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ON INTANGIBLE CULTURAL HERITAGE***

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**PROPOSALS FOR INCLUSION IN THE PRELIMINARY DRAFT ON THE
CONVENTION ON INTANGIBLE CULTURAL HERITAGE**

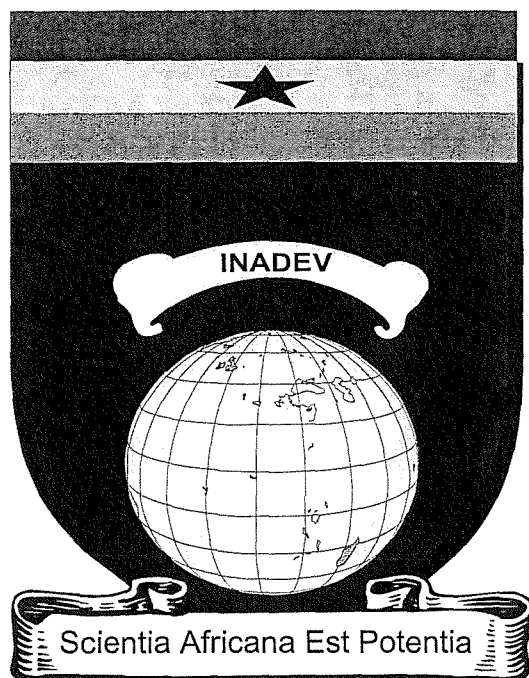
**PROPOSALS FOR INCLUSION
IN THE
PRELIMINARY DRAFT OF THE CONVENTION
ON
INTANGIBLE CULTURAL HERITAGE**

Presented to H.E. Justice Mohammed Bedjaoui
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INTRODUCTION

At the first session of the Working Group on the First Draft of an International Instrument on the Safeguarding of Intangible Heritage, it was felt that to the extent the Working Group's initial draft was based on UNESCO's World Heritage Convention, the weaknesses of that instrument needed to be examined to avoid a repetition in subsequent drafts of problems that have limited the Convention's usefulness. In addition, it was considered useful to explore further existing state practices in relation to the protection of cultural heritage with a view to identifying for inclusion in the draft instrument principles that appear to have gained wide acceptance. This memorandum addresses both needs.

Accordingly, the first and second parts of this memorandum describe the World Heritage Convention and note its limitations. Section Three summarizes the significant initiatives for the protection of cultural heritage at the international, regional and national levels while Section Four provides recommendations on practices for inclusion in the new instrument based on the review of law discussed in the preceding sections. Finally, a draft model convention is appended which incorporates the principles identified in this memorandum.

SECTION ONE: PROVISIONS OF THE WORLD HERITAGE CONVENTION

The World Heritage Convention was adopted in 1972 by the General Conference of UNESCO to encourage international cooperation for the protection of the cultural and natural heritage of mankind. This was necessitated by concerns that cultural heritage and the natural heritage were "increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction" and that "the deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world."ⁱ

Subject matter included within the scope of the Convention as *cultural heritage* are monuments, groups of buildings and sites. The Convention describes monuments as "architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science."ⁱⁱ It refers to groups of buildings as "groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science."ⁱⁱⁱ It defines sites as "works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view."^{iv}

For items protected as *natural heritage*, the Convention identifies first, natural features, consisting of "physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;"^v second, geological and physiographical formations and precisely delineated areas "which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;"^{vi} and finally, natural sites or precisely delineated natural areas "of

outstanding universal value from the point of view of science, conservation or natural beauty.”^{vii}

Under the Convention, each contracting state is primarily responsible for identifying, protecting, conserving and transmitting to future generations, the cultural and natural heritage found within its territory.^{viii} To this end, the state must apply “the utmost of its own resources” and, where appropriate, seek international assistance and co-operation, including financial, artistic, scientific and technical assistance.^{ix} The state is also required to identify and delineate matter eligible for protection,^x and adopt policies and programs for the protection, conservation and protection of cultural and natural heritage.^{xi}

The Convention encourages international cooperation in the efforts to protect cultural and natural heritage since “such heritage constitutes a world heritage.”^{xii} Accordingly, it calls upon the international community to “help in the identification, protection, conservation and presentation of such heritage”^{xiii} and not to “take any deliberate measures which might damage directly or indirectly the cultural and natural heritage situated on the territory of other States...”^{xiv} To facilitate such international cooperation, the Convention established a World Heritage Committee^{xv} charged with preparing and publishing a World Heritage List^{xvi} comprising properties it considers to have “outstanding universal value.”^{xvii} The Committee is also responsible for providing assistance in the form of training, technical aid, equipment and loans to states which request such assistance.^{xviii} A World Heritage Fund has been established to support the activities of the World Heritage Committee.^{xix}

In 1996 the Committee came out with its criteria for the protection of cultural properties of “outstanding universal value.” To be eligible for inclusion in the World Heritage List, the property should represent “a masterpiece of human creative genius” or exhibit “an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design” or bear “a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared.” The List may also include property deemed to be “an outstanding example of a type of building or architectural or technological ensemble of landscape which illustrates significant stage(s) in human history” or “an outstanding example of a traditional human settlement or land-use which is representative of a culture (or cultures), especially when it has become vulnerable under the impact of irreversible change” or is “directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance.”^{xx}

SECTION TWO: WHAT THE CRITICS SAY ABOUT THE WORLD HERITAGE CONVENTION

1. Darrell Posey

Darrell Posey, a world renowned expert in the area of cultural heritage notes the importance of genuine consultation with local groups, and the adoption of a broad definition of the subject-matter of protection as understood by the local people themselves for an effective implementation of the provisions of the World Heritage Convention:

The World Heritage Convention can be useful in protecting the cultural heritage of some indigenous peoples, traditional societies and local communities, depending on: (a) whether governments are willing to consult indigenous peoples by involving them in World Heritage conservation processes - such as identification, assessment, monitoring, evaluation by advisory bodies, management, etc; (b) whether national legislation to implement the convention allows for a flexible or broad interpretation of 'cultural and national heritage', and (c) whether the world Heritage Committee is prepared to recognise that cultural and natural properties important to an indigenous people constitute part of the heritage of humankind of sufficient importance to justify their protection.^{xxi}

2. Ben Boer

On his part, Ben Boer is concerned that the duties imposed on States under the World Heritage Convention have been substantially weakened by the Convention's use of the so-called "best efforts" clauses.

The combination of obligations in Articles 4 and 5 is significant. However, the "duty" mentioned in Article 4 is tempered somewhat by the words "to the utmost of its resources" and "with any international assistance...which it may be able to obtain." Article 5 similarly qualifies its provisions: each state party "shall endeavour" to act along those lines "in so far as possible, and as appropriate for each country." These provisions are deemed to constitute "a best efforts clause" which "does dilute the treaty's obligations."^{xxii}

3. Catherine Vernon

Catherine Vernon, cautions against the danger posed by granting States the sole right to determine which items of cultural property are worthy of protection. She is concerned that the provisions of the World Heritage Convention would allow states to refuse to protect otherwise eligible cultural heritage purely for improper reasons.

While UNESCO advocates that the full enjoyment of common heritage is an indispensable condition for self-realization of all peoples, ... the focus of many of their recommendations and agreements is on the state's rights, as opposed to those who might claim common property rights on a cultural basis. The 1970 Convention on the Illicit Movement of Art Treasures, although not specifically applicable to immovable cultural property, does recognize that "the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation." ...At the same time, however, it upholds the priority of each State's rights in controlling protection efforts over cultural property found within the national territory of each state. ...

Herein lies the major dilemma and obstacle to resolving the question of who should control this common property. Of concern is the Convention's definition of cultural property which provides that host states alone determine which property

is important to the cultural heritage....The Convention goes on to give an extensive, yet not exhaustive, list of categories of objects that are covered by the treaty....The generality in the category descriptions allows each state to subjectively specify the content and scope of which cultural objects are to be subject to the Convention's protective terms..... As a result, there is great diversity among the various national legal systems in establishing their respective criteria for determining which objects, if any, are to be protected....

While this theory might recognize the unique contribution of each state to the cultural heritage of mankind,.... granting each state the right to subjectively specify the scope and content of cultural property includes the right to exclude property from protection that others outside the state might find more culturally valuable. It also permits an exclusion from protection on grounds of domestic budget concerns ___ i.e. if not designated, no funds need be allocated to that artifact for protective efforts. A nationally controlled, self_designated cultural property framework cannot truly promote common outside cultural property interests. Since UNESCO 1970, "protection" of cultural property has in reality become a euphemism for "retention" or "protection against removal" with little regard for the Convention's other language promoting a common cultural property concept.Once again, the foundational support for common protective efforts, including rights of intervention, are found in the treaty's noble ambitions laid down in its introduction. Yet the treaty's text defaults to traditional territorial concepts for its protective legal framework, a framework susceptible to the situs government's self_serving motivations, domestic political persuasion, and internal economic conditions.....

"The most extensive international legislation concerning preservation of mankind's common cultural heritage occurred in 1972 with the signing of the UNESCO World Heritage Convention.However, it too fails to provide special provisions for international intervention and protection of common cultural heritage, instead fully respecting the sovereignty of the States on whose territory the cultural and natural heritage is situated, without prejudicing property rights provided by national legislation. ...

The treaty does provide for the creation and maintenance of a World Heritage List and a List of World Heritage in Danger.... Yet the Convention relies on each State that is a party to submit to the World Heritage Committee an inventory of property forming part of what it subjectively considers to be cultural and natural heritage, situated in its territory, with an outstanding universal value to the formation of the cultural heritage and natural heritage.... The Convention has an express stipulation that "inclusion of a property in the World Heritage List requires the consent of the State concerned." ...

The World Heritage Convention established The World Heritage Committee to consider requests from any State Party for international assistance for property of universal value located within its territory, ...and indicates what forms of

assistance will be granted.... While these ... are applaudable programs, again they are restricted to impetus from the territorial state. Despite the treaty's regard for the world's heritage, the world receives no rights of protection; only States have such rights. The assistance provisions need to be expanded to include a right for any State, not just the one where the cultural heritage is situated, to invoke the help and funding of this UNESCO Committee. The assistance granted by the Committee under the convention cannot be truly protective of common property rights without such recognized intervention provisions.

Further, while funding for properties can be provided by the International Fund for the Promotion of Culture of UNESCO, established in 1977, or the World Heritage Fund established under Article 15 by the signatories to the World Heritage Convention,.... difficulties in financing projects can arise under the existing treaty framework. Any ...funding sources remain limited and unpredictable since contributions of Member States can be, and are, withheld for political reasons....

Therefore, common culture under the World Heritage Convention remains dependent upon the willingness and ability of the host state to provide protection; placing the territorial control of the nation_state above any worldwide or regional interest in the cultural heritage of mankind. This has, and will continue to create situations where domestic concerns take priority over common cultural property preservation, sometimes to the detriment of the world community's interests. A right of intervention could correct this international legal void by allowing protective cultural intercession in the event improved preservation is warranted.^{xxiii}

4. **Sarah Eagen**

Sarah Eagen also dwells on a defect inherent in the Convention as a result of its emphasis on state sovereignty. She suggests as remedial measures, the provision of rights in favor of non-source nations to decide which items ought to be protected. Additionally, she highlights the importance of providing for enforceable rights.

Although the World Heritage Convention acknowledges the value of non_moveable cultural and natural property in the international arena, it fails to provide a method of implementation that does not depend upon the consent of source nations. Under the Convention, international assistance in preserving cultural objects can only occur after a source nation has "requested" assistance from the World Heritage Committee. In addition, only source nations get to designate which cultural objects are worthy of international protection. M. Catherine Vernon correctly notes that "while these are applaudable programs...they are restricted to impetus from the territorial state. Despite the treaty's regard for the world's heritage, the world receives no rights or protection; only States have such rights.".... In addition, she notes that the Convention is weak in its financial aspects because it allows State parties to opt

out of paying their dues to support the World Heritage Fund, which provides the financial resources for international protective assistance.... Therefore, although the World Heritage Convention suggests a positive intent to protect the cultural property throughout the world, like the Hague Convention, it is idealistic in some respects. Until interested non_source nations have a voice in making decisions concerning the preservation of cultural objects, both Conventions for the most part remain ineffective, and provide a false sense of security that the historical and artistic treasures of the world are being adequately protected.....

However, the World Heritage Convention, unlike the Hague Convention, is built upon procedural rules that only permit the source nations of cultural property to decide whether that property is worthy of protection.

Perhaps the largest weakness in the World Heritage Convention is the power it gives source nations to determine the fate of cultural objects within their national territories. Under the Convention, non_source nations have no authority to ensure that cultural objects are being protected.... Although the concept of territorial sovereignty is firmly established throughout the world as a method of establishing power, political independence, and maintaining order, its use does not make sense in the context of cultural property preservation. M. Catherine.... Vernon states that "current national boundaries often have no connection or alignment with the peoples that inhabited the land in past centuries and left cultural clutter as evidence of their existence. Culture is defined by linguistic, religious, or other criteria, not by an artificially placed boundary line.".... The language of the Hague Convention also appears to support the belief that national boundary lines should not determine whether a party has a right to take part in the preservation of cultural objects. After all, the Hague Treaty states that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind."

However, territorial sovereignty is not going to diminish in international law unless there are incentives for it to do so. Theoretically it makes sense for national boundaries to have virtually no role in the rights of cultural property preservation, but such a step will not occur easily. Incentives such as increased profits from tourism and guarantees that permanent removal of cultural objects will not occur, will likely need to be made in order to "get the ball rolling" so to speak.

Although national boundaries are likely to remain a force in international cultural property laws, efforts must be made to decrease the amount of power that source nations have under these laws, by giving non_source nations a voice in preservation decisions. Additionally, a right of action at some level must be acknowledged, because the current international treaties illustrate that positive intent is of little use until it can be implemented. Until such steps are taken, the fate of our cultural heritage remains in the hands of, and at the discretion of host nations.^{xxiv}

Ms. Sarah Eagen also proposes the creation of an international watch committee as a method of checking the otherwise absolute powers of the sovereign state. However, I do not believe that an international watch committee is feasible under the current political climate. I prefer requiring consultations by the national competent authority with local groups. Such consultation is not an encroachment on state sovereignty and would further democracy and encourage government policies to be more reflective of the views of its constituencies.

The World Heritage Convention would be a more effective treaty if it authorized the creation of a "watch committee" that was not only permitted to respond to requests for assistance by source nations, but that could act independently in determining and overseeing the preservation of cultural objects. Such a committee would have the "police power" to investigate and keep tabs on cultural objects located within member nations, and could make appropriate recommendations as to how preservation can be achieved. The committee would be able to notify a nation of particular items that are at risk of damage or destruction, so that the nation could direct its own efforts toward preserving those particular items. If resources were scarce, then source nations would need to inform the committee that it is unable to protect the items at risk without the assistance of the Convention. Accordingly, a nomination could then be made by the watch committee for the cultural property at issue to be included on the World Heritage List, and then efforts could be directed toward raising funds and gathering individuals skilled in conservation techniques ... to provide assistance.

Additionally, funding could possibly come from non_profit organizations such as the World Monuments Fund. It is important to note that the "watch committee" would not replace the World Heritage Committee, but rather, it would function as a complement to the overall regime that has been established by the Convention. Essentially, the "watch committee" would be an apparatus that would have the power to visit, monitor, and investigate cultural property located in countries that are party to the Convention.

Of course, additional changes would need to be made to the Convention in order for the creation of a "watch committee" to be possible. As it currently reads, the Convention only provides for protection of cultural items that are included on the World Heritage List.... This means that items that are not nominated by source countries for inclusion on the List are not entitled to protection under the Convention. Additionally, those items that have been nominated, but have not been accepted for inclusion on the List by the World Heritage Committee, are also not entitled to protection. In order for a "watch committee" to be successful,... the language of the Convention would have to be modified so that the committee would have the power to nominate cultural items for inclusion on the World Heritage List. As a result, preservation efforts could be extended toward items that the committee considers to be in need of protection.

Some may argue that such a change is not possible because source nations will

not want to give up the power they currently have in nominating cultural items they feel are deserving of protection. However, source nations will not lose their nominating powers under the changes that are suggested in this note. Instead, source nations will only share their powers of nomination with an elected policing committee that has to adhere to a set of guidelines which have been created by all countries that are party to the Convention. In other words, the "watch committee" will not be able to act arbitrarily in making its nominations, but rather it will have to comply with the guidelines that have been specifically created for the committee's operations. Additionally, due to the findings and suggestions of the committee, source nations may be provided with an incentive to nominate cultural objects themselves, rather than waiting for the committee to nominate them to be included on the World Heritage List^{xxv}

5. **Catherine Berryman**

Catherine Berryman suggests as measures for improving the effectiveness of the World Heritage Convention, the inclusion of provisions stating clear mandatory state obligations, provisions on moral rights, an effective enforcement scheme and the adoption of suitable implementing domestic legislation.

A more effective means to ensure preservation [of intangible cultural property] is the establishment of a public international convention that explicitly offers tangible_property_type protection for intangible cultural property. Amending tangible cultural property conventions could achieve this goal but these convention provisions and remedies are not designed to protect incorporeal property.... Thus, adequate protection would mandate the creation of specific provisions that recognize the incorporeal status of intangible cultural property and address remedies for transgressions from an incorporeal perspective. Such provisions and remedies could include affirmation of origin (paternity), proper labeling if reproduction is segmented, and injunctive relief for dissemination of inaccurate works....

The creation of a convention that pertains solely to the preservation and protection of intangible cultural property, a convention enforced apart from the existing tangible conventions, would be the optimal way to ensure distinct recognition of intangible expressions.... The convention document could usurp many of the tangible cultural property preambles, goals, and rationales with only a redirection of terms and language to fit its incorporeal object. Its provisions also could be adapted from domestic laws, such as moral rights laws, public domain laws, or folklore laws, and from proposed international instruments. One must note that commentators and UNESCO have suggested that the international public domain and folklore recommendations are mirror images of tangible cultural property conventions for certain segments of intangible cultural property.... One also must note the highly positive response UNESCO received from its member nations which reiterated the need for intangible cultural property protection and stated their satisfaction with UNESCO's draft rules as

effective remedies for the abuses faced by public domain works and folklore. This positive member_state response would seem to indicate that adoption of international protection is both politically feasible and ripe....

An effective convention document would need teeth comparable to those in the tangible cultural property conventions. The convention document should include: (i) strongly stated protective (mandatory) duties for a nation's own intangible cultural property as well as that of other states;(iii) acknowledgement of state moral responsibilities to protect intangible cultural property as linked to the common heritage of mankind; (iv) specific enforcement designation;(v) specific means to protect intangible property that states must domestically implement or legislate;and (vi) the assurance of safeguards and respect for intangible cultural property, by implementing, for example, a minimum of paternity and integrity rights^{xxvi}.....

SECTION THREE: TRENDS IN THE PROTECTION OF CULTURAL HERITAGE

I. INTERNATIONAL INITIATIVES

1. *Protection for Unpublished Works*

The early international instruments on international property did not provide for the protection of cultural heritage. However, the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) was revised in 1967 to include a provision on anonymous works which has some relevance to the protection of cultural heritage. The amended provision 15(4)(a) of the Convention now 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.Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

Adopted in response to calls for the international protection of expressions of folklore, the provision is considered by commentators to authorize the creation of national authorities to regulate uses of folklore.

2. *Development of National Model Laws on Folklore*

An important development in the international legal protection of folklore was the preparation by UNESCO and WIPO of the Tunis Model Copyright Law ("Tunis Model Law") in 1976. The Tunis Model law was intended to be used as a guideline in drafting national copyright legislation. The Model Law protects folklore and works derived therefrom as original works for an indefinite period whether or not the expression of folklore is fixed in a material form. The Model Law also creates moral and economic rights to be administered by a competent authority established by the state. Fees collected by such authority in exchange for the use of folklore would be used to benefit authors and performers and to protect and disseminate national folklore.^{xxvii}

In conjunction with WIPO, UNESCO set up a Committee of Experts to draw up model provisions for national laws on the protection of folklore according to principles similar to those of intellectual property law. In 1982, the Committee of Experts came out with the final text of its Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Model Provisions).^{xxviii}

The Model Provisions employ the terms "expressions" or "productions" instead of "works" to emphasize the uniqueness of the provisions from copyright laws. Rights protected under the Model Provisions are defined as "productions consisting of characteristic elements of traditional artistic heritage developed and maintained by a community, or by individuals reflecting the traditional artistic expectations of such community."^{xxix} Under these provisions, protection is extended to folklore whether it is expressed verbally, musically, by action, or in tangible form.^{xxx}

Due to the fact that in many countries the rights to folklore vest in the state, the Model Provisions avoid the concept of ownership, preferring instead to identify a "competent authority" as the main repository of rights to folklore.^{xxxi} Accordingly, where protected expressions of folklore are to be used both with gainful intent and outside their traditional or customary context, prior approval must be obtained from such authority. However, permission would not be required where the use of folklore is for educational purposes, incorporated in the original work of an author or is incidental. Applications to use an expression of folklore must be made in writing to the authority which may impose fees for such use with the understanding that the revenues so collected would be used to promote or safeguard national folklore.^{xxxii}

The Model Provisions allow criminal penalties to be imposed for: failing to obtain the required written consent prior to use of protected folklore; failing to acknowledge the source of folklore; misrepresenting the origin of expressions of folklore; and distorting works of folklore in any manner considered prejudicial to the honor, dignity or cultural interests of the community from which it originates.^{xxxiii} In addition, objects made in violation of the Model Provisions and any profits made therefrom can be seized. These remedies may be imposed along with damages and other civil remedies.^{xxxiv}

3. Efforts to Develop an International Instrument on Folklore

After promulgating the Model Provisions, the Committee of Experts proceeded to draft an international treaty on folklore that closely tracks the Model Provisions in terms of its

definition of subject-matter, remedies for unauthorized use and acknowledgment of the sources of folklore. Under the Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other prejudicial Actions (“Draft Treaty”), each contracting state would designate a competent authority to administer the protection of expressions of folklore within the state. This authority would request that the other states protect expressions originating in the contracting states’ own territory. Written permission of that authority would be required prior to permitting commercial uses of folklore in other contracting states. To facilitate the implementation of this provision, the state-appointed authority is required to provide information pertaining to the main characteristics and the source of expressions of folklore originating in its territory.^{xxxv}

The request to use an expression of folklore would be made to the competent authority in the state in which the expression of folklore originates.^{xxxvi} With few exceptions, authorization is expected to be automatic and expeditious, but may be conditioned on the payment of adequate compensation which would be fixed by the competent authority in the absence of agreement. Permission is not required from the competent body where the use of folklore is for educational purposes, for creating original literary or artistic works or for incidental use. The Draft Treaty provides for national treatment of foreign works of folklore.^{xxxvii}

4. Recommendations for the Safeguarding Folklore

Noting the importance of folklore as “an integral part of cultural heritage and living culture” and concerned about “the extreme fragility of the traditional forms of folklore,” the General Conference of UNESCO in November 1989 adopted a *Recommendation on the Safeguarding of Traditional Culture and Folklore* and called upon member states to take the necessary legislative steps to give effect to various identification, conservation, preservation, dissemination, protection and international cooperation measures outlined therein.

The Recommendation suggests as identification methods, the creation of national inventories of institutions concerned with folklore, and the development of recording systems and comprehensive registries.^{xxxviii} Conservation measures could center on the establishment of national archives and museums, harmonization of collection and archiving methods, duplication of folklore materials and training of specialists in conservation work.^{xxxix} Relevant preservation measures include the teaching and study of folklore, guarantees of access of cultural communities to their folklore, establishment of a national coordination bodies and promotion of scientific research on folklore.^{xl} Dissemination of folklore is expected to be ensured through such events as fairs, festivals, films, exhibitions and workshops, coverage of folklore in the media, creation of job opportunities for folklorists, and exchanges of persons and groups concerned with folklore.^{xli} Mindful of the complementary nature of the intellectual property related aspects of protection available under the WIPO framework, the Recommendation urges enhanced privacy and confidentiality rights for informants as the transmitters of tradition, and also for collectors through proper archiving and safeguarding of materials against misuse.^{xlii} Finally, the Recommendation calls for international cooperation with other states, international and regional institutions in the field of knowledge, dissemination and protection of folklore.^{xliii}

5. Curbs on Illicit Trade in Cultural Property

The Illicit Trade Convention was adopted in 1970 in recognition of the importance of cultural property as “one of the basic elements of civilization and national culture” which makes it “incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation and illicit export.”^{xliv}

Cultural property is defined under the Convention as “property which on religious or secular ground, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to [certain] categories.”^{xlv} To ensure the protection of such property against illicit import, export and transfer of ownership, contracting states are obligated to set up appropriate national services, require export certificates, and prevent the acquisition by museums of illegally imported property. They are also to prohibit the importation of stolen property, and at the request of the country from which the property was removed, take appropriate steps to recover and return the property. The Convention envisages international cooperation in tackling the problems posed by illicit trade in cultural property.^{xlvi}

Subsequently, UNESCO requested the International Institute for the Unification of Private Law (UNIDROIT) to draw up the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects which was adopted in 1995 as a complement to the Convention on Illicit Trade. The UNIDROIT Convention contains significant provisions regarding the restitution of stolen cultural objects and the return of illegally exported cultural objects.

6. Neighboring Rights of Performers

Although not the creators of the works with which they are involved, performers, recorders, and disseminators are often responsible for the increased public exposure of such works. Regrettably, under early copyright statutes, the benefits from this increased exposure were passed on to copyright holders in the form of royalties and the performers received no economic returns for their efforts. To remedy this anomaly, the concept of neighbouring rights^{xlvii} was developed under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (the Rome Convention).

The Rome Convention prohibits the following acts carried out without the performer's prior consent: (i) broadcasting or communication to the public of a 'live' performance; (ii) recording an unfixed performance; and (iii) reproducing a fixation of the performance, provided that the original fixation was made without the consent of the performer or the reproduction is made for purposes not permitted by the convention or the performer.^{xlviii} Under Article 12, if a phonogram is made for a commercial purposes and communicated publicly, the user must pay an 'equitable remuneration' to the performers or to the producer of the phonogram, or to both. The minimum term of protection is 20 years from the performance, fixation, or broadcast.

The Convention is relevant to the protection of cultural heritage because important aspects of cultural heritage such as “folk tales, poetry, songs, instrumental music, dances, plays and similar expressions of folklore actually live in the form of regular performances.”^{xlix} In this sense, cultural performers constitute important vehicles for communicating aspects of cultural heritage to the public. Therefore, extending the benefits of the Rome Convention to traditional

performers would significantly improve the protection of expressions of cultural heritage that are the subject of such performances. As WIPO notes, “[t]he Convention is particularly interesting for those countries whose civilisation and tradition are oral and where the author is often the performer as well.”^{li} Indeed, of the more than 50 countries that have so far enacted legislation related to the Rome Convention, more than half are developing countries with strong oral traditions. However, although neighbouring rights can be a useful legal tool to protect traditional knowledge in countries that legally recognise them, protection is limited in time and excludes copying what is not performed, broadcast, or contained in phonograms. Moreover, the definition of performers excludes most traditional performers to the extent they are not considered to be performers of “artistic and literary works”^{lii}

The WIPO Performances and Phonograms Treaty was adopted by a diplomatic conference in 1996 to improve the rights of performers and producers of phonograms. Under the Treaty, performers are entitled to moral rights, distribution, rental and reproduction rights as well as rights in fixed and unfixed performances. Producers of phonograms also benefit from reproduction,^{liii} distribution^{liiii} and rental rights^{liv} as well as the right to make their phonograms available.^{lv} Both performers and producers are assured a “single equitable remuneration for the commercial uses of their work”^{lvi} and enjoy a 50 year term of protection.^{lvii}

Significantly, the WPPT defines performers to include “actors, singers, musicians, dancers, and other persons who act, sing, deliver, play in, interpret, or otherwise perform literary or artistic works *or expressions of folklore*.” (Emphasis added). Thus the WPPT overcomes a limitation in the Rome Treaty and traditional performers of expressions of folklore can enjoy the rights recognized under the WPPT which came into force on May 20, 2002.

II. REGIONAL LAWS

1. *African Intellectual Property Organization (OAPI)*

Title II of the Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization (OAPI) is devoted to the protection and promotion of cultural heritage which is defined to include folklore, sites and monuments, and ensembles. The responsibility of protecting, safeguarding and promoting cultural heritage is assigned to the State in the exercise of which the State is required to conduct an inventory, as well as classify and illustrate the elements that make up the cultural heritage.^{lviii} The instrument prohibits the denaturing, destruction, exploitation, sale or illegal transfer of property that is part of the cultural heritage. Except where authorized by a competent national authority, the law also prohibits the commercial publication, reproduction and distribution of copies of cultural property, or commercial performances of any cultural asset, considered to be part of the national cultural heritage.^{lix}

To prevent looting, loss or deterioration, the State is authorized to control the export, distribution, disposal and sale of cultural property.^{lx} The State also enjoys a right of preemption in relation to property liable to enrich the national cultural heritage. Owners of cultural property listed in the State’s inventory of cultural property must apply to the competent national authority

for authorization before making “any modification to the location or object or before undertaking work other than normal maintenance or everyday utilization.^{lxi} Such listing also entitles the competent national authority to oppose any work liable to prejudice the integrity of cultural property, or oppose the export or transfer of listed property.^{lxii}

The OAPI instrument identifies a number of measures for safeguarding cultural heritage including a) the creation and development of museums, the constitution of collections of all kinds, of funds, of foundations and of conservation structures; (b) the survey, listing and restoring of sites and monuments; (c) recording by image and by sound the cultural traditions of the nation; (d) the setting up of written, visual or sound archives; and (e) the regulation of access to sites, monuments and protected ensembles.^{lxiii}

The law requires the State to afford to all citizens, a right of access to the values of the cultural heritage; and to craftsmen, artists and other creators, a right to assistance and encouragement.^{lxiv} The means recommended for guaranteeing such rights are first, education, especially the inclusion of values of cultural heritage in educational, teaching and training programs in public and private institutions, and second, the creation of a special fund devoted to cultural and welfare purposes.^{lxv} Penalties for violating the provisions on the protection of cultural property include a jail terms and fines.^{lxvi} Significantly, the instrument requires the establishment in each member State a High Commission for the Cultural Heritage which is to be consulted on all matters concerning the protection, safeguard and promotion of the cultural heritage.^{lxvii}

2. Organization of African Unity (OAU)

In March 1998, the OAU Council of Ministers adopted 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. [[“Model Law”]]. The legislation is designed to protect the inalienable rights of local communities over their biological resources, knowledge and technologies; recognize and protect the rights of breeders; regulate access to biological resources, and provide mechanisms for a fair and equitable sharing of benefits arising from the use of biological resources, knowledge and technologies.^{lxviii} Significantly, the Model Law reaffirms the sovereignty of the State and people over their biological resources and provides for the establishment of a National Competent Authority^{lxix} to administer the Model Law’s provisions.^{lxx} Matters regulated under the Law can be conveniently classified into four main areas: access to biological resources, community rights, farmers rights and plant breeders rights.

To be granted access to biological resources and knowledge or technologies of local communities in any part of the country, one must apply for prior informed consent and written permit of the National Competent Authority and include in the application such details as the identity of the applicant, type and reasons for resources requested, risks in the use of the resources, benefits to the local communities, and proposed benefit-sharing arrangements.^{lxxi} To ensure transparency, the Law requires publication of the application in a public registry or newspaper. The consent of the concerned local community must also be obtained and access carried out without such local consent and that of the State is invalid.^{lxxii} The National Competent Authority is required to verify with local communities that their consent is in fact sought and

granted.

The second broad area tackled under the Model Law concerns community rights. Here, contracting States undertake to recognize the rights of communities over the following matters: their biological resources; the right to collectively benefit from the use of their biological resources; their innovations, practices, knowledge and technologies acquired through generations; the right to collectively benefit from the utilisation of their innovations, practices, knowledge and technologies; their rights to use their innovations, practices, knowledge and technologies in the conservation and sustainable use of biological diversity; the exercise of collective rights as legitimate custodians and users of their biological resources;^{lxxiii} Such community rights are to be enforced in accordance with the oral or written norms, practices and customary law of local communities.

The Law reaffirms the community's prior informed consent as a condition for access to biological resources, and provides for their right to deny access, or withdraw consent or place restrictions on the activities relating to access where such access will be "detrimental to the integrity of their natural or cultural heritage."^{lxxiv} It guarantees the community's right to access, use and exchange biological resources^{lxxv} and their right to at least 50% of the access permit fees to be shared equitably with "the full participation and approval of the concerned local community."^{lxxvi}

With respect to the third main area regulated under the Law, Farmers Rights are recognized as arising from the "enormous contributions that local farming communities have made in the conservation, development and sustainable use of plant and animal genetic sources that constitute the basis of breeding for food and agriculture production." The Law protects farmers' varieties in accordance with the oral or unwritten customary practices and laws of local communities and also provides for intellectual protection for varieties with special attributes through variety certificates that do not need to meet the criteria of distinction, uniformity and stability.^{lxxvii}

As to the fourth area on Plant Breeder's Rights, the Model Law acknowledges the efforts and investments made by persons or institutions as the bases for recognizing rights in new varieties of plants. It provides the plant breeder exclusive rights to sell or produce a new variety subject to exemptions regarding non-commercial use, further breeding, research or teaching.

The breeders' rights are subject to compulsory licensing and may be restricted by the government in the public interest. Protection is granted for 20 years for annual crops and 25 years for trees, vines and other perennials. Other provisions relevant to plant breeders rights relate to dispute settlement, infringement actions, registration and publication of plant breeders' rights.^{lxxviii}

II. NATIONAL LAWS

Various national copyright statutes provide for the protection of folklore. Ghanaian copyright law, for example, provides that the copyrights of authors of folklore vest in the government as if the government were the creator of the works.^{lxxix} Thus, one cannot use

Ghanaian folklore for purposes other than those statutorily authorized without applying to the Secretary, and paying a fee. It is a criminal offense for a person, without the permission of the Secretary, "to import. . . , sell, offer ... for sale or distribute in Ghana ... copies of... works made outside Ghana [of] works of Ghanaian folklore or translations, adaptations, or arrangements of Ghanaian folklore."^{lxxx} A conviction may result in a substantial fine, a two_year jail term or both. The Secretary also is authorized to adopt regulations regarding the designation of particular practices as Ghanaian folklore.^{lxxxi}

Nigerian copyright law protects expressions of folklore "against reproduction, communication to the public by performance, broadcasting, [or] distribution by cable."^{lxxxii} In addition, it protects adaptations, translations and other transformations of such folklore, when such expressions are made either for commercial purposes, or outside their traditional or customary context. The right to authorize any of the aforementioned acts vests in the Nigerian Copyright Council.^{lxxxiii}

Nigerian folklore may be used without authorization for private or educational purposes, as well as for illustrative purposes in other original works. Whenever folklore is referred to, whether in printed publications or in communications to the public, the law requires identification of the source of the folklore by reference to the community or place from where the folklore is derived.^{lxxxiv} Uses of folklore other than as permitted and without the consent of the Nigerian Copyright Council will subject the user to liability to the Council in damages, injunctions, or any other remedies that the court deems appropriate.^{lxxxv}

Congolese copyright law protects folklore without a time limitation. A society known as the "Body of Authors" is responsible for collecting royalties, representing the interests of authors, and overseeing the use of folklore, which is regarded as part of the national heritage. Prior to any public performance, reproduction, or adaptation of folklore for commercial purposes, permission must be sought from the society. The society charges users of folklore a fee to support cultural and social objectives that benefit Congolese authors. Penalties can be assessed against persons who fail to obtain the required authorization. Although public agencies are exempted from the obligation to obtain prior authorization to use folklore for non_profit activities, they nevertheless must notify the collecting society before using the material.^{lxxxvi}

Congolese copyright law prohibits the import or distribution of copies of works of national folklore made abroad without the permission of the Body of Authors. Under a provision that applies generally to copyright, fines may be imposed for the unlawful export, import or reproduction in Congo of works published in Congo or abroad. The collecting society is authorized to take legal action to prevent the improper exploitation of national folklore and has the power to institute infringement proceedings, to obtain seizure orders, or issue injunctions.^{lxxxvii}

In Algeria, the National Copyright and Related Rights Office is responsible for protecting traditional cultural heritage works.^{lxxxviii} The Office is empowered to authorize the exploitation, impose fees for commercial uses, and refuse or suspend any prejudicial exploitation of such works. Users of cultural heritage works are required to respect the integrity of those works and ensure that they are communicated to the public in a manner that respects their integrity.^{lxxxix}

Sri Lanka's Intellectual Property Code protects works of folklore without limitation to time, and gives the Minister of Culture the right to authorize uses folklore. Copies of works of Sri Lanka folklore made abroad and copies of translations, adaptations, arrangements, or other transformations of works of Sri Lanka folklore made abroad, without the authorization of the Minister of Culture are neither to be imported nor distributed in the country.

Mexico's Federal Law of Copyright effective December 1996, protects "literary and artistic works, works of popular art or craft works, and also all original manifestations in local languages, and the practices, customs and traditions of the multi-cultural society constituting the Mexican State that do not have an identifiable author."^{xc} Such works are protected against distortion or other uses that discredit the image of the community or ethnic group to which they belong. The law also requires the associated community or ethnic group to be acknowledged in any fixation, representation, publication, communication or use of protected works.^{xcii} These protective measures are to be overseen by the National Copyright Institute.^{xcii}

Similarly, Paraguay protects all published or unpublished expressions of folklore against improper exploitation and mutilation or distortion.^{xciii} Under Paraguayan law, the National Directorate of Copyright and other agencies responsible for the care of traditional knowledge are required to protect it against abusive exploitation or violation of its integrity.^{xciv} Where an expression of folklore serves as the basis for a derived work, the author of the latter, or the person who discloses or disseminates it by any means or process, is required to specify the regional community in which the expression originated, and its title if it has one.

SECTION FOUR: PRINCIPLES WORTHY OF INCLUSION IN THE PROPOSED INSTRUMENT ON INTANGIBLE HERITAGE

The above summary of the different laws regulating cultural heritage reveals a number of policies which could be taken as indications of an emerging trend. To the extent they are not found in the Working Group's initial draft, the Working Group should consider them for inclusion in subsequent drafts. In addition, the memorandum has identified major defects in the World Heritage Convention which should be avoided in the proposed instrument to enhance its effectiveness.

1. Duty to Establish National Competent Body

First is the practice of creating a national competent body to oversee the protection of cultural heritage. There is nothing novel about this proposal. It is found in the OAU Model Law, the OAPI Agreement, the Tunis Model Law, UNESCO-WIPO Model Provisions, the UNESCO-WIPO Draft Treaty, and the 1967 revision of the Berne Convention. Thus, a significant number of the instruments in this area recognize the usefulness of creating a national agency. Therefore, providing for it in the proposed draft Convention is not likely to generate any serious opposition as an encroachment on national sovereignty. Perhaps, the draft instrument should leave it open to each state to decide on the number and composition of members of the competent body. However, it would be useful to require the body to have as part of its membership, representatives of local communities.

2. Duty to Consult with Relevant Communities

With respect to the safeguarding of an item of intangible heritage, the national body must be required to consult with the relevant traditional groups on all matters necessary for safeguarding of intangible cultural heritage as specified in the draft Convention. The duty to consult is reflected in the more recent instruments on cultural heritage, including the OAU Model Law. In the draft Convention, local communities should be allowed to initiate discussions with the national body regarding the safeguarding of the identified forms of intangible cultural heritage. Furthermore, no measure should be adopted by a state that meets significant opposition from a substantial section of the local community.

The principle of consultation is important as a way of limiting the adverse consequences occasioned by granting the state the sole discretion to decide how and when to protect cultural heritage. Consultation is consistent with democratic principles since as it ensures that the people who are going to be most affected by a proposed measure on intangible heritage are given a key role in the decision-making process.

3. Description of State Obligations in Clear Unambiguous Language

Duties imposed on the state with respect to safeguarding intangible heritage should be clear and contained in unambiguous language. The use of best-efforts clauses should be avoided, it being understood that states would make every effort to comply with their international commitments. Diluting state duties with reference to “best efforts” would defeat the objective of the proposed Convention. It is useful to note in this context that the TRIPs Agreement exemplifies an emerging trend. It states a clear mandatory duty on all contracting states to protect intellectual property rights. That should be the approach in any serious international instrument which is what I think the proposed convention on intangible cultural heritage is.

4. A Reconsideration of the Scope of the Proposed Convention

The draft in its current form does not address an issue of global importance regarding intangible cultural heritage, namely the improper and unauthorized uses of such heritage which precipitated efforts by UNESCO and WIPO over the years to adopt measures to protect cultural heritage. The term “safeguarding” which is used to refer to the proposed Convention, was defined in the 1989 Recommendation to refer to various identification, conservation, preservation, dissemination and protection measures. Therefore, these broad categories ought to be kept in mind in determining the scope of the preliminary draft instrument. As the current draft of the Working Groups stands, the focus was placed regrettably, on the safeguarding of items through inclusion in an Intangible Heritage List. That is a helpful start. However, there are abuses in the exploitation of intangible cultural heritage which threaten to destroy such heritage and put traditional communities at a distinct social and economic disadvantage, but which cannot be remedied under the Heritage List system. For example, indigenous music and dance are frequently sampled by non-indigenous persons and presented as original compositions or choreography with the economic returns going to such non-indigenous persons rather than the traditional groups that created the forms of music and dance in the first place. In addition, there

are problems of authentication where items of intangible cultural heritage, including artefacts, are sold and misrepresent communal values. To be a genuine instrument for “safeguarding” cultural heritage, the proposed instrument must also tackle the problem of improper and unauthorized uses of cultural heritage. Indeed the 1989 Recommendation recognized the significance of this by stating that protection through a system of rights and remedies would promote “further development, maintenance and dissemination of culture.” Therefore, the proposed Convention should address the issue about rights of communities in their intangible cultural heritage and their control of its uses as a way of safeguarding it.

In this context of rights and remedies, it is unhelpful to argue that UNESCO should not be concerned with them because other international fora, including WIPO already address them. The fact is that WIPO operates on the basis of intellectual property criteria which would exclude many forms of intangible cultural heritage to the extent such heritage is owned by groups, is transmitted orally, is without clearly identifiable authorities and is unlimited as to time. Therefore, removing the issue of communal rights and remedies relative to intangible cultural heritage from the scope of protection of the proposed Convention could lead to a situation where no effective means of protection exists elsewhere for such items to the extent WIPO and other relevant international organizations do not in fact, develop adequate methods of protection. In any event, the issue about an overlapping of rights can be taken care of by including a clause suggesting that the proposed Convention would not in any way limit or prejudice any protection applicable to cultural heritage under national laws or any international instruments.

It is also important to bear in mind that contrary to the general perception, the World Heritage Convention does not apply generally to tangible property. In fact, it applies only to certain forms of immovable tangible property. Thus, all movable tangible property are excluded from the scope of the World Heritage Convention, including those associated with intangible cultural heritage. Although UNESCO’s Illicit Trade Convention and the UNIDROIT Convention pick up the slack, regrettably they are only relevant to illegal transfers and theft of such items and not to other measures contemplated under the notion of safeguarding, including improper and authorized uses. It is important therefore, that the Working Group address this major omission from the World Heritage Convention and adopt a holistic strategy for the effective safeguarding of intangible cultural heritage. Obviously, these observations assume that intangible cultural heritage also includes tangible items as is evident from the definition of intangible cultural heritage.

5. Relevance of the 1989 Recommendation

The tasks outlined in the 1989 Recommendation on the Safeguarding of Folklore with respect to identification, conservation, preservation, dissemination, protection and international cooperation are all relevant to the extent they form part of the definition of the term “safeguarding.” Therefore, these tasks should be referenced in the proposed instrument. The inclusion of selected measures outlined in the Recommendation as a substantive part of the Convention would change the perception of them as a merely recommendatory and transform them into strong obligations.

6. Provision of Rights and Remedies

The various instruments surveyed provide for a system of rights and remedies as a way of enhancing the protection of cultural heritage. Specifically, they provide for the payment of fees for commercial uses of cultural heritage with the funds being used for purposes benefiting cultural heritage generally. See for example, Tunis Model Law, Model Provisions, Draft Treaty, and various national laws e.g. Ghana, Nigeria, Congo, Mali, Cameroon, Central African Republic. Our draft does not address economic uses of intangible cultural heritage. From the definition of intangible cultural heritage it is obvious that many of its aspects are commercially significant. For example, scientific knowledge and works, including practices and products of medicine and of pharmacopoeia (as defined in the OAPI law) of traditional groups are of interest to pharmaceutical and other biotechnology companies. The Committee probably needs to discuss the extent to which the uses of this and other types of intangible cultural heritage need to be regulated under the draft Convention.

On a related matter, what would be the consequences of a failure to abide by the regulations adopted in the State for the safeguarding of the cultural heritage. The various laws surveyed have typically provided for the imposition of fines or jail terms or even seizure of profits. See for example, the Model Provisions, the Draft Treaty, and the laws of Ghana, Nigeria and Congo. The Working Group should consider including specific provisions on rights and remedies to enhance the level of legal protection as a method of safeguarding intangible cultural heritage.

7. Provision for Moral Rights

There should also be a provision for moral rights, including the rights of paternity, and integrity. Such rights would allow the State to prohibit uses of intangible cultural heritage in a manner considered to distort or discredit it. Additionally, it requires the community associated with the heritage to be acknowledged in uses of such heritage. Moral rights are found in the Tunis Model Law, Model Provisions, the Draft Treaty, the OAPI Agreement, and numerous state laws, e.g. laws of Algeria, Nigeria, Qatar, Jordan, Paraguay and Mexico. A provision on moral rights is critical to the success of any instrument on cultural heritage as the commentators surveyed earlier make clear. Understandably, moral rights were not included in the World Heritage Convention probably because the Convention's subject-matter (buildings, monuments, etc) was not readily amenable to the application of moral rights.

ⁱPreamble, Convention Concerning the Protection of the World Cultural and Natural Heritage

ⁱⁱId., Article 1

ⁱⁱⁱId., Article 1

^{iv}Id., Article 1

^vId., Article 2

^{vi}Id., Article 2

^{vii}Id., Article 2

^{viii}Id., Article 4

^{ix}Id., Article 4

^xId., Article 3

^{xi}Under Article 5, each state was required to:

(a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes; (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions; (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage; (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and or (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and encourage scientific research in this field.

^{xii}Id., Article 6(1)

^{xiii}Id., Article 6(2)

^{xiv}Id., Article 6(3)

^{xv}Id., Article 8(1)

^{xvi}The list is compiled from information on local natural and cultural heritage that each state is required to submit to the Heritage Committee. Id., Article 11(1)

^{xvii}Id., Article 11(2).

^{xviii}Under the Article 22 of the Convention, the assistance granted by the World Heritage Committee may include:

(a) studies concerning the artistic, scientific and technical problems raised by the protection, conservation, presentation and rehabilitation of the cultural and natural heritage ... (b) provision of experts, technicians and skilled labour to ensure that the approved work is correctly carried out; (c) training of staff and specialists at all levels in the field of identification, protection, conservation, presentation and rehabilitation of the cultural and natural heritage; (d) supply of equipment which the State concerned does not possess or is not in a position to acquire; (e) low_interest or interest_free loans which might be repayable on a long_term basis; (f) the granting, in exceptional cases and for special reasons, of non_repayable subsidies.

^{xix}Contributions to the Fund come from compulsory and voluntary contributions of states, gifts and bequests by other states, UNESCO, other Un bodies, public and private organizations or individuals and fundraising activities benefiting the Fund. *See* Article 15(3).

^{xx}Operational Guidelines for the Implementation of the World Heritage Convention (*see* UNESCO VTHC/2/Revised, February 1996: Paragraph 24)

^{xxi}Darryl A. Posey Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities 81 (1996).

^{xxii}Ben Boer, World Heritage Disputes in Australia, 7 J. Env'tl. L. & Litig. 247,252 (1992).

^{xxiii}Catherine Vernon, Common Cultural Property: The Search for Rights of Protective

Intervention, 26 Case W. Res. J. Int'l L. 435,468 (1994).

^{xxiv}Sarah Eagen, Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws that Support International Action, 408,430 – 443 (2001).

^{xxv}Id.

^{xxvi}Catherine Berryman, 331

^{xxvii}Id. Section 17.

^{xxviii}See Report of the Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore, 28 June to 2 July 1982, 16(4) Copyright Bulletin, (1982) at 62.

^{xxix}Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 16(4) Copyright Bulletin, (1982). [Hereinafter Model Provisions] Art. 2.

^{xxx}This would include productions of folk art such as drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes, musical instruments and architectural forms. Id. Art. 2.

^{xxxi}Model Provisions, Art. 11.

^{xxxii}Id. Art. 10(2).

^{xxxiii}Id. Art. 6(4).

^{xxxiv}Id. Art. 8.

^{xxxv}Id. Art 4(2).

^{xxxvi}Id. Art. 5(1).

^{xxxvii}Id. Art. 2

^{xxxviii}On identification measures, the Recommendation calls on Member States to: encourage appropriate survey research on national, regional and international levels with the aim to:

- a) develop a national inventory of institutions concerned with folklore with a view to its inclusion in regional and global registers of folklore institutions;
- b) create identification and recording systems (collection, cataloguing, transcription) or develop those that already exist by handbooks, collecting guides, model catalogues, etc., in view of the need to coordinate the classification systems used by different institutions;
- c) stimulate the creation of a standard typology of folklore by way of: i) a general outline of folklore for global use; ii) a comprehensive register of folklore; and iii) regional classifications of folklore, especially field_work pilot projects.

^{xxxix}The conservation measures are listed as:

- a) establish national archives where collected folklore can be properly stored and made available;
- b) establish a central national archive function for service purposes (central cataloguing, dissemination of information on folklore materials and standards of folklore work including the aspect of safeguarding);
- c) create museums or folklore sections at existing museums where traditional and popular culture can be exhibited;
- d) give precedence to ways of presenting traditional and popular cultures that emphasize the living or past aspects of those cultures (showing their surroundings, ways of life and the works, skills and techniques they have produced);
- e) harmonize collecting and archiving methods;
- f) train collectors, archivists, documentalists and other specialists in the conservation of folklore,

from physical conservation to analytic work;

g) provide means for making security and working copies of all folklore materials, and copies for regional institutions, thus securing the cultural community and access to the materials. *Id.*, Section C.

^{xl}As to preservation, member states are called upon to:

a) design and introduce into both formal and out_of_school curricula the teaching and study of folklore in an appropriate manner, laying particular emphasis on respect for folklore in the widest sense of the term, taking into account not only village and other rural cultures but also those created in urban areas by diverse social groups, professions, institutions, etc., and thus promoting a better understanding of cultural diversity and different world views, especially those not reflected in dominant cultures;

b) 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;

c) set up on an interdisciplinary basis a National Folklore Council or similar coordination body in which various interest groups will also be represented;

d) provide moral and economic support for individuals and institutions studying, making known, cultivating or holding items of folklore;

e) promote scientific research relevant to the presentation of folklore.

Id., Section D.

^{xli}Regarding the dissemination of folklore, member states could:

a) encourage the organization of national, regional and international events such as fairs, festivals, films, exhibitions, seminars, symposia, workshops, training courses, congresses, etc., and support the dissemination and publication of their materials, papers and other results;

b) encourage a broader coverage of folklore material in national and regional press, publishing, television, radio and other media, for instance through grants, by creating jobs for folklorists in these units, by ensuring the proper archiving and dissemination of these folklore materials collected by the mass media, and by the establishment of departments of folklore within those organizations;

c) encourage regions, municipalities, associations and other groups working in folklore to establish full_time jobs for folklorists to stimulate and coordinate folklore activities in the region;

support existing units and the creation of new units for the production of educational materials, as for example video films based on recent field_work, and encourage their use in schools, folklore museums, national and international folklore festivals and exhibitions;

e) ensure the availability of adequate information on folklore through documentation centers, libraries, museums, archives, as well as through special folklore bulletins and periodicals; facilitate meetings on exchanges between individuals, groups and institutions concerned with folklore, both nationally and internationally, taking into account bilateral cultural agreements;

f) encourage the international scientific community to adopt a code of ethics ensuring a proper approach to and respect for traditional cultures.

^{xlii}On the matter of general protection of folklore, member states should:

a) regarding the "intellectual property" aspects:

Call the attention of relevant authorities 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;

b) regarding the other rights involved:

- i) protect the informant as the transmitter of tradition (protection of privacy and confidentiality);
- ii) protect the interest of the collector by ensuring that the materials gathered are conserved in archives in good condition and in a methodical manner;
- iii) adopt the necessary measures to safeguard the materials gathered against misuse, whether intentional or otherwise;
- iv) recognize the responsibility of archives to monitor the use made of the materials gathered.

Id., Section F.

^{xliii}Regarding international cooperation, member states are expected to:

a) cooperate with international and regional associations, institutions and organizations concerned with folklore;

b) cooperate in the field of knowledge, dissemination and protection of folklore, in particular through:

- i) exchanges of information of every kind, exchanges of scientific and technical publications;

- ii) training of specialists, awarding of travel grants, sending of scientific and technical personnel and equipment;

- iii) the promotion of bilateral or multilateral projects in the field of the documentation of contemporary folklore;

- iv) the organization of meetings between specialists, of study courses and of the working groups on particular subjects, especially on the classifying and cataloguing of folklore data and expression and on modern methods and techniques in research;

c) cooperate closely so as to ensure internationally that the various interested parties (communities or natural or legal persons) enjoy the economic, moral and so-called neighboring rights resulting from the investigation, creation, composition, performance, recording and/or dissemination of folklore;

d) guarantee the Member State on whose territory research has been carried out the right to obtain from the Member State concerned, copies of all documents, recording, video_films, films and other material;

e) refrain from acts likely to damage folklore materials or to diminish their value or impede their dissemination or use, whether these materials are to be found on their own territory or on the territory of another State;

f) take necessary measures to safeguard folklore against all human and natural dangers to which it is exposed, including the risks deriving from armed conflicts, occupation of territories or public disorders of other kinds.

Id., Section G

^{xliv}See the Preamble.

^{xlv}These categories include:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and

clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; and (g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments. Id Article 1.

^{xlvi}Id, Article 9.

^{xlvii}Neighboring rights are defined as “the rights of Performers, Producers of phonograms and broadcasting organisations. In a wider sense it also covers other rights similar to copyright, such as the right to photographs in certain countries, the rights of film producers in certain countries or the rights of first editions of books or typographical arrangements.”

^{xlviii}Id, Article 7.

^{xliv}WIPO, Final Report on National Experiences with the Legal Protection of Expressions of Folklore, WIPO/GRTKF/IC/3/10, (2002) at 11

^lWorld Intellectual Property Organization, Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) 240 (2000).

^{li}International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

^{lii}Id, Article 11

^{liii}Id, Article 12

^{liv}Id, Article 13

^{lv}Id, Article 14

^{lvi}Id, Article 15

^{lvii}Id, Article 17

^{lviii}Id, Article 72

^{lix}Id, Article 73

^{lx}Id, Article 75

^{lxi}Id, Article 80

^{lxii}Id, Article 81.

^{lxiii}Id, Article 93.

^{lxiv}Id, Article 94.

^{lxv}Id, Article 95.

^{lxvi}Id, Article 96.

^{lxvii}Id, Article 97.

^{lxviii}See Part 1.

^{lxix} Article 57.

^{lxx} The duties of the Competent National Authority are provided in Article 58 as follows:

- i) create and operate a regulatory mechanism that will ensure effective protection of Community Intellectual Rights and Farmers' Rights, and the regulation of access to biological resources;
- ii) carry out the process of consultation and participation of local communities, including farming communities, in the identification of their rights as provided for under the customary practices and laws of the communities;
- iii) identify types of Community Intellectual Rights and Farmers' Rights;
- iv) identify and define the requirements and procedures necessary for the recognition of Community Intellectual Rights and Farmers' Rights;
- v) develop criteria and mechanisms to standardise procedures;
- vi) develop a system of registration of items protected by Community Intellectual Rights and Farmers' Rights according to their customary practices and law;
- vii) issue licenses for the exploitation and commercialisation of biological resources, including protected species, varieties or lineages, and community innovations, practices, knowledge and technologies;
- viii) identify relevant technical institutions that will assist local communities, including farming communities, in the categorisation and characterisation of their biological" resources, innovations, practices, knowledge and technologies.

^{lxxi} The Law provides,

In making an application for access as provided in article above, the following information shall be provided by the applicant:

- (i) the identity of the applicant and the documents that testify to her/his legal capacity to contract, including, where appropriate, the identity of all partners with the contracting party; (ii) the resources to which access is sought, including the sites from , its present and potential uses, its sustainability and the risks which may arise from access to it; (iii) whether any collection of the resource endangers any component of biological diversity and the risks which may arise from the access; (iv) the purpose for which access to the resource is requested including the type and extent of research, teaching or commercial use expected to be derived from it; (v) description of the manner and extent of local and national collaboration in the research and development of the biological resource concerned; (vi) the identification of the national institution or institutions which will participate in the research and be in charge of the monitoring process; (vii) the identity of the location where the research and development will be carried out; (viii) the primary destination of the resource and its probable subsequent destination(s); (ix) the economic, social, technical, biotechnological, scientific, environmental or any other benefits that are intended, or may be likely to, accrue to the country and

local communities providing the biological resource as well as the collector and the country or countries where he/she operates; (x) the proposed mechanisms and arrangements for benefit sharing; (xi) description of the innovation, practice, knowledge or technology associated with the biological resource; and (xii) an environmental and socio_economic impact assessment covering at least the coming three generations, in cases where the collection is in large quantities.

^{lxxii}Id., Part III, 5(2).

^{lxxiii}Id., Article 16

^{lxxiv}Id., Articles 19 and 20

^{lxxv}The Law provides,

- (1) Local communities shall exercise their inalienable right to access, use, exchange or share their biological resources in sustaining their livelihood systems as regulated by their customary practices and laws (2) No legal barriers shall be placed on the traditional exchange system of the local communities in the exercise of their rights as provided for in paragraph (1) above and in other rights that may be provided by the customary practices and laws of the concerned local communities.

Id., Article 21

^{lxxvi}Article 22(2)

^{lxxvii}The scope of Farmer's Rights recognized under the Law include rights to: (a) the protection of their traditional knowledge relevant to plant and animal genetic resources; (b) obtain an equitable share of benefits arising from the use of plant and animal genetic resources; (c) participate in making decisions, including at the national level, on matters related to the conservation and sustainable use of plant and animal genetic resources; (d) save, use, exchange and sell farm_saved seed/propagating material of farmers' varieties; (e) use a new breeders' variety protected under this law to develop farmers' varieties, including material obtained from gene banks or plant genetic resource centres; and (f) collectively save, use, multiply and process farm_saved seed of protected varieties. However, the Law prohibits farmers from selling on a commercial scale farm saved seed or propagating material of a breeders' protected variety in the seed industry. It also allows restrictions on breeders' rights on new varieties to protect food security, health, biological diversity and any other requirements of the farming community for propagation material of a particular variety.

^{lxxviii}Id., Article 38.

^{lxxix}See Copyright Law (Ghana) § 5 (2) (Mar. 21, 1985), reprinted in 21 COPYRIGHT MONTHLY REVIEW, 423, 424.

^{lxxx}Id. § 46(1) (a)-(b). reprinted in 21 COPYRIGHT MONTHLY REVIEW, supra note 44, at 434.

^{lxxxi}See id. § 52 (2) (a) (i), reprinted in 21 COPYRIGHT MONTHLY REVIEW, supra note 44, at 435.

^{lxxxii}Copyright Decree (Nigeria) § 28(1) (Dec. 19, 1988), reprinted in 25 COPYRIGHT MONTHLY REVIEW, supra note 3, at Nigeria, text 1_01, page 1, 8.

^{lxxxiii}See id. § 28(4), reprinted in 25 COPYRIGHT MONTHLY REVIEW, supra note 3, at Nigeria, text 1_01, page 8. The Nigerian Copyright Council is a corporate body "responsible for

all matters affecting copyright in Nigeria," including advising the government on international copyright treaties and conventions, informing the public about copyright issues and maintaining records of authors and their works. See *id.* § 30, reprinted in 25 COPYRIGHT MONTHLY REVIEW, at Nigeria, text 1_01, page 9.

^{lxxxiv} See *id.* § 28(3), reprinted in 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1_01, page 8.

^{lxxxv} See *id.* § 29, reprinted in 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text I01, page 9.

^{lxxxvi} See *id.* art. 19, reprinted in 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 203.

^{lxxxvii} See *id.* arts. 70_72, reprinted in 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 244. Under Congolese law, the Court of First Instance can order a seizure of any unauthorized reproductions of protected works as well as revenues therefrom. See *id.* Art. 71, reprinted in 19 COPYRIGHT MONTHLY REVIEW, 244. Examples of injunctive relief include suspending the manufacture, reproduction, or performance of works of folklore. See *id.*, *supra* note 46, reprinted in 19 COPYRIGHT MONTHLY REVIEW, at 244.

^{lxxxviii} Ordinance No. 97-10 of 27 Shawwal 1417, Corresponding to March 6, 1997, Concerning Authors' Rights and Related Rights, Article 139.

^{lxxxix} *Id.*, Article 142.

^{xc} *Id.*, at Article 157.

^{xc} *Id.* Article 160.

^{xcii} *Id.* Article 208.

^{xciii} *Id.* Article 83, Law No. 1328/98 on Copyright and Related Rights of 1998]]

^{xciv} *Id.* Article 83.

RECOMMENDED CLAUSES FOR INCLUSION IN PROPOSED CONVENTION ON INTANGIBLE HERITAGE

I. INTERNATIONAL UTILIZATION OF INTANGIBLE CULTURAL HERITAGE

SECTION ____:

Utilizations Subject to Authorization

1. The following utilization of forms or practices of intangible cultural heritage shall require written authorization by the competent authority of the Contracting State in which the item originated if the utilization is intended to be made for profit in another Contracting State:

- (i) any publication, reproduction and any distribution of copies of forms or practices of intangible cultural heritage;
- (ii) any public recitation or performance, any transmission by wireless means or by wire, and any other form of communication to the public, of forms or practices of intangible cultural heritage.

2. Each Contracting State shall at any time of depositing its instrument of ratification, acceptance, notify the Director-General of UNESCO, by means of a written declaration, of the kinds, the main characteristics and the source of the forms or practices of intangible cultural heritage originating in its territory the utilization of which is subject to the written authorization of its competent authority. Subsequent changes shall be notified in like manner.

SECTION ____:

Request and Grant of Authorization

1. The application under Article ____ shall be submitted by the prospective utilizer of the form or practice of intangible cultural heritage (hereinafter referred to as the “applicant”) through the competent authority of the Contracting State of which the utilizer is a national or where he/she/it has his/hers/its habitual residence to the competent authority of the Contracting State in which the form or practice of intangible cultural heritage originates, duly in advance; the application shall unequivocally specify, in written form, the form or practice of intangible cultural heritage intended to be used, as well as the nature and extent of the intended utilization.

2. The authorization shall be given in written form without undue delay; it may be made conditional upon payment of an equitable remuneration whose amount, in the absence of agreement, shall be fixed by the competent authority of the Contracting State in which the type of intangible cultural heritage originates. No application shall be refused, except where the intended use would be prejudicial to the honor or dignity of the originating country or community. Any refusal shall be justified in writing.

SECTION ____:

Exceptions

1. The provisions of Section ____ shall not apply in the following cases:

(i) utilisation for purposes of education;

(ii) utilisation by way of illustration in the original work of an author or authors,

provided that the extent of such utilisation is compatible with fair practice;

2. The provisions of Section ____ shall not apply also where the utilisation of the forms or

practices of intangible cultural heritage is incidental. Incidental utilisation includes, in particular:

- (i) utilization of any form or practice of intangible cultural heritage that can be seen or heard in the course of a current event for the purposes of reporting on that current event by means of photography, broadcasting or sound or visual recording, provided that the extent of such utilization is justified by the informatory purpose;
- (ii) utilization of objects containing the form or practice of intangible cultural heritage which are permanently located in a place where they can be viewed by the public, if the utilization consists in including their image in a photograph, in a film or in a television broadcast.

SECTION ____:

Acknowledgement of Source

1. In all printed publications, and in connection with any communications to the public, of any identifiable form or practice of intangible cultural heritage of one Contracting in another Contracting State, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic in which it has originated.
2. The provisions of paragraph ____ shall not apply in the case of the incidental use of forms or practices of intangible cultural heritage.

SECTION 6____:

Offences

Each Contracting State shall punish by penal sanctions any act of

1. Willful or negligent non-compliance with the requirement of obtaining authorization under Section ____
2. Willful or negligent non-compliance with the requirement of acknowledgement of

source according to Section ____

3. Willful deception of others in respect of the origin of forms or practices of intangible cultural heritage.

4. Willful distortion, in any direct or indirect manner, of an form or practice of intangible cultural heritage in a way prejudicial to the honor, dignity or cultural interests of the community in which it originates.

SECTION 7 ____:

Seizure

Each Contracting State shall provide for the possibility of the seizure of any object associated with intangible cultural heritage which was made or imported in a way constituting an offence under this Convention.

SECTION ____:

Civil Remedies

Each Contracting State shall provide for the possibility of claiming damages or other civil remedies where the utilization was made without the required authorization or payment or in any manner causing economic harm to the State or community in which the utilized form or practice of intangible cultural heritage has originated.

SECTION ____:

Relations to Other Forms of Protection

This Convention shall in no way limit or prejudice any protection applicable to forms or practices of intangible cultural heritage under national laws or any international instruments.

II. UTILIZATION OF NATIONAL INTANGIBLE CULTURAL HERITAGE

SECTION ____

Adoption of National Laws

Each State undertakes to adopt legislation protecting intangible cultural heritage as a means of safeguarding it. Such legislation should, at a minimum, provide for the rights specified in Sections ____ through ____ without prejudice to the right of the State to provide additional protection consistent with its own needs and circumstances.

SECTION ____:

Principle of Protection

Forms or practices of intangible cultural heritage developed and maintained in [insert the name of the country] shall be protected by this [law] against illicit exploitation and other prejudicial actions as defined in this [law].

SECTION ____:

Protected Forms or practices of Intangible cultural heritage

For the purposes of this [law], "intangible cultural heritage" means.....

SECTION ____:

Utilizations Subject to Authorization

Subject to the provisions of Section ____, the following utilizations of the forms or practices of intangible cultural heritage are subject to authorisation by the competent authority mentioned in Section ... when they are made both with gainful intent and outside their traditional or customary context:

- (i) any publication, reproduction and any distribution of copies of forms or practices of intangible cultural heritage;
- (ii) any public recitation or performance, any transmission by wireless means or by wire, and any other form of communication to the public, of forms or practices of intangible cultural heritage.

SECTION ____:

Exceptions

1. The provisions of Section ____ shall not apply in the following cases:

- (i) utilisation for purposes of education;
- (ii) utilisation by way of illustration in the original work of an author or authors,

provided that the extent of such utilisation is compatible with fair practice;

2. The provisions of Section 3 shall not apply also where the utilisation of the forms or practices of intangible cultural heritage is incidental. Incidental utilisation includes, in particular:

- (i) utilization of any form or practice of intangible cultural heritage that can be seen or heard in the course of a current event for the purposes of reporting on that current event by means of photography, broadcasting or sound or visual recording, provided that the extent of such utilization is justified by the informatory purpose;

- (ii) utilization of objects containing the forms or practices of intangible cultural heritage which are permanently located in a place where they can be viewed by the public, if the utilization consists in including their image in a photograph, in a film or in a television broadcast.

SECTION ____:

Acknowledgement of Source

1. In all printed publications, and in connection with any communications to the public, of any identifiable form or practice of intangible cultural heritage, its source shall be indicated in an appropriate manner, by this mentioning the community and/or geographic place from where the form or practice utilized has been derived.
2. The provisions of paragraph 1 shall not apply to utilizations referred to in Section 4, paragraphs 1(iii) and 2.

SECTION ____:

Offences

1. Any person who wilfully (or negligently) does not comply with the provisions of Section 5, paragraph 1, shall be liable to _____
2. Any person who, without the authorization of the [competent authority referred to in Section 9, paragraph 1] [community concerned] wilfully [or negligently] utilizes a form or practice of intangible cultural heritage in violation of the provisions of Section 3, shall be liable to _____
3. Any person wilfully deceiving others in respect of the source of artefacts or subject matters of performance or recitations made available to the public by him in any direct or indirect manner, presenting such artefacts or subject matters as forms or practices of intangible cultural heritage of a certain community, from where, in fact, they have not be derived, shall be punishable by _____

4. Any persons who publicly uses, in any direct or indirect manner, forms or practices of intangible cultural heritage wilfully distorting the same in a way prejudicial to the cultural interests of the community concerned, shall be punishable by _____

SECTION ____:

Seizure or Other Actions

Any object which was made in violation of this [law] and any receipts of the person violating it and corresponding to such violations, shall be subject to [seizure] [applicable actions and remedies].

SECTION ____:

Civil Remedies

The sanctions provided for in [Section 6] [Sections 6 and 7] shall be applied without prejudice to damages or other civil remedies as the case may be.

SECTION ____:

Authorities

[1.] For the purpose of this [law], the expression "competent authority" means ...

SECTION ____:

Authorisation

1 .Applications for individual or blanket authorisation of any utilisation of forms or practices of intangible cultural heritage subject to authorisation under this [law] shall be made [in writing] to the [competent authority] [community concerned].

2. Where the [competent authority] [community concerned] grants authorization, it may fix the amount of and collect fees [corresponding to a tariff [established] [approved] by the supervisory authority.] The fees collected shall be used for the purpose of promoting or safeguarding national [culture] [intangible cultural heritage].

[3.Appeals against the decisions of the competent authority may be made by the person applying for the authorisation and/or the representative of the interested community.]

SECTION ____:

Jurisdiction

[1. Appeals against the decisions of the competent authority are admissible to the Court of ...]

[2.] In case of any offence under Section ____, the Court of ... has jurisdiction.

SECTION ____:

Relation to Other Forms of Protection

This [law] shall in no way limit or prejudice any protection applicable to forms or practices of intangible cultural heritage under the copyright law, the law protecting performers, producers of phonograms and broadcasting organisations, the laws protecting industrial property, or any other law or international treaty to which the country is party; nor shall it in any way

prejudice other forms of protection provided for the safeguard and preservation of intangible cultural heritage.

SECTION ____:

Interpretation

The protection granted under this law shall in no way be interpreted in a manner which could hinder the normal use and development of forms or practices of intangible cultural heritage.

III. DEVELOPMENT OF GENERAL POLICIES ON SAFEGUARDING OF INTANGIBLE CULTURAL HERITAGE

1. Consistent with its needs and circumstances, each Contracting state will consider adopting and implementing the following measures to safeguard intangible cultural heritage.

A. Identification of Intangible Cultural Heritage

Intangible Cultural Heritage, as a form of cultural expression, must be safeguarded by and for the group (familial, occupational, national, regional, religious, ethnic, etc.) whose identity it expresses. To this end, Contracting States should encourage appropriate survey research on national, regional and international levels with the aim to:

a) develop a national inventory of institutions concerned with Intangible Cultural Heritage with a view to its inclusion in regional and global registers of Intangible Cultural Heritage institutions;

- b) create identification and recording systems (collection, cataloguing, transcription) or develop those that already exist including handbooks, collecting guides, model catalogues, etc., in view of the need to coordinate the classification systems used by different institutions;
- c) stimulate the creation of a standard typology of Intangible Cultural Heritage by way of: i) a general outline of Intangible Cultural Heritage for global use; ii) a comprehensive register of Intangible Cultural Heritage; and iii) regional classifications of Intangible Cultural Heritage, especially field_work pilot projects.

B. Conservation of Intangible Cultural Heritage

Conservation is concerned with documentation regarding folk traditions and its object is, in the event of the non_utilization or evolution of such traditions, to give researchers and tradition_bearers access to data enabling them to understand the process through which traditions change. While living Intangible Cultural Heritage, owing to its evolving character, cannot always be directly protected, Intangible Cultural Heritage that has to be fixed in a tangible form should be effectively protected.

To this end, Member States should:

- a) establish national archives where collected Intangible Cultural Heritage can be properly stored and made available;
- b) establish a central national archive function for service purposes (central cataloguing, dissemination of information on Intangible Cultural Heritage materials and standards of Intangible Cultural Heritage work including the aspect of safeguarding);

create museums or Intangible Cultural Heritage sections at existing museums where traditional and popular culture can be exhibited;

d) give precedence to ways of presenting traditional and popular cultures that emphasize the living or past aspects of those cultures (showing their surroundings, ways of life and the works, skills and techniques they have produced); harmonize collecting and archiving methods; train collectors, archivists, documentalists and other specialists in the conservation of Intangible Cultural Heritage, from physical conservation to analytic work;

C. Preservation of Intangible Cultural Heritage

Preservation is concerned with protection of intangible cultural heritage and those who are the transmitters, having regard to the fact that each people has a right to its own culture and that its adherence to that culture is often eroded by the impact of the industrialized culture purveyed by the mass media. Measures must be taken to guarantee the status of and economic support for intangible cultural heritage both in the communities which produce them and beyond. To this end, Member States should:

a) design and introduce into both formal and out_of_school curricula the teaching and study of Intangible Cultural Heritage in an appropriate manner, laying particular emphasis on respect for Intangible Cultural Heritage in the widest sense of the term, taking into account not only village and other rural cultures but also those created in urban areas by diverse social groups, professions, institutions, etc., and thus promoting a better understanding of cultural diversity and different world views, especially those not reflected in dominant cultures;

b) guarantee the right of access of various cultural communities to their own Intangible Cultural Heritage by supporting their work in the fields of documentation, archiving, research, etc., as well as in the practice of traditions;

c) set up on an interdisciplinary basis a National Intangible Cultural Heritage Council or similar coordination body in which various interest groups will also be represented;

d) provide moral and economic support for individuals and institutions studying, making known, cultivating or holding items of Intangible Cultural Heritage;

e) promote scientific research relevant to the presentation of Intangible Cultural Heritage.

D. Dissemination of Intangible Cultural Heritage

The attention of people should be drawn to the importance of Intangible Cultural Heritage as an ingredient of cultural identity. It is essential for the practices and representations that make up this cultural heritage to be widely disseminated so that the value of Intangible Cultural Heritage and the need to preserve it can be recognized. However, distortion during dissemination should be avoided so that the integrity of the traditions can be safeguarded. To promote a fair dissemination, Member States should:

a) encourage the organization of national, regional and international events such as fairs, festivals, films, exhibitions, seminars, symposia, workshops, training courses, congresses, etc., and support the dissemination and publication of their materials, papers and other results;

b) encourage a broader coverage of Intangible Cultural Heritage material in national and regional press, publishing, television, radio and other media, for instance through grants, by creating jobs for folklorists in these units, by ensuring the proper archiving and dissemination of these Intangible Cultural Heritage materials collected by the mass media, and by the establishment of departments of Intangible Cultural Heritage within those organizations; encourage regions, municipalities, associations and other groups working in areas of intangible cultural heritage to establish full_time jobs for such individuals to stimulate and coordinate Intangible Cultural Heritage activities in the region; support existing units and the creation of new units for the production of educational materials, as for example video films based on recent field_work, and encourage their use in schools, Intangible Cultural Heritage museums, national and international Intangible Cultural Heritage festivals and exhibitions;

e) ensure the availability of adequate information on Intangible Cultural Heritage through documentation centers, libraries, museums, archives, as well as through special Intangible Cultural Heritage bulletins and periodicals; facilitate meetings on exchanges between individuals, groups and institutions concerned with Intangible Cultural Heritage, both nationally and internationally, taking into account bilateral cultural agreements;

9) encourage the international scientific community to adopt a code of ethics ensuring a proper approach to and respect for traditional cultures.

E. Protection of Intangible Cultural Heritage

In so far as Intangible Cultural Heritage constitutes manifestations of intellectual creativity whether it be individual or collective, it deserves to be protected in a manner inspired by the protection provided for intellectual productions. Such protection of Intangible Cultural Heritage has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, both within and outside the country, without prejudice to related legitimate interests.

Leaving aside the "intellectual property" aspects of the protection of forms and practices of Intangible Cultural Heritage, there are various categories of right which are already protected and should continue to enjoy protection in the future in Intangible Cultural Heritage documentation centers and archives. To this end, Member States should:

- i) protect the informant as the transmitter of tradition (protection of privacy and confidentiality);
- ii) protect the interest of the collector by ensuring that the materials gathered are conserved in archives in good condition and in a methodical manner;
- iii) adopt the necessary measures to safeguard the materials gathered against misuse, whether intentional or otherwise;
- iv) recognize the responsibility of archives to monitor the use made of the materials gathered.

F. International Cooperation

In view of the need to intensify cultural cooperation and exchanges, in particular through the pooling of human and material resources, in order to carry out Intangible Cultural Heritage development and revitalization programs as well as research made by specialists who are the nationals of one Member State on the territory of another Member State, Member States should:

- a) cooperate with international and regional associations, institutions and organizations concerned with Intangible Cultural Heritage;
- b) cooperate in the field of knowledge, dissemination and protection of Intangible Cultural Heritage, in particular through:
 - i) exchanges of information of every kind, exchanges of scientific and technical publications;
 - ii) training of specialists, awarding of travel grants, sending of scientific and technical personnel and equipment;
 - W) the promotion of bilateral or multilateral projects in the field of the documentation of contemporary Intangible Cultural Heritage;
 - iv) the organization of meetings between specialists, of study courses and of the working groups on particular subjects, especially on the classifying and cataloguing of

Intangible Cultural Heritage data and expression and on modern methods and techniques in research; cooperate closely so as to ensure internationally that the various interested parties (communities or natural or legal persons) enjoy the economic, moral and so-called neighboring rights resulting from the investigation, creation, composition, performance, recording and/or dissemination of Intangible Cultural Heritage;

d) guarantee the Member State on whose territory research has been carried out the right to obtain from the Member State concerned, copies of all documents, recording, video_films, films and other material; refrain from acts likely to damage Intangible Cultural Heritage materials or to diminish their value or impede their dissemination or use, whether these materials are to be found on their own territory or on the territory of another State; take necessary measures to safeguard Intangible Cultural Heritage against all human and natural dangers to which it is exposed, including the risks deriving from armed conflicts, occupation of territories or public disorders of other kinds.