention takes a similar approach, noting that the sites are "threatened with destruction not only by the traditional causes of decay but also by changing social and economic conditions which aggravate the situation ."

should lead to the development of national legislation and policies that do not see this heritage in isolation but rather as an integral part of the community that produces it and of society at large.

Definition of ‘folklore’: The definition given for ‘folklore’<sup>166</sup> is currently the only one in any international instrument and, as such, deserves close scrutiny. It contains elements worth noting but suffers from a narrowness of focus. It would need substantial redrafting in order to provide a sufficiently broad definition to encompass all the aspects of intangible cultural heritage that need safeguarding. This definition is discussed in detail above.<sup>167</sup> Its positive elements include noting that folklore develops from traditional culture and within a specific cultural community, the importance of folklore to social and cultural identity and reference to the method of transmission. The main criticisms of this definition are its narrowness of focus, its failure to take account of the social, cultural and intellectual context of the creation and maintenance of folklore and the limited reference to traditional knowledge and indigenous heritage. The inclusion of a list of possible forms that folklore can take at the end of the current definition<sup>168</sup> may not be the most appropriate model to follow. It is understandable in this case since it was a new subject for a UNESCO instrument in 1989 and it was no doubt felt that some explanation was needed of the kinds of forms folklore could take.

Section B on “Identification”: This states that folklore “must be safeguarded by and for the group. whose identity it expresses,” emphasising the need to empower the community to safeguard its folklore traditions. It also makes the essential point that folklore is integral to the identity of the group that produces it. Safeguarding folklore thus involves fostering the social, cultural and economic needs of that group. Unfortunately, the specific actions set out in Section B to be taken by governments do not suggest that this crucial principle has filtered through to these provisions. With the exception of (a),<sup>169</sup> they are concerned with the creation of inventories, identification and recording systems and of a standard typology of folklore, all of which serve the needs of researchers above those of folklore practitioners. It is, of course, necessary for any instrument to be effective that a system for identifying and recording its subject is developed. However, the question must be raised as to who should set the criteria for this identification. As the Recommendation stands, this role is clearly assigned to the scientific community and its methodologies while the voice of the practitioners themselves is absent.

Section C on the “Conservation of Folklore”: This is intended to provide access to researchers and “tradition-bearers” to folklore in the event of its non-utilisation or evolution. The actions

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<sup>166</sup> “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 social and cultural 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.”

<sup>167</sup> Section 1.2.

<sup>168</sup> “Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.” [Section A]

<sup>169</sup> This deals with the need to draw up an inventory of “institutions concerned with folklore” and creating regional and global registers of such institutions.

to be taken to this end are essentially concerned with collating and documenting what data is available in tangible form.<sup>170</sup> Again it appears that scientific researchers are the interest-group who will benefit mostly from this activity. Would “tradition-bearers,” for example, always value or even wish such documentation of a heritage that has traditionally been transmitted orally? A further criticism is the implication that the non-utilisation and/or evolution of oral traditions are inevitably a form of degradation. This ignores the fact that orally transmitted cultural traditions are often evolving into new but related forms and that this may be an intrinsic aspect to their character.<sup>171</sup> That is not to deny the value of such data collection and documentation, rather to question the heavy emphasis placed in the text on this and similar measures.<sup>172</sup> It is important that an instrument also include measures that would foster the present and future creation (and evolution) of oral traditions, while also conserving those that are dying out.

Section D on “Preservation: This places an equal emphasis on folklore and those who transmit it,<sup>173</sup> a fundamental point since the role of the transmitters of the culture is central to its continued existence.<sup>174</sup> It also calls for governments “to guarantee the status of and economic support for folk traditions both in the communities which produce them and beyond.” The proposal to promote the teaching and study of folklore in a manner that emphasises respect for folklore and thus create “a better understanding of cultural diversity and different world views”<sup>175</sup> is important for achieving a pluralistic society that fosters the creation, maintenance and transmission of intangible heritage. The requirement placed on Member States to guarantee cultural communities the right of access to their own folklore by supporting their work in documentation and research as well as in the practice of traditions<sup>176</sup> is a positive one. The provision of moral and economic support to individuals and institutions “studying, making known, cultivating or holding items of folklore”<sup>177</sup> has the potential to empower cultural communities as well as researchers.

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<sup>170</sup> Including: establishing national archives of folklore and national archive functions; setting up museums of folklore or special sections within existing museums; harmonising collection methods; training collectors, archivists, documentalists etc.; and ensuring the security of collected materials.

<sup>171</sup> A similar view in relation to cultural forms in general is expressed in “Recasting Cultural Policy,” in UNESCO *op.cit.* n.3 pp.343-346 at p.344: “In the global system of cultural exchanges some cultures are disappearing. But as some forms of culture disappear, new forms appear locally. The disappearance of old cultural forms is entirely consistent with a rich variety of new forms of human life.”

<sup>172</sup> Six out of seven measures listed in Section C.

<sup>173</sup> “Preservation is concerned with protection of folk traditions and those who are the transmitters.” [Section D, introductory paragraph]

<sup>174</sup> Refer to discussion of the Living Human Treasures programme in Section 5 below.

<sup>175</sup> Section D (a).

<sup>176</sup> Section D (b) reads: “[Member States should] guarantee the right of access of various cultural communities to their own folklore by supporting their work in the fields of documentation, archiving, research, etc., as well as in the practice of traditions;”

<sup>177</sup> Section D (d).

Section E on “Dissemination of folklore”: This recognises the importance of folklore as “an ingredient of cultural identity”<sup>178</sup> and the need for items that make up this heritage to be widely disseminated for its value and the need to preserve it to be understood. The observation that “distortion during dissemination should be avoided”<sup>179</sup> is necessary, but does not address the important issue of aspects of traditional culture and folklore that holders wish to keep secret for spiritual or other reasons. This section contains some measures most likely to be of direct benefit to cultural communities,<sup>180</sup> such as: supporting national, regional and international events (festivals, exhibitions, workshops etc.); encouraging better coverage of folklore material in the national and regional media and the employment of folklorists in media organisations; encouraging regions, municipalities, associations etc. to create employment for folklorists; and facilitating meetings and exchanges between individuals, groups and institutions concerned with folklore both nationally and internationally. The last also calls for Member States to encourage the international scientific community to adopt a code of ethics “ensuring a proper approach to and respect for traditional cultures.”<sup>181</sup> This could be helpful for protecting traditional knowledge but there is no mention made of commercial interests.

Section F on “Protection of folklore”: This deals with folklore in so far as it constitutes “manifestations of intellectual creativity” - whether individual or collective - and addresses the intellectual property aspects of folklore protection, along with other categories of rights already protected. It argues that such protection “has become indispensable as a means of promoting further development, maintenance and dissemination of [folklore] expressions.”<sup>182</sup> Attention is called to the work of UNESCO and WIPO in the field of intellectual property rights, clearly an allusion to the 1982 Model Provisions<sup>183</sup> as is suggested also by the use of the term “expressions” in relation to folklore. The limitations of the IP approach to protection of intangible heritage are noted in the proviso that “this work relates to only one aspect of folklore protection and that the need for separate action in a range of areas to safeguard folklore is urgent.”<sup>184</sup> It is an approach, however, that has been favoured by many States in the pursuit of guaranteeing remuneration for the material expressions of their traditional cultural heritage. Of the other categories of rights relevant to folklore that are already protected and should continue to be, the protection of the informant as a transmitter of tradition on the grounds of privacy and confidentiality sets out a principle that is important in relation to much traditional knowledge.<sup>185</sup>

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<sup>178</sup> Introductory para.

<sup>179</sup> *Idem*.

<sup>180</sup> Section E (a), (b), (c), and (f) are cited.

<sup>181</sup> Section E (g).

<sup>182</sup> Section F “Protection of folklore,” introductory para.

<sup>183</sup> Cited n.47.

<sup>184</sup> Section F (a). Issues relating to the IP protection of intangible heritage are dealt with in detail in Section 3.

<sup>185</sup> Section D (b) (i). The other rights mentioned here are: protecting the interests of the collector by ensuring materials gathered are properly conserved; safeguarding the materials against misuse, intentionally or otherwise, and recognising the role of archives in monitoring the use of these materials.

Section G on “International co-operation”: This aims to intensify cultural co-operation and exchanges<sup>186</sup> to carry out folklore development and revitalisation programmes. It also aims to facilitate research by specialists who are nationals of one Member State on the territory of another. This is interesting since it takes account of the fact that intangible heritage is often common to two or more countries of a region, a fact that has been regarded by some States as an obstacle to developing an international instrument for protection of this heritage. Member States are required to co-operate closely to ensure internationally that all interested parties benefit from the economic, moral and neighbouring rights granted through intellectual property rules.<sup>187</sup> This is designed to ensure that whatever legal protection exists (or is later developed) in the area of such rights is extended as fully as possible to folklore creators, performers and researchers. It is a useful provision in so far as such rights can protect folklore, but is limited by the extent of the ability of such rights to do so and is also neutral as to which interested parties should benefit. Thus those outsiders who commercially exploit folklore are to be the beneficiaries of IP rules as much as the members of the communities that create and maintain it. Member States are also required to refrain from any actions that would damage, devalue or prevent the dissemination of folklore materials and to take all necessary measures to safeguard folklore located on their territory or the territory of other States.<sup>188</sup> These are the type of general duties one would expect to be placed on States and are an important element in international protection.

### *3.3 General comments on the 1989 Recommendation*

The 1989 Recommendation represented a significant step in international protection of cultural heritage as the first attempt to safeguard intangible cultural heritage – ‘traditional culture and folklore’ – through an international instrument. As such, it has had enormous value in bringing the attention of States to the importance of this hitherto neglected area of their heritage and has moved forward considerably the debate over its international protection. It provides a basis from which it is possible to consider the question of developing an international Convention for its protection. It does, however, have certain shortcomings as a text that need to be addressed when considering any future instrument.

A major criticism of the Recommendation is that it is heavily weighted towards a view of ‘safeguarding’ designed with the needs of scientific researchers and government officials in mind. There is too much emphasis on the role of such ‘outsiders’ in the identification, dissemination and conservation of folklore. This is out of tune with more recent calls by indigenous groups for strengthening their role in such activities through capacity-building and other measures.<sup>189</sup> Such calls must be taken account of in any future instrument drafted for protecting intangible heritage. There are occasional nods in the text

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<sup>186</sup> In particular through “the pooling of human and material resources in order to carry out folklore development and revitalization programmes”(Introductory paragraph)

<sup>187</sup> Section G (c) reads: “[Member States should] co-operate closely so as to ensure that the various interested parties enjoy the economic, moral and so-called neighbouring rights resulting from the investigation, creation, composition, performance, recording and/or dissemination of folklore.”

<sup>188</sup> Section G (e) & (f).

<sup>189</sup> For example, the *Suva Declaration of the South Pacific UNDP Consultation on Indigenous Peoples’ Knowledge and Intellectual Property Rights*, Suva, April 1995 calls for a strengthening of the “capacities of Indigenous peoples to maintain their oral traditions, and encourage initiatives by Indigenous peoples to record their knowledge in a permanent form according to their customary practices.”

towards the “group” that should for whom and by whom folklore should be safeguarded<sup>190</sup> and the “tradition-bearers” of such folklore.<sup>191</sup> However, in many cases the promise of such references is not followed through into the specific actions to be taken by Member States and the text appears to suggest that the originating communities do not have a significant interest in the folklore they create and maintain. In a related point, there are certain important interest-groups, such as women and indigenous peoples,<sup>192</sup> absent from the Recommendation and who have a significant role to play in the continuing practice of traditional culture and the social context in which it is practised. This underlines the crucial importance of including exponents and holders of traditional culture and folklore – including indigenous representatives – in the discussions concerning any new instrument on the subject.

Another criticism that can be levelled at the text is that it does not deal with the question of tradition-holders being able to authorise particular uses of their heritage. This is central to their control of it and the Recommendation fails to give control to them or their communities. It is, however, a very complex area since the authorisation processes would differ from one cultural community to another and some might even refuse to disclose who the authorising authority is. Furthermore, there is no specific requirement for informed consent of holders for the use and exploitation of their knowledge, only a call for the scientific community to adopt a Code of Ethics. The position of the Recommendation on the question of secrecy of folklore is also problematic since it clearly assumes that all folklore can and should be widely disseminated<sup>193</sup> in order to raise awareness of its value. This can certainly be a useful approach to protection, however recognition must also be given to the fact that some areas of folklore are, by their nature, confidential and that their secrecy must be safeguarded. The call for protection of the privacy and confidentiality of informants<sup>194</sup> should be extended to guarantee the secrecy of folklore that is traditionally confidential for spiritual or cultural reasons. Another obvious gap in the Recommendation is the lack of any reference to religious tradition or, as discussed more fully elsewhere, traditional knowledge. Both of these are aspects of traditional cultures that often play a very important role in their values, know-how and creativity. Contemporary and urban cultural forms that are based on traditional culture are also ignored by the Recommendation.

A final point that concerns the process of negotiating the Recommendation and has continuing significance for the current question of the advisability of developing a new instrument for this aspect of cultural heritage is the division of labour that developed between UNESCO and WIPO over the protection of folklore. UNESCO concerned itself with the overall question of the protection of folklore while WIPO<sup>195</sup> addressed the intellectual property aspects of protection of expressions of folklore with two theoretical approaches to folklore protection developing. It has been argued that the Recommendation’s weakness results from attempts to reconcile these two apparently incompatible approaches and it is important that UNESCO take a clear position regarding its position *a propos* this debate before embarking on work towards elaborating a new instrument. It will be necessary to find

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<sup>190</sup> The “group (familial, occupational, national, regional, religious, ethnic etc.)” [Introductory paragraph, Section B on “Identification of folklore.”]

<sup>191</sup> Introductory paragraph, Section C on “Conservation of folklore.”

<sup>192</sup> Other interest-groups that need to be considered are local producer, NGOs and private sector organisations in the cultural industries.

<sup>193</sup> Sections B (c)(1) & C (g) are examples.

<sup>194</sup> Section F (b) (i).

<sup>195</sup> In co-operation with the Copyright Division of UNESCO

a means of rendering these approaches mutually compatible and to establish where the division should lie between them. The work conducted both jointly and separately by UNESCO and WIPO on the IP aspects of the international protection of traditional knowledge and folklore (see below) has moved the debate much further on and makes it much easier for such a position to be identified now. This point will be taken up again later in the report.

### *3.4 Application of 1989 Recommendation by Member States*

The Recommendation suffers from two further, fundamental shortcomings that have had an adverse effect on its application and implementation by Member States and, hence, on its effectiveness as a text. It gives no specific mandate to UNESCO and so UNESCO's role in relation to the Recommendation is limited to various programmes that support the main aims of the text<sup>196</sup> and in providing encouragement and support to Member States in applying its principles. Gruzinski<sup>197</sup> in his report prepared for UNESCO draws attention to the difficulty of identifying a programme area that can answer the needs of Member States and UNESCO at the same time while guaranteeing a coherence of approach. It does not, for example, provide for any specialised body or authority to oversee the implementation of the Recommendation's measures and there is a general lack of international machinery in this area compared with other aspects of cultural heritage. Further to this, the obligations that are placed on Member States do not contain any guidance as to how they are to be implemented beyond reference to legislative and administrative measures. This raises the question as to whether some form of model legislation would have been helpful to States or some more detailed listing of measure to be taken on the model of the 1972 Recommendation.<sup>198</sup>

There were no dissenting votes or abstentions on the adoption of the Recommendation in 1989, although the following opinions were expressed in the consultation process leading up to this. Germany objected to any measures that would create a copyright in perpetuity, to any assimilation of folklore protection to copyright and to the definition given for 'folklore.' Sweden suggested removal altogether of Section F on "Protection" on the basis that any State wishing to apply IP protection to folklore could do so through article 15(4) of the Berne Convention (Paris Act, 1971).<sup>199</sup> In 1991, Member States were requested to report on their follow-up activities to the Recommendation and only two States – Japan and Chad – responded by the 1991 General Conference while four States filed late reports.<sup>200</sup> The limited number and the unsatisfactory content of these reports raise important questions as to the effectiveness of the Recommendation as an instrument.

An expert meeting was held in 1993,<sup>201</sup> that assessed the achievements made since 1972 in relation to safeguarding intangible heritage and that defined new strategies for the

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<sup>196</sup> Such as the Red Book of Endangered Languages programme and support for festivals and workshops related to various aspects of traditional culture.

<sup>197</sup> Gruzinski, S. *Protection of the Intangible Cultural Heritage: Survey and New Prospects* [Doc. CLT/ACL/IH, 2 April 1993] at p.19 makes the point that: "There seems to be no possibility of identifying a specific subject area which might satisfy at one and the same time the particular interests of the Member States, the overall objectives of the Organization, the desire to draw comparisons and the need to guarantee the coherence of the relevant action."

<sup>198</sup> Discussed below at Section 6.

<sup>199</sup> Doc.CC/MD/8 cited in Denhez, M. *Pre-evaluation on the Recommendation on the Safeguarding of Traditional Culture and Folklore* at p. 24. [No document reference].

<sup>200</sup> Germany, Lebanon, Italy and Switzerland.

<sup>201</sup> *International Consultation on New Perspectives for UNESCO's Programme: the Intangible Cultural Heritage* (1993). *Final Report* at 110 *et seq.*

intangible heritage programme of UNESCO. Various observations were made at this meeting that are of relevance to the Recommendation. Attention should be given to new “hybridising” (frequently urban) culture in rapidly-industrialising States with its roots in traditional culture. Revitalisation of intangible heritage that is selected by its bearers for transmission to future generations was seen as high priority and the need to place the viewpoints of the exponents of this heritage at the forefront of policy-making was recognised. Due account should be taken of the continually evolving nature of this heritage and that preservation measures must avoid its “fossilisation”. The importance of creating awareness of this heritage and of recording it as [tools] for its preservation was also noted. Gruzinski<sup>202</sup> further noted the need to concentrate material support on actors and producers of local cultural traditions and to preserve the vitality and creativity of intangible heritage. Attention should be given to the means of transmission of this heritage (oral, collective or individual, by women or elders etc.) and to enhancing of the role of tradition-holders.

In 1994, a questionnaire on the application of the 1989 Recommendation was circulated to Member States from whom 103 responses were received.<sup>203</sup> These provided a useful insight into the application of the Recommendation and the implementation of its measures in Member States. In only 43% of respondent States had the Recommendation text been translated into the official language and only 13% of States submitted reports to UNESCO. The priorities identified by respondent States for the safeguarding of traditional culture and folklore included safeguarding (49%), dissemination (49%), revitalisation (34%) and protection (32%). Only 30% of States felt that their infrastructure met the country’s needs for conservation of this heritage with fewer (22%) having harmonised collecting and archiving methods and only 18% regarding their training (of professional collectors, archivists, documentalists etc.)<sup>204</sup> as adequate. In relation to legislation, 50% of States had legislation that addressed the IP aspects of folklore protection, 35% felt the need for national legislation to enhance legal protection and only 3% felt the need for an international Convention to this end.

As a result of socio-economic and geopolitical changes since adoption of the Recommendation in 1989, the preservation of intangible heritage has acquired a new importance for States.<sup>205</sup> Within this context, eight regional seminars were convened between 1995 and 1999 in order to conduct a systematic assessment of the application of the 1989 Recommendation.<sup>206</sup> In view of the region’s recent history, the States of Central Europe and the Caucasus emphasised the importance of traditional cultural heritage for the creation of cultural identity and in nation building. Concerning the application of the Recommendation, the Western European States seem generally to have adopted the 1989 Recommendation definition of ‘traditional culture and folklore’ and folklore is widely and actively disseminated<sup>207</sup> with the private sector heavily involved as a partner in these activities. However, few countries in this region had submitted reports to UNESCO by

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<sup>202</sup> *Op. cit.* n. 197 at p. 23.

<sup>203</sup> The results of this questionnaire are presented in Kurin, R *The UNESCO Questionnaire on the Application of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Preliminary Results* [Doc. UNESCO-SI Conf. 99/INF. 14].

<sup>204</sup> 20% had a system of training voluntary collectors and archivists.

<sup>205</sup> The Tokyo seminar recognised “the need to further strengthen the implementation of the Recommendation within the Member States of UNESCO under [sic] the context of cultural globalisation.”

<sup>206</sup> In Central and Eastern Europe (1995); Latin America and the Caribbean (1997); Asia (1998); Western Europe (1998); Central Asia and the Caucasus (1998); Africa (1999); Pacific (1999); and Arab States (1999).

<sup>207</sup> Report of the Western European seminar at 8: “The preservation, dissemination and active use of traditional culture is quite well guaranteed in Western Europe.”



1998. On the basis of responses from 27 African States, fewer than 50% were aware of the Recommendation and only 39% had published it, with only 10 States addressing matters relating to traditional culture and folklore within national policy. The Asian group of States expressed the view that Member States should use the Recommendation as a reference document for defining policy for the preservation, protection and promotion of this heritage.

Many States expressed great concern over the erosion of traditional and oral cultural heritage and a loss of the associated social values and a need to reconcile modernisation with the continuance of this heritage. They also emphasised the importance of traditional cultural heritage for the creation of identity and for safeguarding cultural diversity in the face of the impact of globalisation. Financial and infrastructural difficulties were cited by several seminars as impediments to the full application and implementation of the Recommendation. Problems cited included: a lack of policy documents, trained personnel and guidelines for indexing; inadequate moral and social support for concerned communities; inadequate participation by the private sector; the lack of a co-ordinated supranational classification system and typology; the lack of centralised national archives for collected materials; lack of financing,<sup>208</sup> equipment and trained personnel; and the separation of the traditional industries from tourism.<sup>209</sup>

The following information concerning national legislation to safeguard intangible heritage was given at different regional seminars. In all States of Central and Eastern Europe, copyright law and neighbouring rights are used to protect this heritage as well as the rights of researchers and performers through international IP treaties. There is no specific legislation for folklore and folk artists although there is legal protection for documents and materials relating to folklore. In some States of the African region, there exist two legal systems in parallel – one based on traditional customary rules and the other on a contemporary system of political, legal and social institutions. The African region seminar also called for the following to be incorporated into national legislation: protection of the informant as a practitioner of tradition (privacy, confidentiality etc.); protection of the interests of collectors and that collected materials are properly conserved; and protection for traditional technologies and their creators.<sup>210</sup> Legislation adopted in the Arab States is primarily based on intellectual property approaches<sup>211</sup> and tends to neglect the situation of both collectors and informants, although there is a growing concern with protecting folklore and adopting new legislation for this.<sup>212</sup> They noted the importance of reaching equilibrium between economic exploitation of folklore and its safeguarding since handicrafts can be a source of local and rural development. The Pacific region States called for the establishment of copyright laws at national level that incorporate procedures to protect traditional cultural heritage from misappropriation where they do not exist, the development of *sui generis* legal and non-legal systems of protection for aspects that IP rules cannot address and for an emphasis on the

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<sup>208</sup> In the Kyrgyz Republic, for example, culture represents only 1.3% of the State annual budget and there is no system for charitable or private sector support.

<sup>209</sup> Raised by the Arab States.

<sup>210</sup> The African seminar also called in its seminar report for States “to include in their respective legislations (sic) measures for the prevention or limitation of the effects of globalisation on traditional culture and folklore to enable communities that are the custodians of intangible heritage to benefit from the measures put in place;”

<sup>211</sup> Six States protect the IP aspects of folklore, folklore artists have State support in eight States (from the private sector only in Kuwait) and, in seven States, the legislation does not protect the collector or informant.

<sup>212</sup> There is particular interest here in protecting traditional crafts and craft industries.

customary owners of this heritage in cultural policies.<sup>213</sup> At the Central Asia and the Caucasus seminar, the feeling was that more technical and legal expertise was needed for framing legislation and States called on UNESCO and WIPO to organise workshops on subjects such as the 1982 Model Provisions.

Several general proposals were put forward at these regional seminars concerning approaches that should be taken towards safeguarding traditional culture and folklore. These included the following.

- Work on compatibility of databases, co-ordination of classification systems and the creation of a terminology for describing traditional culture and folklore
- Encouraging activities relating to the transmission to young people of living traditional culture and folklore and the introduction of educational programmes, such as bilingual and bicultural education in indigenous and ethnic communities.
- Raising awareness of traditional knowledge and skills and of their value to society.
- Recognition of the essential role of tradition-holders in their community and of the constantly evolving character of this heritage.
- Provision of moral and economic support and social incentives for individuals and institutions that cultivate or hold items of traditional culture and folklore.
- Guaranteeing cultural communities access to their own traditional culture and folklore and treating members of those communities as the owners of the knowledge acquired and not simply as informants.
- Reinstating traditional institutions as depositories of knowledge to ensure its transmission to future generations.
- Recognition of the important role played by traditional knowledge in managing natural resources and that its commercial exploitation remains a form of pilfering.
- Noting the importance of integrating cultural factors into development strategies, with reference to the 1998 Stockholm Action Plan.
- Promotion (by UNESCO) of a greater awareness of customary systems of ownership, management and transmission of indigenous heritage through seminars, research etc.

Various views and suggestions were put forward in relation to future developments in international protection of folklore. Two seminars<sup>214</sup> proposed that a Code of Ethics be developed as an Additional Protocol to the 1989 Recommendation that sets out principles for respecting the traditional culture and folklore of all nations and ethnic groups. There were also calls for the Recommendation to be more widely disseminated and for UNESCO to provide support to States in this. The importance of applying the protective measures set out by the Recommendation such as inventorying, surveying and otherwise studying traditional culture and folklore before crafting new law was noted.<sup>215</sup> The Asia regional seminar recommended to UNESCO that it organise a meeting of “experts in legal aspects of intangible cultural heritage”<sup>216</sup> with the aim of giving legal support to the protection of this heritage. The

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<sup>213</sup> Report of Pacific seminar at 7: Member States should ensure “in relevant legislation and policies, that customary owners are the principal participants in the process of documenting and disseminating their knowledge, including control and sharing of benefits, appropriate acknowledgements, and who may inherit and use traditional knowledge.”

<sup>214</sup> Central Asia & Caucasus and Central and Eastern Europe

<sup>215</sup> Africa regional seminar. The *Phuket Forum op. cit.* n.137 also confirmed the need for Member States to organise their own systems of identification, preservation and legal protection of traditional culture and folklore as a basis for developing future international legal protection.

<sup>216</sup> Asia region seminar report at 5.

Latin America and Caribbean region seminar also recommended that UNESCO organise an expert meeting with the same aim as well as the additional one of “examining the possibility of registering collective property.” The Pacific regional seminar called for a survey of the suitability of an international legal instrument that would “intensify the safeguarding of traditional culture and folklore and the possibility to document and study it.”<sup>217</sup> As a more general point, the Pacific region States also set out their position on the type of protection that is most suited to this heritage as a mixture of legal mechanisms non-legal mechanisms and a “combination of various rights and processes” given the complex nature of customary laws relating to it.<sup>218</sup>

As a culmination of these regional seminars, a conference was held in Washington jointly by UNESCO and the Smithsonian Institution entitled *A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation*. At this conference, proposals for future actions and developments were discussed. Consideration of the aforementioned social, cultural and geopolitical changes along with a better understanding of the relevant issues gained through ten years of experience of applying the 1989 Recommendation highlighted certain limitations in the Recommendation text. On the basis of these deliberations, the conference produced an *Action Plan* in which Point 12 of the recommendations to the governments of States was that they should consider “the possible submission of a draft resolution to the UNESCO General Conference requesting UNESCO to undertake a study on the feasibility of adopting a new normative instrument on the safeguarding of traditional culture and folklore.” The Draft Resolution (30 C/DR.84) submitted by the Czech Republic, Lithuania, and Bolivia (supported by Bulgaria, Ivory Coast, Slovakia and Ukraine) to the 30th General Conference of UNESCO and adopted in November 1999 requests that a preliminary study be made into the question of developing a new standard-setting instrument for the safeguarding of intangible cultural heritage.

In March 2000, a questionnaire was addressed to national commissions for UNESCO requesting information concerning the application of the Recommendation in their countries. The responses to this questionnaire have been collated in tabular form (appended as an annex to this study). The following information concerning legislative and policy approaches towards safeguarding intangible heritage in different Member States has been derived from those replies so far received. Several States employ the definition of “folklore” given in the 1989 Recommendation for intangible cultural heritage<sup>219</sup> while others have crafted their own definitions.<sup>220</sup> The different approaches towards the content

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<sup>217</sup> Pacific region seminar report at 8.

<sup>218</sup> Pacific seminar meeting report art 29: “[D]ue to the complex nature of customary laws for ownership, access and transmission of cultural heritage, the most appropriate and comprehensive protection mechanisms should be a combination of various types of rights and processes...”

<sup>219</sup> Including Finland, Guinea, Israel, Laos and Zimbabwe. Bulgaria’s draft *Loi sur le folklore et les études folkloriques* adopts the definition of the 1989 Recommendation in Art. 1. Finland adds the proviso that it is important to distinguish between folklore in its oral and traditional form that serves as “shared tradition-based creations of a cultural community” and applied folklore (e.g. festivals, folk song and dance performances etc.) that cannot be regarded as folklore proper.

<sup>220</sup> For example: Law no.318 of the Dominican Republic (14 June 1968) on National Cultural Heritage defines “patrimonio folclórico” in Art.5 in purely material terms while Law no.41-00 of June 2000 covers “todos los bienes, valores y símbolos culturales tangibles e intangibles”; the Cultural Properties Protection Act of the Republic of Korea (amended 1 July 1999) refers to intangible cultural expressions (dance, drama, handicrafts etc.) in Art.2; the Law on the Protection and Conservation of Cultural Property of Croatia (*Official Bulletin* no.69/1999) covers intangible as well as immovable and movable and cultural property and defines it in Art.9 cited in n.107.

of intangible cultural heritage can be illustrated by those definitions supplied by Kuwait<sup>221</sup> and Croatia.<sup>222</sup> The majority of States whose legislation protects aspects of intangible heritage do so within the framework of copyright and other IP laws while others employ a mix of IP-type protection with cultural heritage and other laws.<sup>223</sup> Both Laos and Zimbabwe noted the strong influence of customary law on their countries' legislative systems. In Finland, the rights of informants and donors are protected by legislation on personal data so that the information given cannot be used without the permission of the informant. Spain makes the point that its legislation does not allow for any conceptual confusion between the terms "traditional communities" and "cultural minorities."<sup>224</sup> In view of the sensitivity towards extending special protections to cultural minorities in some States, this is a useful point to bear in mind.

Details have also been received of new laws already adopted or in development to protect intangible cultural heritage or aspects thereof. Lithuania adopted a new law in 1999 for the protection of 'ethnic culture' defined as all "cultural properties created by the entire nation (ethnos), passed from generation to generation and constantly renewed."<sup>225</sup> This law also protects the transmission, creation and revival of inherited culture, ethnic cultural values and the people who create these values and places a duty of protection on the State.<sup>226</sup> Brazil promulgated a Decree<sup>227</sup> in 2000 concerning the registration of immaterial cultural property that requires registers of various types of intangible heritage to be established, covering areas such as knowledge and know-how, festivals and rituals and forms of expression (literary, musical, plastic etc.). This decree also institutes a National Programme of Intangible Heritage" designed to implement a specific policy of inventorying and valuing this heritage. Croatia adopted a new law on the protection and conservation of

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<sup>221</sup> "Intangible Cultural Heritage is the nation's oral heritage, folklore and spiritual culture that consists of proverbs, habits, traditions, beliefs, actions and individual and communal qualities that distinguishes [a] society from others. This cultural heritage also includes family, wedding habits, arts, letters, songs, settlement and travelling, marriage and delivery, death, food, drinks, medicine and curing, typical Kuwaiti story telling, crafts and activities of Kuwaitis in the past."

<sup>222</sup> Art. 9 of the law cited n. 220 states: "Intangible cultural property may cover different forms and phenomena of intellectual creativity being transmitted by tradition or in any other way, and particularly:

- language, dialects, tongues and toponyms, and traditional literature of all kinds,
- folk creative works from the fields of music, dance, tradition, games, rituals, customs, as well as other folk traditional values,
- traditional skills and crafts."

<sup>223</sup> Spain protects "traditional and popular culture" under the 1985 Historic Heritage Law and the copyright law; the Czech Republic protects intangible cultural heritage (ICH) under laws relating to cultural heritage, archives, exports and IP; Finland protects ICH under laws relating to copyright, archives and neighbouring rights; Lithuania provides protection both under its copyright law and the Law on the Principles of State Protection of Ethnic Culture (Sept. 21 1999, No. VIII-132); and Macedonia currently protects adaptations of works of folk creativity under its copyright law and is developing a new cultural heritage law to cover spiritual as well as tangible heritage.

<sup>224</sup> Cultural minorities as such receive no special protection under Spanish law except that provided for under anti-discrimination legislation while traditional cultural communities are protected in relation to the means of fostering and promoting their activities.

<sup>225</sup> Art. 2 of the Law on the Principles of Protection of Ethnic Culture, No. VIII-1328 (Sept. 21 1999).

<sup>226</sup> This includes guaranteeing the preservation of this heritage and the continuity of living tradition, forming institutions to consolidate State protection, developing ethnic languages, creating conditions for improving the skill of tradition-holders, ensuring protection of their rights and reducing the harmful influence of mass culture.

<sup>227</sup> Decreto No. 3.551, 4 August 2000.

cultural property in 1999<sup>228</sup> that covers three aspects of cultural heritage – immovable cultural property, movable cultural property and intangible cultural property that comprises “intangible forms and phenomena of human intellectual creativity in the past, as well as documentation and bibliographical heritage.” Bulgaria has prepared a draft law on folklore and folklore studies<sup>229</sup> that will employ the definition of ‘folklore’ given in the 1989 Recommendation and seeks to follow the spirit of that text in its provisions. <sup>230</sup>

### 3.5 The ‘Living Human Treasures’ programme (1993) and the proclamation of ‘Masterpieces of the Oral and Intangible Heritage of Humanity’ (1998)

These two programmes developed within UNESCO in relation to intangible cultural heritage represent, along with the 1989 Recommendation, the formal experience of safeguarding and valuing intangible heritage gained thus far. The ‘Living Human treasures’ programme provides a model for the type of measure that States can apply nationally for ensuring the continuing transmission of intangible heritage. The ‘Masterpieces’ programme in particular is likely to prove very important in providing the basis for identifying the scope of intangible heritage as a subject of international protection and the priorities for safeguarding this heritage.

#### The ‘Living Human Treasures’ programme:<sup>231</sup>

This programme proposes the establishment by Member States of systems of ‘living cultural properties’ that are exponents of traditional culture and folklore. They are invited to submit to UNESCO a list of ‘Living Human Treasures’ in their country for inclusion in a future UNESCO World List.<sup>232</sup> The purpose of this programme is stated as follows: “One of the most effective ways of safeguarding the intangible heritage is to conserve it by collecting, recording, and archiving. Even more effective would be to ensure that the bearers of that heritage continue to acquire further knowledge and skills and transmit them to future generations.”<sup>233</sup> By identifying the bearers of this heritage and their ability to transmit the skills, techniques and knowledge to ‘apprentices’ as the focus of protection, it recognises that its existence depends on the social and economic well-being of its holders and their way of life.<sup>234</sup> It also places the skills and techniques of those who practise traditional culture and

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<sup>228</sup> Cited n.220; definition of “intangible cultural property” Art.9 cited n.109.

<sup>229</sup> Cited n.219.

<sup>230</sup> Art. 1, for example, will require that the necessary conditions are ensured for complete collection of folklore materials and their conservation, for a global study of folklore, the dissemination and development of folklore and that folklore values are protected from illicit or uncontrolled exportation.

<sup>231</sup> Proposed by the Executive Board of UNESCO in 1993 as a means of implementing the 1989 Recommendation. See: *Decisions Adopted by the Executive Board at its 142nd Session* [UNESCO Doc.142 EX/Decisions, 10 Dec. 1993] and the *Guidelines - Living Human Treasures* sent to Member States by UNESCO on 16 Sept.1998.

<sup>232</sup> A similar idea to the World Heritage List established under the 1972 Convention but without the formal legal mechanisms established by a Convention.

<sup>233</sup> *Operational Guidelines* (Introduction).

<sup>234</sup> This last point is the most problematic since it may be difficult for traditional crafts and knowledge to have a relevancy in the modern context. The choice may therefore be between allowing certain traditional skills to die out and social and economic development. An example of a traditional skill rapidly dying out is

folklore at the centre of preservation,<sup>235</sup> an element so far missing from the international protection of cultural heritage.

The translation of these principles to a legal or administrative framework raises the difficulty of how to select the exponents of traditional knowledge and techniques to be listed as 'Living Human Treasures'. As with the World Heritage List, the membership of the Commission of Experts and the criteria for the heritage transmitted are crucial. For example, one criterion for selection is the danger of its disappearance owing to a serious decline in the number of practitioners and/or their successors which underlines the central role of the practitioners themselves and their apprentices.

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'Masterpieces of Oral and Intangible Cultural Heritage':

The programme for proclaiming 'Masterpieces of Oral and Intangible Cultural Heritage' was established in 1998. The 'Masterpieces' to be selected are defined as follows.

“Cultural spaces or forms of cultural expression of outstanding value in that they represent either a strong concentration of the intangible cultural heritage of outstanding value or a popular and traditional cultural expression of outstanding value from a historical, artistic, ethnological, sociological, anthropological, linguistic or literary point of view.”<sup>236</sup>

Unlike the World Heritage List that rests on the 1972 Convention, this programme is based on the 1989 Recommendation and has an international jury rather than an intergovernmental committee to select nominated items and relies purely on voluntary financial contributions for funding. A major aim of this programme is to raise the awareness of governments, NGO's and, in particular, local communities of the value of their oral and intangible heritage<sup>237</sup> and to encourage them to identify, preserve and promote it. Oral and intangible heritage is regarded as of “universal value ... by virtue of its diversity and intercultural character” as well as its great importance to peoples in regions where oral forms of cultural heritage predominate.<sup>238</sup> This statement of universality contains elements that could be in a new standard-setting instrument, although they would need to be balanced by reference to the priority of the cultural and other interests of the holders.

Identification of intangible heritage remains a major problem and the lack of an agreed set of criteria for this has presented the greatest challenge to elaborating criteria for the selection of cultural spaces and forms of cultural expression as 'masterpieces' of oral and

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that of the *Pambe-zan* in Iran who uses traditional instruments and skills to renew the cotton stuffing in traditional mattresses - now this job is increasingly carried out in shops by machine.

<sup>235</sup> “The performance and the act of creation are intangible; embodied in the skills of those who do them. So too are the traditional intangible elements employed by those who protect and preserve the material cultural heritage.” At p.2 (Part C 'definition').

<sup>236</sup> Annex to letter from the Director-General to Member States, 26 April 2000 [UNESCO Doc. CL/3553 Annex; 155 EX/SR.14].

<sup>237</sup> “[C]onsidering this to be the depository and collective memory of peoples, which alone can ensure the survival of distinctive cultural characteristics.” *Ibid* at Point 1(b).

<sup>238</sup> Report of the Director General [UNESCO Doc. 155 EX/15, Paris 25 Aug. 1998] reads in point 1: “Il a été souligné que le patrimoine oral, par sa diversité et par son caractère interculturel, a une valeur universelle.”

intangible heritage. Use of the terminology ‘masterpieces’ itself has been subject to debate.<sup>239</sup> Concerns have been expressed that it tends to create a hierarchy of cultures incompatible with the nature of oral heritage and that the ideas of excellence, uniqueness and typicality should rather be emphasised. The definition of “oral and intangible heritage” used for this programme is based on that of “folklore” in the 1989 Recommendation, with the addition of the phrase “traditional forms of communication and information.” Thus the opportunity for developing a new and better definition has been missed and the problems identified in the 1989 definition have been perpetuated. However, the concept of ‘cultural spaces’ as physical or temporal spaces that owe their existence to cultural activities that have traditionally taken place there and where the temporal spaces generally characterised by periodicity<sup>240</sup> is one that adds an important new dimension to the notion of intangible heritage. It is also in keeping with the development of new criteria for ‘associative cultural landscapes’ in the *Operational Guidelines* of the 1972 Convention.

The membership of the Jury established by UNESCO for selecting the ‘Masterpieces’ is aimed at representing the interests of the holders of this heritage as well as experts and, notably, specifically calls for sufficient representation of women and youth.<sup>241</sup> Allowing for submissions to be made by other intergovernmental organisations and NGO’s as well as governments<sup>242</sup> also allows for a wider range of interests to be considered and is a step towards greater local and community empowerment. The cultural criteria for the proclamation of ‘Masterpieces’ emphasise the ‘outstanding value’ of this heritage<sup>243</sup> which is to be expected with this type of exercise and mirrors the criteria by which the World Heritage List operates. Certain criteria given for selecting items of oral and intangible heritage for proclamation would be relevant to a new standard-setting instrument that takes the 1972 Convention as its model. These include: its role in the affirmation of the cultural identity of the peoples or cultural communities involved; the quality of the know-how and techniques deployed; its value as the witness of a living traditional culture; and the risk of its disappearance through lack of means of safeguarding or protection, an accelerated process of transformation, urbanisation or acculturation.<sup>244</sup> Any instrument designed to safeguard this heritage must find a balance between the right of the communities concerned to take advantage of economic and social development - that may well have a profound effect on

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<sup>239</sup> For example, at the first meeting of the Jury for the Proclamation of Masterpieces of Oral and Intangible Heritage, UNESCO, Paris 15 June 2000.

<sup>240</sup> Cyclical, seasonal, calendrical etc.

<sup>241</sup> UNESCO Doc. 155 EX/15 (25 Aug. 1998), Annex IV - page 2 at point 4(a) on “Procedure d’évaluation.”

<sup>242</sup> In contrast, nominations for the World Heritage List may only be submitted by Parties to the Convention.

<sup>243</sup> *Ibid* at point 6: “Les critères culturels: les espaces ou les formes culturelles proclamés chefs-d’œuvre du patrimoine oral et immatériel de l’humanité devront avoir une valeur exceptionnelle, au sens qu’ils devront témoigner:

(a) soit d’une forte concentration du patrimoine culturel immatériel de valeur exceptionnelle;

(b) soit d’une expression culturelle populaire et traditionnelle ayant une valeur exceptionnelle du point de vue de l’histoire, de l’art, de l’ethnologie, de la sociologie, de l’anthropologie, de la linguistique ou de la littérature.”

As noted in relation to the ‘Living Human Treasures’ programme, this may not seem appropriate to folklore but is inevitable when setting up such a system for selection.

<sup>244</sup> This last points to the fact that much of the desire to safeguard and protect this heritage is as a response to the effects of cultural and economic globalisation and social changes which threaten its continued existence.

their traditional culture - and to preserve their intangible heritage in a living form.<sup>245</sup> Nominations must be accompanied by a plan of action appropriate to the space or form of cultural expression listing legal and practical measures for its preservation, protection, support and promotion over the next decade.<sup>246</sup> This requirement should prove useful for identifying legal and administrative measures applicable to safeguarding intangible heritage. The organisational criteria<sup>247</sup> are mostly straightforward and their emphasis on the need for an adequate local management system articulates a ‘bottom-up’ approach to safeguarding this heritage that would empower the local communities that are essential to its creation and maintenance.

#### **4. Traditional Knowledge as a Subject of Protection**

##### *4.1 Traditional knowledge – content and character*

This range of knowledge<sup>248</sup> – sometimes seen as ‘indigenous’ or ‘local’ knowledge – is an important element in intangible cultural heritage that should be taken into consideration in the debate over developing future international protection of that heritage. The 1989 Recommendation, for example, fails adequately to address this important aspect of intangible heritage<sup>249</sup> while the 1982 Model Provisions restrict themselves to the artistic expressions of folklore and so do not address traditional knowledge at all. One area of international law in which the role and importance of traditional knowledge has been appreciated is in connection with biodiversity and sustainable development, with particular reference to the traditional knowledge and environmentally sustainable practices of indigenous peoples.<sup>250</sup> Agenda 21 of the 1992 Rio Declaration<sup>251</sup> calls for the recognition of the values, traditional knowledge and resource management practices of indigenous peoples while the 1998 World Development Report of the World Bank calls for a reinforced understanding of the relationship between traditional knowledge and development.

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<sup>245</sup> Tourism is probably the most problematic of such areas since it has the potential to provide an economic basis for the continuation of traditional cultural activities that otherwise would die out. However, it may also change irrevocably a traditional way of life that fostered the initial creation of folklore.

<sup>246</sup> Annex at Point 6 (i) (b).

<sup>247</sup> Set out in section 6(ii).

<sup>248</sup> “These systems of knowledge and skills, understandings and interpretations, have been developed through generations of fine-grained interaction with the natural environment, and they constitute a vital part of the intangible cultural heritage.” *Traditional Knowledge: cultural diversity, biodiversity and global/local interactions*, Inter-sectoral contribution to the Task Force on programme and Priorities from the sectors of Culture, Social & Human Sciences, Natural Sciences and Communication (draft, 28 June 2000) at p.1.

<sup>249</sup> This is discussed in greater detail in Section 1 in relation to definition.

<sup>250</sup> See discussion in Section 4 of traditional (indigenous) knowledge and in Section 5 on the UN Convention on Biological Diversity (1992).

<sup>251</sup> Chapter 26.



The social and cultural dimensions of this process have thus far been largely ignored and only recently has the importance of adapting sustainable development to specific socio-cultural concepts been understood.<sup>252</sup> The great social and economic importance of traditional knowledge to many societies is illustrated by the fact that, in Africa, 70-80% of the population relies on traditional medicinal knowledge for their primary healthcare.<sup>253</sup> A major concern in relation to the preservation of traditional knowledge is the erosion of cultural diversity and accompanying loss of biological diversity as a result of the continuing and increasing loss of such knowledge in the face of the economic, social and cultural pressures of globalisation. UNESCO has a major role to play in addressing the concept of traditional knowledge in its social and cultural context and to explore the different ways of understanding it in different societies. Much of this work is likely to be most appropriately carried out through operational rather than norm-creating activities that can complement any future new instrument.<sup>254</sup>

In relation to traditional knowledge, “culture” is not seen as a primarily artistic or aesthetic construct but as the whole way of life of a given society and including aspects such as techniques and know-how, language, values, rituals and rites, religious and spiritual beliefs, symbols and gender relations. Furthermore, ‘tradition’ is not static since traditions (such as beliefs and knowledge) are continually evolving and are dynamic. The ‘traditional’ character of traditional knowledge is not therefore its antiquity but rather the way in which it is acquired and used.<sup>255</sup> It is important also to understand that, although they are a group of central importance, the tradition-holders of such knowledge are not confined to indigenous peoples but include also other local communities such as fishermen and rural farmers.

The following characteristics of traditional indigenous knowledge<sup>256</sup> generally apply also to the traditional knowledge of non-indigenous societies. It is community-generated and usually held collectively. It is orally transmitted from generation to generation and so usually undocumented and is location- and culture-specific. It forms the basis for decision-making and survival strategies. It is dynamic and is based on innovation, adaptation and experimentation. Customary laws usually regulate its access and its use within and outside holder communities. The definition of “traditional knowledge and expressions of indigenous cultures of the Pacific Islands” drafted at the Noumea symposium<sup>257</sup> gives a non-exhaustive but comprehensive list of elements that make up this knowledge and expressions that include: spirituality, spiritual knowledge, ethics and moral values; dances, ceremonies and ritual

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<sup>252</sup> See Nakashima, D. “Conceptualizing nature: the cultural context of resource management,” 34(2) *Nature Resources* (1998) 8.

<sup>253</sup> *Ibid.*

<sup>254</sup> The proposed intersectoral LINKS (‘local and indigenous knowledge systems’) programme would be an example if it is adopted.

<sup>255</sup> Dutfield, G. “The public and private domain,” *Science Communication*, Thousand Oaks, March 2000 at p. 1: “[T]he social process of learning and sharing knowledge which is unique to each indigenous culture lies at the very heart of its “traditionality”. Much of this knowledge is actually quite new but it has a social meaning, and legal character, entirely unlike the knowledge indigenous people acquire from settlers and industrialized societies.”

<sup>256</sup> Taken from the MOST programme of the Social Science Sector of UNESCO.

<sup>257</sup> “Traditional knowledge and expressions of indigenous cultures are defined as the ways in which indigenous cultures are expressed and which are manifestations of worldviews of the indigenous peoples of the Pacific. Traditional knowledge and cultural expressions are any knowledge or any expressions created, acquired and inspired (applied, inherent and abstract) for the physical and spiritual well being of the indigenous peoples of the Pacific. The nature and use of such knowledge and expressions are transmitted from one generation to the next to enhance, safeguard and perpetuate the identity, well-being and rights of the indigenous peoples of the Pacific.”

performances and practices; music; language; names, stories, traditions, songs in oral narratives; sites of cultural significance and immovable cultural property and their associated knowledge; scientific, agricultural, technical and ecological knowledge, and the skills required to implement this knowledge; and the delineated forms, parts and details of visual compositions (designs).

Traditional knowledge is a key element in the social capital of an often-marginalised group of people, reflecting their social relations and socio-cultural values as well as their way of viewing the world. Some ways of defining traditional knowledge emphasise its difference from “the international knowledge system” and “scientific” knowledge systems,<sup>258</sup> particularly the tendency of ‘Western’ cultures to view knowledge as an abstract separated from practice while traditional societies do not. The World Conference on Science (1999) debated the nature and role of “traditional and local knowledge systems”<sup>259</sup> and the valuable contributions made by traditional and local knowledge systems to science and technology.<sup>260</sup> Grave concern was expressed over the ‘mining’ of these knowledge systems for short-term intellectual and economic gain without the equitable sharing of benefits. It was therefore recommended that this cultural heritage and empirical knowledge be preserved, protected, researched and promoted.

In order for indigenous and local societies to continue to create and develop their knowledge, they themselves and their way of life must be sustained as well as simply documenting and recording it.<sup>261</sup> Such actions are needed to maintain cultural diversity as well as biological diversity. An interdisciplinary approach to such knowledge is also important<sup>262</sup> with the focus placed also on the social, cultural and political context of the knowledge. The potential within UNESCO for this through inter-sectoral activities is very valuable. For example, the following activities with a relevance to traditional and local knowledge are currently being undertaken by the various sectors of UNESCO: mother tongue education for indigenous peoples (Education); recognition of indigenous knowledge systems in the fields of agriculture and medicine and in relation to biological diversity (Science); preservation of language and knowledge in oral form using new technologies (Communications); protecting both tangible and intangible forms of indigenous cultural heritage and revitalising cultural identity (Cultural Heritage); MOST database of Best Practices on Indigenous Knowledge and work on the human and cultural rights of indigenous peoples (Social and Human Sciences).<sup>263</sup> An example of inter-sectoral co-operation was the international symposium on sacred sites<sup>264</sup> organised within the Man and the Biosphere

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<sup>258</sup> Warren, D. “Using Indigenous Knowledge in Agricultural Development”, *World Bank Discussion Paper* No. 127 (1991): “Indigenous knowledge contrasts with the international knowledge system generated by universities, research institutions and private firms. It is the basis for local-level decision making in agriculture, health care, food preparation, education, natural resource management ...”

<sup>259</sup> Some delegates (particularly from the US and UK) expressed concerns that this might open the door to pseudo-scientific approaches such as creationism and astrology although this was not a majority view.

<sup>260</sup> Meeting Reports of the World Conference on Science, Budapest, June/July 1999, including *Science agenda – Framework for Action* at paras. 32 & 33 and Section 3.4 “Modern science and other systems of knowledge” paras. 83-87.

<sup>261</sup> *Indigenous and local knowledge systems in sustainable development*, informal meeting, UNESCO, 8 Nov. 1999.

<sup>262</sup> ‘Traditional knowledge’ is a term that has different meanings for experts from different disciplines. For example, it can mean “ethnobiology” to some natural scientists while anthropologists would understand it in broader societal and cultural terms.

<sup>263</sup> This work is being conducted within the broader framework of the UN Decade for Indigenous Populations.

<sup>264</sup> *Natural Sacred Sites – Cultural Diversity and Biological Diversity*, UNESCO, 1998.

(MAB) Programme in which the relationships between cultures, societies and nature were addressed within the framework of managing and conserving biological diversity.<sup>265</sup> UNESCO work in the area of enhancing the *in situ* preservation traditional knowledge as a part of intangible cultural heritage in ways that support the tradition-holders themselves and their societies – by conserving their languages and oral traditions, for example – would be of great value and involve inter-sectoral involvement.<sup>266</sup>

Any follow-up work within UNESCO to this study must consider the character, role and preservation of traditional knowledge, including its legal protection, from an inter-sectoral and interdisciplinary approach. The broad mandate that UNESCO enjoys in education, science, social and human sciences, culture and communication places it in a unique position amongst IGO's to take such an holistic approach to the subject. As a corollary to this, UNESCO should not limit itself to developing a normative instrument for the legal protection of traditional knowledge and related intangible heritage, but should also build on existing programmes within the different sectors of UNESCO to explore this interdisciplinary approach in the field.<sup>267</sup> This, in turn, will be invaluable in informing any work on developing a new standard-setting instrument.<sup>268</sup>

#### 4.2 Traditional knowledge and IGOs

Forms of traditional knowledge relevant to the question of the protection and safeguarding of intangible heritage include traditional medicinal, ecological,<sup>269</sup> and agricultural knowledge. Various IGO's have undertaken work in relation to these areas. FAO, for example, has established a Global System to co-ordinate the conservation and utilisation of plant genetic resources.<sup>270</sup> The International Undertaking also covers farmers' rights in recognition of their contribution to preservation and sustainable use of plant genetic resources. In relation to traditional agricultural knowledge, FAO activities include a study of the role of cultural practices in the reduction of pest damage and research into traditional agroforestry systems. The World Bank has supported *in situ* conservation and sustainable use programmes, including customary use under the guidance of local communities, and has launched the Indigenous Knowledge Initiative aimed at enabling development partners to learn more about traditional local practices.

WIPO has recently undertaken substantial work in relation to the IP aspects of traditional knowledge, including their role in the preservation, conservation and dissemination of biological diversity<sup>271</sup> and an exploration of the IP needs and expectation of

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<sup>265</sup> Also within the MAB programme, the biosphere reserve concept is one to which the recognition of indigenous groups' traditional knowledge and cultural investment in sustainable development is central.

<sup>266</sup> Culture, Education, Science and Social & Human Science sectors.

<sup>267</sup> An example of such an activity could be an interdisciplinary study within the framework of the MAB programme that looks at the protection of the marine ecosystem as a whole, including the human communities that depend on it and sustain it through their traditional knowledge and practices.

<sup>268</sup> Specific actions that UNESCO could take might be support of indigenous and local communities include: identifying what knowledge is sacred and secret and what can be shared with outsiders, exploring traditional means of sharing such information, and raising the awareness of governments of the need for legal protection that secures local ownership of traditional knowledge.

<sup>269</sup> Protecting biological diversity and in relation to genetic resources.

<sup>270</sup> Global System for the Conservation and Utilization of Plant Genetic Resources. This includes the International Undertaking on Plant Genetic Resources, a non-binding agreement aimed at the collection, evaluation, utilisation and availability of plant genetic resources of current or future economic importance. It is currently being revised in harmony with the CBD and is expected to become legally binding.

<sup>271</sup> Sub-Program 11.2 *Biological Diversity and Biotechnology*; includes a Working Group to study the IPR aspects of biotechnology, access to and transfer of technology and the implementation of the CBD.

holders of traditional indigenous knowledge and innovations.<sup>272</sup> This latter is aimed at promoting the contribution of the IP system to their social, economic and cultural development. UNEP and WIPO are collaborating in a study of the impact of IPR systems and traditional knowledge on the conservation and sustainable use of biological diversity and the equitable sharing of benefits derived from its use.<sup>273</sup> UNDP established its Indigenous Knowledge Programme in 1993 aimed at preserving and promoting traditional indigenous knowledge and integrating cultural forms with economic strategies for the benefit of the communities themselves.

A further UN Agency that has been active in considering the protection of traditional knowledge and its implications for producer communities is UNCTAD.<sup>274</sup> Recognising the importance of protection for its preservation and further development, UNCTAD is also concerned with harnessing traditional knowledge for development and trade. Many activities and products based on traditional knowledge are important sources of incomes, food and healthcare for many people in developing countries and the long-term sustainable economic development of many indigenous and local communities may depend on their ability to derive commercial benefit from it. UNCTAD is therefore concerned with building the capacity of countries to exploit opportunities for the commercialisation of traditional knowledge-based products and services and promote innovation based on traditional knowledge.

From UNCTAD's perspective, protection of traditional knowledge should be aimed at preserving traditional knowledge to ensure that the benefits from their innovations go to knowledge holders while allowing developing countries to exploit their traditional knowledge to promote trade and development. In the Plan of Action adopted by UNCTAD's tenth conference, it was agreed that protection of traditional knowledge of indigenous and local communities should be studied, taking account of the objectives of the CBD and TRIPS. Various possible approaches to protection of traditional knowledge set out by UNCTAD<sup>275</sup> are: examination of the extent modern IPR regimes (as specified in TRIPS) can be used or complemented to this end; study of how *sui generis* systems can be designed to take account of the characteristics of traditional knowledge where IPRs cannot; and strengthening/developing existing protection systems based on documentation, building institutions, developing networks and strengthening the use of customary law. On the basis of this, they suggest that States can design their traditional knowledge protection system by choosing from a 'menu' of possible approaches that include strengthening customary law, use of IP rules, *sui generis* systems, prior informed consent and access and benefit-sharing mechanisms and documentation.

WHO has established a Traditional Medicine Programme that aims to support Member States in formulating national policy relating to traditional medicine. Medicinal plants and their associated traditional knowledge are of great significance in modern pharmacological research and for the development of new pharmaceutical products. Plant constituents are used directly as therapeutic agents and also as the raw materials for synthesising drugs or as models for pharmacologically-active compounds. There are as yet no agreed standards for providing legislative controls over the manufacturing, licensing and use

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<sup>272</sup> Sub-Program 11.1 *New Approaches to the Use of the IPR System, IPRs for New Beneficiaries*. The Fact-finding Missions on traditional knowledge undertaken by the Global Intellectual Property Division are discussed below.

<sup>273</sup> In relation to Art. 8(j) of the CBD.

<sup>274</sup> *Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices*, UNCTAD Commission on Trade in Goods and Services, and Commodities, Geneva 30 Oct. -1 Nov. 2000. Background document. [Doc. TD/B/COM.1/EM.13/2].

<sup>275</sup> *Ibid* at 10.

of medicinal plants. These are defined differently in different countries and, in 1996, a WHO scientific group involving 100 experts from around the world adopted a list of medicinal plants widely used in primary healthcare. The herbal medicine market is insufficiently closely controlled in most countries and establishing regulation and registration procedures for the use of medicinal plants has become a major concern of both developing and developed countries. In 2000, WHO organised an interregional workshop to address the IP-related issues of traditional medicinal knowledge.<sup>276</sup>

#### 4.3 Public and private domains

IP rules treat all knowledge as being in the public domain unless protection can be extended to it through patents or other IPRs. This is extremely unsatisfactory for the holders of traditional knowledge, many of whom are indigenous people, since IPRs tend to favour those exploiting traditional knowledge for commercial gain. Dutfield<sup>277</sup> argues that there exist other private domains than those created by the IP system enshrined in customary rules and the failure to respect these is the main problem with that system *a propos* traditional knowledge. The TRIPS Agreement (discussed below) has effectively extended this private domain created by IPRs since its provisions are mandatory on all WTO Member. Furthermore, there is no reciprocal obligation on Member States to recognise the public domains of other States.<sup>278</sup>

It is desirable, then, to return much traditional knowledge back to the private domain of indigenous and other traditional communities and it is necessary to study their customary rules in relation to developing the existing IP system.<sup>279</sup> Where States conduct a policy of making traditional knowledge publicly available, they must be able to protect it from being privatised and ensure that the economic benefits from any commercial exploitation is shared with the tradition-holders themselves.<sup>280</sup> However, this cannot be achieved by any State operating such a policy on its own, and would require some form of international agreement.

#### 4.4 Patents and traditional knowledge

Patents grant the holder a legal monopoly over the commercial exploitation of the intellectual property to which it applies for the lifetime of the patent and permission may be

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<sup>276</sup> Report not yet published. Information communicated by Dr Zhang, Head of the Traditional Medicine Programme at WHO.

<sup>277</sup> Dutfield cited n.255 at p.7.

<sup>278</sup> Carniero da Cunha, M. "The role of UNESCO in the defence of traditional knowledge," paper presented at Washington conference cited n.1 at 4: "As a result, knowledge that has been in the public domain for generations in one country might be privatised and enjoy IPRs in another country. Not only is the original country excluded from its benefits, but a supplementary irony is that the TRIPS agreement obliges it to honor such an intellectual right. What was originally in the public domain in the country comes back, thanks to these regulations, as private property."

<sup>279</sup> *Ibid* at 8-9: "After all, if indigenous peoples in WTO Member States are required to accept the existence of patents that they are economically prevented from availing themselves of, why should their own knowledge-related regimes not be respected by others? It is perhaps this point – that one type of IP system is being industrialized and prioritized to the exclusion of all others – that causes most of the concern, especially among those peoples and communities that cannot benefit from what is to them an imposed system."

<sup>280</sup> The statement of the *Bellagio Conference on Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-colonial Era ('Bellagio Declaration')* (1993) notes that each intellectual property right "fences off some portions of the public domain" and that "...we favour increased recognition and protection of the public domain. We call on the international community to expand the public domain through expansive application of concepts of 'fair use', compulsory licensing and narrower initial coverage of property rights in the first place."

granted by the patent holder for its use through a licensing agreement. The international treatment of patents has been regulated by the Paris Convention<sup>281</sup> that does not create any internationally enforceable patent right but rather sets out the standards to be applied in national legislation. The ownership over components of biological diversity claimed through patents is seen as a major threat to traditional knowledge, as sanctioned and promoted by international trade agreements.<sup>282</sup> The specific drawbacks of applying patents to intangible heritage are set out above.<sup>283</sup> Patents are not generally useful for protecting traditional knowledge that people wish to keep confidential<sup>284</sup> and are not suitable mechanisms to protect most traditional knowledge, even where the holders wish to exploit it commercially themselves. For example, most traditional knowledge cannot be traced to a specific group or community and, even where it does fulfil the criteria of patentability, it is unlikely that the tradition-holders could afford the huge costs involved in acquiring a patent. One suggestion put forward to ameliorate this situation is the development of a database of traditional knowledge (with suitable protections for secret knowledge) that can be used by national patent offices to determine the existence or otherwise of prior art.<sup>285</sup>

However, it should be borne in mind that the holders of patents derived from traditional knowledge sources cannot prevent the communities themselves from continuing to use the knowledge in question.<sup>286</sup> Although there is concern amongst tradition-holders that they should share in the economic benefits of commercial exploitation of their knowledge, this is not the central issue that UNESCO should address. That is the inappropriate use of such knowledge and the dissemination by whatever means of knowledge that is held secret (and often sacred) by the community from which it originates. Many States (including the US and Japan) that do not recognise undocumented traditional knowledge as 'prior art,' thus leaving it vulnerable to patenting. A role UNESCO might play is in helping to develop the principles by which such knowledge can be documented where the holder communities wish it, even in the case of secret and sacred knowledge, and provide technical and financial support for this. Trade secret protection<sup>287</sup> should also be considered for such knowledge since it is traditionally extended to intellectual property that is unpatentable and can be applied to a wide range of information that could include traditional knowledge.

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<sup>281</sup> Cited n. 88.

<sup>282</sup> Nijar, G. S. "Intellectual property rights and the WTO: undermining biodiversity and indigenous knowledge systems," paper presented to *Second Regional Worlds Colloquium for 1999-2000*, University of Chicago, Jan. 2000 at p.2 notes that 75% of plants providing active ingredients for prescription drugs are 'discovered' by researchers because of their use in traditional medicine and that 40% of the world economy is based on biological products and processes.

<sup>283</sup> At notes 70-72.

<sup>284</sup> An exception to this may be the potential for patenting applications of traditional knowledge to practical problems (of harvesting or fishing, for example) as 'technology' since that category can include any knowledge that is useful, systematic and organised to address a specific problem.

<sup>285</sup> India, for example, has launched a programme to create digital databases of its traditional knowledge that will be accessible to the patent offices of other countries in order to prevent patents being granted to foreign companies for traditional Indian medical remedies. It will cost \$1 million, much less than the cost of contesting patents in foreign courts once granted. See: Jayaraman, K S "...and India protects its past online," *Nature* 30 Sept. 1999. An example of such a patent contested by India is that granted by the US on the medicinal use of turmeric, successfully overturned in the US courts, see: "Turmeric patent: India's winning case," *Businessline* 16 Oct. 1998.

<sup>286</sup> Indian farmers, for example, can continue to use the neem seed as a pesticide.

<sup>287</sup> Recognised as a measure against unfair competition by the Paris Convention (Art. 10bis) and the TRIPS Agreement (Art. 39).

#### 4.5. The TRIPS Agreement (WTO)

The TRIPS Agreement was designed to harmonise IPR standards as they apply to trade in order to encourage international trade and provide it with a more secure basis.<sup>288</sup> The Preamble makes it clear that the rights it protects are private rights and thus the knowledge, ideas and innovations of traditional societies viewed by them as a commonly held knowledge is not included in its protection regime. Furthermore, IPR protection is granted only to products that have an industrial application and to innovations that are trade-related whereas most innovations in the public domain are for local use and fall outside TRIPS.<sup>289</sup> The philosophy underlying TRIPS is one that does not recognise innovations that are handed down through generations and that are collectively held. These are both primary characteristics of traditional and local knowledge. This must be taken into account when judging the impact of the TRIPS Agreement on traditional knowledge and other aspects of intangible heritage. TRIPS does not make any explicit reference to traditional knowledge or make any distinction between the knowledge of indigenous peoples and local populations and that of industry. The rights that it provides are clearly intended to be of benefit to commercial entities rather than local communities. Furthermore, indigenous and local communities do not perceive of this knowledge as a commercial asset (in most cases) in the way that such commercial entities do.<sup>290</sup>

The term, scope and enforcement of patents was discussed at the TRIPS negotiations<sup>291</sup> and the resulting provisions state that patent protection in Member States should be no less than 20 years from the filing of the application. Patents are also subject to the general enforcement regulations of TRIPS.<sup>292</sup> TRIPS allows for the patenting of life forms and requires GATT Member States to grant protection to plant varieties through patents, *sui generis* protection or a combination of both.<sup>293</sup> The Agreement also requires Member States to allow for the patenting of micro-organisms and thus places an obligation on them to enact intellectual property legislation that reproduces the IPR regimes of industrialised States and extends patents to 'modified' life forms and plant varieties.<sup>294</sup> Several developing States are creating national legislation to regulate access to biological resources and to protect indigenous knowledge systems in response to these pressures, including *sui generis* rules to

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<sup>288</sup>: “Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to international trade.” (Preamble).

<sup>289</sup> Nijar *op. cit.* n.282 argues that TRIPS therefore aims to reinforce the rights of transnational corporations at the expense of the people and producers of the Third world.

<sup>290</sup> However, several Member States of the WTO have argued that nothing in the Agreement prevents them from implementing national legislation and measures that support the objectives of the CBD, including protection of traditional knowledge through *sui generis* systems.

<sup>291</sup> Uruguay round of the GATT Agreement (1994)

<sup>292</sup> These are general enforcement obligations (Art.41), civil and administrative procedures and remedies (Arts.42-49), provisional measures (art.50), special requirements related to border measures (Arts.51-60) and criminal procedures (Art.61).

<sup>293</sup> Art.27(3)(b) allows for the following exclusions from patentability: “Plants and animals other than micro-organisms, and essentially biological processes for the production of plants and animals other than non-biological and micro-biological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.”

<sup>294</sup> Nijar *op. cit.* n.282 at 5:”This means that the dominant paradigm of the industrialised West for IPRs is globalised.”

protect plant varieties and associated indigenous plant breeding customs and practices.<sup>295</sup> It is a significant point that such *sui generis* laws to protect traditional knowledge systems do not violate TRIPS since it simply stipulates minimum obligations<sup>296</sup> and thus leaves open the possibility for States to establish protection that grants a broader set of rights.<sup>297</sup>

Certain aspects of TRIPS can be seen as favourable to the protection of traditional knowledge. It allows for measures to be taken to protect public health and nutrition and to promote the public interest in sectors of vital importance to socio-economic and technical development.<sup>298</sup> This could be used to protect traditional medical knowledge as well as a range of other traditional forms of knowledge and innovation. This is reinforced by the statement of the objectives of TRIPS that includes that IPR protection should be in a manner conducive to social and economic welfare.<sup>299</sup> The need to develop and use indigenous technologies for the conservation and sustainable use of biological diversity is recognised,<sup>300</sup> and it is possible for States to refuse patents where their commercial exploitation is seen as against *ordre public* and public morality.<sup>301</sup> States that have important traditional knowledge relating to life forms could use this to protect it. The right to prevent the disclosure and acquisition of undisclosed information without consent is protected so long as it is secret, has commercial value because it is secret and that reasonable steps have been taken to keep it secret.<sup>302</sup> This could be used to protect some traditional knowledge that is secret, although the requirement that it is commercially valuable *because* it is secret limits the range of information that could be protected in this way and would not include most sacred knowledge, for example.

#### 4.6 WIPO and genetic resources, traditional knowledge and folklore

Given the close history of co-operation between UNESCO and WIPO over the protection of folklore since the late 1970s, it is important to consider recent initiatives by WIPO in the area of traditional knowledge and folklore and how these may affect UNESCO's own work in relation to these issues. A major impetus for WIPO's recent work in the field of traditional knowledge has been the increasing economic, scientific and commercial value of genetic resources to a wide range of interests with the emergence of modern biotechnology. Furthermore, economic and cultural globalisation have increased interest in other "tradition-based creations" such as expressions of folklore.<sup>303</sup> A synoptic report on the fact-finding missions on traditional knowledge<sup>304</sup> called upon the IP community to provide technical

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<sup>295</sup> *Ibid* at 10 cites a number of examples, including a regional initiative in the *African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources* (OAU).

<sup>296</sup> Art. 1(1).

<sup>297</sup> Third World Network (Penang) has proposed the development of a model law dealing with community IPRs as a response to the WTO's call for new forms of *sui generis* IP protection. See: Posey, D & Dutfield, G *Beyond Intellectual Property: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa, 1997) at p.110.

<sup>298</sup> Art. 8(a) & (b).

<sup>299</sup> Art. 7(b).

<sup>300</sup> Art. 18(4).

<sup>301</sup> Art. 27(2).

<sup>302</sup> Art. 39(2).

<sup>303</sup> *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 26<sup>th</sup> (12<sup>th</sup> Extraordinary) Session, WIPO General Assembly, Geneva, 25 Sept. - 3 Oct. 2000.

<sup>304</sup> Synoptic report *Intellectual Property Expectations of Traditional Knowledge Holders, World Intellectual Property Organization (WIPO) - Draft Report on Fact-finding Missions on Intellectual Property and*



expertise and perspectives to debates in the many arenas of public policy – cultural, trade, food and agriculture, indigenous rights, human rights, biological diversity etc. – in which IPRs are implicated.

In WIPO, “traditional knowledge” refers to:

“Tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and, all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”<sup>305</sup>

“Tradition-based” is itself defined as:

“[K]nowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or territory; have generally been developed in a non-systematic way; and are constantly evolving in response to a changing environment.”

Such categories of traditional knowledge would include: agricultural, scientific, technical, ecological, medicinal and biodiversity-related knowledge; ‘expressions of folklore’ in the form of music, dance, song, handicrafts, designs, stories and artworks; ‘elements of languages’ such as names, geographical indications and symbols; and movable cultural properties.<sup>306</sup> However, the listed categories do not, for example, include human remains, languages in general or ‘heritage’ in a broad-based sense and it is therefore a less holistic view of traditional culture and knowledge than that which UNESCO would employ. As a result, the relationship between “traditional knowledge” and “folklore” itself is unclear with “expressions of folklore” treated as a sub-category of the traditional knowledge. Rather, it would be better to regard both folklore and traditional knowledge as elements within a broader category of intangible heritage. The lack of terminological clarity in this area combined with a multiplicity of terminology employed<sup>307</sup> adds to the complexity of the subject.

In the WIPO *Programme and Budget* for the 1998/1999 biennium, the Global Intellectual Property Issues Division was established<sup>308</sup> to address, *inter alia*, intellectual property rights for new beneficiaries, biological diversity and biotechnology and protection of expressions of folklore. They also included investigating the need for (and possible nature and scope of) new or adapted forms of protection for expressions of folklore including a possible new international treaty. Included in Main Programme 11 were programme areas relating to biological diversity and biotechnology, protection of expressions of folklore and IPRs for new beneficiaries. In relation to the last, ECOSOC<sup>309</sup> and the Conference of the

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*Traditional Knowledge (1998-1999)* published on INTERNET at  
< <http://www.wipo.int/traditionalknowledge/report/index.html> > .

<sup>305</sup> *Ibid* at 4.

<sup>306</sup> *Idem*.

<sup>307</sup> WIPO, for example, uses “traditional knowledge, innovations and culture,” “traditional knowledge, innovations and practice,” and “expressions of folklore” in relation to the general category of “traditional knowledge”.

<sup>308</sup> Its purpose described in a WIPO briefing document as: “a response to the challenges facing the intellectual property system in a rapidly changing world ... [that] ... call for the proactive exploration of new ways in which the intellectual property system can continue to serve as an engine for social, cultural and economic progress for the world’s diverse populations.”

<sup>309</sup> United Nations Commission on Human Rights (Sub-commission on the Prevention of Discrimination and protection of Minorities).

Parties to the CBD<sup>310</sup> have been amongst international agencies to call upon WIPO to provide technical advice and information in relation to groups that have had little or no access to the IP system. WIPO's work in the areas of genetic resources, traditional knowledge and expressions of folklore has grown out of the activities initiated under this programme. The main areas of activity have been as follows.

#### Biological diversity and biotechnology:

This has involved convening a Working Group to study IP aspects of biotechnology and the implementation of the CBD and projects for *in situ* documentation of traditional knowledge relevant to the preservation, conservation and sustainable use of biological diversity towards the equitable sharing of the benefits of such knowledge. Co-operative work with UNEP has been carried out with a study of the role of IPRs in the sharing of benefits from the use of biological resources and associated traditional knowledge. It is questionable how far it will be possible to provide any specific blueprint for achieving this given the great diversity of contexts in which it will take place.<sup>311</sup> Following consultations with Member States,<sup>312</sup> it has been proposed that a body be established within WIPO to facilitate discussions concerning genetic resources and that these should include also "the results of WIPO's previous work in the related fields of traditional knowledge and expressions of folklore".<sup>313</sup>

#### Protection of expressions of folklore:

Viewed as a sub-set of traditional knowledge, WIPO's work in relation to expressions of folklore began in co-operation with UNESCO in 1978 and led *inter alia* to the adoption of the 1982 Model Provisions. Activities of the 1998/9 programme<sup>314</sup> in this area included the Regional Consultations with UNESCO and a fact-finding mission to study the collective management of expressions of folklore by national collecting societies. Among the activities specified for this programme were: specialised training in identifying and documenting folklore; provision of legal and technical assistance for the protection of folklore; and the development of an effective international legal regime for the protection of expressions of folklore. Three of the four UNESCO-WIPO Regional Consultations (1999) recommended that a committee on folklore and traditional knowledge be established in WIPO to facilitate future work in this area.

#### Traditional knowledge:

"Traditional knowledge, innovations and creativity" was identified in 1997 as an important area for WIPO despite potential opposition from some States with concerns over

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<sup>310</sup> Workshop on *Traditional Knowledge and Biological Diversity*.

<sup>311</sup> In the synoptic report cited n.304 at p.20: "However, specific advice having general application on how IP rights should be dealt with in an access and benefit-sharing arrangement to ensure that benefit-sharing is "fair and equitable" in the sense of the CBD is perhaps not possible. The diversity of legal, economic, social, cultural and political situations between and within States prevents the elaboration of prescriptive blue-prints in this regard."

<sup>312</sup> Following the Diplomatic Conference for the Adoption of the Patent Law Treaty, 11 May-2 June 2000 at which a statement was agreed, including the following: "Member State discussions concerning genetic resources will continue at WIPO. The format of such discussions will be left to the Director General's discretion in consultation with WIPO Member States." Cited in *Matters op. cit.* n.303 at p.3.

<sup>313</sup> *Idem*.

<sup>314</sup> According to the synoptic report cited n.304 at p.21 "Generally [in 1998] there was consensus that the WIPO workplan for folklore protection should be expanded significantly to include activities at the national, regional and international levels."

undermining the traditional IP system, especially in the areas of biotechnology and the medicinal use of plants.<sup>315</sup> WIPO also recognises, however, that it cannot address the wide variety of expectations and needs in this area and so must collaborate with other relevant organisations.<sup>316</sup> It is worth noting, however, that WIPO itself questions the efficacy of IP mechanisms for the protection of aspects of traditional knowledge such as spiritual beliefs, dispute-settlement processes, languages, human remains and forms of social and political organisation.<sup>317</sup>

WIPO's work in this area began in 1998/9 with two Roundtables on IP and traditional knowledge<sup>318</sup> and a series of nine fact-finding missions on traditional knowledge, innovations and culture.<sup>319</sup> The aim of the latter was to identify and explore the intellectual property needs and expectations of new beneficiaries, including holders of indigenous knowledge and innovations. The legal strategy identified was to develop and experiment with existing IP tools to protect traditional knowledge<sup>320</sup> in a "bottom-up" approach. The importance of creating an international framework for the protection of traditional knowledge was stressed whereby it can be protected in all signatory States as in any other IP treaty. It was felt, however, that creating multilateral consensus on international norms is unlikely in the short-term and that it would need the development of workable solutions at national level for an agreed international framework to appear.<sup>321</sup> Many States resist any adaptation of IP rules that are seen to undermine the traditional IP system while developing States may have problems with indigenous communities and fear granting them further cultural and economic rights. A greater awareness of the IP system is also needed among holders of traditional knowledge and WIPO can provide technical support in this. A further major issue to be examined by WIPO in the context of traditional knowledge is the role of customary law and its relationship to the modern IP system of protection. Activities planned for the 2000/1 biennium programme include feasibility studies on the applicability of customary laws to protection of traditional knowledge and how the IP system can recognise and use customary law to manage the relationship with knowledge holders.

At the WIPO General Assembly session in autumn 2000,<sup>322</sup> it was agreed to establish an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Some States would like this Committee simply to act as a forum for debate on relevant issues with no mandate to propose the development of any international instrument. Others, in contrast, wish the Committee to serve as a means towards creating

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<sup>315</sup> Interview with Mr R Wilder, ex-Director, Office of Legal and Organizational Affairs, WIPO.

<sup>316</sup> Synoptic report cited n.304 at p.21.

<sup>317</sup> *Ibid* at 8.

<sup>318</sup> *Roundtable on Intellectual Property and Indigenous Peoples*, Geneva, 23-24 July 1998; *Roundtable on Intellectual Property and Traditional Knowledge*, Geneva, 1-2 Nov. 1999.

<sup>319</sup> To: South Pacific (June 1998); Southern & Eastern Africa (Sept. 1998); South Asia (Sept/Oct. 1998); North America (Nov. 1998); Central America (Jan. 1999); West Africa (Jan/Feb. 1999); Arab States (Feb/March 1999); Caribbean (May/June 1999); South America (May 1999).

<sup>320</sup> These include: the registration of collective and certification trade marks; the prevention of unauthorised registration of traditional names that is culturally offensive; the registration of geographical indications; inclusion in patent applications of an indication that traditional knowledge has been obtained with the prior informed consent of the country of origin; the copyright protection of oral works; protection of documentation of traditional knowledge through the original and non-original database protection; protection of the 'moral rights' of traditional knowledge holders; and protection of traditional knowledge through protection of performers' rights.

<sup>321</sup> Synoptic report cited n.304 at p.18.

<sup>322</sup> 26<sup>th</sup> (12<sup>th</sup> Extraordinary) Session, 25 Sept.-3 Oct. 2000

proposals for international legal protection of intangible heritage.<sup>323</sup> The three primary themes for the Committee's discussions concern intellectual property issues arising in the context of: access to genetic resources and benefit sharing; protection of traditional knowledge, whether or not associated with these resources; and the protection of expressions of folklore. It was noted that each of these subjects cuts across the conventional branches of intellectual property law and so they do not fit easily into the remit of the existing WIPO bodies,<sup>324</sup> requiring a new Intergovernmental Committee to address them. This action obviously has implications for any future work in the field of 'folklore' and traditional knowledge planned by UNESCO. If UNESCO is to elaborate a new standard-setting instrument that includes traditional knowledge within the defined scope of protection, it should not attempt to employ legal mechanisms for the protection of the intellectual property rights of this subject matter.<sup>325</sup>

## 5. Indigenous Cultural Heritage

### 5.1 Introduction and definitions

The cultural heritage of indigenous peoples and its protection is an aspect of the wider question of safeguarding intangible cultural heritage that was not addressed explicitly in the 1989 Recommendation. UNESCO's mandate to protect and safeguard each culture and the right of every people, including indigenous peoples, to develop their culture is made clear in the Declaration on the Principles of International Cultural Cooperation (1966).<sup>326</sup> The UN Decade For Indigenous Peoples closes in 2004 and UNESCO is now active in this area with programmes relating to indigenous issues spanning most sectors of the Organisation's activities and a specific policy to treat indigenous peoples' rights in an inter-sectoral manner. It will be important for this to be taken into consideration when planning future work on the international protection of intangible cultural heritage within the Organisation and may well provide the model for an inter-sectoral approach to this work.

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<sup>323</sup> Mission report of Mr S Abada (Chief, Copyright Division) to the 25<sup>th</sup> Session of the WIPO General Assembly, Geneva 25 Sept. – 3 Oct. 2000 in which he states that he supported the value of creating this Intergovernmental Committee as a useful means for developing States to develop legislative approaches adapted for the protection of traditional cultural heritage. He also noted that this could be a positive way of re-launching the debate concerning an effective international protection for this heritage. He added that UNESCO is prepared to work in close co-operation with WIPO in this area in which the mandates of the two Organisations are complementary and that the Director-General of UNESCO is personally attached to the issue of promoting the legal protection and safeguarding of traditional and popular culture as a common heritage of humanity.

<sup>324</sup> Standing Committee on the Law of Patents (SCP); Standing Committee on Trademarks, Industrial Designs and Geographical Indications (SCT); Standing Committee on Copyrights and Related Rights (SCCR); and the Standing Committee on Information Technologies (SCIT).

<sup>325</sup> The relationship of WIPO with the Conference of the Parties of the 1992 CBD where the intellectual property aspects of Article 8(j) and related provisions (dealing with access and benefit-sharing in relation to genetic resources) have effectively been 'franchised out' to WIPO as the specialist agency is one to study as a potential model for UNESCO to follow.

<sup>326</sup> Article 1 reads: "1. Each culture has a dignity and value that must be respected and preserved.

2. Every people has the right and duty to develop its culture.

3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all culture form part of the common heritage belonging to all mankind."

When addressing the question of indigenous peoples and their heritage, we should first understand what is meant by that term. The definition given by Martinez Cobo in his report for ECOSOC<sup>327</sup> is the working definition used in UNESCO and other UN Agencies:

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”

The “historical continuity” referred to may be the continuation over an extended period to the present of several factors, one of which is: “Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style etc.)”. Language is also noted as one of the factors in this historical continuity and the report sets out actions that States should take to safeguard and promote indigenous languages, such as guaranteeing access to the communications media, the provision of mother-tongue education and recording the languages in order to preserve them and related oral traditions.<sup>328</sup> Defined as such, there are approximately 350 million indigenous people in over 70 States who speak indigenous languages. They are frequently marginalised socially, culturally and economically and their human and cultural rights denied. They are also repositories of much of the world’s cultural diversity.<sup>329</sup>

Daes<sup>330</sup> gives a definition of “heritage” in the context of indigenous cultural heritage that makes clear the broad scope of such a concept and the range of international instruments that are of relevance to its protection, from UNESCO’s 1972 ‘World Heritage’ Convention to the 1992 UN Convention on Biological Diversity.

“‘Heritage’ is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected.”

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<sup>327</sup> Martinez Cobo, J. R. *A Study of the Discrimination Against Indigenous Peoples*, (United Nations, New York, 1987) [Doc. E/CN.4/Sub.2/1986/7/Add.4], Special Rapporteur of the Sub-Commission on prevention of Discrimination and Protection of Minorities, UCHCR, Geneva at paras. 379 & 380. ILO Convention no.169 cited at n.316 below defines indigenous peoples as those “who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”; furthermore “self-identification as indigenous or tribal shall be regarded as a fundamental criterion” for identifying them as such. (Art.1(1)(b) and (2)). It should be noted, however, that the UN definition refers only to those groups that have listed themselves as ‘indigenous’ for the purposes of UN activities and not in general to the original inhabitants of a given land.

<sup>328</sup> *Ibid* at para.464: “recordings are particularly appropriate as a means of preserving stories, anecdotes, traditions, history, various cultural activities, theatrical performances and any other event at which indigenous languages are used.”

<sup>329</sup> According to Posey, D.A. “Can cultural rights protect traditional cultural knowledge and diversity?” in Niec, H. *Cultural Rights and Wrongs* (UNESCO Publishing, Paris, 1998) at p.44, Nine countries account for 60% of all languages and 4000-5000 of the 6000 languages of the world are indigenous “strongly [implying] that indigenous peoples constitute most of the world’s cultural diversity.”

<sup>330</sup> Daes, E-I *op.cit.* n.65 at para.25.

This also stresses the central role of heritage in the creation and affirmation of a people's identity. Daes continues by noting that the distinction historically made between cultural and intellectual property is an artificial one from the indigenous viewpoint.<sup>331</sup> Indigenous peoples do not view their heritage in terms of property – a doctrine upon which cultural heritage protection is historically predicated - but rather in terms of the responsibility of the individual and the community. For indigenous peoples, it is “a bundle of relationships, rather than a bundle of economic rights.”<sup>332</sup> A further point that signals potential pitfalls when seeking to provide international legal protection for their heritage, is that it is very difficult to separate this from the question of land rights and self-determination of indigenous peoples.<sup>333</sup> Clearly this will be problematic for many States that have significant indigenous populations, many of which are developing States that are generally interested in developing protection for intangible heritage.

## 5.2 Activities of international and other organisations

### Economic and Social Council (UNHCHR)

In the 1971, the UN Sub-commission on Prevention of Discrimination and Protection of Minorities was tasked with conducting a study on the “Problem of Discrimination against Indigenous Populations” under Martinez Cobo as Special Rapporteur. This was a turning point in UN activities in placing the rights of indigenous populations on the international agenda and defining the terms of reference and the issues to be addressed. As a result, a UN Working Group on Indigenous Populations was established within the Sub-commission made up of five rotating members chosen from twenty-six. It was given a dual mandate of reviewing developments relevant to indigenous populations and deciding on the need to create standards to protect indigenous peoples' rights.<sup>334</sup> This proved to be a great success in providing a forum for discussion with indigenous peoples themselves of whom about 1000 attended meetings, most of whom were not from the NGO system. From these discussions, the later work on the heritage of indigenous peoples developed and there was a recognition of the need for new standards since existing human rights that are, on the whole, individual rights do not meet the needs of indigenous peoples.

These extensive deliberations led to the drafting of the UN Draft Declaration on the Rights of Indigenous Peoples (1994/5),<sup>335</sup> granted a greater legitimacy by the direct involvement of indigenous peoples. The Preamble echoes the 1966 UNESCO Declaration, stating that “... all peoples contribute to the diversity and richness of civilizations and cultures which constitute the common heritage of mankind.” The rights of indigenous

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<sup>331</sup> She gives the example of the peoples of the Pacific Northwest coast of America for whom songs, stories, designs and ecological knowledge connected with salmon are all interrelated parts of their heritage.

<sup>332</sup> *Ibid* at para.26.

<sup>333</sup> *Ibid* at para.4: “The protection of cultural and intellectual property is connected fundamentally with the realization of the territorial rights and self-determination of indigenous peoples. Traditional knowledge of values, autonomy or self-government, social organization, managing ecosystems, maintaining harmony among peoples and respecting their land is embedded in the arts, songs, poetry and literature which must be learned and renewed by each generation of indigenous children.”

<sup>334</sup> *Ibid* at iii states that a primary goal of the study was to provide the basis for appropriate standard-setting and international measures by UN bodies in co-operation with indigenous populations, drafting, enacting and publishing model international legislation and other measures to provide indigenous peoples with some immediate relief from the widespread and growing threats to the integrity of their cultural, spiritual, religious, artistic and scientific traditions and values.”

<sup>335</sup> UN Docs.E/CN.4/1995/2 and E/CN.4/Sub.2/1994/56 at p.105.

peoples to maintain and strengthen their distinct political, economic, social and cultural characteristics along with their legal systems while participating fully in the life of the State is affirmed.<sup>336</sup> Other rights set out that are relevant to the protection of indigenous heritage include: the right to practise and revitalise their cultural traditions and customs,<sup>337</sup> to practise and develop spiritual and religious customs and ceremonies and to privacy and access to religious and cultural sites,<sup>338</sup> to use, revitalise and transmit to future generations their languages and oral traditions<sup>339</sup> and the right to their traditional medicines and health practices.<sup>340</sup> The right to special measures to control, develop and protect their sciences, technologies and cultural manifestations is also affirmed. Of the rights set out in this Draft Declaration, only two<sup>341</sup> that deal with individual as opposed to collective rights have so far been adopted, thus illustrating the difficulties inherent in persuading States to accept the idea of recognising collective human rights.

In 1995, the Principles and Guidelines for the Protection of the Heritage of Indigenous People<sup>342</sup> were adopted by ECOSOC. They state as a general principle that effective protection of indigenous heritage benefits all humanity and that cultural diversity is essential to the adaptability and creativity of humankind.<sup>343</sup> Certain of the specific principles that are worth noting include: recognition of indigenous peoples as the primary interpreters and guardians of their cultural heritage; recognition and respect for their customs, rules and practices for transmission of their cultural heritage; that the ownership and custody of this heritage should remain collective, permanent and inalienable; that free and informed consent of the traditional owners of this heritage is a necessary precondition for recording, studying, using or displaying it; and that any agreements relating to it should be revocable and the peoples themselves should be the primary beneficiaries of any commercial applications from it.<sup>344</sup> The Guidelines require that the owners of this heritage should be determined in accordance with indigenous peoples' own customs, laws and practices<sup>345</sup> that will have a significant effect on the approach to be taken in any legal protection of this heritage. It calls into question the historical view of cultural heritage as a property that has an identifiable owner, be it a State or an individual, rather than a communally held heritage and also gives a value to customary law that is interesting. The Guidelines also cover the transmission of indigenous heritage and the policies to be taken nationally for this,<sup>346</sup> the recovery and restitution of heritage (including human remains), the type of national legislation to be

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<sup>336</sup> Art.4.

<sup>337</sup> Art.12 continues: "... the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature ... to restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs."

<sup>338</sup> Art.13.

<sup>339</sup> Art.14: "The right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literature ..."

<sup>340</sup> Art.14.

<sup>341</sup> Arts.5 & 43.

<sup>342</sup> UN Doc.E/CN.4/Sub.2/1995/26 Annex 1, June 1995.

<sup>343</sup> Principle 1.

<sup>344</sup> Principles 3,4,5,9 & 10.

<sup>345</sup> Guideline 13.

<sup>346</sup> Again there is an emphasis on supporting customary means of transmission by the traditional owners and the incorporation of these rules and practices into national legislation (Guideline 14).

developed for its protection,<sup>347</sup> the activities of researchers and institutions,<sup>348</sup> the activities of business and industry,<sup>349</sup> artists, writers and performers, public information and education and the role of international organisations.<sup>350</sup>

### International Labour Organisation (ILO)

The ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989)<sup>351</sup> is a text of major significance for the rights of indigenous peoples. It responds to the demands by indigenous peoples for collective rights of which the beneficiaries are not individuals but traditional communities. Although the scope of this Convention is much broader than simply the protection of indigenous peoples' heritage, it contains provisions that are of much relevance to this since it is an important element in their identity as peoples and in the assertion of their rights. Government action to protect the rights of indigenous and tribal peoples should include promotion of the full realisation of their social, economic and cultural rights "with respect for their social and cultural identity, their customs and traditions and their institutions."<sup>352</sup> This would have implications for safeguarding intangible heritage through the fostering of communities that create and maintain it. The economic importance of the traditional crafts, knowledge and practices for both cultural and economic reasons is explicitly acknowledged:

"Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development."

An obligation is placed on governments to ensure the strengthening and promotion of such activities.<sup>353</sup> Governments are also required to recognise and protect the social, cultural, religious and spiritual values of these peoples in applying this Convention as well as the integrity of their values, practices and institutions.<sup>354</sup> Due regard must also be given to the customs and customary laws of indigenous and tribal peoples in applying national laws and regulations to them where they are not in conflict with fundamental rights.<sup>355</sup> That they must

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<sup>347</sup> Including: denial of copyright or patent without proof of free informed consent of the traditional owners; ensuring the correct attribution of items of this heritage on public display; ensuring the use of indigenous languages in education, the arts, the mass media etc.; and taking immediate steps to identify sacred and ceremonial sites and protect them from unauthorised entry or use. (Guidelines 26 – 29).

<sup>348</sup> Such as: providing full inventories of the indigenous cultural property or documentation of indigenous heritage that they hold; return of indigenous heritage to their traditional owners on demand; and promoting ethical conduct in conformity with the guidelines (Guidelines 32, 33 and 39).

<sup>349</sup> Beyond the requirement to respect the guidelines for researchers, these also include that no further contracts be issued for the rights to discover and record previously undescribed species "until indigenous peoples and communities themselves are capable of supervising and collaborating in the research process" (Guideline 45).

<sup>350</sup> This includes: full access to indigenous peoples in all negotiations on IPR's; compilation of a confidential list of sacred and ceremonial sites requiring special protection and conservation measures and financial/technical support to indigenous peoples to achieve this; and establishment of a UN trust fund to act as a global agent to recover compensation for inappropriate use or use without consent of indigenous heritage and to assist in developing their institutional capacity to defend their heritage (Guidelines 56, 57 & 58).

<sup>351</sup> ILO Convention no. 169, 27 June 1989.

<sup>352</sup> Art. 2.

<sup>353</sup> Art. 23.

<sup>354</sup> Art. 5.

<sup>355</sup> Art. 8.



not conflict with fundamental rights (as defined in national laws or international human rights law) is important since it avoids the charge that cultural practices that are contrary to human rights would be supported by this text. This is a point that any new UNESCO instrument must also include. The importance of preserving and promoting the development and practice of indigenous languages is also stated<sup>356</sup> and that special educational measures and training programmes should be undertaken to eliminate prejudices and based on the economic, environmental, social and cultural conditions of indigenous peoples.<sup>357</sup>

### Other UN Bodies

In 1992, the Rio Declaration on Environment and Development and Agenda 21<sup>358</sup> attempted to incorporate indigenous peoples' rights within the broader agenda of a global environmental strategy and sustainable development. This recognition of the importance of indigenous knowledge, innovations and practices in sustainable environmental development is articulated in Article 8(j) and related provisions of the 1992 CBD (see below). A recommendation of the World Conference on Human Rights (Vienna, 1993) led to the proclamation by the UN General Assembly of the International Decade of the World's Indigenous People (1995-2004).<sup>359</sup> At the World Conference, some States such as Colombia, Finland, Sweden, Norway and the Russian federation noted the contribution of indigenous peoples and their cultures to their societies and the creation of national identity. The World Summit for Social Development in 1995<sup>360</sup> also noted the need for governments to recognise indigenous cultural identity and their right to maintain and develop it while respecting their traditions and cultural values.

Plant breeders' and farmers' rights were internationally recognised in 1989 following negotiation by the Commission on Plant Genetic Resources of the FAO. In this, the innovative role of farmers (often indigenous farmers) in the conservation and development of genetic resources and their right to benefit from it was recognised<sup>361</sup> but the right was vested in governments and not the farmers themselves. Furthermore, the 1991 revision of UPOV<sup>362</sup> allows for patents to be granted as well as plant breeder's rights for plant varieties, strengthening the rights of commercial plant breeders over those of farmers. This effectively ends their traditional right and customary practice of saving, exchanging and using seeds and selling produce within the traditional market place, thus eroding a traditional way of life. The protection granted under plant breeders' rights requires that a sample of the plant variety is

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<sup>356</sup> Art. 28.

<sup>357</sup> Arts. 22 & 31.

<sup>358</sup> UN Conference on Environment and Development, Rio de Janeiro (1992). Chapter 26 of Agenda 21 states: "Recognizing and Strengthening the Role of Indigenous People and their Communities" emphasises the need to recognise indigenous peoples' traditional values, knowledge and relationship with the Earth. Principle 22 of the Rio Declaration requires States to "recognize and duly support their identity, culture and interests."

<sup>359</sup> UNGA Res. 48/163 of 21 Dec. 1993. Art. 31 notes that "the World Conference on Human Rights urges States to ensure the full participation of indigenous people in all aspects of society, in particular in matters of concern to them."

<sup>360</sup> 6-12 March 1995, Copenhagen, Denmark. The Conference stated that governments will commit themselves to "recogniz[ing] and respect[ing] the right of indigenous peoples to maintain and develop their identity, culture and interests" and show respect for "their identity, traditions, forms of social organization and cultural values."

<sup>361</sup> The FAO Conference Resolution referred to the "rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources" [FAO Doc. Conf. Res. 5/89, 1989].

<sup>362</sup> Nijar *op. cit.* n. 282 at p. 5.

deposited and its stable and homogeneous character is demonstrated through repeated propagation trials, thus effectively excluding most indigenous communities from benefiting from the right. It appears, therefore, that the best means currently open to indigenous people to safeguard their traditional ecological, medicinal, agricultural and spiritual knowledge is simply to withhold it unless licensing arrangements that ensure confidentiality and economic benefit sharing are concluded.

The 1966 International Covenant on Civil and Political Rights (ICCPR)<sup>363</sup> affirms the right of indigenous groups to maintain and freely to develop their cultural identities in co-existence with other sectors of society. Its affirmation of the right of minorities to enjoy their own culture, practise their religion and use their own language also has a direct relevance to indigenous heritage.<sup>364</sup> This norm of cultural integrity<sup>365</sup> has been used as the basis for decisions by the UN Human Rights Committee and the Inter-American Commission on Human Rights (of the OAS) in favour of indigenous peoples. For example, in the case of the Yanomami people of Brazil, the OAS Commission invoked Article 27 of the ICCPR to support the view that international law recognises the right of ethnic groups to special protection for their use of language, religion and other characteristics necessary for preserving cultural identity.<sup>366</sup> The draft Inter-American Declaration on the Rights of Indigenous Peoples (OAS, 1995) also asserts the right to cultural integrity.<sup>367</sup>

Issues that are of great importance to indigenous heritage and relate to cultural integrity concern, for example, their works of art, songs, stories, human remains, oral traditions, scientific and technical knowledge and rituals. The interrelationship of the cultural integrity norm with issues of self-determination and land rights can prove extremely problematic.<sup>368</sup> The reluctance of governments to recognise these related rights can militate strongly against any attempts to assert the cultural integrity norm in relation to cultural heritage alone.

### Mataatua Declaration<sup>369</sup>

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<sup>363</sup> UNGA Res.2200A (XXI), *GAOR Supp.* No.16 (1966) 52.

<sup>364</sup> Art 27 reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

<sup>365</sup> Anaya S. J. *Indigenous Peoples in International Law* (Oxford University Press, 1996) at p.102: "As the international community has come to consider indigenous cultures equal in value to all others, the cultural integrity norm has developed to entitle indigenous groups to affirmative measures to remedy the past undermining of their cultural survival and to guard against continuing threats in this regard."

<sup>366</sup> *Ibid* at p.103 for further details and examples. The Australian Law reform Commission took the view in 1986 that recognition of a group's customary law as an aspect of that group's culture is consistent with the spirit of Art.27 of the ICCPR and Australian law has incorporated Aboriginal customary law into its legislation to protect cultural heritage.

<sup>367</sup> "States shall respect the cultural integrity of indigenous peoples, their development in their respective habitats and their historical and archaeological heritage, which are important to the identity of the members of their groups and their ethnic survival ... States shall recognize, and respect, indigenous life-styles customs, traditions, forms of social organization, use of dress, languages and dialects." OAS Doc.OEA/ser/L/V/II.90 rev.1 (1990) at Art. VII.

<sup>368</sup> As in ILO Convention no.169 Art 13(1).

<sup>369</sup> *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* cited in O'Keefe. P.J. "Cultural agency/cultural authority: politics and poetics of intellectual property in the post-colonial era," 4(2) *Int.J. Cult. Property* (1995) 383. Other similar declarations that can be mentioned in this context include: The Declaration of Santa Cruz (1994) adopted by a regional meeting on intellectual property of indigenous peoples; the Declaration of Temuco-Wallmapuche (1994); the Declaration of Julayinbul on the

The Mataatua Declaration is concerned with the traditional knowledge and cultural property of indigenous peoples and their rights over it. The Preamble states that indigenous peoples are capable of managing their traditional knowledge but are willing to offer it to all humanity if their fundamental rights to define and control it are internationally protected. It also insists that the first beneficiaries of “cultural and intellectual property rights” in indigenous knowledge must be direct indigenous descendants of the creators and holders of that knowledge.

They recommend *inter alia* the development of a code of ethics for the recording of traditional and customary knowledge and the development and maintenance of traditional practices and sanctions for the protection, preservation and revitalisation of traditional cultural and intellectual property.<sup>370</sup> They call upon governments to recognise that indigenous peoples are the guardians of customary knowledge and have the right to control its dissemination and that they have the right to create new knowledge based on their cultural traditions.<sup>371</sup> They call on governments and international agencies to note the inadequacy of existing protection mechanisms and to accept that the intellectual and cultural property rights of indigenous peoples are vested in those who created it.<sup>372</sup> Governments and international agencies are called upon to develop a new legal regime that indigenous peoples rights over their cultural and intellectual property.<sup>373</sup>

### 5.3 UN Convention on Biological Diversity (1992)

The relationship between the traditional knowledge of indigenous communities and biological diversity (‘biodiversity’) is an intimate one.<sup>374</sup> It is the sole international legally binding instrument that explicitly makes reference to protection of traditional knowledge. The traditional knowledge of indigenous and other local peoples in relation to forestry, agricultural and fishing practices and innovations, for example, assures the survival of the environmental resource in question, its sustainability as well as of the people themselves and their way of life. In 1992, the Rio Declaration<sup>375</sup> placed human beings at the centre of sustainable development issues and that indigenous and local communities play a vital role in environmental management and development because of their knowledge and traditional practices.<sup>376</sup>

Addressing the General Conference in 1999,<sup>377</sup> then Director-General of UNESCO Mayor noted that, “[j]ust as the protection of biological diversity is indispensable to the physical health of humanity, so the safeguarding of cultural diversity – linguistic, ideological

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Intellectual Property Rights of Indigenes adopted 27 Nov. 1993, Jingarra, Australia; and the Suva Declaration *op. cit.* n.76.

<sup>370</sup> Points 1.3 & 1.6.

<sup>371</sup> Points 2.1 & 2.2.

<sup>372</sup> Points 2.3 & 2.4.

<sup>373</sup> Point 2.5; this should include collective as well as individual ownership, retroactive protection of historical works, protection against the “debasement of culturally significant items” and a multigenerational span of protection.

<sup>374</sup> This relationship is well-expressed in Glowka, L *et al* *Guide to the Convention on Biological Diversity* (IUCN Environmental Law Centre, 1994) at 48: “[loss of biological diversity] tears at the very fabric of human cultural diversity which has co-evolved with, and depends on, their continued existence. As communities, languages and practices if indigenous and local peoples die out, lost forever is the vast library of knowledge accumulated, in some cases, over thousands of years.”

<sup>375</sup> *Rio Declaration on Environment and Development* of the UN Conference on Environment and Development Rio de Janeiro, 3-14 June 1992.

<sup>376</sup> Principles 1 and 22.

<sup>377</sup> 29<sup>th</sup> session of UNESCO General Conference, Paris 12 Nov. 1999.

and artistic – is indispensable to its spiritual health.” Not only is the survival of biodiversity dependent on the continuance of the (indigenous) cultures that sustain it through practices and innovations based on traditional knowledge, but the cultural diversity that they represent is as important to humanity as biological diversity. For this reason, States should support their identity, culture and interests of which the preservation of their cultural heritage is a part.

The UN Convention on Biological Diversity (CBD) of 1992 emphasises the important role of indigenous and local communities’ traditional knowledge and innovations in the sustainable use of natural resources and the preservation of biodiversity.<sup>378</sup> The CBD gives a primary role to the *in situ* conservation of biological resources which, given the above understanding, involves the preservation of the way of life and know-how of the tradition-holders. This is enshrined in Article 8 (j) that requires each Contracting Party as far as possible:

“ Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustained use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge.”

For a Party to fulfil this obligation requires them to identify and eliminate policies that impact negatively on biodiversity through the erosion of cultural diversity, such as “perverse incentives that encourage over-exploitation and displacement of traditional practices.”<sup>379</sup> It also involves promoting the wider application of traditional knowledge, practices and innovations<sup>380</sup> but with the consent and involvement of the tradition-holders as a community or as individuals. This Article appears to affirm that holders have rights over their knowledge, innovations and practices even if these are not necessarily intellectual property rights as such. The Secretariat of the CBD decided to evaluate the inadequacies of IPRs and to develop guidelines and principles seeking advice on access and transfer legislation to protect tradition-holder communities.<sup>381</sup> Placing an importance on equitable benefit sharing from the use of traditional knowledge recognises the economic value of such knowledge and reflects the unease over granting patents in relation to it.<sup>382</sup> Parties need to develop policies that promote the wider application of such knowledge while ensuring the consent of holders and the equitable sharing of benefits from such application.<sup>383</sup> The protection of customary use of components of biological diversity in accordance with traditional cultural practices is

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<sup>378</sup> Referring to the “cultural, recreational and aesthetic values of biological diversity and its components,” the Preamble states that its conservation is “a common concern of humankind.”

<sup>379</sup> Art. 11.

<sup>380</sup> See Arts. 17(2) and 18(4).

<sup>381</sup> Doc. UNEP/CBD/COP/3/22 (1997).

<sup>382</sup> Art. 16(5) obliges Governments to ensure that patents and other IPRs granted are supportive of the objectives of the CBD and do not undermine them. The position of the Council of Europe in this respect is worth. It notes that benefit-sharing from genetic resources does not necessarily require patenting them but “a balanced system for protecting both intellectual property and the common heritage of mankind.” Recommendation 1425 (1999) of the Parliamentary Assembly on *Biotechnology and intellectual property* (adopted on 23 Sept. 1999 at the 30<sup>th</sup> Sitting) at Point 10.

<sup>383</sup> Actions to achieve this might include legislation that requires the informed consent of holders and the sharing of benefits with them, supporting traditional communities in the protection and control of their knowledge, raising public awareness of the value of such knowledge and developing ethical guidelines for its collection and dissemination.

encouraged.<sup>384</sup> Modern centralised government and legislation have militated against the continuance of such customary use with traditional hunting practices, for example, being regarded as poaching and the community ownership of certain resources ignored. The Convention includes a mechanism for developed countries to provide financial resources to developing countries in order to facilitate their implementation of the Convention's commitments,<sup>385</sup> an important provision that echoes the financial mechanism of the 1972 World Heritage Convention.

Article 8(j) and its related provisions were reviewed at the Nairobi meeting of the Conference of the Parties to the Convention (COP) in May 2000.<sup>386</sup> The "potential importance of *sui generis* and other appropriate systems for the protection of traditional knowledge of indigenous and local communities" is noted and co-operation with WIPO on the IPR-related aspects of the Convention is encouraged.<sup>387</sup> This work may lead to a new treaty dealing with the IPR aspects of biodiversity-related knowledge, innovations and practices or a new Protocol added to the CBD. States are called on to promote the preservation of cultural identities (Point 16) and measures that can be taken to this end are listed.<sup>388</sup> The WTO is also called upon to take account of and further explore the interrelationship between TRIPS and the CBD.<sup>389</sup> The Working Group on the Implementation of Article 8(j) and Related Provisions<sup>390</sup> was assigned the task of developing guidelines to assist Parties in developing legislation (which could involve *sui generis* systems) or other mechanisms for implementing Article 8(j) and the related provisions. It was also asked to define the key concepts in that article and the related provisions that recognise and safeguard the rights of indigenous and local communities over their traditional knowledge.

The Working Group took a holistic approach consistent with the spiritual and cultural values and customary practices of indigenous and local communities. Although Article 8(j) does not create rights that can be enforced by indigenous peoples, it was the first formal opportunity for indigenous peoples to open discussion of these issues at international level. Despite much initial disagreement, the Nairobi meeting reached some form of consensus in an extremely problematic area.<sup>391</sup> What is important for UNESCO, therefore, is to build on this hard-fought consensus without entering areas already dealt with by the CBD. The question of genetic resources, for example, is best dealt with by the CBD while other aspects of traditional knowledge such as traditional medical and botanical knowledge in terms of

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<sup>384</sup> Art. 10(c) reads: "[Parties shall as far as possible] protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;"

<sup>385</sup> Arts. 20 and 21.

<sup>386</sup> See, for example: "Draft decision submitted by the Chair of the contact group on Article 8(j) and related provisions", Fifth meeting of the Conference of the Parties to the Convention on Biological Diversity, Nairobi, 15-26 May 2000 [Doc. UNEP/CBD/COP/5/L.31, 25 May 2000].

<sup>387</sup> Point 14 (V/26 "Access to Genetic Resources"). UNEP and WIPO submitted jointly prepared case studies to COP V on the use of IPRs and sharing benefits from use of biological resources and associated traditional knowledge.

<sup>388</sup> Point 17: "... the development of registers of traditional knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity through participatory programmes and consultations with indigenous and local communities, taking into account strengthening legislation, customary practices and traditional systems of resource management, such as the protection of traditional knowledge against unauthorized use."

<sup>389</sup> Annex III [Doc. UNEP/CBD/COP/5/23] Point B(2) at p.200.

<sup>390</sup> Doc. UNEP/CBD/COP/5/5, 12 April 2000.

<sup>391</sup> Interview with Mr P Bridgewater, Natural Science Sector of UNESCO.

their identification, management and monitoring could dealt with by UNESCO in relation to intangible heritage.

#### *5.4 Specific issues relevant to indigenous heritage*

A central point to be appreciated about indigenous communities and their forms of organisation is the existence of customary rules and law that, although as diverse as the myriad different indigenous groups themselves, shares certain common elements that have a bearing on how any international protection should be crafted. Indigenous heritage is primarily oral in character and is often a communal right that is associated with the family, clan, tribe or other kinship group and only the group as a whole – or particular members within it – may consent to sharing this heritage. There is usually one individual from the group who is the custodian of each song, story, ritual, sacred place etc. and consent for access and/or use granted to outsiders is always temporary and revocable and it cannot be alienated or sold except for conditional use. The tradition-holders retain the right to ensure that their heritage (which may be in the form of traditional knowledge) is used appropriately and that it they are properly recognised and rewarded. Each indigenous community should retain permanent control over all aspects of their heritage although they may choose to share the right to enjoy or use certain elements of it. One outcome of these customary norms is that indigenous heritage cannot be divided into separate legal categories such as ‘artistic’, ‘cultural’, ‘spiritual’ or ‘intellectual’ and this has important implications for the legal protection of this heritage.

Particular questions that need to be taken account of when considering the safeguarding of indigenous heritage include: the protection and use of sacred sites;<sup>392</sup> the recovery of sacred and ritual artefacts that are still in use by indigenous communities; the return and reburial of human remains; the misuse of indigenous artworks that are mass-produced outside the cultural community;<sup>393</sup> control over the traditional materials used in indigenous artworks; communal rights to traditional designs and symbols; protection of elements of traditional music and dance from reproduction by non-indigenous performers; protection of secret knowledge with restricted access; and the commercial exploitation of traditional indigenous medicinal and other knowledge.

These issues have certain policy implications for governments as well as regional and international bodies when dealing with indigenous cultural heritage. It requires State policy to be developed with an understanding of and respect for the various elements of indigenous culture and the right of indigenous communities to maintain and develop it. This implies that a pluralistic policy should be taken in cultural and educational arenas, for example, that respects the cultural heritage of all groups within society and their right to transmit their heritage to future generations. In education, for example, the role of oral tradition and the tradition-holders in the construction of social identity of indigenous communities should be understood and the important role that rituals, ceremonies and songs play in transmitting knowledge must be taken into account. It is important also to provide favourable conditions and opportunities for indigenous youth to use indigenous languages, including through the use of new technologies and the media. The special and spiritual relationship that indigenous peoples have with the land which is fundamental to their beliefs, traditions, customs and culture is a significant issue but one that is extremely difficult for many governments.

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<sup>392</sup> Existing forms of protection of cultural heritage are not always applied to sites of importance to indigenous communities, although States such as Australia, Canada, the US and New Zealand have specific legislation for this.

<sup>393</sup> Such as ‘ikat’ textiles from Sulawesi that can be cheaply machine-made.

The UN system can play a central role in building the capacity of indigenous peoples in the research and documentation of folklore, plant varieties and other elements of their heritage and in developing the infrastructure necessary to monitor and protect it. For example, Daes<sup>394</sup> puts forward the suggestion that a trust fund could be established to act as the “global agent” for protection of and licensing rights to the use of indigenous heritage when requested to do so by the people concerned or when they cannot be identified. However, indigenous peoples’ direct participation and agreement should be sought in any international debate on issues that concern them. The choice of indigenous representatives at international meetings follows the model established by ECOSOC.<sup>395</sup> By involving indigenous peoples in discussions from the start, the process can become as important as the final outcome and much can be learnt from them about customary approaches to protection etc.<sup>396</sup>

As far as the IP system is concerned, what has been written elsewhere in this study (section 3.1) applies equally to indigenous heritage. There are some points, however, specific to indigenous heritage and should be noted here. In copyright law, the requirement to identify an individual author runs wholly contrary to the collective nature of indigenous cultural expressions that would need the recognition some form of communal right and the rights of traditional custodians. The fact that copyright can only apply to original works is problematic in view of the derivative nature of much indigenous culture that has been transmitted over generations, as is the fact that it covers only the actual work and not the idea (or traditional design or theme) underlying it. The requirement that the cultural expression to be protected must be fixed in a material form serves to preclude much indigenous heritage that is oral in nature. The time limits for the duration of IPRs (that may range from 15 to 50 years depending on the right granted) does not recognise the character of indigenous heritage that may have been transmitted over millennia. A protective right that lapses after a few years and then leaves it in the public domain is wholly inappropriate to this heritage. A further problem with the protection of designs through industrial property rules<sup>397</sup> is that they do not protect the integrity of the design itself and so fail to address the needs of culturally or spiritually significant designs.

There are existing IPRs that can be valuable for aspects of indigenous cultural expressions which are: collective trademarks<sup>398</sup> that can be used to protect the characteristic motifs that identify a particular indigenous people; the protection of tribal or clan names as “sequences of words” under trademark rules (that are not limited in duration and simply require registration and continued use); and the registration of geographical origin to verify the authenticity of an indigenous product. However, IPRs do not generally meet the needs of indigenous people and their heritage since they encourage commercialisation that may not be desirable, recognise only market values, are open to economic manipulation and are difficult to monitor and enforce.<sup>399</sup> Furthermore, IP protection can be difficult for

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<sup>394</sup> Daes cited n.65 at para.176 (c).

<sup>395</sup> Whereby the IGO itself does not choose the indigenous representatives but financing is provided for indigenous peoples to send their own representatives.

<sup>396</sup> Interview with Mr J Burger, Economic & Social Council, UNHCHR.

<sup>397</sup> Traditional artistic motifs could be covered by the definition of “industrial designs” given in the Paris Convention as “the ornamental or aesthetic aspect of a useful article.”

<sup>398</sup> Governed by Art.7 bis of the Paris Convention. Canada and the US already use special certification marks to identify authentic indigenous artworks.

<sup>399</sup> Other specific problems of applying IPRs to traditional knowledge and culture are discussed above.

indigenous communities to access and benefit from even where they can be applied to their traditional knowledge.<sup>400</sup>

## 6. UNESCO's 1972 Convention and Recommendation

### 6.1 Revision of the 1972 Convention on the World Cultural and Natural Heritage

Inclusion of intangible cultural heritage within the framework of UNESCO's 1972 Convention<sup>401</sup> was originally considered at the time of its development but was dropped before the final version of the text.<sup>402</sup> This idea still has some attractions in view of the formal mechanism for protection that already exists under the Convention and the responsibility it would place on Parties to value and protect intangible heritage located on their territories. The 1972 Convention has also proved the most successful of UNESCO's Conventions in the cultural heritage field with 158 Parties and 630 World Heritage properties located in 118 States world-wide, exhibiting a great diversity of types of site, monument or group of buildings. Furthermore, the duty placed on Parties to ensure the identification, protection, conservation, presentation and transmission to future generations of the heritage protected covers many of the obligations that are needed in relation to intangible cultural heritage. However, despite being the most widely ratified piece of international cultural heritage law, the 1972 Convention appears so far to have benefited wealthier countries more than the less developed and so means need to be found to recognise the diversity of cultural heritage found world-wide.<sup>403</sup>

A major obstacle to safeguarding intangible heritage within the framework of the 1972 Convention lies in its definition of "cultural heritage" that makes no reference to intangible heritage but focuses on monuments, buildings and sites.<sup>404</sup> It is seen as a Eurocentric definition that takes no account of the intangible aspects of cultural heritage that may be the most significant elements of the heritage of States in Africa, Asia, the Pacific region and Latin America. Only in relation to sites<sup>405</sup> can aspects of intangible heritage be covered by the Convention's terms of reference in the general trend to recognise sites of spiritual importance or in terms of land use,<sup>406</sup> although no explicit reference to intangible cultural heritage is made. A further difficulty is the lack of a clear understanding of the requirement of "outstanding universal value" that elements identified and protected under the 1972 Convention must fulfil. This would need further elaboration if it were to be applied to intangible heritage in a meaningful manner. The existing mechanism for the nomination and evaluation of items for inclusion in the World Heritage List is cumbersome (although currently under revision in order to make it more user-friendly) and extending its remit to

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<sup>400</sup> Posey *op. cit.* n.329 at p.47: "Even if intellectual property rights were secured for communities, differential access to patents, copyright, know-how, trade secrets laws and legal aid would generally price them out of any effective registry, monitoring or litigation using such instruments."

<sup>401</sup> Convention concerning the Protection of the World Cultural and Natural Heritage, 16 Nov. 1972 [11 *ILM* 1358].

<sup>402</sup> Intangible cultural heritage was initially included in the travaux préparatoires for the Convention but this is not made explicit in the definition given in the final text.

<sup>403</sup> Perez de Cuellar (ed.) cited n.8 at p.178.

<sup>404</sup> Art.1 gives the elements of 'cultural heritage' as monuments, groups of buildings and sites.

<sup>405</sup> The "works of man or the combined works of man and nature."

<sup>406</sup> This is reflected in recent changes to the Convention's *Operational Guidelines* discussed below.



intangible heritage would simply exacerbate this. A new set of criteria for the evaluation of nominated items would have to be developed to address the specific needs and character of intangible heritage.

For these reasons, it would prove difficult to draft an Additional Protocol to the 1972 Convention for the protection of intangible heritage since this would require redrafting of core parts of the existing Convention, in particular its definition of cultural heritage. The same argument holds true for revision of the Convention in any way to extend its scope to intangible heritage. A further practical point relates to the provisions in the Convention that allow for its revision<sup>407</sup> whereby a revised Convention would be binding only on those States that become Parties to it. This could lead to a very unsatisfactory situation where some States were Parties to the 1972 Convention and others Parties to the revised Convention. This situation might last for many years with certain States prevented by internal conflict, natural disaster or political instability from taking the necessary steps to adopt the amendments. It is a strategy that would risk jeopardising the undoubted success of the existing Convention. Furthermore, when the question was considered in the early 1990's, it was decided that it would require as much work as developing a new instrument altogether and thus did not offer any advantages over such an exercise. For this reason, any protection to be extended to intangible heritage through the Convention itself can be better achieved by redrafting and/or reinterpretation of the *Operational Guidelines* to that Convention.<sup>408</sup> This is obviously only of limited protective value and should therefore be seen as an exercise that is complementary to other actions designed to secure better international protection for intangible heritage.

## 6.2 *The Operational Guidelines to the Convention*

In 1992, the World Heritage Committee conducted a study on the question of amending the Convention in terms of its existing subjects of protection – monuments, sites and groups of buildings. One of the proposals made was for the inclusion of intangible cultural heritage in the subject matter of the Convention. The Committee decided that revision of the *Operational Guidelines*<sup>409</sup> to the Convention would be a more effective means of achieving this end. The *Guidelines* were revised in 1992 to incorporate the concept of cultural landscapes and sacred sites and in response to an appreciation that the listing procedure favoured cultures with highly developed architectural traditions over those whose cultural expression take other forms.<sup>410</sup> The sites of Uluru in Australia and Tongariro in New Zealand, for example, were listed under the new category of “associative cultural landscapes.” Such landscapes are to be included in the List for the powerful religious, artistic or cultural associations of their natural elements rather than material cultural evidence that may be either insignificant or even absent. These two sites had originally been listed as natural heritage sites, a move which outraged the indigenous communities associated with them since it did not take into account their cultural importance as sacred sites.<sup>411</sup>

The ability to amend the *Guidelines* in this way illustrates the efficacy of the model of a ‘skeleton’ Convention that can evolve to meet new challenges by the amendment of detailed guidelines for its implementation. It is a model that would be very useful for safeguarding

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<sup>407</sup> Art. 37(1).

<sup>408</sup> For further on this point, see discussion below of the *Operational Guidelines*.

<sup>409</sup> The most recent version is the 1998 revision [UNESCO Doc. WHC.99/2, March 1999].

<sup>410</sup> The adoption of a Global Strategy aimed at improving representativity of the World Heritage List led to an extension of the concept of cultural heritage in the Convention to a more global ‘anthropological’ approach which views material remains within their wider social and cultural context i.e. the intangible elements.

<sup>411</sup> See Simmonds *op. cit.* n.427 at p.263 for further details.

intangible cultural heritage that is constantly evolving and facing new threats. In 1998, the *Guidelines* were again amended to take account of customary laws relating to sites, a change that introduces another important aspect of intangible heritage. The criteria for listing a cultural property set out in this version of the *Guidelines*<sup>412</sup> include that it should be an outstanding example of a traditional form of land-use representative of a culture (or cultures) or be directly or tangibly associated with events, living traditions, beliefs, ideas or artistic and literary works of outstanding universal significance. These criteria clearly relate to aspects of intangible cultural heritage and reflect the fact that the Convention can be applied to it, albeit in a limited way.

A more fundamental revision of the *Guidelines* is currently taking place that will change their whole structure as well as introducing new sections on, amongst other matters, the issues of authenticity and integrity. A central question in this debate is what aspects of living cultures should be protected and how to avoid ‘fossilising’ a living, evolving culture by the listing process. The most complex aspect of the debate surrounding revision of the *Guidelines* relates to the criteria of authenticity and integrity for cultural and natural properties nominated for the List.<sup>413</sup> Issues that have arisen in this context that are of direct relevance to intangible heritage include placing an emphasis on language and other forms of intangible cultural heritage, enlarging the definition of integrity and clarifying the role of local communities in all stages of the nomination and management processes.

The existing criteria for authenticity of a cultural property emphasise physical and material elements and several types of site and property common in different parts of the world are currently missing from the List.<sup>414</sup> Intangibles such as know-how, workmanship and the value-system and context of creation should also be included also in the criteria of authenticity.<sup>415</sup> Indeed, often these intangibles related to a cultural property is more important than the object itself<sup>416</sup> and the distinction made between tangible and intangible heritage is a false one.

The ‘integrity’ of natural properties is also under discussion, a notion that embraces cultural, religious or customary systems related to the landscape and is particularly relevant to “sites with strong associations with intangible heritage.”<sup>417</sup> This view of the integrity of the site places an emphasis on the taboos, ideas, myths, values, cultural norms and traditional knowledge of the local people (often supporting the sustainability of the site). It is proposed that new sections be added to the *Guidelines* that explicitly refer to the intangibles associated with nominated sites. These will note the need to refer to traditional forms of protection in site management plans, for more importance to be given to the role of local and tradition-holders in evaluating and managing sites and that language should play a greater part in conservation policies with greater research into oral traditions and their links to the material heritage. Furthermore, a comparison should be drawn between the national and regional importance of properties and sites and their ‘outstanding universal value.’ This introduces an

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<sup>412</sup> At Point 24.

<sup>413</sup> This was the subject of an Expert Meeting on “Authenticity and Integrity in an African Context” held in Zimbabwe on 26-29 May 2000 [UNESCO Doc. WHC-2000/CONF.202/INF.13].

<sup>414</sup> Such as land use patterns, sacred and ceremonial places and traditional technical know-how.

<sup>415</sup> For example, revision of criterion (iii) to include notions of cultural tradition and living civilisation and amendments to criterion (iv) to include technical heritage, cultural landscapes and forms of land use.

<sup>416</sup> As Art. 7 of the Nara Document states: “Conservation of the cultural heritage in all its forms and historical periods is rooted in the values attributed to the heritage.”

<sup>417</sup> Cited n.413. A suggested definition of integrity given at p.30 is interesting, “embrac[ing] cultural, religious, or customary systems and taboos that sustain the complete structure, diversity and distinctive character of natural properties and cultural landscapes.”

essential reference to the local value that such elements have and reflects the need to emphasise it alongside signalling the universal importance they may have as a part of the universal heritage of humankind. The lack of any definition of ‘outstanding universal value’ in the Convention has been one of its main failings since this is one of the defining criteria for the inscription of properties and sites in the List.<sup>418</sup>

### 6.3 *The 1972 Convention as a model for a new instrument*

The question to address, therefore, is whether the 1972 Convention itself provides a useful model for the development of a new instrument for safeguarding intangible heritage. The Preamble notes the threats to cultural heritage posed by “changing social and economic conditions” which is directly relevant to the potential loss of traditional cultural heritage in the face of technological advances and globalisation. A central principle on which protection under the 1972 Convention is predicated is the universal character of the cultural and natural heritage.<sup>419</sup> This is a notion that can prove to be a very powerful strategy for protection by raising awareness of cultural heritage and its value to all people and societies and not just to those most closely related to it. It is also the basis for an obligation on all States to take measures to safeguard both the heritage located on their territories and that located in other States Parties. This argument is particularly strong in relation to intangible cultural heritage given its importance to the preservation of cultural diversity and pluralism in the modern world.

It could also, however, prove problematic when applied to intangible heritage (including traditional knowledge) if it led to expressions of that heritage being treated as in the public domain and to the holders being denied control over its use and exploitation. The notion of a universal heritage must therefore be very carefully employed in such a way as to stress the fact that this heritage is primarily a local one. Use of the notion of intangible heritage as a ‘universal heritage of humankind’ should be limited to the responsibilities that this places on the international community and on individual States to safeguard it and cultural diversity. Furthermore, it is preferable that this is presented as a ‘universal interest’ in safeguarding intangible heritage to avoid association with the notion of a ‘common heritage of mankind’ as applied in international law to natural resource exploitation of common space areas. It should also be made clear that this does not place all such heritage in the public domain or deny the holders control over it. The concept of universality is insufficiently explained in the 1972 Convention and it needs further elaboration if it is to be applied to intangible aspects of cultural heritage.

The territorial State is required by the Convention to do all it can within its own resources and with international co-operation where necessary to ensure the identification and preservation of this heritage.<sup>420</sup> This is an important duty and one which any new instrument to safeguard intangible cultural heritage should include, although the specific measures to be taken<sup>421</sup> would need substantial amendment to take into account the needs of this heritage and

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<sup>418</sup> This difficulty almost prevented the adoption of the 1972 Convention. Since a consensus could not be found for the criteria of ‘outstanding universal value’ during its drafting, it was decided that the criteria for listing in the *Guidelines* to the Convention should serve as the criteria for this notion.

<sup>419</sup> Article 6 states the fundamental principle of the universal nature of this heritage, requiring Parties to recognise that it “constitutes a world heritage for whose protection it is a duty of the international community as a whole to co-operate.”

<sup>420</sup> Art. 4.

<sup>421</sup> Measures set out in Art. 5.

its holders. The requirement that States should adopt a general policy to give the heritage “a function in the life of the community”<sup>422</sup> is particularly relevant to intangible heritage and a potentially useful provision is that Parties should help each other in the identification and protection of the heritage.<sup>423</sup> This could prove valuable where cultural traditions straddling borders are concerned or where the heritage in question relates to a minority culture in one Party but belongs to the culture of the majority in another.<sup>424</sup> It can also be helpful where some Parties<sup>425</sup> have advanced legislative and administrative systems for the preservation of traditional heritage and can share their experience with other Parties.

An important principle in this Convention is that “the international protection of the world cultural and natural heritage should be understood to mean the establishment of a system of international co-operation and assistance designed to support State Parties. in their efforts to conserve and identify that heritage.”<sup>426</sup> The mechanism to be established to this end is set out in detail in Articles 8 to 26. Such a system of international co-operation for safeguarding intangible heritage could be justified on the basis of its value to all humankind as a tool in preserving cultural diversity in the world. It is important to note that the Convention in no way undermines State sovereignty over listed properties in its territory through some form of ‘internationalisation’ of those properties.<sup>427</sup> Articles 8 to 14 deal with the establishment of the World Heritage Committee whose role is to select properties for inclusion in the World Heritage List and the List of world Heritage in Danger.<sup>428</sup> If such a system were applied to traditional culture and folklore, the Committee would need a diverse membership that reflects the diversity of peoples and communities concerned.<sup>429</sup>

Obviously, the quality of the criteria for selection of intangible heritage would be crucial to ensure the legitimacy of the list and would need to be extremely carefully drafted. The existing criteria for the selection of ‘masterpieces of oral and intangible heritage’<sup>430</sup> provide a useful starting point for this while recent revisions of the *Operational Guidelines* to the Convention also inform this process. The flexible character of the *Operational Guidelines*

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<sup>422</sup> Art.5(a).

<sup>423</sup> Art.6(2).

<sup>424</sup> The issue of protecting transfrontier cultural heritage is a central and complex one when considering an international instrument for safeguarding traditional culture and folklore that has been as a potential obstacle to such an instrument.

<sup>425</sup> Such as Japan, Korea and the Philippines which all have systems of nominating ‘Living Human Treasures’ that could provide a useful model for other States to follow.

<sup>426</sup> Art.7.

<sup>427</sup> Simmonds, J “UNESCO World Heritage Convention,” 2:3 *Art, Antiquity and Law* (1997) pp.251-281 at p.253: “[t]he Convention in no way ‘internationalises’ outstanding property, but rather emphasis that the primary responsibility for it lies with international co-operation and assistance in a supplementary role. The more radical approach would have established a distinct and novel international heritage, administered by an international agency.”

<sup>428</sup> From properties nominated by Parties and on the basis of criteria set out in the *Operational Guidelines* to the Convention.

<sup>429</sup> This applies also to the membership of the jury for the ‘Masterpieces of Oral and Intangible Heritage’ programme discussed below.

<sup>430</sup> Discussed below.

governing the selection criteria of the World Heritage Committee is of particular interest since it allows for re-evaluation in the light of changing world conditions and new ways of thinking about heritage.<sup>431</sup> Such flexibility would be important in relation to intangible heritage since it is a diverse heritage that may evolve over time with many different interest groups. It would be important also that reference is made to those elements of this heritage that are by their nature secret and not to be disclosed and to the interests of the relevant cultural communities.

The financial measures to support Parties in identifying and conserving this heritage are provided for in Articles 15 to 18 that deal with establishing the World Heritage Fund.<sup>432</sup> This mechanism can be seen as the key to the success of the 1972 Convention and is a model that should be seriously considered if developing an instrument for safeguarding intangible heritage. Lack of financial (and other) resources to carry out the necessary tasks of identification, conservation and preservation of intangible heritage are frequently cited by Member States as a major obstacle to implementing the 1989 Recommendation.<sup>433</sup> Under the conditions and arrangements for international assistance for the identification and protection of the protected heritage (Articles 19 to 26), international assistance to national or regional centres for training staff and specialists at all levels.<sup>434</sup> This could be used to build the capacity of local communities for safeguarding their traditional heritage. Further provisions on educational programmes to strengthen appreciation and respect for world cultural and natural heritage<sup>435</sup> could also usefully be applied to intangible heritage.

There are certain aspects of the 1972 Convention and its administration that are of particular interest when considering it as a model for a new standard-setting instrument for safeguarding intangible cultural heritage. The first of these is the establishment of the World Heritage Fund and the financial measures that accompany it. Lack of financial resources to implement measures such as those set out in the 1989 Recommendation is a common problem for non-industrialised States that have much intangible heritage to safeguard. Although expert bodies such as ICOM and ICOMOS have had an advisory role in relation to UNESCO's other cultural heritage Conventions, the role of ICOMOS and IUCN is set out formally in the *Operational Guidelines* to the Convention.<sup>436</sup> The existence of a permanent Secretariat dedicated to overseeing this Convention, although not required by the text itself,<sup>437</sup> is a further development that provides a greater profile to the operation of the Convention. It is worth considering whether the operation of a new standard-setting instrument developed on the model of the 1972 Convention could also be overseen by the World Heritage Centre. In this way, the aim of associating the safeguarding of intangible heritage with the 1972 Convention could be achieved. A major innovation of the 1972 Convention was the

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<sup>431</sup> The revision of the *Operational Guidelines* is discussed below.

<sup>432</sup> This is to be funded by subventions from Parties equal to 1% or more of their annual UNESCO subvention and by further private donations, fundraising etc.

<sup>433</sup> See, for example, the discussion of the Regional Seminars on the application of the 1989 Recommendation at Section 3.4.

<sup>434</sup> Art. 23.

<sup>435</sup> Arts. 27 & 28.

<sup>436</sup> Points 57 and 61 set out their role in evaluating nominations by Parties as to whether they satisfy the criteria and conditions of authenticity and integrity. ICOMOS evaluates cultural properties while IUCN evaluates natural properties; they will jointly evaluate cultural landscape nominations.

<sup>437</sup> The World Heritage Centre was established 20 years after the adoption of the Convention.

establishment of an Intergovernmental Committee for the Convention.<sup>438</sup> In view of the diverse and complex character of intangible heritage, it might be better to consider the establishment of a series of Scientific Committees of experts nominated by UNESCO with the agreement of Member States to deal with different aspects of this heritage. The 1972 Convention can thus provide a useful model in terms of the general principle of protection it provides as well as certain of its mechanisms and administrative structures. Development of these mechanisms and structures in relation to intangible heritage would also plug a gap in terms of the current lack of international machinery for this heritage. For example, an expert body equivalent to ICOMOS or IUCN (possibly built around the Jury for the 'Masterpieces' programme) could be established under the framework of such a Convention. This would be an important step in providing a formal body to oversee the international safeguarding of intangible heritage and one that places it on an equivalent level of importance with tangible elements of cultural heritage.

It is necessary, then, to consider whether the underlying principle of identifying a few outstanding examples for inclusion in a World Heritage List is the most appropriate system for protecting elements of intangible heritage. The programme for proclaiming elements of intangible heritage 'Masterpieces of Oral and Intangible Heritage' that is currently considering nominations is modelled on the general philosophy of the 1972 Convention but is not established on the basis of any international instrument, binding or otherwise. It can offer a valuable background to the development of a new instrument by (a) providing the basis for developing the criteria for selection (b) clarifying the concept of intangible heritage through States' nominations to the international Jury and (c) identifying priority areas to address. It is questionable, however, whether the model of a World Heritage List is appropriate to a heritage that is so varied and whose value is often found in its mundane qualities. It is uncertain that the selection of a few 'outstanding' examples could either do justice to or effectively safeguard such a heritage.

In conclusion, the 1972 Convention contains elements that offer a useful model in terms of the general principles of protection on which it is based and the specific mechanisms set up to achieve these. It represented a major conceptual leap forward through the decision to link cultural and natural heritage in one instrument<sup>439</sup> and recognising the need to provide international protection for intangible heritage is a similar breakthrough. Unlike the sites and monuments that are subject to the protection of the 1972 Convention, intangible heritage does not yet have a fully developed system of international protection and so establishing an instrument based on a listing system needs careful consideration. It is important that the principles for protecting this heritage and the obligations to be placed on Parties in order to achieve them are clearly identified. There are aspects of this Convention that need to be adapted if they are to be applied to intangible heritage. For example, the concept of 'outstanding universal value' needs further clarification and possible adaptation to include notions such as the uniqueness of the heritage or that it is an archetypal example. Characterisation of intangible heritage as a universal heritage of humankind is important to justify international action for its safeguarding but must be approached with care. The operation of a World Heritage List with its procedures for nomination and monitoring must be carefully structured in a manner appropriate to intangible heritage. Finally, the selection criteria for nominations to a List and the composition of the Committee are areas that need

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<sup>438</sup> Similar Intergovernmental Committees now exist also for the 1970 Convention and the 1999 Second Protocol to the 1954 Hague Convention.

<sup>439</sup> Originally, two separate instruments were under development under the aegis of ICOMOS for cultural heritage and IUCN for natural heritage.

particular attention if they are to be appropriate to the needs of this heritage and its holders. Recent developments in relation to the *Operational Guidelines* to the Convention as well as the experience of developing a nomination system for the ‘Masterpieces’ programme will be helpful in respect of these last two points.

#### 6.4 The 1972 Recommendation

The 1972 Recommendation<sup>440</sup> was developed alongside the 1972 Convention, thus providing for a ‘dual-track’ system of protection whereby certain outstanding examples of this heritage would be protected through the operation of a World Heritage List<sup>441</sup> and Member States encouraged to protect all components of this heritage nationally.<sup>442</sup> The 1972 Recommendation has not been much implemented by Member States, but it does contain provisions of relevance intangible heritage. If the decision is taken to develop a new standard-setting instrument on the model of the 1972 Convention, accompanying it with a similar Recommendation should be seriously considered since it would encourage States to protect intangible heritage nationally and provide guidance as to what measures to take. Since States have frequently expressed a wish for such guidance, it would answer a clear need. Containing sixty-six points, it is a comprehensive survey of legislative and administrative measures and general principles for national protection of the cultural and natural heritage. Part III contains general principles to be applied in protecting this heritage, Part IV sets out the organisation of services to achieve this (Points 12-17), Part V the protective measures (Points 18-59),<sup>443</sup> Part VI the educational action to be taken (Points 60-65) and Part VII various forms of international co-operation (Point 66).

Under Part III (general principles), it calls for States to value and safeguard cultural and natural heritage as a whole and not just the “outstanding items.”<sup>444</sup> In this way, the Recommendation makes it clear that it is concerned with the wide range of cultural and natural heritage that would not meet the criteria for nomination to the List as would be the case of much intangible heritage. Increasingly significant financial resources should be made available by public authorities for the “safeguarding and presentation” of this heritage and private sector financing should also be considered<sup>445</sup> which could be relevant to the economic independence of cultural communities. Positive action should be taken that “give[s] each of the components of this heritage a function which will make it a part of the nation’s social, economic, scientific and cultural life, compatible with the cultural ... character of the item in question.”<sup>446</sup> This is interesting since would reflect the importance of the wider context in which intangible heritage operates while respecting its special character and the needs of its

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<sup>440</sup> Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, Paris 16 Nov. 1972.

<sup>441</sup> Through the application of the 1972 Convention.

<sup>442</sup> By enacting the provisions set out in the 1972 Recommendation.

<sup>443</sup> Sub-divided as “Scientific and technical measures,” “administrative measures,” “legal measures” and “financial measures.”

<sup>444</sup> Part III Point 5: “The cultural and natural heritage should be considered in its entirety as a homogenous whole, comprising not only works of great intrinsic value, but also more modest items that have, with the passage of time, acquired cultural or natural value.”

<sup>445</sup> Part IV Points 10 and 11.

<sup>446</sup> Part III Point 9.

holders. The point that “[t]ourism development programmes involving the cultural and natural heritage should be carefully drawn up so as not to impair the intrinsic character and importance of that heritage”<sup>447</sup> bears on an issue of great significance for the management of intangible heritage. Recognition that responsibility for protection should lie equally with regional and local bodies as well as national authorities<sup>448</sup> is important in view of the local character of most intangible cultural heritage.

Part V (protective measures) includes the requirement that Member States should provide for regular surveillance of components of this heritage,<sup>449</sup> a measure that would stretch the resources of many developing States with a rich intangible heritage. This is true also for the requirement to draw up an inventory of the heritage in question and to publish regularly the information obtained.<sup>450</sup> However, they are measures that are fundamental to safeguarding intangible heritage and serious thought should be given to the possibility of financial and technical support to developing States to carry out such work. An interesting provision is that States should conduct an enquiry into “the social and cultural needs of the community” in which a group of buildings is situated.<sup>451</sup> This, if applied to intangible heritage would be a very valuable measure that could help in fostering the communities that create and maintain it. In general, the Recommendation recognises the importance of local empowerment and the use of ‘bottom-up’ measures for protection and development. This is an important approach when dealing with intangible heritage where the needs of cultural communities are central to issues of protection.

## 7. Conclusions and Recommendations

Safeguarding intangible cultural heritage is an important challenge facing the international community - in particular UNESCO - and one that must be met both urgently and effectively given the powerful economic and cultural forces that threaten it. For many population groups, intangible heritage represents a basic source of identity that has been passed down through many generations. For some, especially indigenous populations, it is essential to their very existence and way of life. It also has a great importance in its role in preserving cultural identity, a point stressed at the 1997 General Conference of UNESCO, and thus as a universal heritage of humanity. It also has an importance to States in both social and cultural terms and can contribute significantly to the economies of developing countries. For some States,<sup>452</sup> oral cultural traditions represent the most important element in cultural heritage. Given the vulnerability of intangible heritage in the modern world, its preservation through documentation and preservation of the human context in which it is created and maintained is increasingly urgent.

A growing interest in intangible heritage (in particular traditional knowledge and indigenous heritage) in various intergovernmental bodies such as WIPO, ECOSOC, the CBD Secretariat and UNCTAD makes a contribution by UNESCO to this issue all the more

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<sup>447</sup> Part IV (Organization of Services) Point 15.

<sup>448</sup> Part IV Point 17.

<sup>449</sup> Part V Point 19.

<sup>450</sup> Part V Points 29 and 30.

<sup>451</sup> Part V Point 26.

<sup>452</sup> Particularly in Africa and the Pacific region.



necessary. UNESCO has historically been most closely involved in the safeguarding of intangible heritage ('traditional culture and folklore') and is the organisation whose mandate is most suited to addressing this heritage in a holistic manner appropriate to the needs of its holders. Existing international instruments in both the cultural heritage and intellectual property fields are inadequate to safeguarding this heritage and the development of a new standard-setting instrument by UNESCO would be an important move in providing protection. The educational value of the process of negotiating an international instrument is an important factor to consider, especially in view of the poor understanding of the issues of protection amongst governments and other interested parties. Existing UNESCO programmes relating to the oral and intangible heritage (discussed above) can complement a new instrument as well as inform its development.

### 7.1 *Objectives of a new instrument*

The objectives for developing a new standard-setting instrument for safeguarding intangible heritage are many and represent a variety of interests, some of which may be incompatible with each other. For this reason, the issue of who should be involved in the process of defining these objectives is a key one. The following represent a number of such objectives that have been identified during the conduct of this study. These can be broken down into the following three categories:

#### a) Those that exist but need restating

- The formal inclusion of intangible elements within the concept of cultural heritage.
- Recording and inventorying of oral heritage and customs in danger of dying out (including languages).<sup>453</sup>
- Revitalisation of the living creative process of traditional culture.<sup>454</sup>

#### b) Those that would be strengthened by an instrument

- Enabling cultural communities to continue to create, maintain and transmit it in the traditional context.<sup>455</sup>
- Taking account of the religious significance and social/cultural function of a site or monument as well as the linguistic and oral traditions that surround it.<sup>456</sup>
- Prevention of the unauthorised use and distortion of expressions of intangible heritage.<sup>457</sup>
- Restitution of items of cultural property associated with intangible heritage.<sup>458</sup>

#### c) Those that require an instrument to be achieved

- Establishing a system of international assistance to enable States to carry out measures for safeguarding.<sup>459</sup>

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<sup>453</sup> Noted during the 1995-1999 Regional Seminars as a remaining high priority for many States.

<sup>454</sup> Point raised at 1993 Expert Meeting cited n.201.

<sup>455</sup> Gruzinski cited n.197.

<sup>456</sup> This point relates to the 1998 and 2000 revisions of the *Operational Guidelines* to the 1972 Convention.

<sup>457</sup> A central objective of States voiced at the joint UNESCO-WIPO Regional Consultations in 1999.

<sup>458</sup> This is particularly important to indigenous communities.

- Raising awareness of the value (to particular societies and to the world) of intangible heritage.<sup>460</sup>
- Safeguarding cultural diversity.<sup>461</sup>
- Ensuring the transmission of intangible heritage to future generations.<sup>462</sup>
- Protection of the informant as a transmitter of intangible heritage.<sup>463</sup>
- Identification of customary rules and approaches for safeguarding that can be employed.<sup>464</sup>
- Involving tradition-holders in the preservation, planning and management of intangible heritage.<sup>465</sup>
- Respect for customary rules and practice regarding the secrecy of certain traditional knowledge.<sup>466</sup>

A further proposal is the inclusion of spiritual culture in the subject of protection.<sup>467</sup> In view of the controversial nature of this as an objective of a new instrument, it is advisable to consider achieving this through drawing the attention of governments to their obligation to respect the right of religious and linguistic minorities to enjoy their culture.<sup>468</sup>

## 7.2 *Developing a new standard-setting instrument*

There are certain issues to be aware of when developing a new standard-setting instrument, in particular an international Convention, in the area of intangible heritage. First is the complexity of identifying the terms of reference for such an instrument and the legal mechanisms for protection. However, there has been much work in this area both since the development of the 1989 Recommendation in various intergovernmental bodies<sup>469</sup> that can greatly inform this process as can the experience gained from the implementation of the Recommendation and the associated UNESCO programmes.<sup>470</sup> The drafting of a workable definition for such an instrument is a task that will initially require an interdisciplinary group of experts to bring together the various aspects of this work, identify the priority areas for

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<sup>459</sup> During the 1995-1999 Regional Seminars, many States cited a lack of infrastructure, training and financial resources as an obstacle to implementing the measures set out in the 1989 Recommendation.

<sup>460</sup> Point raised at 1993 Expert Meeting cited n.201.

<sup>461</sup> Noted during the 1995-1999 Regional Seminars.

<sup>462</sup> Noted during the 1995-1999 Regional Seminars.

<sup>463</sup> Raised by Arab States at their Regional Seminar in 1999.

<sup>464</sup> At their Regional Seminar in 1999, the African States noted the importance of customary law in relation to safeguarding intangible heritage.

<sup>465</sup> The *Declaration on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific* from a Symposium held on the same subject in Noumea, New Caledonia, 15-19 Feb. 1999 at p. 197 calls on States of the region to: “Encourage local-level systems of protection, management and monitoring of traditional knowledge and expressions of indigenous cultures.”

<sup>466</sup> A point frequently raised in the literature relating to Aboriginal heritage in Australia.

<sup>467</sup> Made in the Eastern and Central European Regional Seminar, for example.

<sup>468</sup> International Covenant on Civil and Political Rights (1966). Art. 27 reads: “In those States in which religious and linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

<sup>469</sup> Such as UNESCO, WIPO, UNCTAD, CBD Secretariat, ECOSOC and WHO.

<sup>470</sup> Particularly the ‘Living Human Treasures’ and ‘Proclamation of Masterpieces of Oral and Intangible Heritage’ programmes, but also work in other sectors of UNESCO in relation to local and indigenous knowledge, traditional know-how and sacred/secret sites.

safeguarding and eliminate any potential conflicts of interest.<sup>471</sup> In view of the vastness of the potential field of protection, it will probably prove necessary to limit the scope of a new instrument in order to limit the range of legal mechanisms to be applied.

The work in other intergovernmental organisations in relation to aspects of intangible heritage<sup>472</sup> should also be taken into account and it is advisable not to duplicate this work. The aspects of traditional knowledge and indigenous heritage already addressed in other intergovernmental bodies include: indigenous knowledge contributing to biodiversity and issues of access to genetic resources and benefit-sharing (UNEP and the CBD Secretariat); intellectual property-related aspects of genetic resources, traditional knowledge and expressions of folklore (WIPO); farmers' and plant breeders' rights (FAO); traditional medicinal and botanical knowledge (WHO); and indigenous rights and heritage (ECOSOC). It has been argued that, since indigenous and local peoples view their heritage in a holistic manner, it is inappropriate to provide protection in discrete legal categories.<sup>473</sup> Certainly, UNESCO must explicitly recognise this characteristic of indigenous heritage in its work, but it also has to be pragmatic in terms of the interaction between its own international instruments and those of other intergovernmental bodies and direct duplication of the same work is not advisable. For this reason, it is advisable for UNESCO to address the question of safeguarding intangible heritage primarily from the cultural perspective, taking account of such issues as the sacred character of certain sites associated with intangible heritage and ensuring respect for customary rules of access. Beyond those economic rights enshrined in copyright law, however, it is not in UNESCO's mandate to develop (*sui generis*) legal mechanisms for protection of the economic rights of holders of traditional knowledge.<sup>474</sup>

Protection of intangible heritage may well imply challenging established legal principles in particular those relating to property, ownership and collective as opposed to individual rights. Potentially issues relating to self-determination, land rights (of indigenous peoples) and the rights of minorities are extremely problematic for certain States and should not be directly addressed. Furthermore, it is necessary to ensure that freedom to practise traditional culture is not in contravention of international human rights standards.<sup>475</sup> For this reason, such an instrument will have to be carefully drafted in order to avoid such difficulties. When developing any international instrument, there is always the danger that it has unexpected and perverse outcomes. Even the 1972 Convention – generally regarded as a highly successful instrument – has resulted in the degradation of some listed sites owing to increased tourist interest. In the case on intangible heritage, such unwanted outcomes as artificially removing this heritage from its context, disseminating secret knowledge, creating an inappropriate hierarchy within intangible heritage or the fossilisation of living cultures must all be avoided.

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<sup>471</sup> An International Round Table on *Defining Intangible Cultural Heritage* to be held by UNESCO in Italy on 14-16 March 2001 will work on identifying the scope of definition to be used for UNESCO's future work in this area. The participants come from the six regional groupings of UNESCO Member States and cover the disciplines of anthropology, ethnomusicology, economics, law, philosophy, linguistics, sociology, history and biochemistry.

<sup>472</sup> Such as: WIPO in relation to genetic resources, traditional knowledge and expressions of folklore and the CBD Secretariat in relation to genetic resources and indigenous knowledge.

<sup>473</sup> Such as environmental, biological, cultural etc. For more on this idea, see: Barsh, R.L. "How do you patent a landscape? The perils of dichotomizing cultural and intellectual property," 8 *Int.J.Cult. Property* (1999) 14 at p.15.

<sup>474</sup> Medicinal, botanical, agricultural etc. and related genetic resources.

<sup>475</sup> For example, Art.8(2) of the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989) states: "These people shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights..."

The arguments in favour of developing a new instrument for safeguarding intangible heritage outweigh the potential difficulties.<sup>476</sup> Although the background material on which to base that work is vast and varied (as this study illustrates), it is available and represents over twenty years of experience in both UNESCO and WIPO especially from the development of the 1989 Recommendation. The subsequent experience gathered in the areas of identification, preservation, conservation and protection of intangible heritage through implementation of the Recommendation is a good basis from which to start such work since these remain essential aspects of any protective regime. Development of an international instrument would represent a significant step in creating the necessary dynamic of international co-operation for safeguarding and protecting intangible heritage. It would also be a powerful means of providing internationally agreed standards for protection.<sup>477</sup> Furthermore, the growing interest in protection of intangible heritage – particularly of traditional knowledge – in various international bodies makes it increasingly important that UNESCO should define the terms under which this heritage as a whole should be safeguarded. By working towards the establishment of a new standard-setting instrument, UNESCO would take the leadership role in defining how this heritage should be addressed. UNESCO is better placed than other intergovernmental organisations to reflect the holistic character of this heritage through a combination of its norm-creating and operational activities<sup>478</sup> in view of the broad mandate it enjoys. It is worth noting here that a decision in favour of creating a new instrument is in no way contradictory to pursuing operational activities in related areas. Rather, the two activities should be viewed as complementary.

One of the issues that has in the past bedevilled the question of providing international protection for intangible heritage – ‘traditional culture and folklore’ – has been the apparent dilemma between applying general protective measures of a ‘cultural heritage type’ and employing IPRs and related mechanisms. It is important that UNESCO take a clear position on this question when considering the development of a new standard-setting instrument and resolve any confusion over applying both the broader UNESCO approach and an IP-based (WIPO) approach to the same elements of heritage. Experience gained during the development of the 1982 Model Provisions and the 1989 Recommendation as well as recent work in WIPO on IP-related aspects of traditional knowledge and expressions of folklore have all contributed towards our understanding of this issue. It has become increasingly clear that IPRs are limited in the protection they can offer to this heritage and that even some form of *sui generis* regime inspired by IP rules will be narrower in terms of its aims than a UNESCO instrument must be. There are undoubtedly serious issues in relation to the IP rights of holders of intangible heritage, however placing too great an emphasis on them

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<sup>476</sup> Although only 3% of States responding to a 1994 UNESCO questionnaire on the application of the 1989 Recommendation expressed the view that a new international Convention on the subject was needed, this was only one amongst several measures mentioned in that question. In 1999, three of the Regional Consultations conducted by UNESCO noted the lack of national and international legal protection of traditional culture and folklore as a serious problem. In October 2000, 10 States expressed their wish that a normative instrument for the protection of oral and intangible heritage of humanity be established in the 160<sup>th</sup> Plenary Session of the Executive Council while 2 others expressed the same wish in the PX Commission.

<sup>477</sup> Other means available such as Codes of Practice and Guidelines carry less weight if not associated with a legally-binding text.

<sup>478</sup> The combined effect of norm-creating and operational work is one that should be stressed since some aspects of this heritage are better addressed by non-normative approaches. This is true of much local and indigenous knowledge that is the subject of a proposed intersectoral programme called LINKS (‘Local and indigenous knowledge systems’).

presents the danger of distorting the way in which intangible heritage is viewed by regarding it primarily as a commodity.

For this reason, it is advisable for the protection of the economic rights of tradition-holders to be addressed primarily by other specialist Agencies.<sup>479</sup> In this area, UNESCO should concentrate on means of strengthening the economic and, in particular, the *moral* rights of holders<sup>480</sup> ascribed by copyright. This would be closer to the main objectives in protecting intangible heritage - such as protecting its integrity, its role in expressing the identity of the producer community, its continued practice in traditional forms and its valuing by society. Furthermore, IPRs and related measures only offer legal protection once intangible heritage has been exploited by a third party, often in a context alien to its original one. It does not provide *in situ* protection or foster the socio-cultural context in which it has been developed and maintained both of which must be major goals of any international legal protection of this heritage. UNESCO should also co-operate where appropriate with WIPO in relation to traditional knowledge and expressions of folklore. It is, however, potentially damaging to UNESCO's aims in relation to intangible heritage if a new international treaty concentrating on the IP-related aspects of protecting traditional knowledge is developed.<sup>481</sup>

### 7.3 Obligations that may be placed on and recommendations to States

An important process in the consideration of the type of instrument to be developed is identification of the nature of the obligations to be placed on Parties under the terms of a reciprocally-binding Convention and recommendations to Member States of measures to implement nationally. Some of the obligations that could be included in either a Convention text and the measures that could be included in a Recommendation are rehearsed.

Obligations by which States Parties to an international Convention on safeguarding intangible heritage could be bound by include the following.

- To recognise the value to society (and to humanity) of intangible heritage and the important role of tradition-holders in creating, maintaining and transmitting this heritage.
- To raise awareness of the value and importance of this heritage.
- To ensure the identification, conservation, preservation, protection and transmission to future generations of intangible heritage situated on their territory.
- To refrain from any actions that damage, devalue, distort or otherwise misuse intangible heritage on other States' territories.
- To undertake to prevent their nationals from such prejudicial actions through application of the nationality principle of jurisdiction
- To co-operate in the restitution of cultural property associated with intangible heritage.
- To protect, preserve and guarantee access (to tradition-holders) to sites and other immovable cultural property associated with intangible heritage.
- To guarantee all citizens the freedom to exercise their religion, language and culture.
- To recognise reciprocally the protection extended by other Parties to their intangible heritage.

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<sup>479</sup> UNCTAD and WIPO are the two best placed to do so.

<sup>480</sup> These are the right to preserve integrity of the work, the right to withdraw or divulge it and the right to be acknowledged as the author of the work.

<sup>481</sup> A potential outcome of the recent WIPO work in this area.

- To undertake to establish a competent national authority to oversee safeguarding and protection of intangible heritage.
- To co-operate with other Parties where intangible heritage 'belongs' to communities that straddle more than one State.
- To adopt an agreed Code of Ethics for the collection, documentation, publishing and commercial use of intangible heritage.
- To establish an international expert body to monitor the safeguarding of intangible heritage and to develop policies for this.
- To recognise other Parties' legislation covering authorisation and prior informed consent.
- To set up a mechanism for international co-operation to achieve the goals of the Convention, including financial and technical assistance where needed.
- To fulfil their obligations to safeguard aspects of intangible heritage under Article 27 of the International Covenant on Civil and Political Rights, Article 15 of the International Covenant on Economic, Social and Cultural Rights, Article 8(j) of the Convention on Biological Diversity and international intellectual property treaties.

The following constitute legal and administrative measures that could be included in a Recommendation to Member States.

- To develop and enforce a Code of Ethics for researchers and commercial bodies for the recording, collecting, using etc. of intangible heritage.
- To preserve the transmission of intangible heritage through prizes, provision of spaces for traditional performances and practices and other forms of support to holders.
- To protect the privacy and confidentiality of informants and extend this to guarantee the secrecy of certain aspects of intangible heritage.
- To ensure the conservation and preservation of recorded materials.
- To raise public awareness of traditional knowledge and skills and of their social value.
- To guarantee holder communities access to their own intangible heritage while also respecting customary rules that deny access and use to outsiders.
- To ensure adequate training (especially of holders) and resources in all areas of documenting, recording, preserving, managing etc. of intangible heritage.
- To establish national documentation centres for intangible heritage with community involvement.
- To support mother-tongue education and teaching of the value of traditional and oral elements.
- To encourage the transmission to youth of intangible cultural elements.
- To facilitate and assist tradition-holders to develop their traditional material culture and practices.
- To involve tradition-holders in the safeguarding and management of intangible heritage.
- To support communities in efforts to preserve the active use of local languages.
- To protect significant material culture and spaces that are crucial to transmission of intangible heritage.
- To support tradition-holders in exploiting the commercial potential of their traditional culture.
- To develop mechanisms and legislation that deal with the issue of authorisation and prior informed consent of tradition-holders in relation to traditional knowledge.

- To ensure that the fullest possible protection is offered to intangible heritage through the intellectual property system (economic, moral and neighbouring rights) both in national legislation and through international treaties.
- To enact legislation in keeping with Article 8(j) of the Convention on Biological Diversity where it is appropriate.

It is also possible to identify several general principles that could underpin the development of new standard-setting instrument. These include the following.

- The diversity of cultural traditions expressed by intangible heritage is essential to cultural heritage as a whole.
- Intangible heritage is an integral part of the universal heritage of humankind while, at the same time, specific to the local community that creates, maintains and transmits it
- The role of intangible heritage in the construction of cultural and social identity of the holders and their community.
- The spiritual, cultural, economic, social and ecological importance of intangible heritage.
- The contribution which tradition-holders can make to policy-making in many areas such as health, agriculture, environmental protection, sustainable human development and conflict resolution.
- The historical importance of intangible heritage as well as its role in contemporary society as a living cultural tradition.
- Avoidance of ‘fossilisation’ of intangible heritage through the means of safeguarding.

#### 7.4 *The choice of type of instrument*

When approaching the question of the advisability of developing a new standard-setting instrument in this area, the following choices were initially available for consideration.

- 1) An Additional Protocol to or revision of the 1972 Convention.
- 2) Development of a new Recommendation that “plugs the gaps” of the 1989 text, possibly using that text as a basis.
- 3) Development of a Convention using a *sui generis* system derived from adapted IP rules.
- 4) A Convention that takes as its model the 1972 Convention, with or without an accompanying Recommendation.
- 5) A general cultural heritage Convention that employs a mixture of ‘traditional’ and *sui generis* approaches to protection.

1. Of these choices, the first has already been considered and rejected in this study for reasons given elsewhere in the text. It is clear that IPRs have limited usefulness in this area of protection and are not a promising basis for developing an instrument although States should be encouraged to provide what protection they can through the IPR system.

2. The development of a new Recommendation is unlikely to be favoured over a Convention as the type of instrument to be developed in view of the fact that a Recommendation in this area already exists. However, this option may be considered in the event that it is felt the development of a new Convention is not advisable at this stage. A new Recommendation that extends the 1989 Recommendation to include approaches to safeguarding intangible heritage that it are now understood to be important could be seen as the basis on which to develop a future Convention. Experience, however, would suggest that a Recommendation is not an effective means of creating new State practice in the area despite

good intentions while a new Convention, if adopted, would be. As is discussed below, it may prove advisable to develop a Recommendation alongside a Convention in order to stimulate the positive interaction that can occur between an international instrument and national legislation.

3. As far as Convention texts are concerned, the first proposal is for a Convention based exclusively on *sui generis* approaches to protection that answer specific needs of intangible heritage be developed. It is worth considering the possible content of such *sui generis* rules. These tend to be derived from IP approaches to protection but with adaptations made that take into account the special character and needs of this heritage. They include:

- recognition of traditional collective forms of ownership (through contractual or legislative arrangements);
- respect for traditional authorisation procedures, attribution of source and other moral rights;
- the requirement of proof of the prior informed consent of holders for patent applications based on traditional knowledge;
- economic compensation to holders for the commercial exploitation of traditional knowledge;
- protection granted in perpetuity with no lapse to the public domain after a specified period of time;
- prohibition of the unauthorised registration of sacred and/or culturally significant symbols and words as trademarks;
- prohibition of unauthorised and culturally offensive registration of traditional names;
- prohibition of debasing, destructive or mutilating uses of intangible heritage;
- registration of collective and certification trade marks;
- the registration of geographical indications;
- the copyright protection of oral works;
- protection of documentation of traditional knowledge through original and non-original database protection;
- protection of the ‘moral rights’ of tradition-holders; and
- protection of traditional culture through neighbouring rights.

As this study has set out, there is currently work being undertaken at WIPO, the CBD Secretariat and UNCTAD in relation to developing *sui generis* forms of protection for different elements of intangible heritage, an argument for UNESCO not to duplicate such work. Furthermore, although these proposed forms of protection would answer many serious concerns of holder communities in regard to the commercial exploitation and misuse of their intangible heritage, they do not generally address this heritage and its wider social and cultural context as UNESCO should do. Nor do they cover questions such as the inventorying, recording, conservation, preservation and revitalisation of intangible heritage along with support for the continued practice and transmission of intangible heritage by its holders. It is essentially too narrowly focused to be a satisfactory approach for a UNESCO Convention on the subject. It is a very complex undertaking to develop a new *sui generis* system inspired by IP rules and this would be in an area that is not central to UNESCO’s expertise or mandate. It would also face strong opposition from many Member States on the basis that the traditional IP system should not be ‘undermined’ by such adaptation, particularly if undertaken by UNESCO whose mandate (unlike that of WIPO) does not extend to such areas. For this reason, UNESCO should address the safeguarding intangible heritage from the broader perspective that its mandate uniquely allows it to.



4. The second proposed form of Convention is one that is based broadly on the principles and mechanisms of the 1972 Convention, but with adaptations to suit the needs of intangible heritage and the holder communities. As has been discussed above (in Section 6.3), there are several elements of the 1972 Convention that could provide a useful model on which to base a new Convention. These include the World Heritage Fund and the financial measures that accompany it, a dedicated secretariat to oversee the operation of the Convention<sup>482</sup> and the formally established role of advisory bodies in relation to the operation of the Convention.<sup>483</sup> The creation of an expert body equivalent to ICOMOS or IUCN (possibly built around the Jury for the 'Masterpieces' programme) would be an important step in developing international machinery for safeguarding of intangible heritage, placing it on an equivalent level of importance with tangible elements of cultural heritage. The general principle of protection on which this Convention is predicated is also worth considering. Viewed as a heritage of significance to humanity (in the case of intangible heritage for its role in preserving cultural diversity), it should be safeguarded on the basis of international co-operation and a general duty to protect is placed on all States Parties.

As has also been noted, the specific nature and needs of intangible heritage would require adaptation of central aspects of the 1972 Convention as follows: the notion of 'outstanding universal value' requires further clarification and possible adaptation; the mechanisms for nomination<sup>484</sup> and monitoring (and the administrative structures for this) need to be tailored specifically; and the criteria for selection need extremely careful drafting. In comparison with more general instrument, the identification of its scope would be simpler since it would be limited to 'outstanding' elements of heritage<sup>485</sup> rather than the whole possible range of intangible heritage. This would also limit the range of legal measures to be applied for its safeguarding. It would also have the advantage of avoiding some particularly complex problems that a more general instrument might face, such as assigning ownership to items of intangible heritage (since Parties would be placed in the role of custodians or trustees of the heritage listed).<sup>486</sup> Such questions as assigning economic rights for its commercial exploitation would be dealt with under national legislation (where applicable) and thus avoid creating reciprocal obligations that could be extremely difficult for some States to accede to. A further advantage of this model would be that it could provide a mechanism for nominations relating to intangible heritage that is shared by several States, thus addressing one of the more complex problems of protection and developing strategies for safeguarding this heritage.

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<sup>482</sup> Unlike the other cultural heritage Conventions that are overseen by one Secretariat, the World Heritage Centre is dedicated to overseeing the operation of that 1972 Convention. This gives it an additional profile that is beneficial to achieving the aims and objectives of the Convention. It should be noted, however, that the establishment of the World Heritage Centre is not foreseen in the instrument itself but was undertaken 20 years after its adoption.

<sup>483</sup> Points 57 and 61 of the *Operational Guidelines* set out their role in evaluating nominations by Parties as to whether they satisfy the criteria and conditions of authenticity and integrity. ICOMOS evaluates cultural properties while IUCN evaluates natural properties; they will jointly evaluate cultural landscape nominations.

<sup>484</sup> It is crucial that the system for nomination allows for bodies other than States to nominate intangible properties (as the Masterpieces programme allows) and that the nomination process takes account of the oral character of many holder communities' cultures.

<sup>485</sup> Selected through the nomination process and subject to established criteria.

<sup>486</sup> It is often difficult with intangible heritage that is collectively held to identify a legal owner. This is particularly true of the heritage of indigenous groups whose customary rules do not rely on notions such as 'ownership' and 'property.'

However, a major criticism of this model is that it does not provide broad-based protection to all elements of intangible heritage but simply to those specific examples nominated and selected for listing. This is a strong argument for developing a more general instrument that would encompass a much broader range of intangible heritage, including more mundane elements. It would be very difficult, for example, to address the needs of traditional knowledge and its holders in this type of instrument. For this reason, it would be vital for any Convention following this model to be accompanied by a Recommendation that sets out in detail the legal, administrative and other measures to be taken by Member States to safeguard intangible heritage as a whole. In this way, the Convention would serve to highlight the importance of this heritage, safeguard particular examples that are of special importance (for whatever reasons) and provide the basis for international co-operation for their protection. It would also serve to develop State practice in this area through the measures implemented nationally for safeguarding, protecting and managing listed properties. The fact that a Recommendation is not binding on Member States but merely advisory allows for a range of measures to be included that are central to its protection but that could not easily be included in a Convention.<sup>487</sup> A Recommendation also provides a systematic and comprehensive approach to safeguarding that is necessary for safeguarding intangible heritage. Since this requires the development of national legislation in many States and of innovative legislative measures in some cases, it is a further argument for this ‘dual-track’ approach of a Convention with an accompanying Recommendation.

5. The third form of Convention proposed is an instrument employing a mixture of more general cultural heritage approaches to protection with the addition of certain *sui generis* measures. The advantage of this type of instrument is that it would aim to safeguard intangible heritage in general rather than a limited number of listed examples and would be able to treat it in a holistic manner appropriate to this heritage. However, for this reason, it would present a much more complicated problem of identifying the exact scope of what is to be the subject matter of the instrument and the type of obligations to be placed on Parties. The implementation of a more general Convention of this type is also likely to be less straightforward. Although the primary legal approach of such an instrument might be ‘traditional’ cultural heritage protection measures, intangible heritage has specific needs that are not answered by these measures that have been developed for the material heritage. For this reason, certain *sui generis* approaches will also be employed in addition to general protective measures in order to address important problems of protection that lie beyond their remit. These *sui generis* measures might include some inspired by IP rules such as the prohibition of non-traditional uses of secret, sacred or culturally sensitive elements, use of neighbouring rights to protect traditional culture, recognition of traditional collective forms of ownership and protection of the moral rights of tradition-holders. Another very important source of *sui generis* measures for such an instrument would be the customary law and rules regarding the ownership, use, access to, management and protection of intangible heritage. In the context of a more general instrument that employs accepted cultural heritage protective measures it would be easier to select those *sui generis* measures that are less likely to cause strong opposition.

Safeguarding intangible heritage involves keeping cultural traditions alive and ensuring the transmission of know-how and skills to future generations. This requires that the way of life itself of the tradition-holders is supported and safeguarded as well as their heritage, an obligation that may prove problematic to governments where those ways of life

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<sup>487</sup> This applies particularly to certain *sui generis* forms of protection derived from adapted IPRs.

run counter to State policy and even sovereignty. For this reason, difficult choices will have to be made as to how far an instrument goes in supporting the customary lifestyles of these communities and the elements that make them up. This is particularly true in the case of indigenous and tribal peoples whose continued creation and maintenance of traditional culture depends largely on a special relationship to traditional lands and the exploitation of the natural resources of those lands. In order to be acceptable to Member States, safeguards will need to be built in to a general instrument if it aims to protect traditional ways of life, as regards such issues as the application of customary laws. This is a compromise that certain interest groups will not like but one that is necessary if such an instrument is to have any chance of adoption as an official text of the Organisation.

### 7.5 *Timetable for future action*

The first, fundamental step to be taken in this work is the identification of the scope of the concept of ‘intangible heritage’<sup>488</sup> that UNESCO is to address with a new standard-setting instrument.<sup>489</sup> Although there is a vast range of potential content to the notion of intangible heritage, this has now been the subject of a lot of debate in different international forums. The necessary groundwork has therefore been done for UNESCO to organise an interdisciplinary group of experts who are in a position to bring together these various approaches to intangible heritage in order to identify those aspects that should be included within the scope of a future instrument. It is important in this endeavour that a wide range of interests to be represented in this consideration. In tandem with this work on defining the subject matter (and the choice of terminology) will be the identification of the legal measures to be applied. These are interrelated issues since the content of the definition will, to some degree, determine the type of legal protection that is appropriate while the type of legal protection (and instrument) will also influence the choice of content.

The first set of nominations for proclamations of ‘Masterpieces of Oral and Intangible Heritage’ will have been received by the end of 2000 and will provide a useful indicator of the type of intangible heritage that different States wish to safeguard. An International Roundtable on *Defining Intangible Cultural Heritage* will be held in March 2001<sup>490</sup> aimed at identifying the scope and content of the notion of intangible heritage to be used by UNESCO. It will be necessary to take into account the work currently being conducted by and the experience of other IGOs, NGOs and other interested parties as well as the range of experience developed within the different sectors of UNESCO itself. It will be useful also for the different regional groupings of UNESCO to be consulted as to their views as to the most important characteristics of intangible heritage to be included in the definition since it must reflect the regional variations that exist globally.

WIPO’s work in the area of genetic resources, traditional knowledge and folklore is gathering momentum with the establishment of an Intergovernmental Committee of Experts in September 2000 and may well lead to the development of a new international treaty. WIPO’s activities are firmly based on IP concepts as set out in its original mandate and, if UNESCO does not take the initiative in relation to safeguarding intangible heritage, there is the danger that the narrowly-based IP-related approach<sup>491</sup> will dominate the entire question of

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<sup>488</sup> As has been made clear above in Section 1.1, ‘intangible heritage’ is not the best term to apply but is the one used for the purposes of this report.

<sup>489</sup> Specific issues relating to identifying the concept of intangible heritage and developing a working definition are dealt with in detail in section 1.2.

<sup>490</sup> 14-16 March at Piedmont, Italy.

<sup>491</sup> That has been shown in Section 3 above to be inadequate to safeguarding many important aspects of intangible heritage.

international protection for this heritage. UNESCO remains the sole UN Organisation able to regulate internationally the preservation, conservation and legal protection of intangible heritage from a sufficiently broad perspective. For this reason, it is important that UNESCO take formal steps towards developing international standards for safeguarding it without any lengthy delay since it is likely to prove very difficult to undertake such work at a later date.

There remain questions relating to the scope of the heritage to be safeguarded and the approach to be taken. However, the UNESCO *Rules of Procedure* allow for these to be addressed as a part of the formal process of considering the question of international regulation. In order for a new proposal for international regulation to be placed on the provisional agenda of General Conference, it must be accompanied by a preliminary study of the technical and legal aspects of the problem to be regulated.<sup>492</sup> On the basis of this study, General Conference then decides whether it is a question that should be regulated at the international level, to determine the extent to which it should be regulated and whether by a Convention, a Recommendation or both.<sup>493</sup> At this point in the process, it is open to General Conference to defer the question to a future session and it may instruct the Director-General to submit a report to that session on the desirability of international regulation of the question, the method to be adopted and the extent to which it can be regulated.<sup>494</sup> This report should be communicated to Member States for consideration at least 100 days before the next session of General Conference.<sup>495</sup> Once General Conference has taken a decision under the terms of Article 6, it shall instruct the Director-General to prepare a preliminary report setting out the position with regard to the question to be regulated and the possible scope of the regulating action. This study may be accompanied by a draft text of a Convention or Recommendation and must reach Member States at least 14 months before the opening of the session of General Conference.<sup>496</sup> On the basis of comments received from Member States, the Director-General shall prepare a final report accompanied by one or more draft texts to be communicated to Member States at least seven months before the next General Conference.

In this way, the *Rules of Procedure* allow for a lengthy and exhaustive consideration of the question to be regulated as a part of the formal procedure of deciding whether to develop a new international Convention and/or Recommendation. What is important is that UNESCO begin the formal process without undue delay in order to signal its interest in the area and to ensure that the question of international safeguarding of intangible heritage is understood to lie primarily within UNESCO's competency. Once the formal procedure has been initiated by presenting a proposal to General Conference that it should consider the question of regulating the safeguarding of intangible heritage internationally, any work of other intergovernmental bodies must take cognisance of UNESCO's activities in this area.

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<sup>492</sup> Art. 3.

<sup>493</sup> Art. 6.

<sup>494</sup> Art. 7 (1) and (2).

<sup>495</sup> Art. 7(3).

<sup>496</sup> Art. 10(1) and (2).