

# ON THE PREPARATION AND ADOPTION OF UNESCO 2003 AND 2005 CONVENTIONS

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# SIX UNESCO CULTURE/HERITAGE CONVENTIONS

Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)

Convention for the Safeguarding of the Intangible Cultural Heritage (2003)

Convention on the Protection of the Underwater Cultural Heritage (2001)

Convention concerning the Protection of the World Cultural and Natural Heritage (1972)

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)

Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)

## ALSO RELEVANT ARE ...

*Unesco Universal Declaration on Cultural Diversity (2001),* unanimously adopted, which prepared the road for the 2005 Convention

*The Unesco Recommendation on the Safeguarding of Traditional Culture and Folklore (1989),* the first but not successful legal Unesco text on (safeguarding and documenting) ICH

# INTANGIBLE CULTURAL HERITAGE (ICH) AND SAFEGUARDING AS DEFINED IN THE 2003 CONVENTION

Article 2.1 ICH means: "... 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, ..."

Article 2.2 provides a non-exhaustive list of ICH domains: (a) oral traditions and expressions, (b) performing arts, (c) social practices, rituals and festive events, (d) knowledge and practices concerning nature and the universe, (e) traditional craftsmanship

Article 2.3 "Safeguarding means measures aimed at ensuring the viability of the intangible cultural heritage, ..."

# CULTURAL EXPRESSIONS (CE) AS DEFINED IN THE 2005 CONVENTION

Article 4.3 “ ‘Cultural expressions’ are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.”

Article 4.2 “ ‘Cultural content’ refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.”

# PURPOSES

## 2003 Convention

Assisting communities (groups and individuals) to safeguard their ICH, among other things by creating the general (legal, administrative, financial) conditions required for that purpose

Giving visibility; raising awareness; creating respect for and mutual appreciation of ICH

Communities to recognize and identify their ICH and determine its values (rather than external experts)

Mobilizing ICH for sustainable development

## 2005 Convention

Furthering the creation, production, distribution, dissemination of and access to contemporary (new or traditional) cultural productions

Special treatment for cultural services and goods in trade negotiations (“cultural exception”)

The sovereign rights of States to maintain, adopt and implement cultural policies that protect and promote the diversity of CE on their territory and in particular CE at risk of extinction

Assistance and preferential treatment for developing states wanting to (further) develop cultural policies and industries

Free flow of information and creators; respect for freedom of expression

Mobilizing CE for sustainable development.

# BENEFICIARIES: COMMUNITIES / PRACTITIONERS / PERFORMERS

## 2003 Convention

“communities, groups and individuals” (not defined otherwise than as those who “create, maintain and transmit ICH”).

The Preamble mentions that “communities” includes “Indigenous communities”. “Practitioners” are mentioned in article 21.

Good to know: Many of the ICH elements that are inscribed on the Convention’s Lists or included in national inventories of ICH belong to local or Indigenous communities.

## 2005 Convention

Mentions: individuals, artists, groups, societies, cultural communities, social groups, cultures including “the cultures of persons belonging to minorities and indigenous peoples”, civil society, NGOs, media and cultural industries

Good to know: Various projects financed by this Convention’s Fund concern cultural expressions of minorities or Indigenous peoples/communities.

# INTELLECTUAL PROPERTY RIGHTS

## 2003 Convention

IPR only mentioned in article 3(b):

“[Nothing in this Convention may be interpreted as: .....]

(b) affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties.”

## 2003 Convention Operational Directives (ODs)

The ODs mention IPR twice, in passing by; cf.

OD 104. “States Parties shall endeavour to ensure, in particular through the application of intellectual property rights, privacy rights and any other appropriate form of legal protection, that the rights of the communities, groups and individuals that create, bear and transmit their intangible cultural heritage are duly protected when raising awareness about their heritage or engaging in commercial activities.”



# 2005 CONVENTION: IPR and RELATIONS TO OTHER INTERNATIONAL INSTRUMENTS

## IPR

The preamble recognizes “the importance of IPR in sustaining those involved in cultural creativity ...”.

IPR is not mentioned in the text of the Convention, nor in its Operational Guidelines.

Good to know: Various copyright related projects financed from the 2005 Convention’s Fund

## Relations to other international instruments

Article 20 « (...), without subordinating this Convention to any other treaty,

a) they [the Parties] shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and

b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties. »

# ORGANS AND OBLIGATIONS

## 2003 Convention

IGC under control of General Assembly, assisted by (Unesco) secretariat

Two Lists; Register of Good Practices

Almost obligatory Fund

Few obligations for States Parties: drawing up inventories; contributing to Fund; reporting on implementation.

## 2005 Convention

IGC, under the control of Conference of Parties, assisted by (Unesco) secretariat

No Lists

Voluntary Fund

Main obligation for Parties: submitting quadrennial reports about implementation.

# FINAL NEGOTIATIONS / ADOPTION / UPTAKE

## 2003 Convention

Quick final negotiation: 3 intergovernmental meetings and 1 inter-sessional meeting between September 2002 and June 2003

Adopted October 2003, though not unanimously: about 120 for; 8 abstentions (Australia, Canada, Denmark, New Zealand, Russia, Switzerland, UK, USA); nil against

Rapid uptake: currently 174 SPs, including Denmark and Switzerland

Very long preparation

## 2005 Convention

Quick final negotiation: 3 intergovernmental meetings between September 2004 and June 2005

Adopted October 2005, though not unanimously: 148 for; 4 abstentions (Australia, Honduras, Nicaragua, Liberia); 2 against: Israel, USA.

Rapid uptake: currently 144 SPs, incl. Australia, Honduras and Nicaragua

Long preparation

# EARLY ACTION FOR INTANGIBLE HERITAGE

1973 Bolivia asks for action after which Unesco (copyright division) and WIPO started working together; their cooperation yielded

- 1976 Tunis Model Law on Copyright for Developing Countries
- 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Forms of Prejudicial Action.

After failed attempts to work towards a joint Convention, from mid-80's on, less cooperation. Dispersed programmes and expert meetings in Unesco.

1989 UNESCO adopted the Recommendation on the Safeguarding of Traditional Culture and Folklore (research and product-oriented; proposals include *sui generis* IP-protection; not binding; not successful).

# FINAL PHASE OF PREPARATION FOR 2003

1993 expert meeting, funded by Japan: Secretariat proposes, experts approve new Unesco program for ICH.

1994 Living Human Treasures programme launched, as proposed by Rep. of Korea.

1997/8 Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity launched; 90 Masterpieces proclaimed (2001/3/5).

1990s: evaluations of the 1989 Recommendation. June 1999, Washington DC: final evaluation of “inadequate” 1989 Recommendation.

Nov. 1999, General Conference requests Unesco to undertake preliminary feasibility study; May 2001, Executive Board authorizes DG to continue preparing a new legal instrument; General Conference Oct 2001: let it be “an international Convention.”

Unesco organizes independent expert meetings to discuss scope and definitions (Turin, 2001; Rio, 2002, Paris, 2002), and to prepare a preliminary draft for the Convention (Paris, 2002, 2002).

# WORKING TOWARDS THE 2005 CONVENTION

1996 *Our Creative Diversity*, prepared by independent experts of Unesco's World Commission on Culture and Development

1998 Stockholm Conference of ministers of culture. Upon Canada's initiative were created network of ministers to discuss the place of cultural goods and services in international trade and to advance a Convention on the issue, plus a supporting NGO: International Network on Cultural Policy.

2000 Council of Europe adopted Declaration on Cultural Diversity

2001 Finger exercise: Unesco Universal Declaration on Cultural Diversity (2001)

2003 After authorization by GC independent experts, supported by Unesco secretariat, studied feasibility and prepared a preliminary draft.

2004-5 Text finalized on basis of that draft in three governmental meetings of experts.

# CHALLENGES FACED

## Opposing states within Unesco

- Not in favor of 2003: mainly Group 1 states, plus Australia, New Zealand.
- Not in favor of 2005: US, Israel, Japan; and - at different moments - Argentina, Australia, Brazil, Colombia, India, Mexico, New Zealand, Turkey.
- Within Unesco secretariat no full support for both Conventions

## Debates, e.g.

- 2003: need for Lists, contributions Fund; place of communities vs. NGOs vs. centres of expertise in future implementation.
- 2003: Avoiding for the new heritage convention the widely perceived eurocentric bias of Unesco's 1972 World Heritage Convention and its approaches.
- 2005: scope, relation to other international instruments.

## Considerable sums required for preparation and functioning of Conventions

# REASONS FOR QUICK PROGRESS

Definitions, scope and objectives had been largely agreed upon beforehand, for 2003 in lower level meetings; for 2005 through the 2001 Declaration on Cultural Diversity.

Supportive States paid up for the organisation of meetings and mobilized support. Substantial support for 2003 from Japan; for 2005 from Canada and France

Full adherence was not sought.

Compromises were sought; not all notions used were defined, or they were given open definitions; some issues were left for (further) treatment in operational directives/guidelines.

The Secretariat actively and proactively supported the meetings, in close contact with supportive and dissenting delegations, and with meeting reports concentrating on the more successful debates and their outcomes.

There was a unique window of opportunity: while both conventions had supporters and non-supporters, states agreed, led by Unesco's Japanese director-general, to adopt both conventions.



# AFTERMATH

Both 2003 and 2005 are relatively soft Conventions. While states may have ratified for different reasons, the secretariat now tries to streamline the implementation of the Conventions, through IOS-reports, capacity-building programmes and the reporting obligation.

The organs of the two conventions in their meetings are actively further developing and interpreting them. In the case of 2003 the IGC, for instance, contributes to the interpretation of “ICH” and “communities/groups/individuals” through the discussion of nomination files (for the international lists). With both conventions, the Committees pronounce themselves about implementation on the national level when studying the reports that Parties have to send it. Operational directives/guidelines are rapidly being developed (2003 also developed Ethical Principles for Safeguarding ICH).

There is little cooperation between the 2003 and 2005 Conventions, or between either of them and WIPO’s IGC, nor are concepts and definitions finetuned between them, which – especially in the case of 2003 and WIPO - may be problematic. Those who drafted 2003 foresaw a situation in which there would be complementary conventions for safeguarding and legally protecting intangible cultural heritage/TCE & TK.