

# 1. Terminology

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## 1. FOLKLORE

*Folklore* is the original term used at the international level to refer to the subject matter of this book.<sup>1</sup> Descriptions of the amorphous term<sup>2</sup> tend to emphasize its diverse nature,<sup>3</sup> as consisting of, for example, the “traditional customs, tales, sayings, or art forms preserved among a people.”<sup>4</sup> In this sense, the term applies not only to ideas, or words, but also to physical objects.<sup>5</sup> Its oral nature,<sup>6</sup> group features,<sup>7</sup> and mode of

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<sup>1</sup> For example, as early as 1963, representatives at the African Working Session jointly sponsored in Brazzaville by UNESCO and the Berne Union called for the adoption of special arrangements to protect “folklore.” UNESCO, *Report of the African Study Meeting*, at 2 Brazzaville (Aug. 5–10, 1963) [https://www.wipo.int/mdocsarchives/RADA\\_63/RADA\\_11\\_E.pdf](https://www.wipo.int/mdocsarchives/RADA_63/RADA_11_E.pdf).

<sup>2</sup> For numerous definitions of the term “folklore” and what folklore includes, see Maria Leach, *The Funk & Wagnalls Standard Dictionary of Folklore, Mythology and Legend*, 255–64 (Maria Leach ed., 1949) [hereinafter Dictionary of Folklore] (providing 21 different definitions of the term “folklore”).

<sup>3</sup> Regarding the diversity of folklore, one writer notes:

The great bulk and central core of folklore consists not so much in folk songs and stories (although these are more obvious in their appeal as colorful and characteristic) as in the customs and beliefs attending the ‘periods of emotional stress in the life of an individual in relation to the group-birth, graduation, coming of age, marriage, burial.’ ... Another considerable and important phase of folklore is made up of the mass delusions and hallucinations of myths ... and the apocrypha of hero-worship, with its legends.

See Dictionary of Folklore, *supra* note 2, at 256–7 (discussing oral cultures and “handed-down” folklore as opposed to folklore maintained through print).

<sup>4</sup> WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 479 (1984).

<sup>5</sup> Archer Taylor explains:

The folklore of physical objects includes the shapes and uses of tools, costumes, and the forms of villages and houses. The folklore of gestures and games occupies a position intermediate between the folklore of physical objects and the folklore of ideas. Typical ideas transmitted as folklore are manifested in the customs associated with birth, marriage, and death, with the lesser events of life, with remedies for illnesses and wounds, with agriculture,

transmission through generations of people<sup>8</sup> are other equally important identifying characteristics.

Legal definitions underscore the importance of communal rights to folklore. For instance, Ghanaian legislation defines folklore as:

the literary, artistic and scientific work belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes kente and adinkra designs, where the author of the designs are not known, and any similar work designated under this Act to be works of folklore ... .<sup>9</sup>

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the trades, and the professions, and with religious life. ... Verbal folklore includes ... tales of various kinds (marchen, jests, legends, cumulative tales, exempla, fables, etiological tales), ballads, lyric folk song, children's songs, charms, proverbs and fiddles.

Dictionary of Folklore, *supra* note 2, at 263 (categorizing different types of folklore according to the means by which they are communicated).

<sup>6</sup> According to William Bascom, "the term folklore has come to mean myths, legends, folk tales, proverbs, riddles, verse, and a variety of other forms of artistic expression whose medium is the spoken word." Dictionary of Folklore, *supra* note 2, at 256 (defining folklore in part as a "verbal art").

<sup>7</sup> For example, Theodor Castor notes:

Folklore is that part of a people's culture which is preserved, consciously or unconsciously, in beliefs and practices, customs and observances of general currency; in myths, legends, and tales of common acceptance; and in arts and crafts which express the temper and genius of a group rather than of an individual. Because it is a repository of popular traditions and an integral element of the popular "climate," folklore serves as a constant source and frame of reference for more formal literature and art; but it is distinct therefrom in that it is essentially of the people, by the people, and for the people.

Dictionary of Folklore, *supra* note 2, at 258.

<sup>8</sup> According to B A Botkin, "what distinguishes folklore from the rest of culture is the preponderance of the handed-down over the learned element and the prepotency that the popular imagination derives from and gives to custom and tradition." Dictionary of Folklore, *supra* note 2, at 256 (describing the process of passing down folklore as "creative remembrance" in that folk-tellers remember as much as they forget or corrupt); *see also* Marie Niedzielska, *The Intellectual Property Aspects of Folklore Protection*, 16 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG., 339, 340 (1980) (stating that folklore is "passed by word of mouth, from memory or visually, from generation to generation within a specific social group which is at once its user and carrier").

<sup>9</sup> Copyright Act, 2005, Act 690 (Ghana) § 76.

Similarly, Nigerian law defines folklore as “a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means.”<sup>10</sup> Identical definitions can be found in the laws of other countries, including Congo,<sup>11</sup> Burundi,<sup>12</sup> Mali,<sup>13</sup> Cameroon,<sup>14</sup> Central African Republic,<sup>15</sup> and Senegal.<sup>16</sup>

Examples of folklore provided in the national statutes include poetry, riddles, songs, instrumental music, dances, and plays, productions of art in drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, handicrafts, costumes, and indigenous

<sup>10</sup> Copyright Decree, 1988, CAP 28, as codified 2004 (Nigeria) § 31(5).

<sup>11</sup> Congo refers to folklore as “all literary and artistic productions created on the national territory by authors presumed to be Congolese nationals or by Congolese ethnic communities, passed from generation to generation and constituting one of the basic elements of the national traditional cultural heritage.” Law on Copyright and Neighboring Rights (Congo) Art. 15 (July 7, 1982), reprinted in 19 COPYRIGHT: MONTHLY REV. WORLD. INTELL. PROP. ORG. 201, 201 (1983).

<sup>12</sup> Burundi defines folklore as “all literary, artistic and scientific works created on the national territory by authors presumed to be nationals of Burundi, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.” Decree-Law Regulating the Rights of Authors and Intellectual Property (Burundi) Art. 4 (May 4, 1978), reprinted in 16 COPYRIGHT MONTHLY REV. 120, 120–21 (1980).

<sup>13</sup> In Mali, folklore is defined as “any work composed on the basis of elements borrowed from the national heritage of the Republic of Mali.” Mali, Ordinance Concerning Literary and Artistic Property (Mali) Art. 8 (July 1, 1977), reprinted in 16 COPYRIGHT MONTHLY REV. 180, 182 (1980).

<sup>14</sup> Cameroonian law describes folklore as “all literary, artistic and scientific works produced by various communities and which, passed from one generation to another.” Cameroon, Law No. 82–18 to Regulate Copyright (Cameroon) Art. 4(viii), reprinted in 19 COPYRIGHT MONTHLY REV. 360, 360–61 (1983).

<sup>15</sup> Central African Republic refers to folklore as “all literary and artistic productions created by the national communities, passed on from generation to generation and constituting one of the basic elements of the traditional cultural heritage.” Ordinance No. 85-002 on Copyright (Central African Republic) Art. 9 (Jan. 5, 1985), reprinted in 21 COPYRIGHT MONTHLY REV. 158, 160 (1985).

<sup>16</sup> Senegalese law defines folklore as “all literary and artistic works created by authors presumed to be of Senegalese nationality, passed from generation to generation and constituting one of the basic elements of the Senegalese traditional cultural heritage.” Senegal, Law on the Protection of Copyright (Senegal) Art. 9 (Dec. 4, 1973), reprinted in 10 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 211, 212–13 (1974).

textiles.<sup>17</sup> However, while the national statutory illustrations appear to exclude plant varieties grown by farmers, and plant extracts developed by local medicine men, those items certainly qualify as works of folklore to the extent that these techniques<sup>18</sup> embody scientific techniques passed down through generations in the community.<sup>19</sup> The knowledge they embody is priceless and, once lost cannot be recovered.<sup>20</sup> Widespread abuses in the exploitation of such types of traditional knowledge<sup>21</sup> certainly justify their inclusion in any protective legal regime.

Model Provisions proposed by UNESCO and WIPO contain a much narrower concept of folklore, limiting it only to *expressions* of folklore defined as “productions composed of characteristic elements of the traditional artistic heritage developed and perpetuated by a community ... or by individuals recognised as responding to the traditional artistic aspirations of the community.”<sup>22</sup> Such expressions are conveniently divided into four groups: expressions by words (verbal); expressions by musical sounds (musical); expressions of the human body (by action);

<sup>17</sup> See, e.g., Copyright Decree (Nigeria) *supra* note 10, § 28(5).

<sup>18</sup> The skills and procedures employed in the use of plants for traditional medicinal purposes have been described as follows:

Traditional remedies, although based on natural products, are not found in “nature” as such; they are products of human knowledge. To transform a plant into a medicine, one has to know the correct species, its location, the proper time of collection (some plants are poisonous in certain seasons), the part to be used, how to prepare it (fresh, dried, cut in small pieces, smashed), the solvent to be used (cold, warm, or boiling water; alcohol, addition of salt, etc.), the way to prepare it (time and conditions to be left on the solvent), and finally, posology (route of administration, dosage). Needless to say, curers have to diagnose and select the right medicine for the right patients.

Elaine Elizabetsky, *Folklore, Tradition, or Know-How?*, CULTURAL SURVIVAL, Summer 1991, at 10–11 (questioning why we easily give credit to pharmacists or physicians for their know-how and only refer to indigenous knowledge as “tradition,” “folklore,” or just “knowledge?”).

<sup>19</sup> Ghana law for instance, includes scientific work in its definition of folklore. See Copyright Act (Ghana) *supra* note 9, at § 76.

<sup>20</sup> Elizabetsky, *supra* note 18, at 10–11 (stating that once this knowledge is lost, trying to recover it would be “like searching for a needle in a haystack”).

<sup>21</sup> See Chapters 5 and 13.

<sup>22</sup> Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982) (WIPO), <https://www.wipo.int/edocs/lexdocs/laws/en/unesco/unesco001en.pdf>; see also Report of the Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore, 28 June to 2 July 1982, 16(4) Copyright Bulletin, (1982) at 62.

and expressions incorporated in a material object (tangible expressions). To the extent the definition in the Model Provisions is limited to artistic heritage, the definition does not appear to cover traditional beliefs and scientific views.

## 2. INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY OR CULTURAL HERITAGE

There is strong opposition to the use of the term folklore in international dialogue due to its perceived pejorative connotation with practices common to marginal groups or lower strata of society.<sup>23</sup> For instance, representatives of the Spanish-speaking countries at a WIPO-UNESCO sponsored meeting in 1985 on the protection of expressions of intellectual property objected to the term on the ground of its association with the creations of lower or superseded civilizations. Indigenous Australians have also condemned the term as implying an inferiority of the cultural and intellectual property of indigenous people.<sup>24</sup> Other people find the term objectionable where it is limited to artistic expressions and does not offer protection for scientific processes evident in the development of plant varieties and medicinal uses of plants.<sup>25</sup> For some critics, the term

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<sup>23</sup> Consider for instance, the statement that “[t]he materials of folklore are for the most part the materials of social anthropology that have been collected from the barbarous and ‘uncivilized’ regions of the world, as well as from the rural and illiterate peoples of the ‘civilized’ countries.” Dictionary of Folklore, *supra* note 2, at 257. Similarly, another writer refers to folklore as:

The entire body of ancient popular beliefs, customs, and traditions, which have survived among the less educated elements of civilized societies today. It thus includes fairy tales, myths, and legends, superstitions, festival rites, traditional games, folk songs, popular sayings, arts, crafts, folk dance and the like.

Dictionary of Folklore, *supra* note 2, at 261. Yet another author refers to it as “the accumulated knowledge of a homogenous unsophisticated people, tied together not only by common physical bonds, but also by emotional ones which color their every expression, giving it unity and individual distinction.” Dictionary of Folklore, *supra* note 2, at 261 (concluding that folklore is re-created from its original individual source but becomes a group product through repetition).

<sup>24</sup> Justice Ronald Sackville, *Legal Protection of Indigenous Culture in Australia*, 11 CARDOZO J. INT’L & COMP. L. 711, 717 (2003).

<sup>25</sup> P. Kuruk, *Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States*, AM. U. L. REV. 769, 779–80 (1999).

appears to dilute and therefore, does not adequately take into account the unique concerns of indigenous people and their legitimate demand of self-determination.<sup>26</sup>

Alternative terminology proffered to remedy these problems include “indigenous cultural and intellectual property”,<sup>27</sup> “indigenous knowledge”,<sup>28</sup> or “indigenous resource rights”.<sup>29</sup> Generally, the term “indigenous” is used in these descriptions to refer to communities:

which, having historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of society now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and ethnic identities, as the basis of their continued existence as peoples, in accordance with their cultural pattern, social institutions and legal systems.<sup>30</sup>

Critical elements in the definition of the term as canvassed within the UN system include self-determination of the relevant community, experience of subjugation, marginalization, exclusion, discrimination; and priority in time with respect to the occupation and use of a specific territory.<sup>31</sup>

However, while useful in describing minority groups in the Americas and Australasia marginalized by the majority European settlers, the indigenous label as defined, may not be apt for other regions not having similar history. As one commentator has observed, the term “indigenous people” appropriately describes “regions with a colonial history that has left a predominant national culture and autochthonous cultures that

<sup>26</sup> Darrell Addison Posey, *Preface*, in *HUMAN IMPACTS ON AMAZONIA: THE ROLE OF TRADITIONAL ECOLOGICAL KNOWLEDGE IN CONSERVATION AND DEVELOPMENT* (Darrell Addison Posey and Michael J. Balick eds.) xii (2006) (noting that the claims of indigenous people to their lands, territories and resources are regarded by some policymakers as “mere folklore.”)

<sup>27</sup> TERRI JANKE, *OUR CULTURE OUR FUTURE: A REPORT ON INDIGENOUS CULTURE AND INTELLECTUAL PROPERTY RIGHTS 2* (1999).

<sup>28</sup> See generally, Lauren E. Godshall, *Making Space for Indigenous Intellectual Property Rights Under Current International Environmental Law* 15 *Geo. Int'l Envtl. L. Rev.* 497, 504–10 (2003).

<sup>29</sup> *Id.*, at 6.

<sup>30</sup> Jose Martinez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1986/7 (1987).

<sup>31</sup> *Id.*

coexist and compete for limited resources, especially land.”<sup>32</sup> Therefore, it is not appropriate for parts of Africa and Asia, where a single hybrid or creole culture is not dominant. Although different ethnic groups exist in those areas, it is not possible to designate some as indigenous in contrast to others.<sup>33</sup>

Some writers distinguish between broad and narrow definitions of the term<sup>34</sup> where the term would also apply to traditional groups that do not come under the restrictive UN definition. No doubt influenced by the restrictive view of the term “indigenous,” other writers have even gone so far as to urge that higher priority be given to the concerns of indigenous groups than those of “village peoples” or rural farmers.<sup>35</sup> However, such suggestions reflect a failure to recognize that the term “indigenous peoples,” only artificially differentiates between the customary practices

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<sup>32</sup> Stephen B. Brush, *Whose Knowledge, Whose Genes, Whose Rights?*, in VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS, 1, 5 (Stephen B. Brush & Doreen Stabinsky, eds. 1996).

<sup>33</sup> *Id.*

<sup>34</sup> Surendra J. Patel, *Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?*, in VALUING LOCAL KNOWLEDGE *supra* note 32, 305, 307.

<sup>35</sup> Consider for example the following:

A ... worrisome problem is to recognize that indigenous societies are not alone among peoples who perceive themselves under threat. The so-called “village peoples,” the rural farmers inhabiting the rural areas of most Third World countries, are also demanding separate recognition and international status. They, too, are under assault, have cultural knowledge of potential or demonstrated economic value, and are seeking a voice apart from pronouncements made by others in the national capital. Their role at the UNCED conference in Brazil of June, 1992, is just one indication of their rising ethnic self-consciousness. As we pursue IPR for indigenous peoples, we should anticipate a demand from organized villager groups for inclusion, and their demand has considerable persuasive force. Yet, widening IPR’s special privilege to these groups may weaken the IPR prospects for indigenous societies, who include among their political assets the fact that they are usually seen by members of the dominant society as small, beleaguered, and for whom benefits can be accorded without significantly affecting the quality of life for members of the dominant society. When rural agricultural peoples are included, anxiety will rise that the dominant society’s life way may be disrupted.

Tom Greaves, *IPR: A Current Survey*, in INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK, 11–12 (Tom Greaves ed., 1994).

of those people and traditional communities in other parts of the world.<sup>36</sup> It may therefore be problematic to apply the restrictive definition internationally as a litmus test for determining which cultural interests are deserving of protection. In other regions of the world, there is a preference for the terms “local communities” or “traditional communities” which do not evoke this dilemma.<sup>37</sup>

The term “cultural heritage” has also been used as an alternative to the term “folklore.” The term “heritage” in this context means “something inherited or acquired by a predecessor.”<sup>38</sup> It adequately captures an essential part of the subject matter of the book as one transmitted through generations of people in the community. Indeed, it is the term used to describe folklore in some national legislation. Moreover, the term “heritage” may be broader than “knowledge” of communities to the extent the former includes material objects.<sup>39</sup>

<sup>36</sup> As Descola explains,

[T]he debate has been mainly restricted up to now to native peoples of the Americas and Australia, that is, to cultural and linguistic autochthonous minorities that are clearly identifiable within nations settled by Europeans. In the course of their struggles for land, dignity, and the recognition of their cultural uniqueness, these minorities have often obtained special or derogatory legal statuses (concerning land tenure, civic duties, or personal rights) which contribute to setting them apart, socially and spatially, from ordinary citizens and render them more conspicuous as distinct subsets of the national communities. But such visibility is not the norm everywhere in the world, and advocates of “differentialism” should perhaps pay more attention to the fact that cultural diversity is not only an internal phenomenon typical of great melting-pot nations but also a feature of the whole wide world.

Pillepe Descola, *Michael Brown's Can Culture be Copyrighted?*, 39 CURRENT ANTHROPOLOGY, 208, 209 (1998).

<sup>37</sup> See e.g., *Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, Swakopmund, 2010 (ARIPO), [https://www.wipo.int/edocs/lexdocs/treaties/en/ap010/trt\\_ap010.pdf](https://www.wipo.int/edocs/lexdocs/treaties/en/ap010/trt_ap010.pdf) (last visited March 4, 2019). See also, J. Janewa Osei-Tutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law* 15 MARQ. INTELL. PROP. L. REV. 147, 196–8 (2011).

<sup>38</sup> WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1984).

<sup>39</sup> For example, para. 12 of the Statement of Principles and Guidelines for the Protection of the Heritage of Indigenous People prepared by UN Special Rapporteur Mrs. Erica-Irene Daes defines the term “heritage” as

all moveable cultural property as defined by the relevant conventions of UNESCO; all literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens,

### 3. TRADITIONAL KNOWLEDGE

While sensitive to the negative connotation in the term folklore, WIPO has not opposed its use, but instead, has retained it for the sake of consistency with prior international use.<sup>40</sup> Nevertheless, WIPO also uses the term “traditional knowledge” which it considers to be broader than folklore and indigenous knowledge. WIPO defines *traditional knowledge* as “tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”<sup>41</sup> In this context, *tradition-based* refers to “knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; have generally been developed in a non-systematic way; and are constantly evolving in response to a changing environment.”<sup>42</sup>

Categories of traditional knowledge recognized under this definition include: (i) agricultural knowledge; (ii) scientific knowledge; (iii) ecological knowledge; (iv) medicinal knowledge, including related medicines and remedies; and (v) biodiversity related knowledge. The definition also includes “expressions of folklore” in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties.<sup>43</sup>

Indeed, this broad definition of traditional knowledge comprises the thematic areas WIPO has adopted as the focus of its discussions to develop international instruments, namely, traditional knowledge, cultural

medicines and the rational use of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples heritage on film, photographs, videotape or audiotape.

See UN Commission on Human Rights, Protection of the Heritage of Indigenous Peoples: Final Report of the Special Rapporteur Mrs. Erica-Irene Daes, E/CN.4/Sub.2/1995/26, (1995) Annex 1, para. 12.

<sup>40</sup> WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999) 22 (2001).

<sup>41</sup> *Id.*, at 25.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

expressions and genetic resources. For this purpose, the term “traditional knowledge” is assigned a narrow meaning limited solely to knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations.<sup>44</sup> Traditional knowledge in this sense embodies the traditional lifestyles of indigenous peoples and local communities and is transmitted from generation to generation. Traditional knowledge is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge. Traditional knowledge would also encompass knowledge associated with genetic resources such as plants and animals.<sup>45</sup>

The second category, “traditional cultural expressions” would refer to the forms in which traditional culture and knowledge are expressed. Traditional cultural expressions often form part of the identity and heritage of an indigenous people or local community, and they are passed down from generation to generation.<sup>46</sup> These forms may be expressed verbally (such as stories, signs, symbols and indications); musically (such as songs); by action (such as dances, plays, performances, ceremonies, artistic forms and rituals); and in tangible matter as art (such as drawings, paintings, carvings, sculptures, pottery, woodwork, basket weaving, needlework, designs, textiles), handicrafts, and musical instruments and architectural forms.<sup>47</sup>

The third category, “genetic resources” is defined as “genetic material of actual or potential value.”<sup>48</sup> In this context, genetic material is any material of plant, animal, microbial or other origin containing functional units of heredity. Examples include material of plant, animal or microbial origin such as medicinal plants, agricultural crops and animal breeds.<sup>49</sup>

During its Thirty-Ninth Session in March 2019, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) discussed and elaborated on working definitions of “traditional cultural expressions” and “traditional knowledge” which had been proposed by a contact group established to

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<sup>44</sup> WIPO, *Traditional Knowledge*, <https://www.wipo.int/tk/en/tk/> (last visited June 1, 2019).

<sup>45</sup> *Id.*

<sup>46</sup> WIPO, *Folklore*, <https://www.wipo.int/tk/en/folklore/> (last visited June 1, 2019).

<sup>47</sup> *Id.*

<sup>48</sup> WIPO, *Genetic Resources*, <https://www.wipo.int/tk/en/genetic/> (last visited June 1, 2019).

<sup>49</sup> *Id.*

examine the description of key terms. The IGC referred to “traditional cultural expressions” as:

any forms in which traditional cultural practices are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and may be dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof.” (footnotes omitted)<sup>50</sup>

“Traditional Knowledge” was described as:

[K]nowledge originating from indigenous [peoples], local communities and/or [other beneficiaries] that may be dynamic and evolving and is the result of intellectual activity, experiences, spiritual means, or insights in or from a traditional context, which may be connected to land and environment, including know-how, skills, innovations, practices, teaching, or learning.<sup>51</sup>

However, to qualify for protection under the proposed instruments, the subject matter must meet certain eligibility criteria stipulated in the instruments. In the case of traditional cultural expressions:

Subject to Article 3.2, protection shall be extended under this instrument to traditional cultural expressions which are: (a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols]; (b) linked with, and are an integral part of, the cultural and social identity and traditional heritage of indigenous [peoples], local communities and/or [other beneficiaries]; and (c) transmitted between or from generation to generation, whether consecutively or not.

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<sup>50</sup> The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2, Art. 1 WIPO/GRTKF/IC/39/FACILITATORS TEXT TK Rev. 2 (March 22, 2019) [hereinafter Draft Text on TCEs]. Available at [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_39/wipo\\_grtkf\\_ic\\_39\\_facilitator\\_text\\_tces\\_rev\\_2.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_39/wipo_grtkf_ic_39_facilitator_text_tces_rev_2.pdf) (last visited June 22, 2019).

<sup>51</sup> The Protection of Traditional Knowledge: Draft Articles Rev. 2, Art. 1 WIPO/GRTKF/IC/39/FACILITATORS TEXT TK Rev. 2 (June 22, 2019) [hereinafter Draft Text on TK]. Available at [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_39/wipo\\_grtkf\\_ic\\_39\\_facilitators\\_text\\_tk\\_rev\\_2.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_39/wipo_grtkf_ic_39_facilitators_text_tk_rev_2.pdf) (last visited March 4, 2019).

3.2. A Member State/Contracting Party may under its national law, condition protection on the prior existence of the traditional cultural expressions for a reasonable term as determined by the [Member State/Contracting Party].<sup>52</sup>

Identical eligibility criteria were stated for traditional knowledge.<sup>53</sup>

In keeping with emerging international practice, the term *traditional knowledge* will be retained as the principal reference for the subject matter of this book. However, it will be used interchangeably with *folklore* because the latter term is still in wide use.<sup>54</sup> Unless the context otherwise requires, traditional knowledge also includes traditional cultural expressions and associated genetic resources.

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<sup>52</sup> Draft Text on TCEs, *supra* note 50, Art. 3.

<sup>53</sup> Draft Text on TK, *supra* note 51, Art. 3.

<sup>54</sup> Many national statutes consider folklore to be integral to the national heritage and worthy of protection. *See generally*, Part III of this book. WIPO retains the term as part of its work agenda and describes the body tasked with developing international instruments in this context as the “Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and *Folklore*.” WIPO, Intergovernmental Committee, <https://www.wipo.int/tk/en/igc/> (last visited Mar. 4, 2019) (emphasis added).