

RESEARCH ARTICLES

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From Traditional Culture and Folklore to Intangible Cultural Heritage: Evolution of a Treaty

Abstract: The purpose of this article is to explore the evolution of the 2003 Convention in particular by examining the international policy priorities that led up to this process and also the relevant prevailing international law. Moreover, this process involved moving from seeking to safeguard “traditional culture and folklore”, then to regulating the neologism (in international law, at least) of “intangible cultural heritage” and the implications of that shift. One of these, of course, is the participatory heritage safeguarding model advocated by the 2003 Convention, highlighting its strongly human rights-based orientation. Furthermore, the relationship of the Convention with intellectual property (IP) rules and that of UNESCO with the WIPO in this endeavour is also explored, both up to the adoption of the 2003 Convention and the subsequent work in WIPO to develop *sui generis* IP rules to protect traditional knowledge and cultural expressions. In view of the divergence between UNESCO’s broader

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cultural approach and WIPO's narrower focus on IP rules, the similarity of the 2003 Convention to the model of the 1972 Convention and the potential for overlap that exists between both these treaties in terms of their subject-matter, the role and positioning of the 2003 Convention vis-à-vis the 1972 Convention are also examined here.

Keywords: intangible cultural heritage, traditional culture, folklore, UNESCO 2003 Convention, intellectual property rights, world heritage

Introduction

One of the most striking aspects of UNESCO's 2003 Convention for the Safeguarding of the Intangible Cultural Heritage ("the 2003 Convention")¹ has been its success in terms of ratification by Member States. Although the number of ratifications may reflect, in part, support from UNESCO's capacity-building programme,² it also suggests the will on the part of the international community to take on the obligations to safeguard this category of heritage. This, in turn, suggests that the 2003 Convention responds to the needs perceived by the international community at the time of its development. Hence, the evolution of the 2003 Convention should be understood in the context of a number of important policy and legal developments taking place on the international level, in particular: the advances made in terms of the international development agenda during the 1990s; a growing appreciation for cultural rights, so long neglected within the human rights canon; a growing dissatisfaction among many developing countries, especially in the Latin American, African, and Asia-Pacific regions, with the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage ("the 1972 Convention"),³ which was viewed as "Eurocentric" both in its operation and conception;⁴ and the fundamental question of whether "traditional culture and folklore" – as it was then

¹ 17 October 2003, 2368 UNTS 3.

² The Global Capacity-building Programme was established by the UNESCO Secretariat in order to build capacities within Parties to implement the 2003 Convention, but it has also provided workshops to non-Party Member States on ratification of the 2003 Convention.

³ 16 November 1972, 1037 UNTS 151.

⁴ For more discussion on this, see: M. Askew, *The Magic List of Global Status: UNESCO, World Heritage and the Agendas of States*, in: S. Labadi, C. Long (eds.), *Heritage and Globalisation*, Routledge, London 2010, pp. 19-44; S. Labadi, *A Review of the Global Strategy for a Balanced, Representative and Credible World Heritage List, 1994-2004*, "Conservation and Management of Archaeological Sites" 2005, Vol. 7, pp. 89-102; B. Rudolff, K. Buckley, *World Heritage: Alternative Futures*, in: W. Logan, M. Nic Craith, U. Kokel (eds.), *A Companion to Heritage Studies*, John Wiley & Sons Inc., New York 2015, pp. 522-540; and B.S. Frey, L. Steiner, *World Heritage List: Does It Make Sense?*, "International Journal of Cultural Policy" 2011, Vol. 17, pp. 555-573.

understood⁵ – would be better safeguarded and protected through an approach based on intellectual property rules (as had been the worldwide tendency up until the mid- to late-1990s), or by implementing a broader cultural approach.

The adoption of the 2003 Convention is also closely tied in with a major strategy underlying UNESCO's activities since 1949, namely the preservation of cultural diversity through its international standard-setting activities,⁶ and reflects that strategy more strongly than any previous cultural heritage treaty adopted by UNESCO. The 2003 Convention can be seen as a sibling of the Convention on the Diversity of Cultural Expressions (“the 2005 Convention”),⁷ both being children of the International Declaration on Cultural Diversity.⁸ The latter addresses the need for safeguarding heritage that consists of, or is primarily based on, non-material elements (oral expressions and language, social practices and rituals, performances, cosmologies and knowledge about the natural world, craft skills, and know-how etc.), while the 2005 Convention seeks to protect and promote cultural industries and services, which may include elements safeguarded under the 2003 Convention (e.g. handicrafts) but deals predominantly with more contemporary forms.

In the following sections, I look at the wider policy and legal contexts within which the 2003 Convention was drafted and adopted, in order better to understand the motivations behind this process as well as some of the inevitable constraints. This review of law and policy begins, in both cases, in the late 1960s or early 1970s, since the important trends which ultimately led to the decision of the Member States of UNESCO to develop a new standard-setting instrument (ultimately, a treaty) for safeguarding this aspect of heritage were mainly established during this period. I have chosen to first address the international policy dimensions of the question, since policy usually comes before law-making, and it is only once the decision to draft a new treaty has been made that legal precedents and questions such as the interaction of the new treaty with pre-existing ones become relevant. In addition, this discussion sheds light on some of the understandings and priorities that lay behind the drafting of the 2003 Convention, and as expressed in its Preamble.

⁵ As it was identified and described in the Recommendation for the Safeguarding of Traditional Knowledge and Folklore, 15 November 1989, <http://unesdoc.unesco.org/images/0013/001323/132327m.pdf> [accessed: 7.11.2017]. For more on the question of definitions, see: Y. Ahmad, *The Scope and Definitions of Heritage: From Tangible to Intangible*, “International Journal of Intangible Heritage” 2006, Vol. 12, pp. 292-300.

⁶ L.V. Prott, *International Standards for Cultural Heritage*, in: *World Culture Report 1998. Culture, Creativity and Markets*, UNESCO, Paris 1998, p. 222.

⁷ 20 October 2005, 2440 UNTS 346.

⁸ 2 November 2001, UNESCO Doc. 31C/Res.

Responding to Broader Policy Priorities

The most significant policy-making contexts for the evolution of the 2003 Convention relate to the international development agenda and human rights; the latter being, of course, also a legal one. To some degree, these have now come together in the (policy) principle of sustainable development, which is regarded as including social justice and human rights components. The international development approach taken in the 1970s was mainly driven by economic goals and measured primarily by GDP growth, ignoring the social and cultural dimensions of development.⁹ In this vision culture – especially traditional culture – was generally regarded as an obstacle to development.¹⁰ This view was challenged in Africa and Latin America, where “endogenous development” began to give particular prominence to local and ethnic cultures (including languages).¹¹ The desire to value local and indigenous cultural heritage in the development process also led to recognition of the often intangible character of this type of heritage.

By the mid-1990s a further evolution occurred in the international policy-making agenda with the introduction of the “human development” approach,¹² which created an important parallel between development and human rights¹³ by bringing non-economic (social, cultural, political) measures into this framework. At the same time, a common thread running through the reforms of the international development agenda from the 1990s up until 2015 has been to accord culture a growing, but still insufficient, role in this process. For example, the report of UNESCO’s World Commission on Culture and Development, published in 1996,¹⁴ emphasized the importance of culture as a constituent element in the development process, rather than simply a contingent factor (that might be positive or negative). Significantly for the purposes of this article, the key role played by intangible cultural heritage in development was flagged up in this report. In the late 1990s, an international conference convened on culture and development further articulated this link-

⁹ L. Arizpe, *The Intellectual History of Culture and Development Institutions*, in: V. Rao, M. Walton (eds.), *Culture and Public Action*, Stanford University Press, Stanford 2004, pp. 163-185.

¹⁰ M. Douglas, *Traditional Culture – Let’s Hear No More About It*, in: V. Rao, M. Walton (eds.), *Culture and Public Action*, Stanford University Press, Stanford 2004.

¹¹ L. Arizpe, *The Cultural Politics of Intangible Cultural Heritage*, in: J. Blake (ed.), *Safeguarding Intangible Cultural Heritage – Challenges and Approaches*, Institute of Art and Law, Bülth Wells 2007.

¹² Initially formulated by the Nobel Prize-winning economist Amartya Sen (*On Ethics and Economics*, Wiley-Blackwell, Hoboken 1991) and adopted by United Nations Development Programme (UNDP) for its Human Development Reports series from 1990. See UNDP, *Human Development Report 1994*, Oxford University Press, Oxford 1994, and UNESCO, *World Education Report 2000. The Right to Education: Towards Education for All Throughout Life*, UNESCO, Paris 2000.

¹³ UNESCO, *Change in Continuity – Concepts and Tools for a Cultural Approach to Development*, UNESCO, Paris 2000. For more on the relationship between cultural rights and development, see: UNDP, *Cultural Liberty in Today’s Diverse World*, UNDP, New York 2004.

¹⁴ World Commission on Culture and Development, *Our Creative Diversity*, UNESCO, Paris 1996.

age, noting in its Action Plan¹⁵ that, “[s]ustainable development and the flourishing of culture are interdependent” (Principle 1), and calling on Member States “[t]o make cultural policy one of the key components of development strategy” (Objective 1). Importantly, as part of this approach it required Member States to strengthen their policies and practices “to safeguard and enhance the cultural heritage, tangible and intangible” (Objective 3). Unfortunately, these calls to place culture more at the centre of development fell on relatively stony ground and the Millennium Development Goals (MDGs)¹⁶ adopted by the United Nations in 2000 and setting out the global development agenda until 2015 did not include any explicitly cultural goal (although it was implicit in a number of them, in particular those relating to education and health).¹⁷ The Member States of UNESCO have attempted to remedy this lacuna through culture’s lead role in the Culture and Development Thematic Window of the Millennium Development Goals Achievement Fund (MDG-F) initiative.¹⁸

Of course, sustainable development¹⁹ was also formally articulated in the early 1990s in the text of the Rio Declaration (1992).²⁰ This was undoubtedly the most far-reaching evolution in development thinking and one that continues to have an impact today. The Rio Declaration acknowledged the value of local and indigenous cultures in development (echoing the endogenous development approach of the 1980s).²¹ Although one of the three “pillars” of sustainable development was understood to be socio-cultural, operating in tandem with the economy and environment, this understanding has not yet been given its full weight in implementing sustainable development internationally. Given that the Preamble to the 2003 Convention makes explicit reference to it by noting that ICH is a basis for ensuring a “guarantee for sustainable development” (second recital), it is quite legitimate to regard this as an attempt to flesh out the socio-cultural pillar of sustainable development in an intergovernmental context and to provide it with clearer content in

¹⁵ UNESCO, *Action Plan on Cultural Policies for Development*, 2 April 1998.

¹⁶ *United Nations Millennium Declaration*, United Nations, New York 2000.

¹⁷ P. Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, “Human Rights Quarterly” 2005, Vol. 27, p. 755; P. Alston, M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement*, Oxford University Press, Oxford 2005.

¹⁸ The MDG-Fund was established in December 2006 by the UN with a contribution of US\$710 million from the Spanish Government. See the Fund’s website, <http://www.mdgfund.org> [accessed: 12.03.2015].

¹⁹ First formulated by the World Commission on Environment and Development in its report (*Report of the World Commission on Environment and Development: Our Common Future*, United Nations, New York 1987) as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.

²⁰ United Nations Conference on Environment and Development (UNCED), Rio Declaration on Environment and Development, 13 June 1992, 31 ILM 874 (1992).

²¹ The Convention on Biological Diversity (5 June 1992, 1760 UNTS 79), also adopted at UNCED, gave a prominent position to “local and indigenous knowledge, practices and innovations” in ensuring environmental sustainability (at Article 8(j)).

terms of its implementation. The adoption in 2016 of a new Chapter VI to the Operational Directives²² of the 2003 Convention – which seeks to clarify how States Parties can develop policy approaches towards safeguarding ICH that also fulfil commitments to achieve sustainable development – is a further step in this direction. Here we see the way in which this treaty is not only inspired by other areas of international policy and law, in particular development and human rights, but can also contribute to their future advancement through its implementation. In this regard, a 2013 internal evaluation conducted by UNESCO recommended that sustainable development as an objective should be better incorporated into the 2003 Convention’s operation²³ and pointed out that the way to do so needs to be better understood.²⁴ It is worth noting that the 2005 Convention takes the sustainable development/culture linkage even further,²⁵ listing sustainable development among the foundational principles of the Convention (Article 2(6)), and including two substantive articles that set out the need to integrate culture into sustainable development at all levels (local, national, regional, and international).²⁶

The final report of the Rio+20 meeting (2012)²⁷ made direct reference to culture and emphasized that the three dimensions of sustainable development be given importance in UN programming for sustainability, but its wording is rather poorly expressed and contains few specifics.²⁸ In response, the International Congress on Culture: Key to Sustainable Development was organized in 2013 under the auspices of UNESCO²⁹ in an attempt to influence the on-going work on the inter-

²² UNESCO, *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*, 2016 version, https://ich.unesco.org/doc/src/ICH-Operational_Directives-6.GA-PDF-EN.pdf [accessed: 7.11.2017].

²³ B. Torggler, E. Sediakina-Rivière (with J. Blake as consultant), *Evaluation of UNESCO’s Standard-setting Work of the Culture Sector. Part I – 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. Final Report*, UNESCO, Paris 2013 called on UNESCO to “[c]ooperate with sustainable development experts when supporting State Parties with the integration of ICH into non-cultural legislation and policy, and with other work related to ICH and sustainable development” (Recommendation 5).

²⁴ *Ibidem*, para. 57: “while people involved in the Convention generally agreed that the link [with sustainable development] was important, clarifying the nature of this link, identifying the potential that these linkages hold both for sustainable development on one hand and for the viability of ICH on the other, identifying the potential risks that development, if not sustainable, holds for ICH, etc. were still very much work in progress”.

²⁵ It states in Article 1 (Purposes) Paragraph (f) the objective “to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link”.

²⁶ Article 13 requires international cooperation “for the creation of conditions conducive to sustainable development”. In this regard, this is the first treaty provision ever to do so.

²⁷ UNGA Resolution 66/288, *The Future We Want*, 27 July 2012, UN Doc. A/RES/66/288 (2012).

²⁸ B. Torggler, E. Sediakina-Rivière, *op. cit.*, p. 13.

²⁹ UNESCO, *The Hangzhou Declaration: Placing Culture at the Heart of Sustainable Development Policies*, 17 May 2013, <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/FinalHangzhouDeclaration20130517.pdf> [accessed: 7.11.2017].

national development agenda (foreseeing the adoption of new development goals in 2015) by formally putting the role of culture in sustainable development on the table. The Hangzhou Declaration (2013) called for a specific international development goal focused on culture to be included in the post-2015 UN development agenda, “based on heritage, diversity, creativity and the transmission of knowledge and [include] clear targets and indicators that relate culture to all dimensions of sustainable development”.³⁰ Sadly, the Sustainable Development Goals (SDGs) adopted by the international community in 2015 did not fully respond to this, as there is still no SDG specific to culture. However, a number of the SDGs do have clear cultural dimensions, and the following are of direct relevance to ICH and ICH-related policy-making: to end poverty in all its forms everywhere (Goal 1); to end hunger, achieve food security, improve nutrition, and promote sustainable agriculture (Goal 2); to ensure healthy lives and promote well-being for all at all ages (Goal 3); to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all (Goal 4); to ensure gender equality and empower all women and girls (Goal 5); to ensure the availability and sustainable management of water and sanitation for all (Goal 6); to promote sustained, inclusive, and sustainable economic growth, full and productive employment, and decent work for all (Goal 8); to make cities and human settlements inclusive, safe, resilient, and sustainable (Goal 11); to ensure sustainable consumption and production patterns (Goal 12); to conserve and sustainably use the oceans, seas, and marine resources for sustainable development (Goal 14); to protect, restore, and promote sustainable use of terrestrial ecosystems (Goal 15); and to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels (Goal 16).

As noted above, the other important policy (and legal) context in which the 2003 Convention was created is that of human rights and, specifically, cultural rights. This context ties in with the development process too, since the notion of sustainability inherently contains a clear human rights dimension in terms of the requirement to develop human capacities, which need to be supported by human rights and ensure social justice. Hence, at the same time as these new development paradigms were being articulated internationally, the importance of cultural rights – for a long time the “Cinderella” of the human rights family³¹ – began to be acknowledged. Following the adoption of the UN Covenant on Economic, Social and Cultural Rights in 1966, the notion of “culture” was re-examined internationally at the World Conference on Cultural Policies (MONDIACULT) held in Mexico in

³⁰ Ibidem.

³¹ As famously noted by Janusz Symonides in *Cultural Rights: A Neglected Category of Human Rights*, “International Social Science Journal” 1998, Vol. 50, pp. 559-571. They had, after all, been adopted in 1966 in the UN Convention on Economic, Social and Cultural Rights and technically have the same legal force as economic, social, civil, and political rights.

1982. Its Declaration articulated an inclusive view of culture that embraced ways of life, social organization, and value/belief systems, as well as material elements, and importantly linked this with the idea of cultural identity.³² By making the linkage with cultural identity explicit, it also made clear that it is linked with human rights, given the essential importance of cultural identity to a person's sense of human dignity. If we look at how ICH is defined in the 2003 Convention, we can see that the definition provided in Article 2(1) is closely based on that contained in the MONDIACULT Declaration in 1982.³³ In particular, the statement (in this definition) that ICH "provides... [communities, groups and individuals] ... with a sense of identity and continuity" again underscores the strong human rights dimension of this treaty. It is also not without significance that the programme initiated in UNESCO in 1996 aimed at codifying cultural rights led, ultimately, to the drafting of the 2001 Declaration on Cultural Diversity which, as we have seen, was an important precursor to the 2003 Convention.

Another relevant endeavour, undertaken as an operational programme of UNESCO since the mid-1990s, was its work with the Institute of Human Rights (University of Fribourg) to identify and clarify the content of cultural rights. As a result of this work, the Fribourg Declaration on Cultural Rights adopted in 2007 is regarded, although it has no legal status as such, as a reliable exposition of the nature and content of cultural rights. In its Preamble, it sets out the explicit connection between cultural heritage and the sustainability of development, treating cultural heritage as a critical factor in ensuring cultural diversity, which in turn is seen as a guarantee of all internationally recognized human rights. It further states that, "respect for diversity and cultural rights is a crucial factor in the legitimacy and consistency of sustainable development based upon the indivisibility of human rights". Hence, the idea was shaped that (a) cultural rights and diversity (of which ICH is an important element) are crucial for achieving "truly sustainable development";³⁴ while (b) cultural rights have an important transversal or cross-cutting character, meaning that they are necessary for the enjoyment of many other

³² The Mexico City Declaration on Cultural Policies, published in UNESCO, *World Conference on Cultural Policies, Mexico City, 26 July - 6 August 1982. Final Report*, UNESCO, Paris 1982, defined "culture" as "the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs".

³³ It defines ICH, for the purposes of the 2003 Convention, as: "the practices, representations, expressions, knowledge, skills - as well as the instruments, objects, artefacts and cultural spaces associated therewith - that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity...".

³⁴ The wording used in the Preamble to the 2003 Convention.

human rights³⁵ and (as we have seen above) for reaching many of the goals of sustainability.³⁶ Adoption of the 2003 Convention thus marks the culmination of a gradual recognition of the significance of cultural heritage in its own right. This recognition is largely based on a greater understanding of its role as a mainspring of cultural diversity and as a guarantee of truly sustainable development.³⁷ A further impetus for this normative work was the great acceleration in the loss of intangible cultural heritage due to the combined effects of the threats to its continued existence arising from, amongst others, globalization and acculturation.

Legal Opportunities and Constraints

In the late 1990s, when the issue of developing a new standard-setting instrument to safeguard traditional culture and folklore³⁸ began to be raised, there were two main legal contexts within which it was considered, namely that of cultural heritage law (and especially the 1972 Convention) and the intellectual property regime.

An intellectual property rights-approach to the protection of ICH

Since the 1970s, UNESCO has been involved with the World Intellectual Property Organization (WIPO) in seeking to develop stronger protection for traditional culture and folklore. In fact, UNESCO's formal relationship with WIPO dates back to the 1950s with the adoption of the Universal Copyright Convention in 1952,³⁹ and their joint activities led to the adoption in 1976 of the Tunis Model Law extending copyright protection to folklore.⁴⁰ However, an important step forward occurred in 1978 when the organizations formally agreed on a dual-track approach to protection of folklore, whereby UNESCO would examine the question from an interdis-

³⁵ P. Meyer-Bisch, *Le droit à l'interdépendance et au développement des libertés*, in: J. Bouchard, S. Gandolfi, P. Meyer-Bisch (eds.), *Les droits de l'homme, une grammaire du développement*, l'Harmattan, Paris 2013, pp. 19-33.

³⁶ The work of ECOSOC from the mid-1990s aimed at codifying indigenous peoples' rights (which culminated in the UN Declaration on the Rights of Indigenous People adopted by the UN General Assembly in 2007) can be seen as another significant contextual factor on the international policy level.

³⁷ Both are mentioned in the Preamble to the 2003 Convention. Also, the Final Communiqué issued by the Third Round Table of Ministers of Culture held by UNESCO in Istanbul in September 2002 noted that: "Laying the foundations of true sustainable development requires the emergence of an integrated vision of development based on the enhancement of values and practices involved in the intangible cultural heritage. Alike [sic] cultural diversity, which stems from it, intangible cultural heritage is a guarantee for sustainable development and peace".

³⁸ The term of art at the time, being the terminology employed in the 1989 Recommendation.

³⁹ Revised on 24 July 1971, 943 UNTS 178.

⁴⁰ Article 6 of the Tunis Model Law on Copyright for Developing Countries (UNESCO/WIPO, Paris – Geneva 1976, http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf [accessed: 12.12.2014]) provides for the protection of national folklore.

ciplinary standpoint⁴¹ and WIPO would continue to explore means of protection derived from IP rules. The two organizations thus continued their cooperation on this basis, which led to the adoption of a set of Model Provisions⁴² in 1982, which offered a model for the application of intellectual property rules to the protection of “expressions of folklore”. UNESCO and WIPO continued their cooperation and, two years later, developed a draft treaty⁴³ on the protection of expressions of folklore, although this text was never formally adopted by either organization.⁴⁴ As has been shown by later experiences in WIPO, this is a particularly complex issue that raises a series of fundamental questions and specific problems regarding the adoption of such a treaty, including: which State’s authority will be competent to authorize the utilization of folklore expressions; what should happen where one State has acceded to the treaty and another has not; and how can regional cooperation be organized in relation to shared expressions of folklore.

Following the failure to adopt the aforementioned draft treaty in 1984 (it was rejected by industrialized States, which declined to grant protection to community-based cultural expressions⁴⁵), the formal UNESCO/WIPO cooperation was suspended, and each organization continued its own activities based on the division of labour set out in 1978. Hence, work carried out within UNESCO in this area led to the adoption of the Recommendation on Traditional Knowledge and Folklore in 1989 (“the 1989 Recommendation”), an instrument that reflects a primarily cultural approach towards safeguarding this heritage.⁴⁶ UNESCO-WIPO cooperation saw a brief revival with the World Forum held at Phuket (Thailand) in 1997⁴⁷ and in a series of Regional Consultations on the Protection of Expressions of Folklore. However, this cooperation did not last long, and in 1998 WIPO began to undertake its own explorations in this area⁴⁸ and sought to identify *sui generis* approaches, based

⁴¹ It would address issues such as the definition, identification, preservation, conservation, promotion, and protection of folklore.

⁴² UNESCO and WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, UNESCO/WIPO, Paris – Geneva 1982, http://www.wipo.int/wipolex/en/text.jsp?file_id=186459 [accessed: 12.12.2014].

⁴³ UNESCO and WIPO, *Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, UNESCO/WIPO, Paris – Geneva 1984.

⁴⁴ Given the lack of experience relating to their protection at the national level and, in particular, of the application of the Model Provisions, it was judged premature to establish such an international treaty at that time.

⁴⁵ UNESCO and WIPO, *Draft Treaty...*

⁴⁶ Recommendation for the Safeguarding... This is the first time that the term “safeguarding” was used in the title for a cultural heritage instrument and “protection” is used in the text to mean, specifically, IP-style protection.

⁴⁷ UNESCO-WIPO World Forum on the Protection of Folklore, Phuket, Thailand, 8-10 April 1997.

⁴⁸ In 1998, it set up a Global Intellectual Property Issues Division. Its purpose was described in a WIPO briefing document as: “a response to the challenges facing the intellectual property system in a rapidly changing world ... [that] ... call for the proactive exploration of new ways in which the intellectual property

on intellectual property rules, for protecting traditional knowledge and folklore. In the year 2000 it established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore⁴⁹ to seek to develop a standard-setting instrument containing such *sui generis* measures. Although two sets of draft provisions for protecting traditional knowledge and traditional cultural expressions were adopted by WIPO in 2014,⁵⁰ this work has stalled and has not yet led to the adoption of any standard-setting instrument.⁵¹

A cultural approach towards safeguarding ICH

The adoption of the 1989 Recommendation signalled that Member States were increasingly interested in providing safeguarding specifically for non-material aspects of cultural heritage. Although one of its seven parts (Part F)⁵² covered intellectual property protection, it primarily took a cultural approach to this endeavour. At a major conference held on the 10th anniversary of the adoption of the Recommendation,⁵³ it was felt that this text served too strongly the interests of scientific experts and researchers, and treated the bearers of this heritage largely as passive informants rather than the prime movers in any safeguarding actions. Despite these criticisms, however, it must be recalled that the 1989 Recommendation was the first international instrument to provide a framework for safeguarding what later came to be known as ICH,⁵⁴ and despite the disadvantage of its non-binding

system can continue to serve as an engine for social, cultural and economic progress for the world's diverse populations”.

⁴⁹ 25th Session of the WIPO General Assembly, Geneva, 25 September – 3 October 2000. See: WIPO, *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 25 August 2000, WO/GA/26/6.

⁵⁰ WIPO, *The Protection of Traditional Knowledge: Draft Articles (Rev. 2)*, 28 March 2014, Doc. WIPO/GRTKF/IC/27/REF/FACILITATORS DOCUMENT REV. 2 and WIPO, *The Protection of Traditional Cultural Expressions: Draft Articles (Rev. 2)*, 4 April 2014, Doc. WIPO/GRTKF/IC/27/REF/FACILITATORS TCES DOCUMENT REV. 2, respectively, adopted by the Intergovernmental Committee at its 27th session on 24 March – 4 April 2014.

⁵¹ For a detailed discussion on this work, see: J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015, Chapter 7.

⁵² It was divided into seven sections (Sections A to G) which cover, *inter alia*, measures for the identification, conservation, preservation, dissemination, and protection (understood as intellectual property-style protection) of the “traditional culture and folklore” which is the subject of this instrument. Many of these were included in the definition of “safeguarding” provided in Article 2(3) of the 2003 Convention.

⁵³ International conference on *A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Co-operation*, jointly held by UNESCO and the Smithsonian Institution, Washington D.C., 30 June – 2 July 1999. Proceedings published in P. Seitel (ed.), *Safeguarding Traditional Cultures: A Global Assessment*, Smithsonian Institution, Washington D.C. 2001.

⁵⁴ This was the culmination of work undertaken by a Committee of Experts on the Safeguarding of Folklore established in 1982 and a meeting of the Committee of Governmental Experts on the Safeguarding of Folklore convened in Paris in 1985 to carry out an interdisciplinary study of the possible range and scope of general regulations for the safeguarding of folklore. After General Conference decided in 1987 to develop the text, a Special Committee of Governmental Experts was set up that year to prepare the final draft.

character it paved the way for future legal developments in this area. The approach it took was interdisciplinary and addressed issues of the definition, identification, conservation, preservation, and utilization of folklore. Without the 1989 Recommendation, the preliminary work towards developing the 2003 Convention could not have happened. Not only did these Recommendations drive the later drafting and negotiating process by emphasizing the importance of community involvement in the safeguarding process, they also provided the broad template for a treaty taking a cultural approach, rather than a purely intellectual property one.

In parallel with the movement within UNESCO towards the achievement of a new standard-setting instrument for safeguarding intangible aspects of heritage, its Member States from the African, Latin American, and Asia-Pacific regions increasingly felt that the inscription criteria (including the concept of authenticity) which was then applied to cultural properties failed to reflect the reality of much of their cultural heritage, which was intangible in character. They felt that the normative activity of UNESCO had been almost exclusively oriented towards the material elements of what often represented a “Eurocentric” conception of a monumental and prestigious culture. This conception ignored important parts of their heritage, much of which represented the cultural practices of local and indigenous communities. As a response, the World Heritage Committee (of the 1972 Convention) launched its Global Strategy in the mid-1990s, with the objective of achieving a greater “geographic representation” of sites on the World Heritage List.⁵⁵ In order to appreciate the fundamental difference in philosophy underlying the two treaties, we can compare the premises of the Representative List of Intangible Heritage of Humanity (“RL”) of the 2003 Convention with that of the World Heritage List. The notion of “representativeness” of the ICH to be inscribed on the RL is aimed at celebrating the diversity of ICH worldwide, as reflected in its relatively broad listing criteria.⁵⁶ The list is not intended to be seen as indicating any special or outstanding international significance of the items contained in it. They may be quite mundane, with each element being of primarily local significance. This is very different from the 1972 Convention, which is predicated on the notion of a heritage of such “outstanding” significance and “unique” character that it transcends any local significance.⁵⁷ Although the 1972 Convention

⁵⁵ The Global Strategy for a Representative, Balanced and Credible World Heritage List proposed a “move away from a purely architectural view of the cultural heritage of humanity towards one which was much more anthropological, multi-functional and universal” with regard to cultural properties inscribed on the List (UNESCO, *Expert Meeting on the “Global Strategy” and Thematic Studies for a Representative World Heritage List*, 13 October 1994, UNESCO Doc. WHC-94/CONF.003/INF.6). For more information, see: <http://whc.unesco.org/en/globalstrategy/> [accessed: 7.11.2017].

⁵⁶ Set out in Paragraphs 1 and 2 of the Operational Directives. They include criteria such as historical continuity, a cultural community that identifies with it, community consent to inscription, etc.

⁵⁷ See: C. Cameron, *Evolution of the Application of “Outstanding Universal Value” for Cultural and Natural Heritage*, paper presented at the Special Expert Meeting of the World Heritage Convention: *The Concept of Outstanding Universal Value*, held in Kazan, Republic of Tatarstan, Russian Federation on 6-9 April 2005, UNESCO Doc. WHC-05/29.COM/INF.9B.

has moved away from this notion of outstanding and unique heritage during the last 40 years and moved towards the idea of examples that are “representative” of the best available in a particular cultural area, region, theme, or historical period,⁵⁸ it still remains true to a philosophy that is fundamentally different from that of the 2003 Convention.

The Operational Guidelines to the 1972 Convention also underwent significant revisions in 1992 and 1998, which allowed for more consideration of the intangible dimensions of world heritage properties in the inscription process.⁵⁹ The first of these revisions was the introduction of cultural landscapes into the Guidelines in 1992, and one of the three categories of cultural landscapes was called “associative cultural landscapes”, defined as those “whose inclusion is justifiable by virtue of the *powerful religious, artistic or cultural associations of the natural element* rather than material cultural evidence, which may be insignificant or even absent”. Here, then, a contrast is drawn between the non-material associations of the landscape and any “material cultural evidence” it contains. This recognition of associated intangible elements was reinforced by the introduction of mixed cultural-natural properties in 1998, where very often intangible aspects provide the link between the cultural and natural heritage dimensions of such sites.⁶⁰ It is certainly not without relevance to the 2003 Convention that one of the earliest mixed properties was the site of Uluru-Kata Tjuta National Park in Australia (re-inscribed on the basis of criteria v, vii, viii and ix).⁶¹ In addition, inscription criterion vi⁶² (which was understood to be one for inscribing cultural properties until 2005, after which the nine listing criteria were no longer separated according to cultural and natural properties), makes reference to the idea of “living traditions”, which is frequently regard-

⁵⁸ A.Y. Abdulqawi, *Article 1 – Definition of Cultural Heritage*, in: F. Francioni, F. Lenzerini (eds.), *The 1972 World Heritage Convention – A Commentary*, Oxford University Press, Oxford 2006, pp. 23-50.

⁵⁹ Marcel Robischon argues, in *Ghost of the Forest: The Tangible and Intangible in Natural and Cultural Heritage*, “International Journal of Intangible Heritage” 2015, Vol. 10, pp. 20-30, for the addition of “intangible natural heritage” to the current categories recognized under the 1972 Convention, in order to strengthen conservation efforts and lead to a better understanding of the relationship between natural and cultural heritage.

⁶⁰ This mutuality of the relationship between the tangible and intangible aspects of heritage is well expressed by Deacon and Beazley, who note that “[i]ntangible heritage is probably best described as a kind of significance or value, indicating non-material aspects of heritage that are significant, rather than a separate kind of ‘non-material’ heritage” (H. Deacon, O. Beazley, *Safeguarding Intangible Heritage Values under the World Heritage Convention: Auschwitz, Hiroshima and Robben Island*, in: J. Blake (ed.), *Safeguarding Intangible Cultural Heritage – Challenges and Approaches*, Institute of Art and Law, Bulth Wells 2007, pp. 93-108).

⁶¹ Interestingly, this site was previously inscribed on the World Heritage List as an associative cultural landscape in 1994, and later re-inscribed as a mixed cultural/natural site because of its importance to the belief system of the local Anangu Aboriginal people. See: B. Boer, S. Gruber, *Human Rights and Heritage Conservation Law*, in: J. Blake (ed.), *Proceedings of the Conference on Human Rights and the Environment*, Majd Publishing, Tehran 2009, pp. 90-115.

⁶² This reads: “(vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria)”.

ed as a synonym for “intangible cultural heritage” and which, again, underscores the likelihood of a linkage between the tangible and intangible aspects of world heritage properties.⁶³ The use of this terminology also implies a direct connection with one or more local cultural communities with a property inscribed under this criterion.

The inscription was extended to that of a mixed site because of its importance in the belief system of the local Anangu Aboriginal people, who are one of the oldest human societies. The close inter-relationship between tangible and intangible heritage has now reached the point where a site can be inscribed as a World Heritage (“WH”) property while its related intangible heritage (oral expressions, use of raw materials, know-how and practices, etc.) may be inscribed on the RL of the 2003 Convention.⁶⁴ Bandiagara in Mali, inscribed on the WH List in 1989 on the basis of one cultural and one natural criterion (criteria v and vii)⁶⁵ also well illustrates the interplay between tangible and intangible heritage. It is an outstanding landscape of cliffs and sandy plateaux that contains significant architectural elements (houses, granaries, altars, sanctuaries, and communal meeting-places) and has served as a cultural space for mask rituals, feasts, and ceremonies involving ancestor worship.

However, it was by no means clear in 1999 what approach towards protection/safeguarding would be taken by a UNESCO instrument, and three main options were examined in the preliminary study into the question.⁶⁶ The first – the creation of a new Recommendation to “plug the gaps” of the 1989 Recommendation – was relatively quickly discounted since it would face similar challenges as the existing Recommendation in lacking “teeth” for enforcement. The possibility of adding a Protocol to the 1972 Convention, or of revising its text to extend its coverage more explicitly to include ICH, was rejected as being no easier to achieve than drafting a new Convention. Once it was decided to draft a new Convention, there remained three options with respect to the type of treaty to be developed and the nature of the obligations it should contain. The available choices were essentially: (1) a treaty using a *sui generis* intellectual property rights-based approach

⁶³ For example, Kumi Kato's *Community, Connection and Conservation: Intangible Cultural Values in Natural Heritage – the Case of Shirakami-sanchi World Heritage Area*, “International Journal of Intangible Heritage” 2006, Vol. 12, pp. 458-473 contains a case study of the Shirakami-sanchi World Heritage Area. This reveals that a community's spiritual connection and place-based identity underpin their conservation actions, leading to the World Heritage nomination.

⁶⁴ As in the case of the Rice Terraces of the Ifugao community, which extend over the highlands of the northern island of the Philippine archipelago (in the Cordilleras), and which were inscribed on the WH List in 1995, while the Hudhud narrative chants traditionally performed by women when planting the rice were inscribed on the RL in 2008. See: B. Boer, S. Gruber, op. cit.

⁶⁵ The Bandiagara (Cliff of the Dogons) property was inscribed by Mali on the WH List in 1989 (Decision CONF 004 XV.A). Details available online at: <http://whc.unesco.org/en/list/516> [accessed: 7.11.2017].

⁶⁶ J. Blake, *Developing a New Standard-setting Instrument for Safeguarding Intangible Cultural Heritage – Elements for Consideration*, UNESCO, Paris 2001, pp. 31-32.

to protection; one which addressed the special character and requirements of ICH (and its bearers);⁶⁷ (2) a treaty taking a broadly cultural approach, but with some *sui generis* intellectual property rights where gaps in protection were identified; and (3) a treaty taking a cultural approach that employs the mechanisms of the 1972 Convention, but adapted to the needs of intangible cultural heritage and the communities that create and maintain it. The third option was chosen by UNESCO General Conference in 2001, while the *sui generis* intellectual property rights approach towards protection of this heritage has, since 2000, been pursued in WIPO.⁶⁸

After it was clear that a broadly cultural convention would be drafted, the challenge remained as to how to define its subject-matter. Crafting the definition would, as we have seen, also help to describe the relative rights of different stakeholders. UNESCO actually had been developing a definition of “intangible cultural heritage” for operational purposes since the mid-1960s⁶⁹ (initially in its programmes in Africa), which covered social customs and beliefs, ceremonies and rituals, musical traditions, theatre, oral traditions, cosmogonies, skills and know-how. For the purposes of the 2003 Convention, a specific definition that was workable within a binding normative instrument was required.⁷⁰ This proved to be one of the most challenging aspects of drafting the 2003 Convention, given that this was a very new area for international regulation,⁷¹ and that the definition chosen would be central to the nature and scope of obligations to be placed on States Parties. The definition included in the final text of the treaty consists of a general clause followed by a non-exhaustive illustrative list of the five main domains in which ICH is found.⁷²

⁶⁷ These include: the recognition of traditional collective forms of ownership (through contractual or other arrangements); the requirement of proof of prior informed consent of holders of TK for the granting of patents; protection to be granted both in perpetuity and time-limited; protection of the moral rights of tradition-holders; and prohibition of the unauthorized registration of sacred and/or culturally significant symbols and words as trademarks.

⁶⁸ Within its Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore established in 2000. For a detailed discussion on this work, see: J. Blake, *International...*, Chapter 7.

⁶⁹ N. Aikawa-Faure, *From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage*, in: L. Smith, N. Agakawa (eds.), *Intangible Heritage*, Routledge, London 2009.

⁷⁰ The definition of ICH and its domains contained in Articles 2(1) and (2) was initially created at an Expert Meeting held in Italy in 2001, and then in the First Preliminary Draft of the Convention prepared by a Restricted Drafting Group of non-governmental experts in 2002.

⁷¹ For more on terminology related to ICH, see: W. van Zanten, *Constructing New Terminology for Intangible Cultural Heritage*, “Museum International” 2004, Vol. 56(1-2), pp. 36-45.

⁷² According to Article 2(1), ICH is: “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect

The proviso that “consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments” is worth noting. This limitation on what could be included in intangible cultural heritage under the 2003 Convention is an important one, since there are several traditional cultural practices that clearly contravene international human rights standards, such as female infanticide, ritual rape, forced marriage, tribal scarring, and female genital mutilation. Certain other aspects of the definition are worth drawing attention to here: that ICH includes physical artefacts where these are associated with it; that ICH is primarily identified by cultural communities and groups themselves; and that it provides them with a sense of identity and continuity. Hence, the communities and groups encompassed in the 2003 Convention are defined in terms of their ICH, and their ICH is also defined in terms of them and their recognition of it. Outside actors cannot identify an ICH element as belonging to a particular community unless the community itself recognizes it as such. This is an important human rights safeguard and also ensures the direct participation of cultural communities in all aspects of safeguarding, including the fundamental step of identification of ICH.

Conclusions

One of the tricky questions facing the drafters of the 2003 Convention was how it should relate to other international treaties dealing with aspects of this category of heritage, in particular those in the intellectual property rights domain. The Convention attempts to resolve this question by making clear that nothing in the Convention should alter the status or diminish the level of protection afforded by the 1972 Convention, and that it should not affect the rights and obligations of States under any instrument to which they are Parties in the field of intellectual property rights or concerning the use of biological and ecological resources.⁷³ How this will work in practice, especially in relation to the intellectual property regime, still needs to be fleshed out, and since 2015, UNESCO and WIPO have begun consultations on the issue.⁷⁴ The relationship between the 2003 Convention and other

among communities, groups and individuals, and of sustainable development”. The five domains set out in Article 2(2) are: a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.

⁷³ Article 3. L. Lixinski, *Intangible Cultural Heritage in International Law*, Oxford University Press, Oxford 2013 notes at p. 37 that “[t]he system created by the 2003 Convention was meant to be, from the very beginning, complementary to other regimes that could be created by other specialized agencies. The commitment to complementarity is true particularly regarding IP protection, which was, and still is, being developed by WIPO”.

⁷⁴ Interestingly, the Convention on the International Trade in Endangered Species (CITES) (3 March 1973, 993 UNTS 243) at its COP held in 2015 sought representation by the UNESCO Secretariat dealing with the 2003 Convention.

treaties (including, now, the 2005 Convention) is one that is not wholly resolved and needs further consideration by the treaty organs.

If one judges the 2003 Convention by the number of ratifications in the first decade of its operation, it is an extremely successful treaty,⁷⁵ more successful than the celebrated 1972 Convention. However, it seems appropriate to evaluate the 2003 Convention in qualitative terms as well. In particular, the extent to which it has established a new paradigm in heritage safeguarding⁷⁶ is best evidenced in the high degree of community participation. In addition, the 2003 Convention has demonstrated that safeguarding ICH should be an integral part not only of cultural policies, but also of policies in other areas (education, health, trade, tourism development, economic regeneration, etc.), both internationally and nationally, in order to ensure sustainable forms of development. It can also be argued that it has had an influence on other areas of international law, in particular human rights and environmental law in which, for example, the collective character of cultural rights⁷⁷ and the importance of traditional knowledge and practices for environmental sustainability are now increasingly accepted.

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⁷⁵ The 2003 Convention had secured 175 States Parties by 5 September 2017, which is very high compared with the Convention on the Protection of the Underwater Cultural Heritage (2 November 2001, 2562 UNTS 1), for example, which had 58 States Parties by 30 August 2017. See <http://www.unesco.org/eri/la/convention.asp?KO=17116&language=E>, and <http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha> [accessed: 30.11.2017].

⁷⁶ J. Blake, *The Impact of UNESCO's 2003 Convention on National Policy-making: Developing a New Heritage Protection Paradigm?*, in: P. Davis, M.L. Stefano (eds.), *Intangible Cultural Heritage*, Routledge, London 2016.

⁷⁷ A number of insightful essays dealing with collective rights and cultural heritage can be found in A. Jakubowski (ed.), *Cultural Rights as Collective Rights – An International Law Perspective*, Brill, Leiden 2016.

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