Playing the Devil’s Advocate: Protecting Intangible Cultural Heritage and the Infringement of Human Rights

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Abstract
Adopted in 2003 and coming into force in 2006, the Convention for the Safeguarding of Intangible Heritage has now been ratified or otherwise approved by 112 national governments. It is notable, however, that a number of countries which have been strongly involved in the World Heritage system have so far chosen not to ratify the Convention. Australia is one of these countries. This paper explores some of the reasons for this widespread resistance in terms of the key concepts, the system now set up under the Operational Directives, the impacts on communities whose intangible heritage has been nominated or not nominated for inscription on the Representative List, and human rights. In writing this paper, I am playing Devil’s Advocate, raising the issues that cause concern but with the view that, if these issues can be resolved, resistance to ratification may disappear. Nevertheless the paper concludes that, as an alternative to adopting the listing established under the Convention, a more democratic and broadly based set of consultative programs might achieve more effective maintenance of the diverse intangible cultural heritage of Australia and other resistant nations.

Adopted in 2003 and coming into force in 2006, the Convention for the Safeguarding of Intangible Heritage has now (at June 2009) been ratified or otherwise approved by 114 national governments. It is notable, however, that a large number of countries which have been strongly involved in the World Heritage system have so far chosen not to ratify the Convention. Even though as a UNESCO Member State at the organization’s General Conference it voted for the Convention’s adoption in 2003, Australia is not a State Party to the Convention. Other non-ratifiers include Canada, Denmark, Germany, Netherlands, New Zealand, Sweden, Thailand, UK and USA. The question is why not? What are the reasons for such widespread resistance?

Under the previous Australian government led by Prime Minister John Howard the resolute resistance to ratifying the Convention was not surprising, given that government’s hostility towards multiculturalism and suspicion of international treaties. The recent change of government at the national level, however, means that these Conventions have come back onto the agenda. Some professional and other interested groups around Australia are lobbying in particular for the Intangible Convention to be ratified. Others, including myself, have however expressed doubts. This is not because of opposition to protecting intangible heritage but because the mechanisms set up under the Convention do not appear to be the most appropriate; indeed they may create situations where human rights can be infringed. Because of this difference and some of the implications of focusing on ‘living heritage embodied in people’, great care needs to be taken. Ethical dilemmas arise and there are dangers that human rights may be unintentionally infringed by the operations of the Intangible Heritage Convention.

While UNESCO insists that communities are fully involved in heritage identification and management, it is clear in the World Heritage system that this is not always happening. Frequently heritage protection campaigns serve ideological and political purposes such as nation building. This can be benign, where it helps bring communities together in a peaceful, democratic, consultative and informed way, or malign, where it is used to force the assimilation of minority groups into the dominant culture (Langfield, Logan and Nic Craith in press). While it does not specify the cases it had in mind, in its submission to the World Heritage Committee workshop held in Paris in February 2009 to reflect on the future of the World Heritage Convention
ICOMOS ranked human rights issues associated with heritage conservation as one of seven ‘new and complex global pressures’ impacting negatively on outcomes (ICOMOS 2008:5). While no-one could object to the notion that the intangible cultural heritage of community groups should be respected, some ‘problems’ – ‘challenges’ at least - lie in the way that the system under the Intangible Convention is being developed. In the time available I will deal only with fours sets of ‘problems’. The first relates to the fact that the key notions used in the Convention are themselves problematic, as too are the actions being taken (or not being taken) under it.

Problems in the key concepts themselves

Cultural diversity

The value of maintaining cultural diversity, the principal motivation for protecting intangible cultural heritage, is accepted without question. The diversity theme, and especially the protection of diversity, began to emerge as a major focus of UNESCO activities in the 1990s, in large part due to fears that globalization was threatening the survival of the world’s cultural diversity (Logan 2007a: 36). In October 2000, UNESCO’s Executive Board invited the Director-General to prepare a declaration aimed at ‘promoting cultural diversity in the context of globalization’. The resulting instrument was the Universal Declaration on Cultural Diversity adopted in 2001. The UNESCO web site refers to it as the founding act of a new ethic for the twenty-first century, providing the international community, for the first time, with a ‘wide-ranging standard-setting instrument to underpin its conviction that respect for cultural diversity and intercultural dialogue is one of the surest guarantees of development and peace’. Although in 1989 UNESCO had adopted a Recommendation on the Safeguarding of Traditional Culture and Folklore, it had not gone anywhere. But building on this Recommendation, by 2000 the UNESCO Director-General, Koichiro Matsuura, had put in place a scheme called Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity.

The push to protect intangible alongside the tangible heritage of places and artefacts can be seen, therefore, as a further step in recognizing cultural diversity, and the 2003 Convention for the Safeguarding of Intangible Heritage as well as the ensuing International Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions of 2005 seek to engage states in binding legal instruments representing a commitment to cultural diversity. The Masterpieces program, by the way, ended in 2006 when the Intangible Convention came into force. There were 90 items on the list by this time, and some of these have been inscribed on the new Intangible Heritage List that has been set up under the Intangible Convention.

Certainly many people today are concerned that the world’s rich cultural diversity is under threat, the forces of globalisation sweeping the world, undermining local cultures and imposing a degree of uniformity and blandness. Although the picture is in fact much more complex than a simple ‘Westernisation’ (or ‘Americanisation’ via Hollywood and the music industry), there are some reasons for anxiety. For many commentators, the protection of variety in the world is important and becoming increasingly urgent (Logan 2003: xi-xii). Other commentators, however, have noted that since the end of the Cold War, there has been an upsurge in small and localised conflicts, mostly provoked by cultural differences. Think of the Balkans conflicts, Timor, Chechnya and so on. Samuel P. Huntington’s ‘clash of civilisations’ (1993) is conflict based on cultural difference at its most extreme. World politics, he says, is entering a new phase, in which the great divisions among humankind and the dominating source of international conflict will be cultural.

Heritage to be abandoned rather than safeguarded

People seeing the world this way may well call for less cultural diversity, rather than its protection. This is not my preferred vision for the world, although I can think of many manifestations of ‘heritage’ that in my opinion deserve to be forgotten today. Indeed, there are some dimensions of our own culture that we don’t want to keep at all – and some elements of other people’s cultures that we might hope they would abandon. Some cultural practices have been eradicated in the past, including social forms like Chinese foot-binding, and economic forms like ‘New World’ slavery. But this raises an interesting question: How would we decide which elements of intangible cultural heritage are worth protecting and which not? Heritage professionals generally baulk at the idea; there is something unholy about destroying heritage. However a problem is that ‘culture’ these days is usually defined broadly to take in most expressions of a community – a far cry from the narrower, more elitist and safer definition of culture as forms of artistic activity and expression.

In the recent book Places of Pain and Shame: Dealing with Difficult Heritage’, Colin Long and Keir Reeves (2009) look at this question in their chapter about Anlong Veng, Pol Pot’s home village in Cambodia, which is being memorialised – their argument is that this is heritage we might actively destroy since it memorialises the perpetrator of a genocide. This is a far cry from memorialising the victims of genocide, as in Auschwitz (Young 2009), or massacres as in Myall Creek (Batten 2009).

Intangible heritage and the World Heritage Committee’s Global Strategy

This push into intangible cultural heritage was also related to the World Heritage Committee’s ‘Global Strategy’ introduced in the early 1990s, which sought to recognize and protect embodied cultural heritage in societies where perhaps the built heritage was less significant. Intangible cultural heritage values have always been encompassed by the World Heritage Convention 1972. The World Heritage Committee’s Operational Guidelines list the 10 Criteria for evaluating places to determine whether they have Outstanding Universal Value (UNESCO WHC 2008). Of these at least three (v, vi, ix) involve intangible values; that is traditional skills embodied in people.

In strengthening the credibility of the World Heritage List over the two decades, the World Heritage Committee has been tightening up the inscription requirements and more thoroughly monitoring the state of conservation at sites after they have been inscribed. It is now clearly recognised that there must be a Statement of Outstanding Universal Value (SOUV) that captures the reasons for inscription. This was not a firm requirement until relatively recently and where nomination documents from earlier inscriptions lacked a SOUV, or had an inadequate SOUV, Retrospective SOUVs are now being requested. This is providing a golden opportunity for States Parties to highlight the intangible heritage values of their sites. An example of this is the Old Town of Lijiang in China where the traditional skills of the Naxi indigenous people is able to be emphasised in the revised SOUV.
Perceived deficiencies in the listing system

Structure of the Intangible Cultural Heritage Convention

The text is short – only 13 pages – and it conforms with the usual convention structure. A Preamble sets the scope and intellectual and instrumental context. It refers at the outset to existing international human rights instruments, in particular the Universal Declaration of Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966. It notes the importance of the intangible heritage as a mainspring of cultural diversity and a guarantee of sustainable development, and also recognises the deep-seated interdependence of tangible and intangible as well as globalization and social transformation.

The General Provisions (Section I) outline the purposes of the Convention, the definitions and its relationship to the World Heritage Convention and to Intellectual Property. In a key Article (2.1) the Convention observes that

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.

This highlights the fact that, as we are dealing with living heritage, it will change over time and this puts the focus onto the process of inter-generational transmission as a key criterion for evaluating the worthiness of an intangible heritage element (compared with ‘authenticity’ in relation to the World Heritage places) and as the key safeguarding mechanism.

The organisational structure is explained in Section II, in particular the General Assembly of States Parties (GA) and the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (IGC). (A third organisation unit is the Secretariat based in UNESCO headquarters in Paris.) The GA meets every two years and is the sovereign body for this Convention. The IGC comprises 24 State Parties elected by the General Assembly to examine and decide upon submissions to the two lists set up under the Convention – the Urgent Safeguarding List, and the Representative List. The IGC aims for equitable geographical representation of its membership by using a voting system based on six electoral divisions. Separate sections deal with safeguarding the Intangible Cultural Heritage at the National level (Section III) and International level (Section IV), International Cooperation and Assistance (Section V) and the Intangible Cultural Heritage Fund (Section VI). The Convention ends with Section VII relating to Transition – ratification of and accession to the Convention, requirements for its entry into force, and so on.

Urgent Safeguarding List

To be inscribed on the Urgent Safeguarding List an element must meet all of the following criteria if it is to be listed:

U.1 The element constitutes ICH as defined in Article 2 of the Convention.
U.2a The element is in need of urgent safeguarding because its viability is at risk despite the efforts of the community, group, or, if applicable, individuals and States Parties; OR
U.2b The element faces grave threats and is unlikely to survive without urgent safeguarding

U.3 Safeguarding measures must be proposed; that is, a safeguarding plan is a necessary component of the nomination dossier.
U.4 The element has been nominated following the widest possible participation of the community, group, or, if applicable, individuals concerned and with their free, prior and informed consent.
U.5 The element is included in the State Party’s ICH inventory.
U.6 In case of extreme urgency (U.2b) the State Party has been duly consulted.

Nomination dossiers are examined by the IGC. This process takes 1.5 years for U.2a cases but may be quicker for U.2b cases. One or more of the numerous accredited advisory bodies may be asked to provide an opinion on the worthiness of a nomination, but it is clear that the States Parties want to control the process rather more than is the case with the World Heritage List where the Advisory Bodies – IUCN, ICOMOS and ICCROM – have their roles defined and made mandatory by the World Heritage Convention 1972. Removal of an element from the Urgent Safeguarding List may be decided by the IGC if that element no longer satisfies one or more criteria. Involvement of the accredited advisory bodies is not required in the delisting process and it is unlikely that States Parties are going to vote themselves off the list.

Representative List

The goal of the Representative List is to ‘ensure better visibility of the ICH and awareness of its significance, and to encourage dialogue which respects cultural diversity…’ (Article 16). To be inscribed an element must meet all of the following criteria, many of which are the same as for the Urgent Safeguarding List:

R.1 As for U.1
R.2 ‘Inscription will contribute to ensuring visibility and awareness of the significance of the ICH and to encourage dialogue, thus reflecting cultural diversity worldwide and testifying to human creativity’
R.3 As for U.3, a Safeguarding Plan is required. This will be designed to protect and promote the element.
R.4 As for U.4; full community participation is required.
R.5 As for U.5, the element will be on the State Party’s ICH inventory.

States Parties are encouraged to jointly submit multi-national nominations when an element is found on the territory of more than one State Party. Examination of the nomination dossier is done by the IGC using one or more accredited advisory body. The process takes 13 months. Strangely, this seems to be a quicker process than for the Urgent Safeguarding List. Note also that there is provision for nominating programs, projects and activities that best reflect the principles and objectives of the Convention.

Not only is the listing system slow and cumbersome, but there is no doubt that it imposes a large amount of new work on the State Party. The reporting activities alone are onerous. Article 12 requires that a national inventory of intangible heritage elements is kept and updated regularly, as well as a directory of accredited experts. It will also require supporting educational institutions to become centres of expertise. Given the severe funding shortage in Australia for carrying out the current range of heritage protection responsibilities, and the likelihood that the existing funds pool will be subdivided rather than expanded, are we in a position to take on the costs of adopting the listing approach set up under the Convention?
Impact of selection and non-selection

Another problem with the listing process as it has now been set up is that it creates a situation in each nominating country where one community appears to be favoured over others. Inscription certainly gives visibility; indeed, the selected community is likely to become the target of increased tourism. Before long entrepreneurs in the selected community begin to provide what they think tourists want. For those communities not selected, the implication is that they are second-rate. Since, as Graeme Aplin notes (2002: 140-1), ‘Emphasising the heritage of one group at the expense of other groups reinforces the feelings of superiority of the dominant group, and those of inferiority of the other groups’, this can have serious socio-political consequences. There may also be an impulse to modify their heritage to make it like that of the ‘successful’ community and so attract increased tourism. In short, the community heritage may be distorted in both the ‘successful’ and ‘unsuccessful’ communities as a result of economic factors.

In Brazil, where intangible heritage has been protected by the national government for many decades, intangible elements are listed only for a limited period of time, so that the ‘advantages’ up under the Convention there appears to be no easy way to attract increased tourism. In short, the community heritage may be removed from the Representative List. Although the community off the list if it no longer meets the criteria, this will likely to be resisted by the State Party concerned. Perhaps, heritage to make it like that of the ‘successful’ community and therefore, in Australia’s case it might be better to have a national program that deals more broadly with the intangible cultural heritage of all racial and ethnic groups in Australia rather than focusing on a few chosen ones. This would seem to be a more equitable and effective framework for protecting Australia’s intangible heritage.

Strong resistance to the Convention has come from various Indigenous peoples, such as the Maori, who are not comfortable with the creation of inventories since these might result in prioritisation among different cultural expressions and, more importantly, in the disclosure to the general public of sacred sites and practices. Many Indigenous Australians feel the same way. It is essential, then, that if we are to proceed down the Intangible Convention line and begin inventorising and nominating intangible elements for listing, the communities whose intangible heritage is being targeted are consulted before they find they are caught up in a system over which they have no control. ‘Free, prior and informed consent’ must be upheld as a hurdle requirement.

The World Heritage system set up under the 1972 Convention failed to insist upon that, and belated efforts to correct the problem are proving difficult and contentious. Let’s not go down the same track again. The drafters of the 2003 Intangible Convention saw the problem clearly and inserted Criteria U4 and R4. However Article 77 of the Operational Directives clearly waters this down by encouraging States Parties merely to set up a ‘consultative body or coordination mechanism’ to facilitate participation. This will probably mean top-down control over the ‘community participation’ process.

Human rights implications

Despite the Preamble insisting that nothing should be done under the Convention that would infringe human rights, such infringement might occur unintentionally or even intentionally. While UNESCO insists that communities are fully involved in heritage identification and management, it is clear in the World Heritage system that this is not always happening. Frequently heritage protection campaigns serve ideological and political purposes such as nation building. This can be benign, where it helps bring communities together in a peaceful, democratic, consultative and informed way, or malign, where it is used to force the assimilation of minority groups into the dominant culture (Langfield, Logan and Nic Craith 2009).

Valentine Moghadam and Manilee Bagheritari look at the cultural rights of women in their 2007 article in UNESCO’s journal, Museum International (Moghadam and Bagheritari 2007). They argue that under the Intangible Cultural Heritage Convention women could be ‘vulnerable to manipulation or dismissal of women’s participation and rights’ because of its gender-neutral language and because it fails to refer to the UN’s 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) or other women’s rights instruments. Their fundamental point is that “culture” is not a valid justification for gender inequality (p. 11). It follows that cultural forms that represent and perpetuate gender inequality should not be safeguarded.

We must allow for change and let people decide their future for themselves. We should not seek to lock communities into patterns of life they no longer value, no matter how exotic they might seem to the outsider. In some cases, the best that might be hoped for is to ‘festivalise’ the intangible heritage, turning it from an everyday feature of community life into an occasional albeit celebratory one. An example of culture being kept alive in this way is the traditional gong-playing of the ethnic minority communities in the Tay Nguyen region of central Vietnam (Logan in press). The essential problem is that the younger generation prefers to play modern forms of music on their iPods and the role of gong-playing in birth, marriage, burial and other rituals is petering out. After being added to the Masterpieces and then transferred to the Representative List, a UNESCO Hanoi Office program funded by the Government of Norway is now strengthening a network of local clubs where training takes place on a weekly basis. A set of ‘master gong players’ has been identified and further visibility and status has been given to gong-playing by the development of an annual international festival. This ensures the transmission of gong-playing skills to at least some young people. Others are innovating, with some even playing Latin American rhythm music on traditional gongs.

Another example is the diving skills of the Haenyeo women on Jeju Island, Republic of Korea. Preparation has been going on for four years to prepare a nomination to the Representative List. The process has been top-down, with the main proponents being Korea’s culture bureaucrats, academics and the Haenyeo Museum on Jeju. The women themselves seem supportive if it improves their wages and working conditions but it is not clear that the Operational Directives’ requirement of ‘free, prior and informed consent’ has been met. Moreover, if the basic human right to be able to choose one’s own life is upheld, how would it be possible to keep the diving activities alive, short of ‘festivalising’ them or turning them into a tourist performance. Young Jeju women have refused to take up the hard diving life, so that there is left only a very small number of divers under the age of 60.

It appears now (June 2009) that the Seoul culture bureaucrats...
have decided that nominating the diving skills is too difficult and instead a nomination has been drafted by Haenyeo Museum nominating the songs that the women have created to accompany their diving activities. However it seems that the group of songs to be nominated include two called ‘Anti-Japanese Songs’. Certainly the Haenyeo diving women took a lead in the anticolonial uprising against the Japanese during the 1930s and WW2, but to nominate such songs seems to be in direct opposition to the UNESCO Constitution’s primary emphasis on building bridges to peace in the minds of men, and the Intangible Convention’s Preamble about working towards dialogue and peace.

The process developed for evaluating nominations to the Representative List has been excessively politicised. It is governments rather than either the experts or the communities directly affected which will decide what should be inscribed. How will the Anti-Japanese songs be dealt with? Even if good sense prevails, what damage will have been done already? The examples given by Anthony Seeger (2009: 122) from the experience of the International Council for Traditional Music gives cause for concern. Seeger was Secretary-General of the ICTM in 2001-5 and supervised the evaluation of around 90 nominations to the UNESCO Masterpieces program. He saw how the process could be seen as aiding and abetting a process of cultural cleansing when, for instance, Rom (Gypsy) music, which is important in many European UNESCO Member States, was never once nominated by those states. Meanwhile other nominated songs glorified convicted war criminals and celebrated war crimes and could have slipped onto the Masterpieces list because the decisionmakers lacked expertise in the kind of music concerned and were unable to understand the language of the songs.

These sorts of examples help to explain the resistance to ratifying the Convention. Clearly the goals of the Convention are commendable: it recognises a form of cultural heritage long ignored, and it could help to achieve a more balanced and hence credible set of UNESCO programs protecting the world’s heritage. It is up to individual nations to decide whether or not to ratify the Convention. In writing this paper, I am playing Devil’s Advocate, raising the issues that cause concern. If these issues can be resolved resistance to ratification may disappear. But it may be that an alternative more democratic and broadly based set of consultative programs will achieve more effective maintenance of the diverse intangible cultural heritage of Australia and other resistant nations. Spending time, effort and funds on servicing the Representative List does not, at this point, seem warranted.

References