

INTANGIBLE CULTURAL HERITAGE - WORKING DEFINITIONS

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I. The Specificity of Intangible Heritage as an Object of International Protection

1. Pursuant to the agenda of this Round table, the task of the VIth Session is the identification of values to be safeguarded through UNESCO and the development of terminology for a working definition. In this respect, one has to keep in mind that the 1989 UNESCO Recommendation does not employ the term "intangible heritage" but the narrower terms of "traditional culture and folklore".

2 The word "intangible", and the equivalent in French "immatériel", seem to have crept into UNESCO usage and language by way of a rather free translation from the pertinent Japanese legislation dating back to 1950 (Prott). However, to understand the meaning of "intangible" in English, one has to go back to its Latin root which is formed by the negative suffix "in" = "un" and the word "tangere" which means to touch. Therefore, in its original coining intangible is anything that cannot be touched, that cannot be perceived as "corporeal", "material" or endowed with a physical form.

3. From a general point of view the non corporeal nature of an object is not an obstacle to its legal protection. Legal systems throughout the world have recognized the possibility of extending protection to non material goods such as inventions, copyright and intellectual property in general. What counts is 1) the existence of an "interest" (normally an individual interest) of the creator or holder to the economic utilisation of the immaterial property, 2) the recognition by the law of such interest as worthy of protection (perhaps as an incentive and reward for creativity), 3) the regulation by law of forms and procedures for authorization of use, time limits, public policy limits etc. Once these conditions are met, the "interests" to be protected become legal entitlements or, if we prefer, "rights" of intellectual property nature. International law has developed hand in hand with national legislation from the 1886 Berne Convention, to the constitution of the World Intellectual Property Organization (WIPO), to the recent introduction of intellectual property rights (TRIPS) into the World Trade Organization. It is all too obvious that the "new economy", increasingly based on "knowledge" and the commercial utilizations of "discoveries" and "creations", and the globalization of markets entail a growing importance of international law as an instrument to ensure mutual recognition of intellectual property rights (IPR) to nationals of different countries as well as appropriate security for foreign investments and transfers of technologies and know-how.

4. If the traditional IPR paradigm can provide an attractive tool for the protection of intangible cultural heritage, at the same time it presents serious limits and shortcomings from the point of view of the UNESCO mission in this area. First of all, the IPR approach focuses on the end product of a specific artistic or cultural tradition, rather than on the societal structures and processes from which the cultural product is derived. So, for example, IPR may provide protection to an outstanding tradition of work songs in a given society. However, one thing is to provide protection against unauthorized commercial use of the songs, another is to try to preserve and protect the socio-cultural basis, the living culture, that has generated and developed those songs through the customs and rituals of agricultural practices, harvest ceremonies, and the complex interaction between individuals and community, nature and society. In the field of intangible heritage, the end product is

only the tip of the iceberg represented by the complexity and richness of the intellectual, political and cultural processes in which the heritage is rooted. The 1989 Unesco recommendation, by stressing the notion of Folklore, seems to neglect this important component of intangible heritage and, in this respect, it needs to be up-dated.

5. A second limit of the IPR approach is that, in principle, intellectual property protection requires an act of "invention" or "discovery". By contrast, many important manifestations of intangible cultural heritage are not traceable to specific acts of invention; rather, they have developed spontaneously from generation to generation as collective expressions of social necessities, artistic talents, beliefs, and spiritual needs of a given society.

6. The collective character of most forms of intangible cultural heritage may represent a further obstacle to the use of IPR as an instrument for international protection. The author of a literary, scientific or musical work may obtain copyrights protection in the form of a monopoly over its commercial exploitation and for a certain period of time. This includes the right to licence the use of the work to other subjects by appropriate contractual deeds. With intangible cultural heritage which has developed through generations of communal traditions, the title holder is the collective body of the community. This may render problematic the identification of a custodian or trustee by whom the intellectual property rights are to be exercised or the determination of the appropriate legal process to licence the commercial use of the relevant heritage. It goes without saying that in some communities intangible cultural heritage may even be surrounded by spiritual and sacred attributes so as to rule out, in principle, its commercial use by way of licence or authorization.

7. In light of the above, a major concern in defining the UNESCO's approach to protecting intangible heritage should be the adaptation of the international protection model to the specificity of the intangible cultural heritage, and not the other way around, *i.e.* the adaptation of intangible cultural heritage to the pre-established model of intellectual property rights. This requires, first of all that, unlike IPR, the title holder of the heritage be identified with the community as a whole; that the legal foundation of the title be recognized not only in connection with the formal criteria of ownership and property rights, that inform most of the common law and civil law jurisdictions, but also in relation to customary practices giving rise to collective entitlements in a way as to make them inextricably intertwined with social responsibilities and duties. UNESCO has already been able to successfully overcome the private law strictures of ownership and the public law concept of regulatory authority by allowing the inscription of new sites (in the Pacific) in the World Heritage List solely on the strength of safeguards and protective schemes provided by local customary practices rather than by the standards regulatory plans and management schemes usually required as a condition for World Heritage nomination. In the same spirit of full respect for the intrinsic specificity of the societal conditions where intangible cultural heritage originates, one should avoid imposing a single IPR model for the licencing and authorization of the use of such heritage. The modes, conditions and limitations on the authorization of the use of intangible heritage should be determined as far as possible by the traditions and practices prevailing in the community that has created the heritage. National legislation should facilitate the recognition of traditional methods of cultural heritage transmission. Indeed, an international normative instrument on intangible cultural heritage could stimulate recognition by States of customary practices within their territory as a means to improve respect for cultural diversity.

II. Elements for a Working Definition

8. Given the potentially immense scope of the concept of intangible cultural heritage, the problem of its definition is critical and preliminary to the consideration of the problem whether, and what kind of, an international normative instrument is needed in order to improve the protection provided by the 1989 UNESCO Recommendation. In addressing this problem, I will first review the way in which cultural heritage has been defined in relevant international instruments; then I will discuss whether and to what extent existing definition can be useful for intangible cultural heritage; finally, I will try to provide a set of elements and criteria for a workable definition of such heritage.

9. The first UNESCO instrument for the protection of cultural heritage is the 1954 Hague Convention concerning the protection of cultural property in the event of armed conflict. This instrument is accompanied by a Protocol prohibiting the transfer of cultural objects from occupied territories and by a recent (1999) Protocol designed to strengthen the original protection regime. All these instruments are applicable to cultural property as defined in Article 1 of the Convention which adopts two basic criteria. The first is that of the "importance" of cultural objects. To qualify for treaty protection such objects must be of "great importance" ("grand importance"). The second criterion is provided by the typology of protected cultural property which is classified according to three general categories: a. objects of artistic, historical and cultural interest; b. buildings containing objects falling under a., such as museums, collections etc; c. monumental centers. A special feature of the 1954 "system" - i.e. the Convention plus the two Protocols - is the regime of special protection or reinforced protection which is reserved to cultural property of outstanding value. The identification and delineation of such cultural property is the responsibility of the interested State. However, the certification of the proposed property for special or enhanced protection depends on formal procedures set forth in the international instrument and, as far as enhanced protection is concerned, the 1999 Protocol entrusts to an inter-governmental committee the task of bringing a proposed property within the scope of enhanced protection by its inscription in an appropriate register to be kept at the UNESCO Secretariat.

10. A slightly different approach to the definition of cultural property can be found in the 1970 UNESCO Convention on the means to prevent illicit trade in cultural objects. Here the definition consists of a general clause assigning to contracting Parties the power to designate cultural objects as being of importance for "archeology, history, literature, art or science". which is followed by a specific listing of eleven categories of objects falling within the scope of treaty protection.

11. A third approach can be found in the 1972 World Heritage Convention. First, this convention applies to both culture and nature and employs the term "heritage" instead of the value-neutral terms cultural "objects" and "property" which have been used by the 1954 and 1970 conventions. Article 1 specifically addresses the definition of cultural heritage and identifies three categories of such heritage: 1) monuments, architectural works, sculpture and painting, elements and structures of an archeological nature, cave dwellings; 2) group of buildings, separate or connected buildings of particular significance because of their architecture, their homogeneity or their place in the landscape; 3) sites, works of man or the combined works of nature and man of historical, aesthetic, ethnological or anthropological point of view. Further, the definition includes the general requirement that all three categories of heritage are of "outstanding universal value" from the point of view of history, art and science. This is a particularly high threshold test, but perfectly understandable for a convention that aims at certifying the "world" heritage value of the property. In addition to the definitional criteria contained in Article 1, Article 3 of the convention provides that it is "for each State Party... to identify and delineate the different properties situated on its territory"

which may be proposed for inclusion in one of the three general categories contemplated at Article 1 definition.

12. Although not part of the text of the 1972 Convention, two other features of the world heritage definitional regime are worth mentioning for their relevance to the identification of appropriate methods to define intangible cultural heritage. The first is the substantial enlargement of Article 1 definition in the implementing practice of the convention through the formal recognition of the category of "cultural landscapes". These are sites where nature and culture blend in forming an environment of outstanding universal value either because of its intrinsic aesthetic or natural value or because of its associated value with spiritual, religious or cultural traditions of the inhabitants. The second, and more important feature, is the development through the institutional organ of the Convention, the Committee (Articles 8-14) of "operational guidelines" that codify the implementing practice of the convention and, in particular, provide detailed "criteria" for inclusion of world cultural heritage within the general scope of the definition provided in Article 1 of the Convention. I shall revert to these criteria as possible models for defining and identifying intangible cultural heritage.

13. Besides those mentioned above, other international normative instruments exist that may provide a model for the definition of cultural heritage. Although not technically a UNESCO instrument, the UNIDROIT Convention of 1995 on the return of stolen and illegally exported cultural objects contains a *double face* definition of cultural property: a general one that follows the definition and detailed listing provided by the already mentioned UNESCO 1970 Convention; a qualified one for illegally exported objects, which, unlike stolen cultural objects, are eligible for return under the convention only to the extent that their removal from the country of origin significantly impairs one of the public interests specified in the convention, such as the preservation of the object or the safeguarding of the integrity of a complex object.

14. To what extent are the above instruments a useful source of criteria for a working definition of intangible cultural heritage? In my view the most important lessons to be learned from these instruments are the following:

1) the definition should include the concept of "importance" or "significance" of intangible heritage for the cultural and social identity of the people, community or group which are the creators or bearers of the heritage;

2) the definition *could* include also a reference to the universal value of certain types of intangible cultural heritage to the extent that loss or destruction of such heritage amounts to loss and impoverishment of the common cultural heritage of humanity (this is a criterion taken from the Preamble to the 1954 Hague Convention);

3) the definition should contain a general, synthetic and inclusive clause encompassing all forms of intangible heritage with an indication of some essential typologies (along the lines of Article 1 of the World Heritage Convention);

4) the general definition should be inter-fused with the indication of operational criteria to be used - by UNESCO, by advisory bodies, by an inter-governmental body, depending on the nature and content of the normative instrument to be adopted - in determining the eligibility of a proposed intangible cultural heritage for inclusion within the scope of international protection.

5) a final *caveat* regarding the method of definition is that with intangible heritage, more than with physical heritage, the definition must reflect the intrinsic cultural values of the heritage as conceived and perceived by the people, group or community to which such heritage belongs. In other words, more than the "external manifestations" of the heritage, as perceived by an outside observer, even a sophisticated one and even a professional one who is interested in cultural-anthropological research, a proper definition must include the value identification of the heritage by

the very people who have produced it and lived with it from generation to generation. In this perspective, I believe that the term "folklore" as used in the 1989 Recommendation is overly reductionist and scarcely reflective of the well-spring of living culture and spiritual values that underlie any manifestation of intangible heritage.

15. If we follow this approach, a general definition of intangible cultural heritage could be the following:

For the purposes of this ["Convention", "Protocol", "Declaration", "Recommendation", "Instrument" the following shall be considered "intangible cultural heritage":

"Any non-corporeal manifestation of tradition-based creativity, spontaneously originated and developed within a cultural community by which it is perceived to be an important component or reflection of the community's social or cultural identity. It includes, besides the immaterial product of the tradition based creations, the social, intellectual and cultural processes that from generation to generation, by oral transmission, by imitation or by other means of learning have made possible the development of a distinct cultural tradition whose preservation and protection is important for the safeguarding of the cultural diversity and creativity of humanity".

The forms in which intangible cultural heritage may manifest it-self are, among others, language, literature, music, drama, dance, mime, games, hunting, fishing and agricultural practices, religious ceremonies, traditional skills in weaving, building and carving, cuisine, extrajudicial methods of dispute resolution, traditional medicine and traditional knowledge applied to plants and their medical, biological and agricultural properties.