

**Select Drafting Group
on the first draft of an international convention
for intangible cultural heritage**

UNESCO Headquarters, Paris, 20-22 March 2002

FINAL REPORT

I. Introduction

Afin de mettre en oeuvre la résolution 31 C/30 adoptée par la Conférence générale à sa 31^{ème} session, le Directeur général a convoqué un groupe de rédaction restreint sur l'avant-projet de convention internationale pour le patrimoine culturel immatériel (voir ordre du jour en annexe 1). Ce groupe de rédaction restreint était composé essentiellement de juristes (voir liste des participants en annexe 2).

II. Séance d'ouverture

1. Opening remarks by Mr K. Matsuura, Director-General of UNESCO

Le Directeur Général a remercié les experts pour leur présence, puis a souhaité la bienvenue aux observateurs, en particulier les représentants des Etats membres.

Le Directeur général a rappelé qu'il s'agissait là, parmi les nombreuses réflexions et initiatives engagées sur le patrimoine culturel immatériel, d'une étape plus spécifiquement juridique. Il a ensuite souligné le contexte de cette nouvelle étape, celle d'une reconnaissance grandissante, puis universelle, de l'importance de ce patrimoine, elle-même sous-tendue par une exigence proprement normative, et non plus seulement sociale, de la sauvegarde du patrimoine culturel immatériel. A cet égard, il a mentionné le rôle de la Déclaration universelle sur la diversité culturelle, qui a porté un jugement d'opportunité et de nécessité quant à la préservation de tous les patrimoines culturels, puis la Résolution 31C/30 adoptée lors de la 31^{ème} session de la Conférence générale, qui a décidé que cette question devait être réglementée par la voie d'une convention internationale.

Concernant l'approche de cette sauvegarde, le Directeur général a souligné que cette dernière devait être spécifiquement culturelle, afin d'éviter tout chevauchement d'activités avec d'autres organismes, tels que l'OMPI. Il a également souligné que cette approche devait pouvoir s'inscrire dans la continuité des précédentes réunions, telles que la Table ronde internationale de Turin en mars 2001 ou la réunion de Rio de Janeiro de janvier 2002. Toutefois, il a proposé d'organiser à Paris, au début du mois de juin, une nouvelle réunion d'experts sur la terminologie elle-même suivie par un comité d'experts de catégorie VI.

Enfin, il a présenté cinq principes pouvant constituer l'assise du travail à venir des experts : i) le consensus sur la définition du patrimoine culturel immatériel établie lors de la Table ronde de Turin ; ii) la possibilité pour chaque Etat de déterminer, au niveau national, des domaines prioritaires de sauvegarde ; iii) l'intégration au niveau international d'un mécanisme dans le domaine de la sauvegarde du

patrimoine culturel immatériel, permettant de mieux faire connaître au public les différents aspects de ce patrimoine, en s'inspirant du Programme de la Proclamation des chefs-d'œuvre du patrimoine oral et immatériel de l'humanité ; iv) la prise en compte de l'implication des différents acteurs concernés par le patrimoine immatériel ; v) la coopération au niveau international (voir discours en annexe III).

2. H.E. Mr A. Jalali, President of the General Conference of UNESCO in his speech raised certain issues and suggestions for the Working Group to consider. He referred to the importance of the phrase "intellectual and moral solidarity" in the UNESCO Constitution and need to see importance of any new subject in the light of that. He raised the conceptual relationship between tangible and intangible heritage, citing the Bamyán Buddhas as an example of this. He emphasised the difference between a primarily cultural approach to intangible heritage (IH) and the individualistic intellectual property approach. He reminded participants of UNESCO's *raison d'être* to contribute to peace and security through intellectual and moral solidarity. In relation to the Dialogue among Civilisations programme, he noted the need to define clear modalities of action and suggested that discussion of Intangible Heritage can help towards the axiomatic development of this programme.

3. H.E. Ms A. Bennani, President of the Executive Board spoke. She recalled how IH is a subject of great importance for herself and her country (Morocco) and one that they have been concerned about for some time. She noted that the large number of observers at the meeting was evidence of a great interest among Member States in the subject, an internationally shared interest. The experience of the Proclamation programme showed that here we are dealing with a new and different subject for UNESCO, the people who are transmitters of Intangible Heritage. This is a group of pioneers undertaking the pre-project of drafting a Convention text, the work being based on previous reflections and debates on the subject in the Executive Board, General Conference and Expert Meetings. She reminded the meeting that the experts meeting in Rio reconfirmed the use of the Turin definition in a new instrument and set out the main lines for the text. Intangible heritage is a flexible concept, adapted to different contexts, but this is no bar to an instrument that takes account of its specificity, allowing each country, people and individual to realise their own cultural heritage.

4. H.E. Mr. M. Bedjaoui, Chairman of the Meeting, addressed the meeting. He reminded the participants that they were invited to follow a specific mandate given by the General Conference and Executive Board of UNESCO and stressed the complex link between previous reflections and the setting of a legal framework. The group of experts has been asked to prepare the basis for a preliminary draft Convention to be presented to the General Conference in 2003. He noted that there were several points that would have to be set aside in the present discussion until further political instruction to the group. He noted the desirability of some adaptations to the 1972 World Heritage Convention (WHC) which is in principle adopted as a model and stated the aim of finding ways of safeguarding Intangible heritage in an appropriate manner that also treats it as a common heritage of humankind. Each State should be encouraged to use its own legislation to best safeguard Intangible Heritage. The central problem remains the type of definition to give Intangible Heritage, a strategic one since both the general principles and specific measures will flow from it as will the

scope of the domains. He suggested the Turin definition be used as a basis on which to fix ideas, but stressed the need to consider the legal consequences of each element. In any approach to safeguarding, the definition remains central and all possible rigour must be applied to crafting a legal definition while keeping as open as possible the scope of domains. In the face of globalisation, this activity requires new approaches to safeguarding, a humanist view of Intangible Heritage. Financial difficulties must not be the reason for this target to fail (see speech in annex IV).

III.

H.E. Mr. Bedjaoui took the Chair and the following were officially adopted as office-bearers of the meeting:

- Vice-President: Mr F. Francioni
- Rapporteur: Ms J. Blake
- Drafting Committee Chairman: Mr S. Sucharitkul
- Drafting Committee Members: Mr P. Kuruk
Mr P. Dupuy

A working method was presented on the basis of a draft text prepared by Mr Bedjaoui, comprising 21 files on key issues arising from the 1972 WHC and a conclusion. He proposed working on a step-by-step basis through the files and later adding any further necessary “colouring” and working on the definition. The terms of reference for this working method are as follows:

- the question of the 1972 WHC as a model,
- the title for a future Convention,
- the Preamble,
- the definition of IH,
- articulation of notions of safeguarding (national and international),
- the idea of an Intergovernmental Committee as in the 1972 WHC,
- the need for a “World Heritage Fund” for IH,
- the terms and conditions for international assistance,
- educational programmes in all countries,
- articles on reporting methods and the final clauses.

He stressed that this meeting fulfils the Rio mandate by establishing a restricted drafting group (the “group”) to be nominated by the Director-General and to provide the potential scope of and a preliminary draft text for the October/November 2003 General Conference. The group’s meetings will be open to Permanent Delegations as observers and decisions will be taken by majority vote.

This last point provoked some discussion, with a call for agreement by consensus, and it was hoped that most points could be agreed by the group without a vote. The Chairman then gave a historical introduction of the stages leading up to this meeting, including the May 2001 Executive Board decision, Member States’ comments on that, the General Conference resolution (Nov. 2001) and its consensus agreement to draft a new Convention modelled on the 1972 Convention

model: the nature and needs of IH differ markedly from the subject of the 1972 WHC; the 1972 WHC requires several adjustments; the relationship between drafting an instrument and the Proclamation programme must be taken into account; the unanimous adoption of the Declaration on Cultural Diversity and its provisions should be taken into account; and international efforts for preserving IH should also be based on respect for human rights, equity and sustainable development.

DISCUSSION OF MANDATE AND WORKING METHOD

In this discussion, the following points were raised by members of the group:

- i) It is a difficult task to know how to use the mandate given since IH is so different from the subject of the 1972 WHC and it is difficult to identify the appropriate legal provisions here.
- ii) Two clear objectives of the 1972 WHC are protecting the world heritage and the establishment of the World Heritage List. It is to be questioned whether the second is appropriate to IH.
- iii) The need to consider the way in which a new instrument will interact with the 1972 WHC that is increasingly covering sites of relevance to IH.
- iv) The desire was expressed that the final document should represent dissenting opinions if decisions are taken by majority vote.
- v) Should the group be restricted to aspirational recommendations or can they identify clear enforcement mechanisms (as does TRIPS) – this was answered by noting that the mandate refers to a pre-draft of a Convention that will imply placing obligations on Parties. It was also noted that the 1972 WHC contains no dispute-settlement or enforcement provisions but rather subtle means of persuasion and dissuasion.
- vi) The extent to which obligations imposed by different provisions are binding can vary since some may require action (or legislation) to implement them.
- vii) A central question is whether to follow one's aspirations or to be more pragmatic and hope to find a mechanism to encourage the development of national legislation. A necessary balance between the two needs to be struck.
- viii) The possibility of drafting a Convention text setting out obligations binding on Parties along with a text such as a Recommendation that can cover other aspects of safeguarding.

Clarification was provided by the Secretariat on the point that the working group is tasked to provide elements to the Director-General that can form the basis of a preliminary draft text.

DISCUSSION OF THE 21 FILES

Discussion Unit 2 – Basic principles and objectives

This issue needs in-depth discussion concerning possible ways of involving local communities and custodians in the safeguarding process.

Certain legal milestones such as the Universal Declaration on Human Rights, the UNESCO Constitution and the Declaration on Cultural Diversity should be mentioned here.

The question arose as to whether to place these principles in a provision (e.g. Article 1) of the text rather than in the Preamble. This proposal was supported and a specific form of article based on Para. 24 of Doc. 161 EX/15 could be written (possibly two articles). It was suggested also that point (iv) could be placed in relation to institutional issues and assistance (cf. Art. 7 of 1972 WHC).

Discussion Unit 3 – Title of Convention

This was a preliminary discussion, with the title to be finalized later.

It was noted that “safeguarding” is favoured over “protection” in relation to IH. The evolution of these and related terms in cultural heritage texts was explained, and various reasons were given to support the use of “safeguarding” as the term of art since:

- it is less paternalistic,
- it is wider in meaning than “protection” and includes the idea of transmission to future generations,
- “protection” as applied to IH implies intellectual property approaches (see its use in 1989 Recommendation).

It was strongly felt that the text should be a Convention (and not a “Charter”) or similar title) since that is in the General Conference mandate and will render it more closely allied with, and complementary to, the 1972 WHC.

Finally, the issue of “universal value” is a difficult one since one cannot necessarily say that any IH has *ex se* a universal aspect.

Discussion Unit 4 – Preamble

The following additions were put forward:

- Reference should be made to the relevant UNESCO Recommendations, Conventions and Declaration. It was suggested that one may want to add a reference to the 1972 Convention to para. 24 if regarding IH as something with a tangible outcome.
- That the loss of one country’s IH is a loss to the cultural heritage of humanity, especially as its contribution to cultural diversity.
- Suggested use of terms “common concern of humanity” and “for the benefit of future generations” borrowed from environmental law. Some care was advised over this.

General agreement was reached on the desirability of a short Preamble.

Discussion Unit 5 – Definition

It was proposed that detailed discussion of this be held at the end of the discussion of the text since it will be informed by other issues raised. However, the definition also informs the scope and content of the text.

The importance of a definition in determining all that follows was stressed and it was noted that it is really an issue of scope, i.e. is each element to be legally valid with rights and duties attached?

The question was raised as to the appropriacy of the term “process” in the Turin definition. The meaning of “living communities” in that definition was also questioned in terms of the minimum size of group necessary to fulfil the conditions of this.

There was broad support for keeping the Turin definition at this stage since it has been endorsed by various fora and is sufficiently encompassing.

Discussion Unit 6 – Article 2 on State Sovereignty

Two versions of this article were offered, the first based on the 1972 WHC and the second from the Rio Meeting.

A call was made to specify minimum standards for Parties (as does TRIPS) and to take caution in ceding State sovereignty. It was suggested that Parties be required to establish a national authority to identify and safeguard IH.

It was pointed out that the system of National Commissions for UNESCO was a unique one that allows for great possibilities in addressing the desire to establish a means for consulting local communities.

It was felt that this concern was addressed in part by Articles 3 and 4 and that, if minimum standards are required, they should be in terms of Best Practices (for safeguarding IH) and accompany the text.

It was put forward that some phrase relating to ensuring the full involvement of practitioner communities be included since States do not necessarily have a motivation to safeguard IH they do not view as their own.

General agreement existed over limiting this article to the issue of State sovereignty and addressing the above points elsewhere in the text.

Discussion Unit 7 – Article 3 on Cooperation

It was agreed to drop the phrase “belonging to the State” since much IH is not owned by States.

Return to Discussion on Article 2

It was suggested that cooperation should be referred to as an overarching principle, but it was felt Article 2 was too early in the text to state this.

A form of words was proposed to answer calls for imposing minimum standards that reads; “Each government shall endeavour to establish an authority with the capabilities to ...”

Furthermore, the aforementioned Best Practices could be referred to here as an advisory rather than as an imposition on States.

Finally, it was stressed that the communities that are custodians of IH are not equivalent to other stakeholders since without them there is not IH, thus they need to be involved in all

stages of identification and safeguarding and be referred to in Article 2. A counter-argument was given to include this point in the Preamble.

Discussion of Unit 8 - Article 4

There was discussion of the issue of whether to include the phrase "situated on its territory." This phrase was regarded as being inappropriate in the context of IH, although there was a desire amongst some participants to include some jurisdictional link with the State Party in question.

It was suggested that the idea of "present" is important as providing the necessary temporal element that characterises IH as evolving and migratory. A further suggestion was a formulation such as "with links with the population situated on the territory ...". [An alternative proposal not supported was "practised by its citizens"].

It was agreed that reference to Best Practices could be included here and a draft provision should be provided to the Drafting Committee on this topic.

Reference to establishment of a national authority that should oversee identification safeguarding of IH and consult with bearer communities should be included in 4 (b). Examples of such provisions can be found in the Berne Convention (1967 revision), 1982 Model Provisions and Article 37 of the OAS Model Law. A copy of this article should be given to the Drafting Committee as a model for such a provision.

Although the issue of trans-boundary IH was raised, it was felt that any reference to extra-territoriality of State jurisdiction should be avoided.

The decision was taken to delete the phrase "situated on its territory" from the opening paragraph of Article 4.

Discussion Unit 9 - Article 5

The formulation "common heritage of humanity" should clearly be avoided and it was proposed that a linkage with the importance of cultural diversity and the fact that its loss or erosion would be a loss to humanity. In other words, the universality should not be applied to the IH itself but to the justification for its safeguarding.

Furthermore, IH should be safeguarded "for the general interest of humanity/humankind" and the including the notion of safeguarding IH "for the [benefit] of present and future generations" was also proposed.

Further related ideas included developing the notion of a 'shared heritage' and that, in view of terminological difficulties, 'heritage' ('patrimoine') should be avoided and the safeguarding of IH should not be seen as a "common good".

The problem of territorial linkage was still felt to be important, and the proposal to make a linkage with the IH present on a State's territory was repeated.

Discussion Unit 10- Article 6 on Safeguarding

It was felt that this could be difficult to discuss at this stage since it assumes the existence of a system for financing (covered in later provisions).

It was noted that the 1972 Convention is the only one with a system for technical assistance - a key element in safeguarding IH - and one that is established in the Convention text. Since lack of resources weakens implementation, this provision was felt to be essential.

The use of 'safeguarding' in the title to the article is inappropriate since the subject of the article - international cooperation - is too narrow to encompass all the actions safeguarding implies. It should be revised at the discretion of the Drafting Committee.

Discussion Unit 11 - Article 7 on the 'Intergovernmental Committee'

Two questions were raised at the start of the discussion of this provision:

- can it be built in the image of the 1972 WHC Committee?
- how can its work be integrated into that of the advisory bodies, a much more complex question than that faced by the 1972 WHC?

It is seen as a useful mechanism for developing the spirit of cooperation and making it attractive to States and so is essential to the Convention's working.

The name "Intergovernmental Committee" was seen to be problematic as closing the door on the possibility of wider representation beyond simply representatives of States, such as NGOs.

After some debate, the formulations "Intangible Cultural Heritage Committee", "International Committee" and/or "Council" (rather than 'Committee') were the preferred alternatives, the latter primarily implying State representation on the body.

The drafting of the provision 7(3) would be very important to making it successful. In relation to NGO participation, it was felt that they should not be given a role beyond the advisory and that the choice of NGO's should be left open depending on the IH under examination.

The Drafting Committee was then requested to work with the above ideas.

Discussion Unit 12 - Article 8 - Composition

The group should avoid removing from the [Committee] the powers and responsibilities it is given here.

The Drafting Committee was asked to redraft this article as appropriate.

Discussion Unit 13 - Article 9 on Rules of Procedure

This was passed to the Drafting Committee.

Discussion Unit 14 - Article 10 on establishment of lists

The discussion on the establishment of heritage lists indicated a general consensus about the value of such listing and the credibility that the screening process lends it.

The main issues here related to:

- "heritage list"
- "universal value"
- "inventory of properties".

It was decided that the term "property" should be removed from 10 (1).

In relation to the "heritage list", some type of inventorying of the subject-matter is needed and is also politically important in giving visibility to the listed items.

The inclusion of fundamental criteria in the provision itself (and not just in *Operational Guidelines* that can be subject to revision) was proposed. It is important, though, for States Parties to be free to adopt detailed criteria within those cited in the provision.

Alternative terminologies for 'list' were suggested, particularly 'inventory' and 'category'. Furthermore, the need for drafting a list at all was questioned and the idea was proposed simply that information on IH be made globally available.

The value of Parties providing indicative lists (not originally required by the 1972 WHC) was noted, namely in requiring an inventory in order to achieve this.

The importance of avoiding a two-tier level of protection was stressed by placing the onus on Parties to develop national safeguarding overall. It was proposed that, with suitable drafting, Article 11 of the draft Convention can answer this by adding that this also establishes a general duty to safeguard regardless of listing. This was debated later in relation to that article.

The idea was posited of requiring UNESCO to provide a database containing all the information relating to candidacies for listing alongside the 'World Heritage List' itself. The value of having such information available on Internet was recognised and it was noted that such a clearing house mechanism is about to be established under the Proclamation programme.

In relation to 'universal value', it was decided to drop the references to 'universal' and 'world'. The word 'unique' was proposed in the place of 'outstanding', but the formulation 'outstanding value' was settled upon by the group. 'Unique' was seen as too restrictive and calling for a potentially difficult burden of proof.

It was also felt important to make reference to items that are of 'outstanding value for cultural diversity'.

In relation to 'properties', it was decided to replace it and the terms 'manifestations', 'expressions' and 'means of expression' were proposed. The terms 'testimony' and 'item' were preferred by the group and it was recalled that the phrase 'forms of traditional and cultural expression' is used in the Proclamation programme.

In relation to the phrase "requires the consent of the State concerned" in Article 10 (3) - the issue of State consent was seen as problematic and should be replaced with reference to the fact that "the [Committee] will only act on candidatures presented by a State Party" and thus probably remove the need for consent. In relation to trans-boundary IH, it was noted that in ASEAN practice if one country wishes to list, no other country can veto it.

In the second sentence of Article 10 (3), the reference to "dispute" settlement should be replaced by the notion of "consultation" and this should include consultation with the peoples concerned. The idea of replacing the phrase "the State concerned" with one referring to the "State where the IH in question is situated" was raised and referred to the Drafting Committee.

A major discussion was held concerning provision 10 (4) that sets out the procedure for establishing a List of World Heritage in Danger. The following are the main points:

- a) Is such a List necessary? Generally this was accepted in view of its strong ethical value and role on drawing the attention of the international community to the need for emergency measures and material support i.e. a very useful procedural mechanism. However, it needs amendment to be appropriate to IH and must be regularly up-dated and left flexible. It is important also to identify what is in danger of disappearance rather than the normal process of evolution.
- b) The phrase "major operations" should be changed to "conservation [remedial] measures" or a similar phrase to be determined by the Drafting Committee .
- c) The selection criteria set out in paragraph 24 (g) of the revised Proclamations programme should be incorporated and the original text be shortened to accommodate this.
- d) There was general agreement to remove this provision from the Convention text, although it may appear in accompanying *Regulations*.

Discussion Unit 15 - Articles 11, 12 and 13

Article 11:

- The removal of "universal" from the English text was agreed.
- The alternative to be placed instead of "property" was deferred to the Drafting Committee.
- The question of including a general duty to safeguard in this text was subject to much debate with two main views expressed:
 - a) The general duty is already sufficiently covered elsewhere (Arts. 3, 4 and 5(3)) - a view based on a treaty law interpretation.
 - b) The duty to safeguard is not yet developed as customary international law for IH and so such a provision is necessary.

A desire to leave open the possibility of cooperation in safeguarding with non-Parties (in an institutional framework) was also expressed.

Article 12:

In order to address the fundamental question of whether there is a need for such a fund, it was decided to move forward to a discussion of Article 14 before discussion this Article.

Discussion unit 16 – Article 14, 15, 16 and 17

Article 14 – Fund for safeguarding IH.

There was general agreement that some form of funding mechanism is vital for the Convention to have sufficient viability and to be sufficiently attractive to Member States.

The question therefore remained as to whether the provision of draft Article 14 needed modification.

Discussion unit 17 – Articles 18 to 25 on Modalities of International Assistance

Article 19 should allow for the possibility of assistance for preparing candidacy files or for sites to come of the list of Heritage in Danger.

This was left to the Drafting Committee.

Discussion unit 18 – Articles 26 and 27 on Education Programmes

Article 26 was unanimously regarded as a subject of great importance for IH, but “educational and information” programmes was seen as both vast in scope and vague. It was stressed that assistance should be given with a view to registration and not as a condition of it.

It was suggested that explicit reference to means of transmission and youth education be passed to the Drafting Committee for consideration, along with the importance of sustaining IH, respect for cultural diversity and the need for documentation.

Discussion unit 19 – Article 28 on Reports

This follows emerging practice and prevents inertia, although some modifications were suggested for consideration by the Drafting Committee on:

- The timing of the reports.
- Submission of reports to the [committee] and not the General Conference.

Discussion unit 20 – Articles 29-37, the Final clauses

Article 29 The text will be drafted in six languages.

Article 32 The replacement of “acceptance and accession” by “acceptance” on its own was suggested.

The thirtieth ratification (in place of the twentieth or fifteenth) should probably be required, although this is also a political issue and can be reconsidered.

Article 33 The suggestion of waiving the 1972 WHC provisions in favour of those now incorporated into the recently adapted Convention on Underwater Cultural Heritage was accepted. These are more useful as not just dealing with Federal states and including the concept of “portions of Territory”. It gives states a reasonable lee-way.

The text of this provision from the Underwater Convention should be passed onto the Drafting Committee.

Tentative Timetable for future meetings:

A tentative timetable for future meetings, subject to possible modification, was proposed :

*6-7-8 June 2002 : Meeting on Terminology, with drafting of a glossary on Intangible Cultural Heritage (UNESCO, Paris).

*10-11-12 June 2002 : Second Meeting of the Working Group on the first Draft of an International Convention on Intangible Cultural heritage (UNESCO, Paris).

*3-4-5 July 2002 : Expert Meeting of Category VI (UNESCO, Paris).