



## **International Convention on the Elimination of All Forms of Racial Discrimination**

### **Background**

All human beings are born free and equal in dignity and rights that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, color or national origin. All human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination. This Convention is based on the Charter of the United Nation and the purpose of the United Nation which is promoting and encouraging universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

United Nation has condemned colonialism and all practices of segregation and discrimination since the 1970, proclaimed that the discrimination needs to end. There is no justification for racial differentiation in practice of theory, and any doctrine of racial differentiation is false, morally condemnable, socially unjust and dangerous. Discrimination between human beings on the grounds of race, color or ethnic origin in a barrier to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State. It is repugnant to the ideals of any human society.

### **Concept**

This Convention aims to adopt all necessary measures for eliminating racial discrimination in all its forms and manifestations, preventing and combating racist doctrines and practices. Its goal is to promotes understanding between races and to build an international community

free from all forms of racial segregation and racial discrimination, and ending all forms of racial discrimination as soon as possible. All States Parties desires to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end.

#### **Entry into Force**

Article 19 of the present Convention states that this Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession. Further, for each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

#### **Main Features**

The Convention consists of 25 Articles which is divided into 3 Parts. Part 1 of the Convention consists of Article 1-7, which explains about the basic definition of the Convention itself. The Convention defines the term racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Each of the States Parties agrees to pursue all appropriate means to eliminate racial discrimination by doing such acts: engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; not to sponsor, defend or support racial discrimination by any persons or organizations; take effective measures to review governmental, national and local policies, and to amend, rescind or

nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization; encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

In the following articles in the Part 1 of the Convention, the States Parties will condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin. They will undertake to adopt immediate and positive measures designed to eradicate all incitement or acts of such discriminations. The States Parties will prohibit and eliminate racial discrimination in all its forms and also guarantee the right of equality before the law for everyone without any distinction to their race, color, national or ethnic origin.

Part 2 of the Convention consists of Article 8-16; explains about the establishment about a committee named the Committee on the Elimination of Racial Discrimination. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties, where each State Party may nominate one person from among its own nationals. The Committee will deal with matter within the scope of this Convention after it has ascertained that all available domestic remedies have been invoked and exhausted in that case.

Part 3 of the Convention consists of Article 17-25. This part explains about the general rule of a convention regarding the matters relating entry into force of a convention, accession, ratification, signatory and dispute settlement.

### **Dispute Settlement**

Article 22 of the Convention regulates the matter relating dispute settlement between two or more States Parties. It is stated that Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall,

at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

(Luna Puspita)

## Convention for the Safeguarding of the Intangible Cultural Heritage

### Background

Before 1970s, the focus on the preservation of the cultural heritage done by most nations around the world was the object the product of a culture, such as: monuments, archeological relics, historical buildings, and other objects that in essence are tangible.<sup>1</sup> UNESCO, in order protect cultural heritage, in 1972 took necessarily action by enacting the World Heritage Convention (WHC). It invokes the international cooperation to protect the cultural heritage of mankind. In general, the WHC only covers the 'tangible sides' of the heritage, in fact; it can be said WHC is in contrary to general perception since it does not apply to all tangible property. It only applies to certain immovable properties.<sup>2</sup> To make things clear, three subject matter protected under WHC as *culture heritage* are monuments, buildings, and sites. Nevertheless, thanks to WHC, it triggered the awareness of the nations throughout the world to preserve the cultural heritage of theirs.

The need of preserving the 'intangible' side of the cultural heritage has been gradually thriving in some of the countries. Japan and South Korea are the countries that initially passed the law of preserving the intangible cultural heritage. As the world moving to the globalization, some local traditions rapidly disappeared. Apparently, the global economic has been counterbalance to globalization, hence, the strong

<sup>1</sup> Chau Hing-Wah, Lecture 1.3: Intangible Cultural Heritage.

<sup>2</sup> Paul Kuruk, Commentary: Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding the Intangible Cultural Heritage

economy supersedes the weak economy and the same goes for culture<sup>3</sup>. The victims took the measures of protecting the culture heritage.

In 1996, UNESCO, to answer the needs of protection of intangible cultural heritage, as initial step launched the Living Human Treasures Program to promoted the transmission on intangible cultural right. Two years later, UNESCO adopted the a Proclamation on Masterpieces of the Oral and Intangible Heritage of Humanity to encourage governments, non-governmental organizations (NGOs) and local communities to identify, safeguard, revitalize and promote their oral intangible cultural heritage.<sup>4</sup> And finally, in 2003, the effort landed on the Convention for the Safeguarding of the Intangible Cultural Heritage (IHC), which expected to accommodate the need of preservation of the intangible cultural heritage.

### Concept

The world 'intangible' clearly serves on which aspect of cultural heritage that need to be preserved. It is not exorbitantly broad when it comes to what object needed to be preserved compare to what WHC called as cultural heritage, which rather general in the sense.

The main focus apparently is set on the intangible side of the cultural heritage; left the tangible cultural heritage protected by the WHC. The conceptualization of IHC was developed with the influence of Japan and Korea's practice of protecting the cultural heritage. The idea of cultural heritage is not only consists of monuments, objects and sides, but also the living cultural expression and the idea of the necessity of state intervention in effort of preserving such heritage helped in nurturing the conception of IHC. Intangible culture heritage due to the 'living' and 'evanescent' nature, is in need of safeguarding from modernization and globalization. The born of IHC revealed the institutional dichotomy of the effort in safeguarding the cultural heritage with WHC in tangible section and IHC in the intangible section.<sup>5</sup>

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<sup>3</sup> *Ibid*

<sup>4</sup> *Ibid*

<sup>5</sup> Marilena Alivizatou, Contextualising Intangible Cultural Heritage in Heritage Studies and Muscology

### **Entry into forces**

This convention came into force on 20 April 2006 in accordance with the Article 34 of the IHC. Article 34 regulates that the convention shall enter into force three months after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date. It shall enter into force with respect to any other State Party three months after the deposit of its instrument of ratification, acceptance, approval or accession.

### **Main Features<sup>6</sup>**

The convention is divided into IX parts in general, which consist of 40 articles. The part I of the convention covers matters such as the purposes of the convention, which is to preserve the intangible cultural heritage and to invoke the participation for international cooperation in relation to provides safeguard for the Intangible Cultural heritage. Besides giving the definition of matters within the scope of the convention, it also establishes what intangible cultural heritage that 'compatible with existing international human rights instruments, with the requirement of mutual respect among communities, groups and individuals, and with sustainable development.' The example of domains that compatible with the definition are: oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; traditional craftsmanship. The last, this convention relates to other international instrument, which makes this convention not as the alteration or diminution of level of protection under WHC and affecting the right and obligation of the state parties deriving from international instruments relating to intellectual property right.

The state parties have obligation to ensure that any necessary measures are taken in implementing the safeguarding of intangible cultural right present in their area including the identification and definition of various elements of the intangible cultural heritage with

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<sup>6</sup> Paul Kuruk, *op. cit.*, 118-122

the help of the communities, group, and relevant-non-governmental organization. State parties have to ensure the awareness of the public about such intangible heritage, the legal protection and competent institution and authorities, and invocation of public participation in preserving the intangible heritage.

To assist its implementation, the convention set up the Intergovernmental Committees to promote the objectives of the Commission, and to encourage and monitor the implementation thereof as well as 'provide guidance on best practices and make recommendations on measures for the safeguarding of the intangible cultural heritage. The ICH Intergovernmental Committee, upon the proposal of the States Parties concerned, is required to establish a Representative List of the Intangible Cultural Heritage of Humanity in order to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue in regard to cultural diversity. The ICH Intergovernmental Committee is authorized to select and promote national, sub regional and regional programs, projects and activities for the safeguarding of the heritage, which it considers best reflect the principles and objectives of the ICH Convention, taking into account the special needs of developing countries.

The international cooperation is provided by this convention in safeguarding the intangible cultural heritage. Exchange information and experience, joint initiatives, establishment of assistance (which provided for the preparation of inventories, support for special programs and activities) are provided by international cooperation in order to safeguard the intangible cultural heritage.

The convention does not forget to generate fund for the safeguarding intangible cultural heritage by regulating the funding mechanism. It consist of contributions made by States Parties, funds appropriated by the General Conference of UNESCO, gifts or bequests from other States, international organizations including the United Nations system as well as public or private bodies or individuals.

(Samuel Yefta)

## **Convention on the Protection and Promotion of the Diversity of Cultural Expression**

### **Background**

As the only United Nation body with responsibility for culture, UNESCO is entrusted with the mandate of promoting the 'diversity of culture' and 'free flow of the word and image'. The recognition of equal dignity of all cultures becomes the main point in promoting the diversity of culture. According to the preamble of the Universal Declaration on Cultural Diversity, culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.

To ensure the protection and promotion of the Diversity of Cultural Expression, UNESCO elaborated what had been stipulated in Universal Declaration of Cultural Diversity in Article 8 through Article 11. As a standard-setter, UNESCO produced this convention as complementary of 6 other conventions in relation to the Universal Declaration of Cultural Diversity.

As to the reason of the conception of the convention, it is influence by the relationship between 'culture' and 'trade'<sup>7</sup>, not to mention the conflict between them. It is the fact that every commodities of trading bear the traits of culture within them. The question arose whether the certain category of product should be exempted due to the special features. As the time pass by, the globalization progressively develops so does the international trading. In amidst of the international trading activity, the exertion on countries to waive their right to enforce cultural policies and to put all aspect of cultural sector when negotiating international trade agreement grew becoming pressure. In response to that, the convention is adopted because the international community senses the urgency of having international law that gives protection for cultural diversity, essentially, to reaffirm the sovereign right of the state to adopt cultural regulations to support its cultural industries.

<sup>7</sup> Rostam J. Neuwirth, "United in Divergency": A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, pg. 824-829



### **Concept<sup>8</sup>**

Apparently, the enactment of the convention is not to protect the cultural diversity in broad sense, but rather to protect the specific aspect of cultural diversity, which is the diversity of cultural content and artistic expression.

In the course of negotiation later on, the term 'cultural content and artistic expression' was simplified as 'cultural expression'. The definition of 'cultural expression' can be seen in the Art. 4 (3). The term refers to those expressions "that result from the creativity of individuals, groups and societies and that have cultural content". The cultural expressions are primarily manifest in "creation, production, dissemination, distribution of and access to cultural goods, services and activities.

In essence, recognizing at the beginning the distinctive nature of cultural activities goods and services as vehicles of identity, values and meaning"<sup>9</sup>, reaffirms the sovereign right of States "to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory"<sup>10</sup> and proposes a program of action designed "to protect and promote the diversity of cultural expressions" and "to create the conditions for cultures to flourish and freely interact in a mutually beneficial manner"<sup>11</sup>.

### **Entry into Force**

As what is stipulated in the Convention, the Convention shall entry into force three months after the thirtieth instrument of ratification, acceptance, approval or accession has been deposited with the Director-General of UNESCO.<sup>12</sup> And, the convention itself was entry into force in 18 March 2007.

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<sup>8</sup> Ivan Bernier, *the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression: A Cultural Instrument at the Junction of Law and Politics*, pg. 2-4

<sup>9</sup> Article 1 (g)

<sup>10</sup> Article 1 (h) and Article 5.1

<sup>11</sup> Article 1 (a) and 1 (b) of the Convention

<sup>12</sup> Article 29 par (1) of the Convention

### **Main Features<sup>13</sup>**

The convention consists of preamble, thirty-five articles, and an annex.

In the Title I “Objectives and Guiding Principles”, the opening article, Art. 1, lists the principle objective subdivided into nine. First, to avoid misconception, the present Convention is neither about the protection or promotion of culture, nor about cultural diversity but instead about the diversity of cultural expressions. The choice for the term attempts to narrow down the scope covered by the Convention and to separate the term “cultural expression” from the concept of “culture” and even from the “cultural diversity”, which implies more general and broad definition and coverage. Further, the Art. 1 reiterates the importance of the link between culture and development of all countries. For more general information concerning the objectives is provided in the Art. 2.

Title II “the Scope of Application” is stipulated in the Art. 3. it states that “this Convention shall apply to the policies and measures adopted by the Parties relating to the protection and promotion of the diversity of cultural expressions”, giving the vague, repetitive, and superfluous impression to the Article.

Title III “Definition” is given in the Article 4 of the convention. It serves with the central concept used in the Convention. Interesting to know that the definitions given from the paragraph 1 up to paragraph 5 are in the hierarchical order, starting with the main principle concept “cultural diversity” of which the “culture content” and “cultural element” are the main elements, and moving to “cultural activities, goods and services.”

Title IV “Rights and Obligations of the Parties”. It contains some more specific provisions in terms of application, implementation and overall success of the convention. As the opening, Art. 5 opens by stating the general rule the Parties’ rights and obligations. The phrasing in the Art. 5 “sovereign right to formulate and implement cultural policies and to adopt measures” has been criticized because it can be interpreted as opening the invitation to a violation of other agreements and obligations deriving from trade agreements. Therefore, the Art. 5 should be read in

<sup>13</sup> Rostam J. Neuwirth, “United in Divergency”: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, pg. 835-847.

connection with Art. 2 (1), which specifies the rule that no one can use any provision in this article for the purpose of infringing human right and fundamental freedom, and also with Art. 20, which stipulates the relation of this Convention with other instruments. In Art. 6, it lists the Parties' rights and the measures they may adopt within the framework of cultural policies at a national level. For the Art. 7 and Art. 8, they map out the framework for measure, which in the one side, promote, and in the other side, protect cultural expression. Subsequently, Art. 9 deals with information sharing and transparency and calls on the Parties to exchange information, to provide relevant information in their reports to UNESCO every four years, and to establish contact points responsible for information sharing. Article 10 aims for fostering public awareness and education of the importance of the protection and promotion of the diversity of cultural expression. And for Article 11, it emphasizes the fundamental role of the civil society. Art. 12 and Art. 19, further, move the attention from the national level to cooperation at International level.

Title V "Relationship with other Instrument". This part claimed as crucial for the scope and objective of the Convention since it draws the boundaries lie between rights and obligations deriving from the convention and deriving from other agreements. The content of Arts. 20 and 21 decides on the success or failure of the Convention in creating an appropriate regulatory setting for the cultural industries and, eventually, the diversity of cultural expressions with a view to greater global cultural diversity.

Title VI "Organs of the Convention". It deals with the organs established by the convention, not to mention the organ, which entrusted by the convention.

Title IX "Final Clauses and the Annex. Article 25 serves the critical part in the final clause. It regulates the *modus operandi* for the settlement of the conflict between parties to the convention. In the time of the conflict, negotiation will be the first way-out. But if it meets no end, parties may ask for good office, or request mediation by a third party will solve the solution. If it is still fail, the procedure stipulated in the Annex of the Convention can be used as recourse.

(Samuel Yefta)