

**Intangible Cultural Heritage:  
the Safeguarding of Traditional Festive Events in a  
Globalized World**

**A Comparative Analysis of the Italian and Japanese Experience**

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## INTRODUCTION

The identity of a people or community is of utmost importance to their very existence, representing a record of their culture that transcends generations.

An issue of such global importance requires a diligent and consistent response from the international community, particularly in efforts to safeguard cultural identities for future generations through the transfer of knowledge, skills, and meaning. When someone refers to Cultural Heritage it often means concrete objects such as drawings, mosaics, paintings, monuments, sculptures and buildings. However it means a wider range of objects: it represents all the evidence of human expression and creativity, which means photographs, books, manuscripts, instruments as well. Those could be in the form of single piece or a collection. In the present time even places, such as underwater temples, and environment can be counted as Cultural Heritage. There are communities who link their identity to a specific landscape, which expresses their faith. Furthermore cultural heritage is not only related to physical objects but it also counts abstract elements: traditions, oral history, performing arts, social practices and all the knowledge transmitted from a generation to another inside a community.

Manifestations of communities' identity are collectively referred to as "cultural heritage," which encompasses material expressions of community identity such as statues and monuments and intangible expressions like performances, rituals, and skills. Since intangible cultural heritage (ICH) is expressed through living traditions and practices rather than physical objects, it cannot be preserved or captured through strategies developed for tangible expressions of cultural heritage. Heritage is a property; it is something that is inherited, passed down from previous generations to the current generation and the next following. In the case of 'cultural heritage', it does not consist in money or property, but of culture, traditions values and identity.

Global cultural heritage is always in danger due to wars, confrontations and conflicts. Those acts continuously jeopardize both movable and immovable cultural properties and at the same time

drain the intangible global cultural heritage irreversibly. Destroying an enemy's cultural heritage to establish a stronger one is an old strategy that warmongers know well.

For instance, in the current climate, the destruction of Palmyra by Daesh can be seen as a strategy part of ethnic warfare, so if it is so easy to destroy ancient monuments, it should be presumed that ICH can be dissolved too, due to war but also to globalization and the subsequent cultural flattering.

For this and many other reasons the UNESCO (United Nations Educational, Scientific and Cultural Organization) was founded in 1954. In the later years, it has adopted several international conventions regarding the protection of cultural heritage, as it will be possible to understand in the next chapters. UNESCO made possible increasing intercultural understanding while underlining the value of international collaboration. As a matter of fact, the protection of cultural heritage is a well-known issue. It is often problematic to mediate between individual and community interest, as well as private and public rights.

The term "intangible heritage" appeared in official documents for the first time in 1982, during the World Conference on Cultural Policies, called MONDIALCULT which took place in Mexico City. On this occasion, it was stated that:

“The cultural heritage of a people includes the works of its artists, architects, musicians, writers and scientists and also the work of anonymous artists, expressions of the people's spirituality, and the body of values which give meaning to life. It includes both tangible and intangible works through which the creativity of the people find expression: languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries” (MONDIALCULT, 1982)

This definition is important because for the first time words as “intangible and tangible” are mentioned in an UNESCO document.

Understanding the importance of ICH and the tools at hand to enforce its protection becomes fundamental on the national and international level. General Director Koichiro Matsuura in the 146<sup>th</sup> session of UNESCO in 1995, emphasized even more the protection of heritage and the promotion of diversity: “Stress should be laid, in particular, on the close links that exist between



the conservation and protection of tangible and intangible cultural heritage, the need to assemble and provide access to information about them, and the need for scientific description and analysis of them” (UNESCO, 1995a, p. 11). The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage enforces the protection of ICH and adds one more layer to the safeguarding of culture as a human right: identity is not just made of monuments but also of traditions.

The methodology followed during the research and writing of this thesis was based on a qualitative model. The data was collected with two things in mind: the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the cases through which it will be analyzed. To reach an understanding of the 2003 Convention, it was necessary to research the decision taken by UNESCO in matters of Cultural Heritage conservation. Once that was done, the 2003 Convention itself presented a series of challenges, which led to formulating the following questions: what are the criteria it uses to define ICH? How do they apply to this thesis? With these in mind, the cases came into play, requiring not only a thorough study of their peculiarities and the legal framework in which they take place, but also how the aspects of the Convention applied to them. The data allowed for a singular analysis in this field: a bottom-up (the bottom being the practical event or ICH, and the ‘up’ being the theoretical legal framework of the Convention), comparative and comprehensive inquiry into the most critical aspects of the 2003 Convention.

The thesis will examine fundamental international, national and local policies on safeguarding intangible cultural heritage, with a particular focus on festive rituals. The First chapter is focused on legal framework, and how the work of legal experts, state agencies, and international organizations, UNESCO *in primis*, has strived to enforce the international legal framework on legal protection of cultural heritage and intangible cultural heritage in particular.

The following chapter Two aims at presenting the two case studies: the *Gigli's* festival of Nola (Italy) and the Yamaboko floating parade inside the Gion matsuri of Kyoto (Japan). Those festive rituals are inscribed in the representative list of Intangible Cultural Heritage. In this chapter it will be possible to understand how the festivals work and also how the legal systems in Italy and Japan aid their safeguarding. Since the understanding of the 2003 Convention will be done

through the lenses of these case studies, it is necessary to study them in depth through this brief but dense chapter.

In the last chapter, chapter Three, the thesis will focus on the main challenge and problems of safeguarding intangible cultural heritage. More specifically the thesis will stress arguments such as the complex relationship between Intangible cultural heritage and human rights, the relationship between communities and state parties to applicable treaties and the risk of de-contextualization or commodification of intangible cultural heritage.

Finally, a brief conclusion will address the research at hand, its findings and ongoing challenges and topics for further consideration.

## Chapter 1: The Legal history of cultural heritage convention and its safeguard

It is complicated to give a definition of Cultural Heritage, because it has different meanings regarding to a specific context. Cultural Heritage has a specific place and time and its history is tied with them. It links together the past, the present and the future.

The first attempts to protect Cultural Heritage were in the 16<sup>th</sup> and 17<sup>th</sup> centuries, when works of art gained a specific legal status and they were not counted as “ordinary objects”. Furthermore, a legal distinction to separate private property and “enemy state” property was developed for the first time.

At the end of the Thirty Years War (1618-1648), in Westphalia, with the treaty of the same name, lawmakers started to address the issue of the protection of cultural property. From the Treaty of Westphalia onwards, different international treaties began to address the matter, developing new criteria that signatory states had to follow. There were new criteria to be followed regarding the state of the war, during the war, *Ad Hoc* codification, and others to be pursued after the war, *a posteriori* codification. Since the Treaty of Westphalia, numerous others approach the matter of heritage protection, the most important ones being: the Instructions for the Government of Armies of the United States in the Field of 1863; the Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber and promulgated by President Lincoln as General Order 100; and the State of International Law 1863 before the Adoption of the Hague Convention Legal framework. Some of the articles were provided for protection of cultural property.

In 1874 in Brussels there was an attempt to protect cultural heritage during wartime with the *International Agreement on the Laws and Customs of War*, however it never got approved. It is important to highlight that article 8 stated: “that all seizure or destruction of, or willful damage to cultural property should be made the subject of legal proceedings by the competent authorities”. Article 17 stated that “in the event of a siege or bombardment, all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes.”

The two Hague Conventions of 1889 and 1907 made some progress regarding the protection of cultural property, too. Article 27 of the 1907 convention stated: "in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand." Regarding occupied territories and their cultural heritage, Article 56 addressed the matter stating that "the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."

It is considered the origins of the modern legal concept of "cultural heritage" are found in the first international legal instruments meant to protect cultural property in armed conflicts (in particular the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, the Hague, 14 May 1954), where the definition of "cultural property" was used (Blake, 2000:61-85). Over time, the need of substituting the term "property" arose, in order to give priority to other social objectives that had to be guaranteed. It is important to notice that the protection is not absolute and it is secondary to military necessity and that this protection is confined in the nearby of the combat area.

The legal concept of "property", used in the protection of cultural heritage, was considered limited, as it was similar to a subject of private law of predominantly economic nature. One of the fundamental aspects of the property as a right, the *ius et utendi abutendi* (the owner's right to use and consume and, also, to destroy the possessed object), can't definitely be exercised in relation to the conservation of the cultural heritage, as it's essential to give precedence to the protection of the interests of the community and future generations, and this gradually led to use the term "cultural heritage". This change highlights a gradual, albeit controversial, understanding that the protection of cultural heritage concerns the relationship between heritage and communities linked to them (Lixinski, 2013:5-6).

Another step forward was taken with the *Treaty on the Protection of Artistic and Scientific Institution and Historic Monuments* signed on 15<sup>th</sup> of April 1935 in Washington. The first article recited: “the historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents.”

After the Second World War, the Nuremberg International Military Tribunal stated again the importance of the 1907 treaty signed in the Hague, which was a guideline to international customary law regarding cultural heritage. Furthermore the Nuremberg International Military Tribunal added to article 27 and 56 of The Hague convention of the year 1907 that: “respecting the Laws and Customs of War on Land were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war” including the protection of cultural property. The 1946 Nuremberg International Military Tribunal declared that in 1939 the rules contained in the Hague Convention (IV) respecting the Laws and Customs of War on Land were “recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war...”. This concerned, among other things, the obligations set out in Articles 27 and 56 protecting cultural property (UNESCO, 2004).

The United Nation for Education Science Culture Organization was established on November 16<sup>th</sup> 1945 in London, by initiative of the British Ministry of Education, and the representatives of 37 countries who signed the Constitutive Act. The focus in the early years of this organization was the defense of cultural properties during war and conflict.

Nonetheless, in its name we can clearly see how natural was for UNESCO to widen its share of competences on other matters such as illiteracy, freedom of scientific research, protection of heritage.

## **Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972)**

The Convention concerning the Protection of World Cultural and Natural Heritage was adopted at the 17th UNESCO General Conference Session in November 1972 and entered into force in December 1975, three months after the deposit of the twentieth instrument of ratification, acceptance or accession, as stated by art. 33. Sweden was the first country in 1968 to suggest the United Nations Economic and Social Council to focus on humans interacting with the environment. A resolution was passed in support of this proposal and the 1969's General Assembly Resolution 2398 decided to hold a conference on the matter in 1972, requesting that it should aim at "stimulating and providing guidelines for action by national government and international organizations" that encountered environmental issues (DeSombre, 2003:22-23).

International law on the cultural and natural heritage protection was being developed when the Convention was adopted and the concept of "heritage" - understood as a heritage transmitted from the experience and human knowledge - had yet to be clearly identified. Moreover, the jurisprudence dedicated to the sector was considered a prerogative internal to each individual state. Since 1972 the collective and public character of cultural heritage and the representative of the aggregate value of creative expression (recognized by the community as part of their tradition and cultural identity) had begun to be emphasized. These innovations were then merged in all the subsequent binding agreements, as well as in programs and in international instruments of soft law (Francioni and Lenzerini, 2008:3-5).

The international debate that eventually led to the development of an international legal instrument aimed at the protection of exceptionally valuable heritage took place between the 1950s and 1960s of the last century. The reports drawn up as a result of the over fifteen meetings between UNESCO-established committees and expert groups, reveal the difficulty in reaching the goal, as evident by the large number of discarded projects. At the time, there was a tendency to associate the emerging notion of 'World Heritage' to monuments of big proportions and dating back to the great civilizations of the past, often demanding major international financing campaign efforts to ensure their conservation. A report on the meeting for the study of the identification of appropriate means aimed at the protection of monuments held in March

1963, for example, shows how worldwide interest monuments always consisted of enormous and extended structures, and how, in order to preserve them, it was necessary to use large sums of money (UNESCO, 1963:3).

As previously mentioned, the turning point for the adoption of a new international Convention on World Heritage protection was the Stockholm Conference in June 1972. Before the Conference, UNESCO established in April 1972 a special committee of governmental experts with the purpose of drawing up a project to be presented at meetings in the Swedish capital. While the committee was at work, they were presented over 100 amendments, including the proposal of adding the adjective "outstanding" to the "universal value" definition. The accepted proposal made the phrase "outstanding universal value" become the basic concept of the Convention, aiming at restricting the range of items meeting the appropriate criteria for inclusion in the protection system of the new Treaty (Labadi, 2013). The work of the Stockholm meeting in conclusion produced Recommendation 99, urging for the adoption of the new Convention by UNESCO's General Conference, which was then approved with the insertion of additional amendments.

The 1972 Convention is characterized by two important innovative aspects: on the one hand it contains the first recognition in legal history of the strong relationship between culture and nature, having established a common system for the conservation and protection of both the most significant man-made monuments and the most wonders of the natural world; the other significant innovation is the adoption of the concept of "world heritage" to designate sites, monuments and goods which, for their exceptional value, are of primary importance to humanity as a whole and have, as a result, requirements to be placed under a special system of international protection represented by the inclusion in the World Heritage List (Francioni and Lenzerini, 2008:4-5).

In the first two recitals of the Preamble of the Convention it is stated that "the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction" (UNESCO, 1972) and that the "deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world" (1972). The reference is to the general process of rapid industrialization and urbanization in the sixties,

which had begun to show negative effects for cultural and natural heritage. Specifically some events that occurred prior to 1972 were deemed critical for their international importance and resonance. They also helped to focus attention on the real risks that the planet's cultural and natural heritage was facing:

- in 1960, the construction of the Aswan High Dam, decided by Egyptian President Nasser, threatened to cancel an important archaeological site of ancient Egypt, which included the temples of Abu Simbel and the giant statue of Ramses II;
- in 1966 the tragic floods in Venice and Florence caused enormous damage the two cities.

In both cases, the international response was immediate and generous, also helping in the acceleration of the process of the Convention.

The fourth recital of the Preamble is concerned with the central role of UNESCO, arising from Article 1 of the UNESCO Constitution of 1945, which is reaffirmed with pride. In fact it says:

*“Recalling that the Constitution of the Organization provides that it will maintain, increase, and diffuse knowledge by assuring the conservation and protection of the world's heritage, and recommending to the nations concerned the necessary international conventions [to this end]”*  
(1972)

As previously mentioned, the key concept of the Convention is based on the "universal outstanding value." This is the fundamental requirement for an element of the cultural or natural heritage must have in order to be entitled to the Treaty's protection. The expression is mentioned in recitals 7 and 8, as well as in art. 11 par. 2, art. 15 par. 1 and art. 19, and it means that the system of protection and assistance established by the Convention is limited in its application to a particular category of goods. The expression, however, is not subject to a precise definition within the treaty's text, as instead they are "cultural heritage" and "natural heritage" are explained in Articles 1 and 2 (Francioni and Lezzerini, 2008:17-18). The meaning of "exceptional universal value" can be found in the Operational Guidelines for the implementation of the Convention established by the World Heritage Committee. The first edition of the Guidelines, which have become an indispensable tool for the practical implementation of the Convention,



was drawn up in 1977. The Committee and the States Parties constantly refer to this instrument, which has been updated regularly until the latest version published in July 2013. The following is the current interpretation of the notion of "outstanding universal value" per the document:

*“Outstanding Universal Value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity. As such, the permanent protection of this heritage is of the highest importance to the international community as a whole. The Committee defines the criteria for the inscription of properties on the World Heritage List.”* (UNESCO, 2013)

The subject of the Convention concerning the protection cultural and natural properties in peaceful times, as identified in the first articles. Article 1 contains the definition of "cultural heritage":

- *“monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;*
- *groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;*
- *sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”* (UNESCO, 1972:art. 1) The explicit link between cultural and natural heritage situated in the third part of paragraph of Article 1 is original. Heritage by man and nature is also included in the sites although it was “always considered as separate entities” (Labadi, 2013:28). The specific definition of natural heritage is contained in art. 2:
- *“natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;*

- *geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;*
- *natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.” (1972:art. 2)*

The Convention sets out in detail the duties to which the Contracting States subject aiming at protecting their assets. Member States are responsible for identifying and delimiting the heritage situated in their territory, guaranteeing it protection, preservation, enhancement and transmission to future generations (art. 3 and 4). Article 5 lists the actions that a state must commit to adopt in order to ensure the most effective measures of protection, preservation and enhancement of their cultural and natural heritage:

- to assign a function to the good;
- to establish protection and storage services; to develop studies and research and to perfect the methods of intervention;
- to take legal measures, technical, administrative and financial;
- to encourage the establishment of national or regional training centers. Some of these concepts are reiterated in articles. 27 and 28, which, on the one hand, further encourage States Parties to develop educational programs "to strengthen appreciation and respect by their peoples of the cultural and natural heritage" (1972:art. 27) and, on the other hand, to emphasize the importance of keeping "the public broadly informed of the dangers threatening this heritage" (1972:art. 28) to ensure the survival of the sites. While fully respecting their sovereignty, states are required to recognize that the cultural and natural heritage should be considered as a world heritage site and the entire international community has a duty to cooperate in order to ensure their protection. Paragraph 3 of art. 6 also requires that each Party commits not to take

"deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention".

The institutional profiles under the Convention are governed by artt.8-14. The General Assembly of States Parties meets every two years, to coincide with the ordinary session of the UNESCO General Conference, and manages the meeting in accordance with the Rules of Procedures (UNESCO, 2011) adopted in 1978 and amended several times. The General Assembly elects the World Heritage Committee (1972:art. 8 par. 1), or Intergovernmental Committee for the Protection of Cultural and Natural Heritage, formed in the first instance by 15 States Parties and subsequently by 21, following the fortieth ratification came in August 1978. In addition, the General Assembly receives and considers reports on the activities of the Committee and determines the percentage of the contributions due from the Contracting States to the World Heritage Fund.

The 1972 Convention was the first international instrument to envisage an Intergovernmental Committee as the body entitled to represent the common interests of the adhering States. The main functions of the Committee are defined by the Guidelines (UNESCO, 2011). Par. 2 Article 8 states: "Election of members of the Committee shall ensure an equitable representation of the different regions and cultures of the world." (UNESCO, 1972). The principle of equitable representation, expected by many international treaties, is based not only on geographical factors, but also cultural ones. The Member States have been divided into five regional groups: Africa, Arab States, Asia and Pacific, Europe and North America, Latin America and the Caribbean. In addition, in the 2005 Guidelines, it was established that a certain number of seats should be reserved for States Parties who had no property inscribed on the World Heritage List. In 2007, finally, it was decided to allocate only one seat representing these countries (Scovazzi, 2008:151). The renewal of the Members of the Committee takes place in accordance with art. 9.

To be included in the World Heritage List, sites must have outstanding universal value and meet at least one of the ten selection criteria provided. They are:

- “1. To represent a masterpiece of human creative genius;
2. To exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design;

3. To bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;
4. To be an outstanding example of a type of building, architectural or technological ensemble or landscape, which illustrates (a) significant stage(s) in human history;
5. To be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change;
6. To be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria);
7. To contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance;
8. To be outstanding examples representing major stages of earth's history, including the record of life, significant ongoing geological processes in the development of landforms, or significant geomorphic or physiographic features;
9. To be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, freshwater, coastal and marine ecosystems and communities of plants and animals;
10. To contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation." (UNESCO, 2016)

The criteria are contained in the Operational Guidelines and are regularly reviewed by the Committee in order to be adapted to the progressive evolution of the concept of World Heritage. Even the protection status, management, authenticity and integrity of the site candidate to insertion in the list are subject to evaluation.

In ensuring regular and continuous management of the Convention, the WHC organizes its annual sessions and those of its Bureau; it provides advice to States Parties in the preparation of site nominations; organizes assistance at the request of the International World Heritage Fund and coordinates both the reports on the condition of the sites that the emergency actions taken in support of endangered sites. The WHC is also involved in the organization of workshops and the production of teaching materials to raise awareness on the need for heritage conservation.

The Convention provides for sanctions to be applied in case of violation of the provisions of the Convention relative to the measures of protection measures necessary to ensure the maintenance of the criteria leading to the recognition of an asset on the World Heritage List.

The Convention Concerning the Protection of Cultural and Natural Heritage of 1972, was the most ratified universal legal instrument regarding the cultural heritage, introduced the innovative notion of "World Heritage Site", however limiting its action to the tangible aspect of the cultural heritage that has an "outstanding universal value". This prospect generated, over time, a certain level of conceptual tension and dissatisfaction of many States Parties: the parameter of exceptionality and the overly Eurocentric view of the system, which had nothing to do with the ideas and cultural values of many large areas of the planet, became elements of relative weakness intrinsic to the Convention content and, since the years immediately following the ratification, it sparked a significant international debate that led, over time, to a revisionism on the actual substance of the cultural heritage and what should be the most suitable measures to protect it and enhance it. The 1972 Convention did not take into account the protection of the manifestations of intangible folk cultural heritage, because the rights of the collective intellectual property weren't yet clearly defined.

## **Recommendation on the safeguarding of traditional culture and folklore 1989 (Paris, 15 November 1989)**

In the first years of UNESCO investigation to protect and safeguard intangible Cultural Heritage a theoretical dilemma occurred. This problem survives even today and it is whether to safeguard folklore inside or outside copyright law.

UNESCO's 1952 *Universal Copyright Convention* answered affirmatively to the dilemma. From this convention onward copyright and folklore are tightly tied together. The *Berne Convention, the International Union for the Protection of Literary and Artistic Works*, established standards of protection of the copyright, which each nation acknowledged to recognize in its national legislation. The laws injected into the national legislation would be the same for every signatory country. The aim of the Conventions was to circumscribe the international exploitation of intangible and tangible works of art by creating laws that would give the possibility to judges to condemn people who infringed the copyright.

UNESCO and BIRPI organized together a *Regional Meeting on the Study of Copyright* in Brazzaville in the year 1963; during this meeting for the first time, a recommendation relating to folklore was adopted.

With the Final adoption of the UNESCO *Recommendation on the Safeguarding of Traditional Culture and Folklore* the Folklore-Copyright dilemma achieved some results. The outcome was a long process where numerous actors were involved to create the legal framework to protect the world's intangible cultural heritage. Furthermore there was a codification at national and regional levels regarding copyright and folklore. (Sherkin, 2001)

Mexico was the first nation to enlist folklore works inside the Copyright Directorate in 1956, with a codification based on the UNESCO one.

In the former colonies or protectorates the folklore aspects are intertwined with the creation of the new states, especially to create a sense of national identity. For these reasons many former colonies reinvented and revived local tradition in order to achieve a national identity within the

new states. Furthermore folklore played an important role to increase the income of the state while attracting tourism.

In 1971 UNESCO formulate a document named *Possibility of Establishing an International Instrument for the Protection of Folklore*.

The beginning of this process of cultural policy formation can be listed in November 1972 with the *General Conference of UNESCO* and with the *Convention concerning the Protection of the World Cultural and Natural Heritage*.

The purpose of the Convention was to protect tangible objects, which carry enormous value to human history, art or science. However it did not apply to the intangible objects, for this reason the government of Bolivia presented a request in April 1973 that a Protocol should be added regarding the protection of popular arts and cultural patrimony of all countries.

In 1973, a strong disagreement with this approach led the government of Bolivia to proposing the addition of a Protocol to the *Universal Copyright Convention* of 1952 (as revised in 1971) in order to regulate the preservation, promotion and diffusion of folklore. The Bolivian proposal was not accepted, but the following year, in Tunis, a meeting of governmental experts was held, with the support of UNESCO and the World Intellectual Property Organization (WIPO), to begin the drafting of a legislative instrument for protecting the rights of intellectual property about traditional cultural events.

The Conference ended with the request to UNESCO to set up a program of activities for the protection of popular culture and, in particular, the oral traditions. These activities had to be based on the recognition of the universality, diversity and absolute dignity of people and cultures.

On November 1976, the UNESCO General Conference officially established the *Comprehensive Program on the Intangible Cultural Heritage*.

UNESCO and WIPO formally agreed on May 1978 that an interdisciplinary approach was essential to find a solution for the protection of folklore.

In February 1982, UNESCO changed his focus regarding the overall question on Folklore. It organized a *Committee of Governmental Experts on the Safeguarding of Folklore* (Paris). The purpose of this meeting was to consider different aspects of folklore in regard of finding a

solution to safeguard its continued existence, advancement and originality. The results were outstanding and for the first time ever a definition of folklore was clearly settled. Furthermore the committee declared the possibility to take action against whoever try to use unauthentic folklore materials as well as prohibiting the diffusion of cultural folklore distortion.

From May 1983 UNESCO assumed a more decisive role, independent of WIPO, regarding the protection of folklore. It was obvious at the 116<sup>th</sup> session of the UNESCO Executive Board, when a document named *Preliminary Study on the Technical and Legal Aspects of the Safeguarding of Folklore* (Document 116 EX/26) was given for examination. The Board was invited to decide if the document would have been sent to the General Conference as a proposal regarding an international regulation for the protection of folklore. (Sherkin, 2001)

During the 25<sup>th</sup> session the General Conference approved the *Recommendation on the Safeguarding of Traditional Culture and Folklore*. The recommendation protects the cultural heritage of the countries, especially from the danger of being abused or even manipulated by our own people and by foreigners for commercial purposes.

However the Folklore dilemma was not settled and the division between the overall question of folklore and its intellectual property aspect was a major point of conflict. Each representative had different opinions regarding the question. For that reason the contents of the recommendation includes both of the perspective, trying to satisfy each representative.



## **Proclamation of the Masterpieces of the Oral and Intangible Heritage of Humanity (Paris, 12 November 1997)**

The UNESCO General Conference, during the 29th plenary session held in Paris on 12 November 1997, adopted a resolution with which it was decided to highlight the importance of the Intangible Cultural Heritage for peoples and nations by proclaiming spaces or forms of cultural expression such as masterpieces of the "oral heritage of humanity", favorably welcoming the conclusions of the International Consultation on the Conservation of Cultural Popular Spaces held in Marrakech in June 1997. The importance of preserving the popular cultural spaces was highlighted during the consultation, such as the square Jama 'el-Fna square', which was the subject of in-depth case studies designed to illustrate the concept of "oral heritage of humanity". The Program UNESCO called Proclamation of Masterpieces of the Oral and World Intangible Heritage was then started as a short-term initiative for the safeguarding of intangible cultural heritage, which had been proposed by Morocco, with the support of other member states.

In the same resolution the United States and the international community, jointly with the Organization, were invited to carry out the activities and programs aimed at identifying permanent spaces of popular and traditional forms of cultural expression that deserved to be proclaimed symbols of the oral heritage.

The resolution also contained an invitation for the Director General of UNESCO to submit to the next Executive Committee's session a detailed proposal session on the criteria on the basis of which spaces or cultural forms had to be selected for nomination to the proclamation, the practical arrangements for international recognition of the same as an oral heritage of humanity, as well as the type of action required by UNESCO, the international community and from any public or private donors in order to ensure the protection and promotion of proclaimed masterpieces.

During the discussion of the Executive Board, which took place within the Commission PX (Program and External Relations Commission) speakers showed how oral heritage could not be dissociated from the intangible heritage; therefore the term "intangible" was consequently added

to the title of the program, as it was not covered in the first version of the documentation. Subsequent meetings were held in 1998 led to the acceptance of conceptual and operational amendments and clarifications, with a series of changes to the Regulations relating to the Proclamation. It adopted, for example, an anthropological notion of "cultural space" to indicate a place, or "physical space", in which the popular and traditional cultural activities and can focus, but also the notion of "space-time", which is generally characterized by a certain periodicity or as a recurring event. He said, among other things, that the jury charged with selecting the masterpieces could request the participation or opinion of recognized community custodians of the element of the oral and intangible heritage under consideration (UNESCO, 1998). The Proclamation of Masterpieces program has therefore established an international recognition to sensitize member countries to intangible heritage, enhancing it on a global scale.

Following the three calls of Proclamation (2001, 2003 and 2005), that took place before the entry into force of the Convention for the Safeguarding of Intangible Cultural Heritage of 2003, 90 forms of cultural expression and cultural spaces belonging to seventy different countries received the recognition. Over a hundred countries took part in the program and more than 150 application dossiers were submitted to the jury. The first Proclamation, held in May 2001 led to enrollment of the first 19 Masterpieces in the List of World Heritage Oral and Intangible, followed by some 28 examples of expressions and cultural spaces in November 2003. In November 2005, 43 new masterpieces were added a few months before the entry into force of the Convention of 2003, demonstrating the timeliness of UNESCO in this field under the Koïchiro Matsuura's guide, who, since his appointment as Director General in 1999, made the safeguarding of intangible heritage one of the priorities of the Organization. According to Matsuura, the key point of the program was the development of specific strategic plans to safeguard the proclaimed Masterpieces, which largely benefited from support from UNESCO to set and implement many projects, thanks to the financing offered to the program by the Japanese government. The outline of the Proclamation adopted an innovative approach by assigning an important role to local communities and the main guardians of tradition in the protection of their intangible heritage, having been placed emphasis on the need for transmission of traditions to future generations (UNESCO, 2006).

The main objectives of the Proclamation program, as highlighted in the Guide for the presentation of candidatures (UNESCO, 2006:2-3), have been raising awareness and mobilizing public opinion in favor of the recognition of the oral and intangible asset value and the need to safeguard and revitalize it. It also wanted to promote the assessment and cataloging examples of the world's oral and intangible heritage, to encourage countries to establish national inventories and to take legal and administrative measures for their protection. Finally, it is noted that emphasis was given to the need to involve the traditional artists and local practitioners in identifying and revitalizing of the intangible cultural heritage.

The program has considered in particular two categories of intangible cultural heritage: the forms of popular expression and traditional and cultural spaces, defined as "Places in which popular and traditional activities are *concentrated*" (UNESCO, 2006).

The Proclamation of Masterpieces program could consider two types of event. The oral and intangible cultural heritage is expressed, in fact, through forms of traditional cultural events "Such as musical or theatrical performances, rituals or other festivities" (UNESCO, 2006) or as a cultural space, defined as "a place which brings together a concentration of popular and traditional cultural activities and also as a time for a normally regularly occurring event" (UNESCO, 2006). The existence of this temporal and physical space should be closely tied to cultural events traditionally held in that place (UNESCO 2006<sup>a</sup>).

According to the Regulations of the program of Proclamation, each Member State could submit an application every two years. If a form of expression or cultural space extended beyond the political boundaries of a country, the Member States concerned were invited to submit joint multi-national nomination. This type of application could be submitted in addition to the portion reserved to each State.

The candidate's evaluation procedure of candidates was entrusted to a Jury of eighteen members appointed by the UNESCO's Director-General, in consultation with Member States, ensuring a balance in the geographical distribution, in the representation of women and young people, and between the various artistic disciplines and techniques applied in crafts and traditional architecture.

Selected Masterpieces had to be proclaimed by the Director General of the jury's recommendation, according to six criteria:

- "Its outstanding value as a masterpiece of the human creative genius;
- Its roots in the cultural tradition or cultural history of the community Concerned;
- Its role as a means of affirming the cultural identity of the peoples and cultural communities Concerned, its Importance as a source of inspiration and intercultural exchange and as a means of Bringing peoples or communities closer together, and its contemporary cultural and social role in the community Concerned;
- Excellence in the application of the skill and technical qualities displayed;
- Its value as a unique testimony of a living cultural tradition;
- The risk of its disappearing two either to the lack of means for safeguarding and protecting it or to processes of rapid change, or to urbanization, or to acculturation." (UNESCO 1972<sup>a</sup>)

The Proclamation was also based on an action plan by the State concerned, which required continuous monitoring and control. The Member States to which the proclaimed Masterpieces belonged were to adopt a firm commitment to conservation, submitting regularly to UNESCO, reports on the implementation of the action plan. The report must include, among other things, a commitment to improve the transmission of knowledge and know-how to younger generations, as well as awareness campaigns on a local and national level, with information campaigns, festivals, workshops, conferences and other means, and the adoption of measures of legal protection. The protection measures were to be established together with the affected communities.

Particular attention was devoted to expressions and cultural spaces considered endangered due to factors such as migration, the uncontrolled influx of mass media, inadequate financial means, standardization policies or simply general disinterest: factors that can clearly enhance the erosion of functions and the value of cultural heritage, contributing to removal of the younger generations.

An essential element of the Proclamation program was the so-called "preparatory assistance" (UNESCO 1972<sup>a</sup>), which it provided financial support for the completion of the application form by Member States in developing. This aid could be used for different types of activities: research in the field, creating inventories, census techniques, seminars and workshops with communities and institutions, and audiovisual documentation preparation. By establishing a financial support, UNESCO intended to induce the communities concerned to take a direct role in drawing up action plans.

With the entry into force of the Convention for the Safeguarding of Intangible Cultural Heritage, April 20, 2006, the Proclamation program came to an end. According to the transitional provisions of Section 8, Art. 31 of the Convention, the items that had been proclaimed "masterpieces of the oral and intangible heritage of humanity" were added to the Representative List of Intangible Heritage and, according to the meaning of Article 31.3 (2006), "no further Proclamation will be made after the entry into force of this Convention".

## Universal Declaration on Cultural Diversity (Paris, November 2nd 2001)

On 2 November 2001, the 31<sup>st</sup> UNESCO General Conference in Paris unanimously adopted the Universal Declaration on Cultural Diversity together with the lines of an Essential Action Plan. The great importance of the Declaration, approved a short distance from the attack on the Twin Towers on September 11, is evident from the fact that the UNESCO General Conference supported the principle that a universal recognition of cultural diversity represented a way to counter fundamentalism and conflict between civilizations. In the Preamble of the Declaration reaffirms, in fact, that "that 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" (UNESCO, 2002:Recital 5). This statement allows us to recognize in the Declaration a link with aspects of the intangible cultural heritage that were then subject of the 2003 Convention.

The action in defense of cultural diversity has been pursued by UNESCO for over half a century through numerous projects and programs. At the dawn of the new millennium this long journey has faced new challenges, particularly in view of the growing phenomenon of globalization, in a process that, as well as having paved the way for new means of expression and innovation, has helped expose more culture vulnerable to the risk of marginalization. In a context of conflict, often related to cultural diversity, which led to the disintegration of social ties, as well as the liberalization of large-scale economic and trade, the defense of diversity has come at a crucial point in human history (UNESCO, 2001<sup>b</sup>:1-2).

The Preamble of the Universal Declaration on Cultural Diversity, recalling the commitment to the realization of the principles of the Universal Declaration of Human Rights and subsequent international treaties of 1966 (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted in New York on 16 December 1966), states that the dissemination of culture and education for justice, liberty and peace should be pursued by all nations, as also stated in UNESCO's constitution. Reference is also made to various provisions on cultural diversity contained in other international instruments

promoted by the Organization, and there is a call to the definition of culture as configured in the conclusions of some international conferences of the eighties and nineties (MONDIALCULT, 1982). In stating that "respect for the diversity of cultures, tolerance, dialogue and cooperation in a climate of trust and mutual understanding are among the best guarantees of peace and international security," (UNESCO, 2002) there's a final consideration that globalization can help create the conditions for a dialogue between cultures and civilizations, although it constitutes a challenge for cultural diversity.

The text of the Declaration is divided into four main themes, each of which are devoted three articles: "Identity, Diversity and Pluralism"; "Cultural Diversity and Human Rights"; "Cultural Diversity and Creativity"; "Cultural Diversity and International Solidarity".

Article 1 defines the cultural diversity "Common World Heritage", which is considered, for the human race, as necessary as biodiversity for any form of life. Article 2 attests to the relationship between democracy and cultural pluralism, which "is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life" (UNESCO, 2002). In Article 3 it is stated that cultural diversity is a source of economic, intellectual and spiritual development.

Articles 4-6 show the relationship between human rights and cultural diversity, whose defense equals the respect for human dignity and the rights of minorities and indigenous peoples. Asserting that cultural rights are an integral part of human rights is therefore crucial to ensure the right of all cultures to be known, with equal access to artistic expressions and scientific and technological knowledge.

Cultural heritage must be preserved, enhanced and handed to future generations as evidenced by the experience and aspirations of humanity (2002:art. 7). As it will then be considered fundamental in the 2005 Convention, Art. 8 states that cultural goods and services should not be

considered common consumer goods. Each country has to define its own cultural policy to be implemented with the most appropriate operational and regulatory instruments (art. 9).

The last section highlights the need to strengthen international cooperation in order to enable all countries, especially those in the developing world, to establish cultural institutions with national and international expertise (art. 10). Critical to ensuring the promotion of cultural diversity is the role of public policies in collaboration with the private sector and civil society (art. 11).

To this end, UNESCO's responsibility is crucial to support the recruitment of the principles of the Declaration in the framework of development strategies drawn up by intergovernmental institutions; to be the reference institution and consultant between the various stakeholders in the development in favor of cultural diversity policies; to pursue further regulatory actions, awareness and development and facilitate the Action Plan, whose main lines are attached to the Declaration.

The essential lines of UNESCO's Declaration of the Universal Action Plan on Cultural Diversity explicit in 20 points the objectives that Member States undertake to pursue through a series of appropriate measures to disseminate the Declaration and to support its effective implementation.



## **The Istanbul Declaration on Intangible Heritage (Istanbul, 17 September 2002)**

The Istanbul Declaration was adopted at the conclusion of the Third Round Table of the Ministers of Culture entitled *Intangible Cultural Heritage: a mirror of cultural diversity*, organized by UNESCO on 16 and 17 September 2002 on the Bosphorus, and attended by 110 States, among which 70 were represented by their ministers of culture. During the meeting the links between sustainable development, cultural diversity and the intangible cultural heritage in the context of globalization were placed in particular prominence (Third Round Table of Ministers of Culture, 2002).

Recognizing how the intangible cultural heritage constitutes a set of constantly renewed living practices, and a complex web of knowledge and representations allowing the individual and the community to express, at all levels, their view of the world through a systems of values and ethical principles the Declaration stresses that priority should be given to an all-encompassing approach to cultural heritage keeping in mind the dynamic links between tangible and intangible heritage (2002).

It is also highlighted that the safeguarding and transmission of intangible heritage is essentially based on the direct involvement of practitioners, thus governments must promote the democratic participation of all stakeholders (2002).

Because of its vulnerability, intangible heritage is constantly threatened by conflicts, intolerance, excessive commercialization, uncontrolled urbanization or rural decay; it is therefore necessary to lay the foundation for an effective sustainable development as the intangible culture is also recognized as a guarantee of peace (2002:point 4:05).

The signatories of the Declaration of Istanbul considered appropriate and necessary, in that context, a close cooperation between professionals and witnesses of intangible cultural heritage. To this end, they called on UNESCO to encourage the development of new forms of international cooperation, encouraging research, the development of inventories and records and establish adequate regulatory protection mechanisms (2002:step 7, par. III and IV).

The ministers expressed their full support for effective measures at all levels, from international to local, to preserve, protect and improve intangible cultural heritage. The fact that the adoption of an international convention would be a positive step towards the realization of this objective was also emphasized (Director General of UNESCO, 2002).

The Director General of UNESCO, Koïchiro Matsuura, welcomed the adoption of the Istanbul Declaration, ensuring that Intangible Cultural Heritage was part of a specific political program and marking an important step in the process of drafting an international convention on intangible heritage that was adopted the following year.

## **Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 17 October 2003)**

The Convention for the Safeguarding of the Intangible Cultural Heritage was adopted on 17 October 2003 with 120 votes in favor, 8 abstentions and no votes against, and entered into force on 20 April 2006, three months after the deposit, the thirtieth instrument of acceptance by Romania. The States Parties, according to the list updated to 10 May 2017, are 172.

After a long introduction that saw, in the course of over thirty years, a progressive and significant conceptual development aimed at providing formal recognition to intangible heritage (Blake, 2001), the new Convention was added to that of 1972 on the world cultural and natural heritage, with which "an item of the intangible cultural heritage is directly associated" (UNESCO, 2003:art. 3, para 1).

One of the most significant innovations in policies and international laws about the protection and enhancement of cultural heritage is undoubtedly the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), adopted October 17, 2003 in Paris at the UNESCO headquarters and came into force on 20 April 2006, which represented the outcome of a lengthy review and renewal process in this area of interest.

Turning our attention to the significant international debate that, over the past few decades, led to the development and drafting of the 2003 Convention, through a fervent discussion between different cultures, one can easily understand the main reasons that led to a profound redefinition of the meaning and the nature of cultural heritage and recognition of intangible heritage.

The origins and scope of the concept of "cultural heritage" are found in the first international legal instruments meant to protect cultural property in armed conflicts (in particular the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, the Hague, 14 May 1954), where the definition of "cultural property" was used (Blake, 2000:61-85). Over time,

the need of substituting the term "property" arose, in order to give priority to other social objectives that had to be guaranteed.

The legal concept of "property", used in the protection of cultural heritage, was considered limited, as it was similar to a subject of private law of predominantly economic nature. One of the fundamental aspects of the property as a right, the *ius et utendi abutendi* (the owner's right to use and consume and, also, to destroy the possessed object), can't definitely be exercised in relation to the conservation of the cultural heritage, as it's essential to give precedence to the protection of the interests of the community and future generations, and this gradually led to use the term "cultural heritage". This change highlights a gradual, albeit controversial, understanding that the protection of cultural heritage concerns the relationship between heritage and communities linked to them (Lixinski, 2013:5-6).

Already in 1963, on the occasion of the 65th meeting of the UNESCO Executive Committee held in Paris, following the proposal by the Director General René Maheu to achieve the creation of an international fund for the protection of monuments, and a worldwide census of those worth preserving, Representatives of the Australian Institute of Aboriginal Studies raised the question of how Australia "has some groupings of Aboriginal cave paintings and rock engravings which are of outstanding interest and in some cases of world interest but there are no groupings of monuments of the kind apparently visualized in the UNESCO document. The preservation of Australian relics does not involve the expenditure of large sums of money but requires rather, adequate laws with severe penalties for damaging relics, the provision of rangers, the erection of protective devices and similar inexpensive action" (1964), thus highlighting how the precious heritage of Aboriginal culture was not included at all in the type considered by UNESCO.

The Convention Concerning the Protection of Cultural and Natural Heritage of 1972 (UNESCO, 1972), which is the most ratified universal legal instrument regarding the cultural heritage, introduced the innovative notion of "World Heritage Site", however limiting its action to the tangible aspect of the cultural heritage that has an "outstanding universal value". This prospect generated, over time, a certain level of conceptual tension and dissatisfaction of many States

Parties: the debatable parameter of exceptionality and the overly Eurocentric view of the system, which had nothing to do with the ideas and cultural values of many large areas of the planet, became elements of relative weakness intrinsic to the Convention content and, since the years immediately following the ratification, it sparked a significant international debate that led, over time, to a revisionism on the actual substance of the cultural heritage and what should be the most suitable measures to protect it and enhance it. The 1972 Convention did not take into account the protection of the manifestations of intangible folk cultural heritage, because the rights of the collective intellectual property weren't yet clearly defined. In 1973, a strong disagreement with this approach led the government of Bolivia to proposing the addition of a Protocol to the *Universal Copyright Convention* of 1952 (as revised in 1971) in order to regulate the preservation, promotion and diffusion of folklore. The Bolivian proposal was not accepted, but the following year, in Tunis, a meeting of governmental experts was held, with the support of UNESCO and the World Intellectual Property Organization (WIPO), to begin the drafting of a legislative instrument for protecting the rights of intellectual property about traditional cultural events.

The Conference ended with the request to UNESCO to set up a program of activities for the protection of popular culture and, in particular, the oral traditions. These activities had to be based on the recognition of the universality, diversity and absolute dignity of people and cultures.

The protection of folklore, however, had to wait seven more years to be configured as an international non-binding agreement until, during the twenty-fifth session of the General Conference held in 1989; UNESCO adopted the *Recommendation on the Safeguarding of Traditional Culture and Folklore*. In order to promote the Recommendation, UNESCO organized training courses, provided assistance in the drafting of projects for the protection, revitalization and diffusion of the cultural heritage of minorities and indigenous groups, and organized festivals of traditional culture. In order to facilitate the implementation of the 1989 Recommendation, in the following years, eight regional seminars were organized, and they undoubtedly contributed

to raise awareness of the need to pay particular attention to the intangible heritage, although they still were not sufficient to achieve a result definitive.

It was the Republic of Korea, in 1993, that made a proposal to finally give substance to the 1989 Recommendation, starting a program called *Living Human Treasures* that aimed to encourage States to grant official recognition to individuals considered exponents of living cultures. These individuals possess a high degree of knowledge and skills for representing or recreating specific elements of intangible heritage, thus contributing to the transmission of traditions, technical skills and knowledge to the new generations. In this new phase, when the focus on the intangible cultural heritage began to be translated into concrete actions and targeted projects, the influence of the Eastern world was remarkable, as it was loaded of their own philosophical conceptions and heritage practices. The selection criteria, based on the Western museological and academic perspective, gradually opened to a new vision that put the moment of transmission before the moment of documentation or the circumstance of the objective.

In November 1995 the World Commission on Culture and Development produced a report entitled *Our Creative Diversity* (UNESCO, 1996), which highlighted how the intangible heritage, inherent in the collective memory of the various communities of the planet, was the key element to help strengthen the sense of identity in moments of uncertainty: a fragile cultural heritage that didn't receive the due attention yet, because industry policies were primarily aimed at monuments, works of art and craft.

The meeting of experts called *The International Consultation on the Preservation of Popular Cultural Spaces - Declaration of the Oral Heritage of Mankind* took place in Marrakech in 1997, following a plea to the then Director General of UNESCO Federico Mayor and Spanish writer Juan Goytisolo, for safeguarding the Jemaa'el-Fna square, whose peculiarities were in danger of being seriously compromised by the implementation of the new project of urbanization of the Moroccan city.

Canadian lawyer Marc Denhez, expert of cultural heritage, was invited to examine different possible actions to take in order to obtain international recognition of cultural spaces that unlikely would have survived, promoting their conservation and spreading awareness about the importance of intangible heritage. The consultation of Marrakech helped accelerating an important process: in the October of that year, Morocco and Guinea, with the support of other States (Saudi Arabia, Cape Verde, UAE, Spain, Lebanon, Mali, Uzbekistan, Portugal, the Dominican Republic and Venezuela) presented to the twenty-ninth UNESCO General Conference a proposal for a new measure entitled *Proclamation of Masterpieces of Oral Heritage of Humanity* (UNESCO, 2006). A regulation draft for this project was submitted to the Executive Board session in May 1998, first eliminating the criterion of authenticity from the text; however, the Executive Committee members supported in theory the project, but rejected the proposed Regulation. The countries of Western Europe, which supported more "traditional political capital", showed some hostility and inability to see a great value in this program. In addition, countries in whose territories lived singled indigenous peoples, saw in the project the risk of possible claims (Smith and Akagawa, 2009:14-20). Eventually, the Committee decided to expand the scope of the program by adding to the title "*intangible cultural heritage*", thereby altering its scope. Therefore, it was requested to the Director General to initiate a thorough research among the Member States to re-table the proposal to the next session of the Committee. The heated debates generated by the project of Proclamation of Masterpieces between member states left ground for the preparation of the Convention on Intangible Heritage.

The procedure for undertaking a study for the adoption of a new legally binding device, aimed at protection of traditional culture and popular events, was finally launched during the General Conference in Washington in 1999, jointly organized by UNESCO and the United States of America at the Smithsonian Center for Folklife and Cultural Heritage (CFCH). The famous American cultural institution was already formally appointed by UNESCO to analyze the results of the 1989 Recommendation through a series of seminars and surveys undertaken with detailed questionnaires submitted to member states.

The CFCH had agreed to cooperate, asking however a condition: the request to engage in the debate the custodians of popular traditions. During the meetings organized by CFCH the slogan "*There is no folklore without the Folk*" emerged, kept as a useful reminder of the necessary principles that had to guide experts in order to improve the Recommendation (Early and Seitel, 2002).

In Washington, it was highlighted that how a binding instrument was absolutely necessary, as the results achieved by the 1989 Recommendation were far below expectations "*mostly two to its soft law nature and lack of incentives could stimulate Which Member States*". At the end of the summit, a invitation to the new Director General of UNESCO emerged, in order to launch a first draft of the Treaty for the Protection of Intangible Cultural Heritage. Koichiro Matsuura, who certainly constituted a major boost for the development of the new Convention, inserted the program among the eight priorities of the Organization (Smith and Akagawa, 2009:22).

After that, in March 2001, a panel of specialists met in Turin to reflect on the structure of the future Convention, in order to pinpoint the definition, scope and terminology relevant to the intangible cultural heritage "Intangible cultural heritage – Working definitions". a unanimous consensus was reached on the definition of intangible cultural heritage:

"Peoples' learned processes along with the knowledge, skills and creativity that inform and are developed by them, the products they create, and the resources, spaces and other aspects of social and natural context necessary to their sustainability; these processes provide living communities with a sense of continuity with previous generations and are important to cultural identity, as well as to the safeguarding of cultural diversity and creativity of humanity" (Seitel, 2002).



During the meeting emerged the need to focus attention on the social, intellectual and cultural custodian communities and safeguard them, with an emphasis on diversity and cultural identity. Another important aspect was the need to divert attention from the cultural product to its own production process, as the protection of intangible heritage must necessarily coincide with the social protection of the environment in which it manifested itself (2009:23-25). In the notes of the final report of the meeting, it emerged how essential it was to give greater recognition to the custodians of intangible heritage who, being the architects of the traditional events, have the necessary experience to transmit them to future generations.

The panel adopted, as a final act, an Action Plan for the safeguarding of intangible cultural heritage, containing an account of the conclusions of the experts, which was the foundation for the Convention's future direction. The document was presented to the 161<sup>o</sup> Session of the Executive Committee held in Paris the following May. On that occasion, after a long debate, the crucial decision to authorize the Director General to continue the preparation of a new international treaty was taken.

In the same session, the Executive Committee was preparing to examine the program Proclamation of Masterpieces, definitively started a few days earlier with the first selection of nineteen thirty-two elements chosen from nominations. The first proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity was held May 18, 2001, at the end of a meeting of the international jury, which took place in Spain and chaired by the Spanish writer Juan Goytisolo. The experience gained thanks to the Proclamation helped to integrate and deepen the reflection on the future Convention. Some of the selection criteria adopted for the first proclamation had proved to be approximate, but the program gave unexpected results, thus greatly enhancing the awareness of the value of intangible heritage, as shown by the evidence of surveys conducted on the custodian communities of the first proclaimed masterpieces.

In order to continue the consideration, UNESCO summoned an extraordinary session of the *International Jury for the Proclamation of Masterpieces* in Elche, Spain. The debate aimed to establish the most detailed selection criteria in order to improve the evaluation process. Among the various analyzed aspects, it was deemed necessary to review the concept of the most discussed issue in the international debate about the capital: the essential meaning of "masterpiece". First, a draft definition of "masterpiece" was presented, and it was based on the traditional mediaeval European model of the ancient guilds, a distinctly Western and elitist conception, considered inadequate by the majority of the jury. Alternatively, a French proposal was adopted, in which the "masterpiece", as the oral and intangible heritage of humanity, was conceived as an intangible cultural event of exceptional value, which cannot be assessed outside its environment and expresses the freedom of expression and the creative genius of its people. In Elche, in addition, it was pointed out that, in order to consider the nominations of masterpieces, it was necessary to ensure their coherence with UNESCO's ideals: all the spaces and forms of cultural expressions, that qualify to be proclaimed masterpieces of the oral heritage and intangible of the World, must be coherent to the ideals of UNESCO and, in particular, with the Universal Declaration of Human rights adopted by the United Nations in 1948. The Guide for the Presentation of Candidature Files was modified on this basis for the subsequent designation appeals.

The preparation of a convention on intangible heritage was finally launched in 2002, after the 31st General Conference Session, held in Paris in October 2001, took the decision to undertake the preparation of an appropriate legal instrument to protect the intangible cultural heritage. Some Member States (Argentina, Barbados, Denmark, Finland, France, Germany, Grenada, Greece, Mexico, Norway, Netherlands, Portugal, Saint Lucia, Spain, St Vincent Grenadines islands, Sweden, Switzerland) disagreed with the decision and formally expressed their hesitation about the adoption of a Convention.

For reflecting on the identification of the areas subject of the new International Convention for the Safeguarding of the Intangible Cultural Heritage, a group of specialized consultants was

invited by UNESCO to Rio de Janeiro (22-24 January 2002) where it was determined that the cultural dimension of the intangible heritage should consider exclusive areas, that had to be covered yet by other intergovernmental organizations. The experts thought that the new convention should have been developed in harmony with the *Universal Declaration on Cultural Diversity* (UNESCO, 2001) that has been adopted unanimously by the General Conference in October 2001. The Declaration, associating the custody of the intangible heritage to the cultural diversity, considered a source of inspiration of human genius and sustainable development, says that the heritage, in all its configurations, must be protected, enhanced and handed on to future generations as evidence of the aspirations and the experience of man, in order to encourage creativity and inspire dialogue between cultures (as testified in article 7). The safeguarding of the intangible cultural heritage is therefore a vital contribution to strengthening the identity of the groups because it involves numerous forms of artistic and cultural expressions. The policy for the intangible heritage is an effective expedient of intercultural dialogue and provides important elements of unity and communication.

After the Istanbul Declaration, issued at the conclusion of the Round Table of Ministers of Culture "*Intangible Cultural Heritage, mirror of cultural diversity*", where the need of adopting a new international convention was recognized once again, three meetings of government experts were held at UNESCO district of Paris, between September 2002 and June 2003, with the purpose of defining the objective and carry on the work of the preliminary draft of the Convention. Gradually, there have been defined important functional principles for the drafting the new instrument, as the close interdependence between tangible and intangible heritage, the recognition of living nature and evolving cultural practices, as well as their extreme fragility. They reached agreements on the identification of the objectives of the Convention, the definitions of "intangible cultural heritage" and "safeguarding", and how to establish national inventories to ensure that the heritage is identified. The consensus materialized on key issues, in particular those referring to the role the States had to have in the activity of the preservation and identification of intangible heritage in their territories, in cooperation with their cultural communities, NGOs and all stakeholders involved. It was also decided to create an international registry of intangible cultural heritage (the future Representative List), aimed at ensuring the

visibility of assets and help promote cultural diversity. It was also accepted the principle of establishing a second list dedicated to the intangible heritage in danger of survival.

The strong influence that the *Convention for the Protection of Intangible Cultural Heritage* had on the international community is noteworthy. The year following its entry into force, already 77 States had already signed the treaty, emphasizing the wish to use the new treaty instrument, and work against the risks to which the intangible heritage was subjected due to its high vulnerability. However, the most striking thing, considering the current list of States Parties, is the lack of anglo-American countries.

Looking at the first part of the Preamble, it can be noted that the emphasis is on the need to pursue the safeguarding of intangible heritage, based on respect for the universally recognized human rights, citing the three international instruments to which the Convention refers: the Universal Declaration on 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. The recital aims to reaffirm the importance of mandatory obligations about minority rights and the guarantees of equality and prevention of discrimination that must be considered in taking all measures to protect the heritage. Here, there is the repeal of the importance of intangible cultural heritage and of the three legislative measures, none of which of binding nature, to which the Convention refers:

*“Considering the importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development, as underscored in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989, in the UNESCO Universal Declaration on Cultural Diversity of 2001, and in the Istanbul Declaration of 2002 adopted by the Third Round Table of Ministers of Culture” (UNESCO, 2003:Preamble, par. 3)*

Considering its relevance as a model of the new treaty, the *Convention for the Protection of the World Cultural and Natural Heritage* (1972) is mentioned in a separate paragraph (par. 8), as an example for emphasize the impact of UNESCO's normative work on the protection of cultural heritage.

Another aspect highlighted in the Preamble is the important role played by the "*indigenous communities, groups and, in some cases, individuals*" for the preservation of intangible heritage and their essential contribution to "*enrich cultural diversity and human creativity*" (2003:Preamble, par 7). For the first time, in a legal instrument, the importance of communities in the preservation of cultural heritage is recognized. The topic was widely discussed during the various meetings of experts and the Intergovernmental Committee in the previous years (Blake, 2006:27). In the Convention text "*community, groups and in some cases individuals*" are identified as custodians of intangible cultural heritage: those who shall recreate and transmit it from generation to generation (UNESCO, 2003:Art.2, par.1).

The recognition, by the States Parties, of the elements of intangible cultural heritage on the territory must therefore happen with the contribution of the involved communities; however, their involvement in safeguarding activities and asset management is not mandatory, but is left to the discretion of States:

*"Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party Shall endeavor to Ensure the widest possible participation of communities, groups and, where appropriate, individuals That create, maintain and transmit such heritage, and to involve them actively in its management "* (2003:art. 15)

For the negotiators of the Convention, the expression "shall endeavor" was the only possible compromise between the different needs of the various States (Urbinati, 2012). The issue was raised again once the drafting of the guidelines was started. During the second session of the

Intergovernmental Committee, held in September 2007, it was decided to create a subsidiary unit, instructed to prepare a document on the possible rules of participation for the communities (and the practitioners, the experts and the research centers) in the implementation of the Convention on a national level, reaffirming and emphasizing their crucial role. The project of operational directives about the involvement of these parts was presented the following year during the meeting of the Steering Committee of Sofia, for eventually being approved by the General Assembly.

Art. 1 lists, in a very concise form, the purposes of the Convention:

*“The purposes of this Convention are:*

- a. to safeguard the intangible cultural heritage;*
- b. to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;*
- c. to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;*
- d. to provide for international cooperation and assistance” (UNESCO, 2003)*

The issue of protection, contained in the first point, must be examined in conjunction to the information contained in article 2, par.3, which defines the concept as a function of the Convention, by clarifying what actions the States parties are required to undertake for the intangible assets located within its boundaries:

*“Safeguarding’ means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage” (2003).*

The priority given to this issue shows how the incentive for the development of a legislation and national strategies for the protection of intangible heritage is a central objective of the Convention. The details for implementing a national protection system are set out in Part II (arts. 11 to 15).

Note how the term "safeguarding" greatly widens the protection criteria, opposite to the 1972 Convention, in which just the word "protection" is found, and now it considers a number of actions that have to be implemented in order to ensure the survival of the heritage. Safeguarding involves maintaining the conditions in which the intangible assets were created, maintained and transmitted, identifying the custodian communities as essential living environments for the survival of the heritage itself (Blake, 2008:59).

Two central aspects of the Treaty are raising awareness about the intangible cultural heritage value, and promote international cooperation and support. The remarkable awareness that was raised towards the assets included in the list of the World Heritage Convention of 1972 and the other instruments aimed at the protection of cultural and natural heritage, has led to follow the same model for intangible heritage. International cooperation, supported by a funding mechanism, is undoubtedly one of the tools to activate the principles of the Convention, especially if it is considered how many states that include important examples of intangible cultural heritage are among the poorest countries (Blake, 2006:30).

The definition of the object of the Convention, formally expressed by art. 2, par. 1, has been one of the most controversial aspects in the course of the preparatory work, as there was a need of including in the concept of heritage not only the product of a creative process, but also the entity that creates, maintains and transmits such assets; at the same time, the definition must be sufficiently contained and limited, in order to be suitable to legal configuration. For solving the contradiction and reaching the most appropriate definition it was necessary to involve experts of

wider-ranging disciplines. In addition, to ensure the survival of intangible heritage providing for its preservation is not enough, because:

*“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” (UNESCO, 2003:art. 2, point 1)*

Unlike what was expressed in the 1989 Recommendation, the living and evolving tract of the intangible cultural heritage is now highlighted. Therefore, the commitment is to not limit it to just cataloguing the forms of expression, but trying to maintain the specific conditions that allow the enhancement of such heritage.

The material scope is indicated by art. 2 par. 2. It's a list readable as an indicative guide, which lists five spheres of activities in which the intangible cultural heritage can manifest:

- a) “oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;*
- b) performing arts;*
- c) social practices, rituals and festive events;*
- d) the knowledge and practices concerning the nature and the universe;*



*e) traditional craftsmanship" (2003)*

The issue of including, or not, the word "languages" in the final version was very controversial and it was necessary to find a compromise between the various points of view. The language, therefore, is not considered intangible heritage itself, but it has a role in the expression and transmission of intangible events and it is a vehicle for the revitalization of cultural heritage, considering that oral transmission is the most common form of diffusion of the heritage itself.

The Convention provides for two main institutional units: the General Assembly (Article 4) and the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (Article 5).

The sovereign unit is the General Assembly of States Parties, which meets in ordinary sessions every two years and in extraordinary session, if deemed necessary or requested by at least one third of the States parties. The Assembly is responsible for identifying and guiding the strategies necessary for the application of the Convention. The creation of the General Assembly of the States is a substantial change from the World Heritage Convention of 1972, which did not provide for such a unit. The introduction of a new institutional level reflects the strong desire of States to ensure a final check on the implementation of the Convention (Blake, 2006:46), especially in dealing with sensitive issues, such as aspects of living culture or claims by communities or groups.

The Committee is elected by the General Assembly and it is composed of 24 States belonging to UNESCO's six geographic regions, so it can reflect the diversity of opinions on the principle of equitable geographical distribution among members. The duration of the charge is four years, renewing half of the components every two years, who can not be re-elected for two consecutive

terms. The Committee normally meets annually and, at the request of at least two thirds of the States Parties, it may meet in extraordinary session.

The essential functions of the Committee (Art. 7) are: to further the objectives of the Convention, to provide guidance on the application of the best practices, and to suggest measures to promote the safeguarding of intangible heritage. The Committee is responsible for examining the applications of the elements proposed by States Parties, for enrolling them in the lists provided by the Convention and for their proposals for programs and projects based on Article. 18 (Best Practices). It is also responsible for international assistance management and planning the use of resources from the *Fund for the Safeguarding of Intangible Cultural Heritage* (Art. 25).

During its meetings, the Committee has the chance to consult organizations, public or private, of established competence in the intangible heritage sector, which can offer accreditation to the General Assembly (art. 8.3 and 9.1). The practical questions about to the application of the Convention may also be delegated to any subsidiary organs that the Committee may establish in accordance to article 21 of the Rules of Procedure.

The Convention also stipulates that the UNESCO Secretariat has to assist the General Assembly and the Committee, by preparing documentation for their meetings and making sure that the decisions taken are applied (art. 10).

The safeguard policies, on a national level, are essential for the success of the Convention. Article. 11 requires that the States Parties should take the necessary measures to protect the national intangible heritage, finding elements for a collaboration with community groups and non-governmental organizations through the preparation of inventories, that have to be systematically updated (art. 12). Other safeguards methods, that include activation policies for promotion of intangible cultural heritage in society, are fundamental, as they are an important part of the social and cultural fabric, and the adoption of other legal, technical and administrative

measures, as well as the establishment of competent authorities for the assets management (art. 13).

Regarding the international aspect of the Convention, Article. 29 requests a report on the legal and administrative procedures applied for the operation of the treaty, that has to be periodically submitted to the Committee by each Contracting State. The preservation of intangible heritage on an international level is applied primarily through the establishment of two lists, the "*Representative List of Intangible Cultural heritage of humanity*" (article 16) and the "*List of Intangible Cultural Heritage in Need of Urgent Safeguarding*" (art. 17). It also requests the identification of "*projects, programs and activities or the safeguarding of intangible cultural heritage*" (Art. 18) in order to spread and ensure the visibility of those practices that best reflect the principles and the objectives of the Convention, for establishing a platform for exchanging experiences on the application of the Treaty.

The cooperation activities and international assistance for the States that requested them (2003:art. 19-24) are based on formal recognition by all the Contracting States "*the safeguarding of intangible cultural heritage is of general interest to humanity, and to that end undertake to cooperate at the bilateral, subregional, regional and international levels*". The non-elitist nature of the 2003 Convention is very explicit and it has a clearly different approach from the 1972 Convention, which restricted international assistance to cultural and natural properties of "*outstanding universal value*", a necessary requirement for registration in the World Heritage List (Blake, 2006:89).

Article. 25 concerns the creation of a "*Fund for the Safeguarding of the Intangible Cultural Heritage*". The fund's resources come from the contributions of the Contracting States, from funds allocated by the General Conference of UNESCO, from voluntary contributions of States (members and non-members of Convention) and the United Nations system's organizations and programs, as well as by public or private bodies (artt.26-28). Article. 26 offers a creative

compromise to the trade difficulties of the States' obligation: since it creates a duty of contribution, a State can submit a declaration of withdrawal (Art. 26 par.2); but if the State submits such declaration, it is still obliged to make every possible effort to withdraw the declaration and to fully contribute to the system (art. 26 par. 3). The compulsory contribution of the State can not exceed the 1% of the contribution to UNESCO's disciplinary budget (art. 26 par.1).

A final important aspect is the transitional clause that considers the integration, into the Representative List, of the selected assets from the *Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity* before the entry into force of the Convention. In art. 31 it is stated that the inclusion of the elements would, anyway, not interfere with the criteria for determining the membership of other manifestations of heritage in the list, indicating that there would have been no additional proclamations. While this clause constitutes an affirmation of the fact that the Masterpieces Program has been a precursor to the 2003 Convention, it also shows that the new treaty deviates from that model's approach, rather favoring a system of representation and promotion of cultural diversity.

The Operational Guidelines for the Application of the Convention determined that the inclusion in the Representative List of *Proclaimed Masterpieces* would take place after the adoption of the Directives by the General Assembly. Among the Masterpieces, there were also some assets belonging to States that did not subscribe to the Convention (Malaysia, Palestine and Russia). These States had to fulfil rights and obligations of the Convention only in relation to those parts included in the Representative List. The Director-General notified their registration and the consequent change in the legal regime of the safeguard program, offering them the opportunity to express, within one year, the consent to be liable to the new regime. If the consent could not be clearly demonstrated, the Committee had the right to remove such manifestations from the list. All the assets were eventually kept in the Representative List of the General Assembly Decision.

To date, the two lists, created with the aim of increasing awareness of the importance of intangible heritage and promoting their preservation and survival through the identification of appropriate measures and international cooperation, contemplate 391 assets, of which 341 items are included in the *Representative List of the intangible cultural heritage of Humanity*, and 43 are counted in the *List of Intangible Cultural Heritage in need of Urgent Safeguarding*. Projects and activities considered functional to identify programs that best reflects the objectives of the Convention (Art. 18) registered in the *Register of best safeguarding practices* are only 18.

## Chapter 2: An introduction of the two case study and their regional and national legal framework

In this Chapter it will be possible to find the description of two festive rituals, both inscribed in the UNESCO list of Intangible Cultural Heritage. One is the Gigli's festival of Nola (Italy), listed in 2013 with other three Italian festive rituals implying shoulder-borne structures such as Palmi's *Varia* ('*varia*' means festival in Calabrese dialect), Santa Rosa's machine of Viterbo and Sassari's *Farrada* ('*farrada*' means festival in Sardinia). In fact, these are all included in the list as "Celebrations of big shoulder-borne processional structures". The other case study is the Yamahoko, the float ceremony of the Kyoto Gion festival, inscribed in the list in 2009, but replaced in 2016 by the Yama, Hoko, Yatai, float festivals in Japan, due to the new definition that includes the Hitachi Fuyumono and the Yamahoko festival. This change is in conformity with Chapter I.6 of the Operational Directives.

Although the two cases are coming from a very different cultural background, there are several similarities between those two festivals. They are both celebrated in the summer; they both have a parade during which wooden structures are carried throughout a specific part of the city. And, in both cases, the music and the craftsmanship play a vital role in for the success of each year edition.

It is important to describe what is the general concept of festival before going in depth into the details of the cases.

As Fallassi, one of the main anthropologist of the XXth century wrote in his paper "*Time Out of Time: Essays on the Festival*": "As for the social science, the definition that can be inferred from the works of scholars who have dealt with festival while studying social and ritual events from the viewpoint of various disciplines such as comparative religion anthropology, social psychology, folklore, and sociology indicates that festival commonly means "a periodically recurrent social occasion in which, through a multiplicity of forms and a series of coordinated events, participate directly or indirectly and to various degrees, all members of a whole community, united by ethnic, linguistic, religious, historical bonds, and sharing a worldview."Both the social function and the symbolic meaning of the festival are closely related

to a series of overt values that the community recognizes as essential to its ideology and worldview, to its social identity, its historical continuity, and to its physical survival, which is ultimately what festival celebrates.” (Falassi, 1985, pg 5).

The chapter continues with a brief description of the European, Italian and Japanese legal framework on safeguarding cultural heritage.

## THE GIGLI'S FESTIVAL OF NOLA (ITALY)

The history of the Gigli of Nola begun with a tale of Pope Gregorius Magnus around the seventh century. He was narrating of the charity of the Bishop Paolino, saint protector of the city of Nola, a city in the countryside of Campania region 20 km away from Neaples. The Saint offered himself, instead of the only child of a widow, to be taken as a slave and brought to Africa together with many residents of Nola by Alarico's Vandals. When they arrived in Africa, the Saint distinguished himself with different prodigies and the King noticed his strong faith and good heart. To repay the deeds of the holy man, the King allowed him and all the people from Nola to return to their city with a ship driven by a moor. When they returned, the whole city was celebrating the event and every corporation met him offering beautiful liliams (*Gigli* in italian). The tradition explains that the order of the parade is the same of the order in which the corporations greeted the holy man with the floral gifts; the ship which appears during the ceremony is a reminder of the transport which brought back the people of Nola from the dark continent to the small harbor of Oplonti (the actual name is Torre Annunziata) where *Paolino* arrived at. *La Barca*, the wooden machine shaped as a boat, was introduced inside the festival because it reminded of the liberation of the people of Nola thanks to saint Paolino and their return through the sea (Avella 1973).

### The festival today

Every year, the Sunday after the twenty-second of June, at the ringing bell of midnight, the old festive cycle ends and a new one begins, in a way to ensure continuity to the festival, according to the popular belief. To make a *Giglio* takes several months of preparations. According to the previous rules set up by the *Fondazione festa dei gigli (Gigli's festival foundation)*, an agency ad hoc composed by people of the city council and the church, is allowed to become a *maestro di festa* (Master of Cerimony), a person who was born in Nola, he or she has to have worked under one of the ancient corporation, never have participate in the creation of a *Giglio* and posses an old age.



The corporations are: Ortolano (greengrocer) - Salumiere (grocer)- Bettoliere (taver-keeper) - Panettiere (baker)- Barca (ship) Beccaiio (butcher) – Calzolaio (cobbler) – Fabbro (blacksmith) – Sarto (tailor) .

During the year, the maestro has to start collecting money to build the *Giglio*, in order to do so it is common to create a *comitato* (committee) to help reduce the expenses of the single participant. When the committee, the group or the family are settled to make a *Giglio* they have to found an old man or woman from Nola to be their *Maestro di Festa*, who has to sign in front of the authorities as a member of the corporation representing the *Giglio*. (Ballacchino, 2015).

After the summer, the new *Maestro di Festa* of every corporation encounter the old one to decide the date of the official pass of the *bandiera* (flag) from the older one to the new one. Every *Maestro di Festa*, during the whole cycle of his competence, keeps at his place the flag of their own corporation. The *bandiera* officially represents the honor and the burden of the family to represent their arts at the festival and to represent the whole corporation for an entire year. Usually the *Bandiera's* parade is celebrate In October or November.

Constitute the *papranza* (crew), the group of people that will carry the *giglio* during the Sunday celebration, is one of the duty of the *maestro di festa*. To do so, the use was to pay strong people from other villages.

This people through the years, brought the *giglio* in their homevillage. Since XIX century, in the celebration of Saint Antony of Padua or the *Piedigrotta Barrese* , there are *giglio* carried through the city, although without a specific corporation attributed to the *giglio* and without paper-maché revestment. (ballachino, 2015)

Nowdays, the *paranza* have assumed authonomy from the figure of the *maestro di festa*. They are already formed and recognize the authority of a *Capo-parazna* (head-crew), a carismatic person able to lead the *paranza* while they are carrying the *giglio*, expert of where the *giglio* should be

lifted

or

carried.



Shortly after, in wintertime the *Comitato* will decide to whom to leave the construction of the *Giglio* and to whom to arrange the music, which will be played throughout all the different parts of the festival.

In the beginning of the spring the *questue* (*Money collecting*) begin and every committee will organize a parade through the city center, where they exchange *oboli* (*donations*) with holy pictures. The cost of a *Giglio* and the burdens related to the organization of the festival impose every *comitato* to actively search for economic aids to be able to finish it on time.

The Saturday or Friday before the event, the workers proceed to decorate the *Giglio*. To fulfill the operation of decoration six or seven people are needed. Two of them need to go at the top of the structure and then, thanks to a pulley, place the paper-liegé panels at their precise location. The first panel to be placed is at the top and it usually represents *San Paolino*, *San Felice* or a holy cross. After the summit, the *Giglio* is decorated from top to bottom. The lateral parts of the obelisk are decorated with small flags of colored or reflective paper.

Friday, called *il venerdì delle cene* (Friday's dinner), in the city center and in the immediate surroundings, *gigli's* comitatos, associations, free groups of people organize dinners in the street or in the courtyards. Usually, each dinner has its own special t-shirt for the occasion and a little concert of *gigli's* style music, where people dance and sing along. Around midnight, all "*cene*" are to merge into Piazza Duomo, creating a single big party until late night.

The Saturday evening, famous as *sabato dei comitati* (committee's Saturday) to the house of each *Maestro di Festa* a reception is being held where all the people who participated to the creation of the *Giglio* and the relatives of the *Maestro della Festa* are welcomed. After dinner the corporations go to the Duomo square where the party last almost all the night.

The day of the procession, which is the Sunday after the Saint procession, all the wooden machine are ready in their neighborhood where they have been built. It is tradition that the *Gigli* can not be built or moved outside the historical city center, called '*ncopp 'e serece* which means the ancient borders of the city; for that reason the urban fabric is tied with the festival of the city, especially the older urban-architectural heritage.

At the dawn of the festival day some people from the *paranza*, together with the *capoparanza* and the *caporali*, place the *varre* (planks) in their right place. The obelisks are made to dance over the shoulders of the *paranza* and there are showed some tricks to express the strength and the skill of the *paranza*. Every exhibition is ruled by the will of exhibition the strength and the freshness of the *paranza*. However, it is already some years that for safety reason only one *Giglio* at time is allowed to enter into the Duomo square. When all the *Gigli* and the *barca* are lined in front of the cathedral (the order is made by tradition, in a clockwise order looking at the City Palace the bells carry the opening of the main door of the Duomo. It appears in the middle of the square the silver simulacrum of *San Paolino* followed by the Bishop and representatives of the clergy. The crowd begin to pray as the Bishop blesses the nine machines. After the blessing the crowd exults and sugared almond are thrown towards the simulacrum of the Saint. The blessing of the Bishop closes the first part of the day. After a break, in the afternoon, it begins the procession of the *Gigli* following an order made by hundreds of years of tradition.



## THE YAMABOKO FESTIVAL OF KYOTO (JAPAN)

The Kyoto Gion Festival paints each summer in the city with rainbow hues for the entire month of July. Among the traditions surrounding the procession there is a unique ceremony which was developed among the residents of the district called Shimogyo 下京 and has been passed down as the float ceremony. Thirty-two decorated floats proceed down the bronze streets of Kyoto. These traditional floats have been carefully preserved and handed down for hundreds of years by the ancestors of the resident of Kyoto's various districts. The Yamaboko are the float-owning and many of the districts are now called by the names of their floats. The festival procession of floats has been revived many times despite having been interrupted from fires or wars. This demonstrates how important a role this one festival played in the lives of the residents of this area. (takeshi 2008)

Kyoto was originally called Heian-kyo emperor Kanmu created it as his new capital city in 794 the area chosen for the capital was bordered by mountains on three sides. the climate of high temperatures and humidity, typical for the basin it occupied ,meant that the summer months brought with them the front of epidemics. The people thought that these epidemics were caused by the angry ghosts of those who had been killed in the course of political conflicts and laid their curses on the inhabitants of the area (Ozawa 2000 85-87). The imperial court at this time decided that when epidemic stroke out festivals will be celebrated to appease the angry ghosts. These festivals were called Gion Go-ryōe (ghost ritual). Gion was the name of the most important shrine of the zone. This was the beginning of the present-day Gion festival. The first festivals were celebrated during the long rainy period at the beginning of the summer, when epidemics commonly occurred. Nowadays, 32 yamaboko style floats participate in the possession they are classified according to the five different types of design. 5鉾 hoko 2船鉾 funehoko 3曳き山 hikiyama 2舁き山 kakiyama 2傘鉾 kasahoko





The essence of the procession consists of beckoning the god of plague and escorting him out of the city the five types of float designs currently in use have evolved from those which perform the function of a tabernacle for the god to inhabit and those which featured festive music. (Takeshi, 2008)



### *The festival today*

On July second a lottery is performed at the Kyoto city hall since the conflict over who would come first in the processions used to be fierce. Of the 32 floats, 24 participate in the lottery while the other floats, including the Naginata-hoko, have established places in the order and do not draw lottery numbers.

Essential for the community, either for the success of the edition are the *Chimaki*, protected charms to ward off misfortune are indispensable to the festival and are handmade by farmers on the outskirts of the city. The components include a type of grass called chigaya and bamboo leaves. A traditional message is inscribed on a piece of paper attached to the chimaki stating “we are the descendants of somin shorai”. Chimaki are distributed to each home and in addition to the role as talismans express appreciation to those who put on the festival.

The yamahoko construction while viewing footage of the actual construction process a hoko is a temporary structure assembled for only one week it is about 25 meters high and weighs nearly 10 tons over 40 people will ride on it and since it is also pulled by people it must have a stable design

From the sides to the upper trim, and the underskirts, there are more than a thousand tapestries in the Yamaboko districts and about thirty percent of them come from overseas they come from all over the world, including Europe, Persia, India and neighboring China and Korea. It interesting how they integrate different styles of tapestries together (takeshi, 2008)

The period from the completion of the floats on the 14th to the 16th the day before the procession is traditionally called yoiyama 宵山 (procession Eve) during this period in the yamahoko districts the prized treasures of the meeting hall storehouse are exhibited to visitors.

The morning of the procession July 17th, an official from the foundation for Gion festival preservation associations confirms the order of each float in the procession when the floats are all gathered the spectacle is the highlight of the festivities.

The mayor of Kyoto in his ceremonial role as a federal magistrate confirms the results of the lottery.

The *Naginatahoko* leads the procession every year, and does not participate in the Procession Order Draw.

Today is the *Naginatahoko* is the only float on which children ride. The child performers begin to dance. The children know as Chigo, who is chosen to act as the deity's sacred page. He repeats the dance at crucial points along the parade.

The orchestra changes its leisurely rhythm playing faster than up until now they have played in a style called *Noboribayashi* (going music) now they play in a style called *Moboribayashi* (returning music).

About 40 or 50 people pull the yamahoko. Roughly 20 people carrier Yama style float the float pullers and bearers or adult males and those selected for the honour are generally those involved with the yamahoko or volunteers in some capacity.

The entire parade is 2,5 kilometres long and it takes five hours from the start of the procession. When the procession ends the Chigo is then carried from the float. Each yamahoko having fulfilled its obligation, now returns to its district. Upon the return of the Yama floats their pine trees are cut in the context of the Gion festival it is believed that the plague God who inhabited the floats disappears along with them district residents greet the returning local site floats the floats are rapidly disassembled.

The Chimaki, which were distributed to residents, are placed above the doorjamb in the most visible location to act as charms to protect these homes from disaster.

The fear and unease which city residents had felt in the past has been transformed into a dazzling and gorgeous ceremony, but the humble yet heartfelt belief of Japanese people lives on today in the midst of modern life though the forms may have changed. The Yamaboko float ceremony of the Kyoto Gion festival in which each float competes with the next to express the arts of aesthetic *Fūryū* (風流) became the origin Japan's great urban festivals the district residents of Kyoto have never relaxed in transmitting this spirit and aesthetic with great pride down to the present. (Takeshi, 2008)



## **Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 27 October 2005)**

The Framework Convention on the Value of Cultural Heritage for Society was opened for signature by member States of the Council of Europe October 27, 2005 in Faro, Portugal, and came into force on June 1, 2011. This is the most recent international convention in the cultural field, outlining an innovative framework at European level for enhancement policies, focused on the recognition of the individual right of free participation in cultural life of the community, as defined by art. 27, paragraph 1 of the Universal Declaration of Human Rights (United Nations, 1948).

The Council of Europe believes that, in order to develop a new cultural policy, the ideal legal instrument was a framework convention, that could define the general objectives and identify the areas of intervention, leaving the choice of the path to the signatory States for deciding what best suits their national traditions of law, policy and practice to pursue the subscribed commitments.

The Faro Convention presents an innovative way of considering the European cultural heritage. Europe's cultural heritage. The definition of a valid and complete picture of the sector was considered necessary to ensure that the cultural heritage, and culture in general, had the right place at the center of a new model of sustainable development, considering the positive effects to evaluate the heritage as "cultural capital". While previous legal arrangements have focused mainly on the need of preserving the heritage and how to protect it, the new Convention sets instead a number of methods of how to use cultural heritage, and focuses on why its value should be recognized.

The origins of the Convention date back to the debate that has developed in the international community as a result of the conflict in the Balkans in the late '90s, which dramatically highlighted how often the damage to the cultural heritage is caused by human activity. The destruction during the Bosnian conflict of the fifteenth-century bridge in Mostar, and the following dramatic demolition of the ancient giant Buddha statues of Bamiyan in 2001, have stimulated awareness by States of the Council of Europe that led to the formulation of the framework Convention on the value of Cultural Heritage for Society (Sciacchitano, 2005:170).

The themes and objectives of the Convention are discussed briefly in the Preamble, consisting of eight paragraphs: referring to the ideas and the basic principles of the Council of Europe, the Convention highlights the cultural heritage's potential in contributing to broaden its objectives. aim of contributing to broader range of objectives. The third paragraph, with emphasis on the value of cultural heritage as a factor in sustainable development, intends to remember that respect for diversity and cultural identity is inherent in the concept of sustainability. The fourth paragraph introduces one of the cornerstones of the Convention, that is the right to cultural heritage, which sets foundation for the innovative content of the new international instrument. The importance of the heritage and the training policies, in order to promote dialogue between cultures and religions, help mutual understanding and prevent conflict are highlighted in the sixth paragraph.

Another absolutely innovative new notion is "common heritage of Europe" introduced by art. 3 whereby the Signatory Parties must commit to promoting knowledge and understanding. The European heritage consists of two inseparable elements:

- "all forms of cultural heritage in Europe which together constitute a shared source of remembrance, understanding, identity, cohesion and creativity, and
- the ideals, principles and values, derived from the experience gained through progress and past conflicts, which foster the development of a peaceful and stable society, founded on respect for human rights, democracy and the rule of law" (2005)

The interaction of these two elements expresses an unifying theme of the Convention, developing the important principles of respect and equal treatment respecting "cultural identities and practices, and the expression of the corresponding forms of heritage, provided that these comply with the principles upheld by the Council of Europe" (COE, 2005/2) already expressed by the Declaration on Intercultural Dialogue and Conflict Prevention (Declaration of Opatija 2003).

## **The Italian legislation on safeguard of heritage: The Code on Cultural Heritage and Landscape (2004-2008)**

The new Code of Cultural Heritage and Landscape, which replaced the previous legislation dating back to 1999, was approved on January 22, 2004. The Code is the main Italian normative reference that assigns to the Ministry of Cultural Heritage and Activities the task of protecting, preserving and enhancing the cultural heritage. Thanks to the Legislative Decree n. 62/2008 art. 1, following the ratification by Italy of UNESCO's Convention for the Safeguarding of the Intangible Cultural Heritage (2003)<sup>162</sup> and for Cultural Diversity (2005), the Article 7-bis was added in the first part of the Code:

*“Art. 7- Expressions of cultural and collective identity: The expressions of collective cultural identity contemplated by the UNESCO Conventions for the Safeguarding of Intangible Cultural Heritage and for the Protection and Promotion of Cultural Diversity, adopted in Paris respectively on November 3 2003 and 20 October 2005 are Subject to the provisions of this Code if they are represented by material evidence and the conditions and conditions for the applicability of Article 10.” (Ministero per i Beni e le Attività Culturali, 2008)*

While this represents a step forward in the national framework of legislation about intangible cultural events, it should be noted that this article neither outlines an organic framework able to provide precise criteria for identifying manifestations of intangible culture, nor provides methods of intervention helping its protection and enhancement, nor it contains any principles the State institutions and regional or local government should follow to ensure the preservation of the various forms of the national intangible heritage (Giampieretti, 2011).

From some lawyers' point of view, the condition set in art. 7-bis for the application of Article 10 is equivalent to a circumvention of the same Conventions, revealing the intention of reaffirming the national Code structure's superiority, and shows how the 2004's choice of the Italian legislature, and stubbornly repeated in 2008, is ahistorical and against the spirit of international pactional provisions. Despite national legislators' fulfillment of the UNESCO Conventions is inevitable, the

absence of a specific regulation dedicated to the intangible cultural heritage highlights the opposition to acknowledging a wider concept of a cultural object that isn't safeguarded only through bonding administrative measures, influenced by the "Res qui tangi potest" requirement (Tarasco, 2008).

Since enhancing cultural and environmental heritage and the organization of cultural activities is concurrent legislative competence of the Italian Constitution, some Italian regions have started to partially fill the void of the national legislation about protection of intangible heritage by promoting the creation of eco-museums in order to protect and enhance environments, landscapes and identity values for local communities<sup>1</sup>. Some other regions have opted for the protection of historical and ancient villages, support of traditional crafts, historic inns or local languages and dialects.

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## The Japanese legislation on heritage Protection

Since the so-called Meiji Restoration of 1868 Japan has developed a strong body of legislation that in time would also cover the subject of intangible cultural heritage (kakiuchi, 2014). The event took place under Emperor Meiji's rule and managed to restore the practical connotations of imperial rule in Japan, there were major changes in the country's political and social architecture and it started the Meiji period.

Currently, it is the Agency for Cultural Affairs' Cultural Properties Department and its Traditional Culture Division that promote Japanese tangible and intangible cultural heritage (ACCU, 2009:15). The 1950 Law for the Protection of Cultural Properties assigned protection only to ICH running the risk of extinction. A few years afterwards it was amended to add a system of holders and to ensure protection based on the value of ICH rather than the impending danger of extinction. Moreover, in 1975 community-based customs was also included in the Law, also protecting conservation techniques (a further amendment on this was added in 2004).

There are now six categories of cultural property that are recognised by the Japanese Law for the Protection of Cultural Properties, and they are:

“Tangible cultural property; Intangible cultural property; Folk cultural property; Monuments; Cultural landscapes; Groups of historical buildings. In addition, conservation techniques are also protected” (ACCU 2009:15)

Tangible cultural property concerns buildings, art and applied art; intangible cultural property covers cultural traditions of Japanese culture such as Kabuki theatre or No, etc.; folk cultural properties include regional and local customs such as festivals, rituals and an evolved culture characteristics of the people; monuments goes to protect both man-made buildings such as ruins as well as geographical and natural elements; cultural landscapes concerns the landscapes that are typical of Japan such as terraced rice paddies, etc.; and finally groups of historical buildings

are cultural property such as ancient historic towns, architectural wonders that cannot be discerned therefore are protected as a group. Intangible cultural heritage is therefore protected in three categories: Intangible Cultural Property, Folk Cultural Property and conservation techniques (Kakiuchi, 2014).

## **Chapter 3: Analyzing the 2003 Convention through the lenses of two case study**

In this Chapter we are going to analyze from different perspective, what are the strengths and weaknesses of the convention of 2003 and the safeguard of intangible cultural heritage in general. In order to do so, we are going to use as example the case study introduced in the previous chapter. The principal arguments are the humanitarian aspect of safeguarding intangible cultural heritage, the relationship between the State and the communities bearers of the ICH and the risk of misappropriation and commodification, and the debate about the use of the category “authenticity” safeguarding Intangible cultural heritage.

### **The relationship between Intangible Cultural Heritage and International Human Rights**

It is clear that through the safeguard and the protection of cultural heritage in general, international law tries to protect cultural identity. The use of the term ‘safeguarding’ in the Convention is meant to embody human rights concerns as a whole. Hence, it is matter of fact that there is a strong link between ICH and human rights protection also due to the ‘evolutionary interpretation’ made by several international courts in their adjudications, as the European Court of Human Rights or the Inter-American Court of Human Rights (Lixindski: 2011,147).

There are three main ‘tensions’ in the relationship between safeguarding ICH and human rights. The first one is the application of individual rights for the protection of heritage belonging to a group of people, or a community, rather than individuals as such. The second tension concerns the custom that cultural heritage protection largely depends on nationally-based public laws. Moreover it also depends on the increase of complexity at the international level of what is the human dimension of international cultural law and in general the increasing relevance of culture in contemporary international law discourse (Francioni, 2011:9). Lastly, it is interesting to note in some cases how intangible cultural heritage is an obstacle to the enjoyment of human rights.

In the first place, there is the general claim that upholding individual human rights implies accepting a liberal human rights framework centered on individual rights alone, and the idea that group interests boil down to individual interests. This tension mainly reveals itself in the *prohibition of actio popularis*, which entails that international law is allowing judicial protection only upon the infringement of an individual's human rights, and not upon claims by a group.

This goes against the general anthropological consensus that intangible cultural heritage belongs to the community rather than the single individual. In fact, individuals have a somewhat marginal role in the context of ICH, as they are often perceived as having a 'secondary role' and are only recognized 'in some cases' (Lixinski, 2013:148). It should also be noted that the collective dimension of individual rights could be seen as group rights. Nonetheless, Lixinski on Blaket states: "while the notion of collective cultural rights seems to come from the text of the Convention, such an interpretation would be erroneous, as the Convention clearly refers to universal human rights standards, obviously based on individual human rights." (2013:150)

The fundamental argument here is that the protection of cultural rights works through individual human rights, therefore accepting the framework on which the latter are based, that is individual rights and that group interests have to boil down to individual interests. Nonetheless, there is disagreement with collapsing groups rights into individual rights, as the process overlooks complex social structures going beyond the sum of the individuals (Johnston, 1989). Furthermore, these advocates contend that specific group rights cannot be put into action individually, calling for the acknowledgement of group rights (Dinstein, 1976).

The debate on group rights v. individual rights is ongoing both on the scholarly and the adjudication levels. On the adjudication level, the mechanisms in place in the practice of international law seemingly appeal only to individual claims, and not those of larger groups, as the *prohibition of actio popularis* states. The prohibition is the origin of the tension at hand and it also is ubiquitous in human rights adjudication. Paradoxically, its exercise can lead to oxymoronic consequences: the resolving of an individual's case may need the adoption of measures that can benefit communities and victims with similar circumstances at large. The



Inter-American Court of Human Rights (IACtHR) used this approach, for example in the case of *Moiwana village v. Suriname* of 2005. This quasi-loophole has allowed the protection of the interests of several communities and groups in time, with the translation of group interests as individual rights and the treatment of the case and of an individual's, and not a group's (Johnston, 1989:185). It is also necessary to note that the mechanisms in place to protect minorities work as individual rights (Lixinski, 2013:149).

Governments have a duty towards cultural property of safeguarding and transmission to future generations, rendering it effectively 'communal property' or public patrimony, rather than just the subject of individual rights adjudications, etc. When showcasing specific cultural aspects of a community or a minority group, cultural property becomes a crucial dimension of human rights. According to Francioni: "the object of safeguarding is not a State interest, or a purely material item, but rather the human value of creative autonomy, of the freedom of manifestation of one's own beliefs and convictions, either individually or in community, in public or in private, of peoples, groups or minorities" (2011:10).

Cultural heritage viewed as 'common concern of mankind' stems from the postulate that all future generations should be able to enjoy and share it as much as older and current ones, therefore only action on a global scale can guarantee such right. When this view encounters intangible cultural heritage, then the very concept entails the idea of legacy legacy, or the same ICH will die. For this reason the community nature behind cultural heritage is to be kept in high regard when devising safeguarding mechanisms from a legal point of view.

Nonetheless, according to Lenzerini:

"The other side of the coin concerning the relationship between ICH and human rights is represented by the condition that the former must be consistent with the latter, as emphasised by the final sentence of the definition included in Article 2 CSICH. While this assumption is plain in terms of legal theory, it can create problems in practice, in

consideration of the fact that ICH represents the main concrete 'product' into which the idea of cultural diversity translates. Indeed, the operation of placing limits on diversity, on whatever basis, can appear a contradiction in terms. In fact, if the value of diversity is based on differences, the very fact of limiting these differences within certain borders – which must be acceptable according to generally acknowledged conditions – is tantamount to including an element of uniformity in the appreciation of diversity. This operation, therefore, inevitably leads to a degree (although quite limited) of homogeneity and standardisation of diversity." (Lenzerini; 2011:117)

Any legal instrument, whether used nationally or internationally, together with national and territorial heritage conservation frameworks, has to be analysed and assimilated within the realm of human dignity and human rights - something that not all cultural heritage guarantees. Similarly, the 1966 International Covenant on Civil and Political Rights gives to members of ethnic, religious or linguistic communities the right to "enjoy their own culture, to profess and practise their own religion, or to use their own language" (United Nations<sup>a</sup>, 1966:art. 27) and share it with other members of their cultural group. All these rules require for states to offer adequate measures of protection to all groups with cultural property of heritage requiring it. States must also not destroy or damage such heritage.

The relationship between human rights and intangible cultural heritage has come under scrutiny for another important reason: at times human rights can become a limit to the protection of intangible heritage; as a matter of fact human rights are limited in their actions when manifestations of ICH go against the same human rights. The 2003 UNESCO Convention clearly stated that manifestations of ICH must conform and be compatible with human rights. The idea that cultural rights and distinctive cultural heritage should be protected as long as they don't violate human rights is called 'invisible asterisk'. For instance, some could argue that FGM (Female Genital Mutilation) is a cultural practice of certain communities, but in completely violating human rights it is not protected as cultural heritage and, actually, heavily condemned. Although some may argue that the 'invisible asterisk' constitutes cultural relativism, Lixinski argues that it can be a useful tool that cultural groups can use to inform the debate on their practices, (forcibly) opening them to cultural exchanges. It must be noted that this 'positive'

approach to the 'asterisk' may not be positive at all at times. As a matter of fact, communities may feel pressured to erase their cultural heritage in order to gain recognition, etc., without a debate or a dialogue on its cultural habits and their clashes with human rights.

Nonetheless, the international community cannot disregard human rights in favor of cultural expressions violating them. For this reason ICH must conform to a some basic legal rules echoing the fundamental values of the UN - especially the *jus cogens* norms on human rights.

For instance, it is true that in both study cases, it is evident that there are specific roles for woman and man in the ritual of the festival. However, the role of women during the festival was often a marginal one, and some aspects of the festival, carry the Giglio or pull the Yamaboko, are for the man a moment where they can show their "Manhood" (Ballacchino, 2015).

Nonetheless, in the last decades the gender barriers fell down due to the change of society and cultural context. Nowadays, women can become *Maestro di Festa* in the Gigli's festival, and female musicians are allowed to play on the Yamaboko.

This said, the landscape in which this tension takes places is particularly complicated, as the prohibition of upholding intangible cultural heritage becomes itself a violation of human rights. The necessity is therefore of finding a balance "in order to ascertain whether the inconsistency with those rights resulting from the operation of ICH would, in terms of severity, override the restriction on the enjoyment of the same rights determined by the prohibition on practicing and benefiting from that manifestation" (Lenzerini, 2011:117).

With the convention of 2003 the indissoluble relationship between cultural heritage, cultural diversity and cultural rights has been strengthened. State obligations concerning the safeguarding of the heritage can now be seen from the perspective of international human rights law.

If a ICH is perceived as an essential element of cultural identity, its safeguard, viability and continuity, and rights of access to and enjoyment of its creators and bearers represents an essential condition for the realization of human rights,

the obligation to protect the latter inherently extends to ICH safeguarding, for the reason that, if this heritage is not properly safeguarded, the human rights the realization of which depends on ICH would lack effectiveness.

Using Lenzerini world's "ICH often represents an element the preservation of which is indispensable for the enjoyment of certain human rights" (Lenzerini, 2011)

## **The relationship between the State and communities**

The third and fourth sections of the 2003 Convention, as we already saw previously, are dedicated to the safeguard of the intangible heritage at national and international level. The articles concerning the safeguard of ICH at the international level are article 16, 17 and 18. The first is about the Representative List of the Intangible Cultural Heritage of Humanity. The Committee, upon the proposal of the States Parties concerned, shall establish a representative list *"in order to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity"* (UNESCO; 2003). Articles 17 and 18 relate to the List of Intangible Cultural Heritage in Need of Urgent Safeguarding and the programs or activities that the committee shall promote at regional, sub-regional or national level.

These three articles are the core around which all the other mechanisms and institutions of the convention revolve. The opportunity of using a system based on these lists has been the focus of heated discussions during the planning and preparation of the international instrument. Part of the States expressed their opposition, fearing that they had to establish a hierarchy as part of the intangible heritage, something that would have led to protect only the elements included in the lists at the expense of those excluded. Another supposed risk was that the inclusion of some assets on the lists would have caused their own fossilization (Blake, 2006:78-79)

The registration process in the lists or in the registry of the projects requires the submission, by the proposing State (or States), of a nomination dossier to certify that the candidate asset meets all the required criteria. It's the Committee's duty to consider the applications submitted by Parties and approve their registration requests (UNESCO, 2003:art. 7 letter. G). The selection

criteria and the procedures for registering in the lists were written by the Committee and reviewed by the General Assembly.

Among the defined criteria for the inclusion of the elements of intangible cultural heritage, both in the Representative List and in the heritage list of the ones that needed urgent safeguarding, it's worth mentioning the application to provide evidence that: *"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"*. The Committee wanted to further emphasize the need of involving the stakeholders from the moment the safeguard process starts.

On the other hand, the articles concerning what State Parties shall endeavour at national level, according to articles from 11 to 14 are related to the setting of regularly updated inventories, to the adoption of programs aimed at safeguarding intangible heritage and to raise awareness about the importance of the ICH. Article 15 is totally focused on the participation and mutual collaboration of Communities groups and individuals. It states:

*"Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management."*

It is clear from all the aforementioned articles, in particular from article 15, that the Convention strives to create an equal ground for State Parties and ICH bearers, although the it is clear that this Convention addresses national states. Despite all the remarks that the convention and the operational directives give to State Parties, community involvement, engagement and ownership, together with the possible relationship between national state and communities and the role played by communities in the implementation of the Convention was one of the most discussed topic. It is a matter of fact that the legal framework, either at national and international level generally privileges state agencies and experts opinion over the relevant communities' concerns (Smith, 2000). This shift was stressed during the negotiations by the Bulgarian delegation, pointing out that it is the community who creates the ICH, not the state-party to the Convention. Hence, communities must have a crucial role in the safeguarding. Norway, on the other hand, remarked the lack of expertise from communities to effectively contribute at the international

level, but acknowledging them a primary role at local and national level (UNESCO; 2002). The Norwegian approach could be defined as State-centric, and it was the prevalent one in the early years. The committee, with its work, has moved to a more community-oriented stance since the first steps of the Operational Directives.

Looking at the Operational Directives, the Third chapter is indeed inherent to the participation of communities in the implementation of the convention. The first article of this chapter states:

*“79. Recalling Article 11 (b) of the Convention and in the spirit of Article 15 of the Convention, the Committee encourages States Parties to establish functional and complementary cooperation among communities, groups and, where applicable, individuals who create, maintain and transmit intangible cultural heritage, as well as experts, centres of expertise and research institutes.”*

Following articles 81 and 82 declare:

*“81. States Parties shall take necessary measures to raise the awareness of communities, groups and, where applicable, individuals regarding the importance and value of their intangible cultural heritage, as well as of the Convention, so that the bearers of this heritage may fully benefit from this standard-setting instrument.*

*82. In conformity with the provisions of Articles 11–15 of the Convention, States Parties shall undertake appropriate measures to ensure capacity-building of communities, groups and, where applicable, individuals.”*

Community engagement is also mentioned in the Nara Document of 1994, annexed at the World Heritage convention of 1972 as Annex 4 in 2004, remarking the importance of *“the cultural context in which the heritage belongs”*. In 2009 the world heritage committee reflected upon *“develop an inclusive plan of action to increase community awareness and engagement”* (UNESCO, 2009).

As Kurin wrote a few months after the 2003 convention had been drawn up, working with communities is sociologically and legally challenging as they often represent themselves in an informal asset. It is also common finding a difference between public officials and political institution and experts on one side, and practitioners of the tradition on the other side (Kurin; 2004).

Identifying a group of people and label them as community and manage as “heritage” has also political implications. (Deacon & Smeets, 2013). This may create conflicts between and within the community and local and national government. Starting from what Kurin said about fragmentation of communities, this concern is confirmed by the path that brought the Gigli’s community to be part of the list. There were three attempts of being listed as one of the Masterpieces of the Oral and Intangible Heritage of Humanity in 2001 and 2003, and in the representative list in 2005. The efforts were made by the NGO *Extra Moenia* (D’Uva, 2010). This NGO was composed by local experts and scholars, and in their attempts there was the idea of calling UNESCO to action in order to stop what they considered degenerating aspects of the festival.

Although the applications to be part of the list were beyond the spirit of the convention, because the whole community did not allow *Extra Moenia* to talk in their name on one hand, and *Extra Moenia* did not ask the prior, free, informed consent of the community in this matter on the other, they have led to positive effects in the community. Being recognised by UNESCO became for the Gigli’s community an important matter.

Acknowledging that the festival have problems and internal conflicts was a start, afterwards in 2006 the mayors, of Nola, Sassari, Gubbio, Viterbo, Palmi Calabro, signed an agreement in order to present a common candidacy as “big shoulder-borne processional structures” (Ballacchino, 2015). Few months later Gubbio withdrew the adhesion. The same year, the community founded the *Ente Festa* (festival agency), an agency established in order to regulate the festival. In 2011 the candidacy was accepted by the Italian UNESCO’s commission. In 2012 most of the associations involved into the festival signed an agreement in order to refund a new agency, the Gigli’s Festival Foundation, neutral and unbiased by politics. Finally in 2013, in Baku the “big shoulder-borne processional structures” became part of the list.

Looking at the Gion Festival, modernisation, or better, Westernisation of Japan was a matter of conflict between the Yamaboko community and the city of Kyoto.□ Before the Meiji Restoration, with the so-called Yorichō system, followers of the Gion Shrine were legally obligated to give labor or monetary assistance to the Choju (town community), and administrative unit on a certain portion of the city with authority on real estate, residence relocation permits and such (ACCU, 2008). Each Choju was also owner of a *Yamahoko*.

As Shigeru Fukami, former Director General of the Gion Matsuri Yamaboko Rengo-kai, pointed out in a seminar run by the ACCU, “In short, chōjū created groups or guilds of certain professions within their own community, exerted a certain amount of control over them, and exercised considerable rights of autonomy to hold the Gion Matsuri.”

In 1872, the Yoricho system was abolished, creating a severe financial problem for the festival. In 1898, when Kyoto gained self-government and administrative rights, it transformed the Choju in informal “resident associations”, which lost their rights to the choie (town houses) where yamahokos are stored during the year.

“In sum, they lost: (1) the right to mobilize residents to carry out the Gion Matsuri; (2) their bases of operations, i.e. the chōie; and (3) consequently, the right to legally own yamahoko” (2008). This crucial loss did not stop the community from celebrating the festival. Some Choju were wealthy enough to buy back the Yamaboko and the Choie while some other were not, unfortunately. Furthermore, some families privately bought the Yamaboko from the city of Kyoto. This led to a conflict inside the community that threatened the very existence of the festival.

A counter-trend later began in 1923 when the city of Kyoto launched a restoration program in order to help financially the festival. In the 1979 Yamahoko, the float ceremony of the Kyoto Gion festival was proclaimed an important intangible folk cultural asset. Currently the government is the first to help the Yamahoko community, handing out subsidies for those communities not wealthy enough to face repair tapestries (ACCU, 2009).

Often, Japanese system is not completely understood because it makes a distinction between performing arts which are professionalised (or professionalizable) and the techniques of craftsman that are considered as intangible cultural properties and community-based folk intangible cultural properties (ACCU, 2009).

Both are forms of ICH as defined under the UNESCO Convention. According to the Japanese legal system, measures to safeguard ICH had to focus on the people who gave it life rather on the products produced. This is why Professor Ukei remarks that “is particularly difficult and important in the case of community-based folk intangible cultural properties.” (ACCU, 2009)



The relationship between state and communities lives a duality between the will of state to rule through the law and the resistance of local communities of being ruled, generating conflicts.

## The tension between safeguarding and the danger of decontextualisation and commodification

While the relationship between state party and communities can be not easy to start due to many differences, it is even more challenging for the state to apply what are the norms endeavored by the convention without decontextualizing the ICH, or upsetting the balance inside the community whose members are trying to collaborate one with another.

In the UNESCO Internal Oversight Service of 2013 it is reported a wide sphere of comments about how the convention is applied by state parts and what are the main challenge on the matter.

In point 123 it says.

*“Another constraining factor is the lack of knowledge about ICH and culture in general by many legal experts in charge of drafting and amending existing legislation. The consequence of this is that even when sustainable development related policies and laws make reference to ICH, it is not always done in the spirit of the 2003 Convention.”*

This approach may be coming from by the legacy of the Masterpieces programme. Although the programme was a precursor of 2003 convention, the approach deeply changed from a model similar in many aspects to the World Heritage Convention to a model that could foster cultural diversity and guarantee cultural identities. (Blake, 2006).

The current director general Irina Bukova once declared that “UNESCO World Heritage isn’t a beauty contest. It’s at the heart of our efforts to create peace and sustainable development worldwide” (UNESCOdoc, 2012). In other points of the aforementioned report, it is pointed out that State Parties should create the conditions where legal experts, NGOs, experts of other fields such as sustainable development or anthropology and communities can work together in order to set plans in the development of policy, legislation, safeguarding plans and sustainable development plans. The Law’s role is to tackle social and political process as globalisation or commodification remains fundamental.

To better understand the issue about this matter, it is very much useful to refer to the example of one of the most controversial cases in ICH history, which was the inscription of the Mediterranean Diet in the Representative list in 2010. It was jointly proposed by Italy, Morocco, Spain and Greece, but in 2009 the first candidacy was rejected because it was more focused on food and in recipes composing the diet, rather than any social practice behind the diet itself. The following year, in 2010 the new candidacy was centered on communities. They presented as example for every country a specific local community, as Soria in Spain or Cilento in Italy, demonstrating the link between those communities and the practice of eating. The candidacy was accepted and in the last years Croatia, Cyprus joined in the group. The main criticism on the first attempt was that the spirit beyond that candidacy was to be part of the list as matter of prestige and use the UNESCO's symbol for appealing for tourism. However, even if the Mediterranean diet is now inscribed in the list, critical comments can still be raised. This candidacy can also be used as an example of a top-down approach that UNESCO tries to avoid with the 2003 convention.

Avoiding instrumentalisation of the convention for communization proposes remains one of the main concerns of the Intergovernmental Committee. This is verifiable in the operative directives, in the section dedicated at the commercial activities related to intangible cultural heritage the point n. 120 says:

*“When publicizing and disseminating information on the elements inscribed on the Lists, care should be given to presenting the elements in their context and to focusing on their value and meaning for the communities concerned, rather than only on their aesthetic appeal or entertainment value.”*

Nonetheless, it is evident that ICH, in most of its manifestations, conceals in its nature an economic value of sorts. Quoting the work of the anthropologist Maguet: “it is remarkable that 85% of the representative elements which are presents on the UNESCO site concern activities which imply the existence of a ‘public’: marionettes spectacles, theatres, musicals, carnival, festivals, and more generally all the artistic practices which are linked to musical and para-musical forms.[...] The fact is evident for the participates of a carnival, event which has to be described following a gradation of commitment who's degree can vary during the course of the party and not in terms of an opposition between actors and spectators, but it also has to be

stressed for the types of spectacles, which clearly be picked specialised practitioners” (Maguet, 2011)

About the relationship between economic interest and management of ICH, the Internal Oversight Service continue as follow at its 59th point:

*“59. Many stakeholders also highlighted the potential of ICH to attract cultural tourism and the economic benefits it could bring to communities and to the economy,*

*ultimately contributing to poverty reduction. In this context, the potential dangers of tourism for ICH were pointed out, including the fact that ICH domains such as performing arts, rituals, festive events and others, once conducted for the purposes of tourism only, might be "frozen" in time or distorted, separated from people's identity and emotions, and might therefore lose their intrinsic meaning and the importance the ICH once held for concerned communities and people. In fact, these kinds of performances would not even qualify as ICH in the spirit of the Convention. Overall, however, most stakeholders consulted are optimistic that the benefits of tourism, if sustainable and well managed, would outweigh the risks involved.”*

It must be reminded, as many anthropologist pointed out, that in none of the 90 first proclamations includes collective excesses, which can lead to physical violence, or even alcohol consumption or use of psychotropic drugs. The festivals on the list, where the subject matter more or less progressive domestication, work by aiming to make the spectacle acceptable.

So a possible mistake that communities might make is to develop a “socially acceptable” formula of their festivals so a larger number of public can take part or assist. In other words, they are giving a version of cultural traditions that is sufficiently euphemistic to be acceptable for a public of tourist, who in return will be educated in the sense of a reasonable and responsible consumption.

In case of festive rituals, there must be a clear distinction between the public (or tourists) and the concept of “host”. As a matter of fact “a host is not a public. He/she is welcomed and protected, but for this he has to renounce his autonomy. For example he/she won’t have access to certain space and will only be able to partly participate in collective activities. Unless he/she is adopted or initiated he/she stays a stranger.” (Maguet, 2011)

Looking at the study cases, this is partly confirmed, but it is in their ritualised way to finance the festivals that distortions have been avoided. In Gigli's festival, the local network of people from Nola composing the '*questua*' are independent from the financial point of view from the festival itself. However in the last thirty years the municipality, together with local cultural associations or event planners, extended the event taking place in Nola for the entire month of June, calling it in fact *Giugno Nolano* (Nola's June). The events during this period range from jazz concert to outdoor theatre. During the Sunday of the traditional Gigli's procession, no other events are planned or authorised in any other part of the city.

Before being inscribed in the list, in order to "Internationalise" the festival, the city of Nola exported the festival in other places outside the context of the procession. In 2004 a Giglio was built and carried in during la fiesta *Castrelles de Vilafranca in Spain*, and in 2006 a Giglio was exposed in Palmi Calabrese in Italy during their shoulder-burned festival, as symbol of fraternity (Ballacchino, 2015). Even if they seemed initiatives that are in line with the spirit con cultural exchange that the convention endeavours, they have been halted by the community because they were considered as a misappropriation and decontextualisation of the festival. However, since 2013 in the official poster of *Gigli's festival* and *Giugno Nolano* instead of the ICH emblem it is possible to find the logo of UNESCO, and throughout the circuit of the parade, flags with UNESCO's logo are shown on people's balcony.

On one hand this misuse of the symbol can be interpreted as the attempt to use the prestige of "being part of UNESCO" as driving force for tourism, considering that Nola's area is one of the poorest region in Italy. Nonetheless, often the UNESCO's rhetoric is used by people of Nola as something to be proud of. A rhetoric that people of Nola use sometimes "against" people of other city as Brusciano or Crispano, because Nola's festival is "UNESCO's granted" and theirs are not.

As Ballacchino pointed out "The illusion created by many parties to make Nola's so-far-danced part of humanity's heritage has often become, as we have seen, a double eyebrow that perhaps anthropologists are required to monitor with their skills and tools." (ballacchino, 2015).

In the Yamaboko Matsuri in Japan, the selling of Chimaki during the Gion festival and the organisation of the *yamayoi*, the events before the float parade, are the main funding resources of the festival. In 2014, since the increase of the number of visitors of the festival the Gion festival

association reestablished after 50 years the *ato-matsuri junko* ( after festival parade), a smaller parade, with only 10 out of the 32 *yamaboko* pulled. Another parade means three more days of *yamayo* that are probably more enjoyable for visitors than the parade itself. This relaunched event attract more tourist, so more income for the festival, which means the community involved beyond any *yamaboko* can afford the expansion of maintaining the ornaments and decoration, despite that the related local industries are in recession (ACCU, 2008).

## Convergence between tangible and intangible heritage on authenticity in values

The use of term “Authenticity” was debated at length during the drafting phase of the 2003 convention. In the end, experts, decided not to use ‘authenticity’ as one of the criteria defining Intangible Cultural Heritage. The main concerns were that the use of this concept would lead to the idea of a static and “frozen” heritage.

Nonetheless, authenticity remains one of the fundamental criteria for world heritage since the Venezia Charter of 1964. Design, material, workmanship and setting are the four fundamental parameters for authenticity. Over the years, this approach has been criticised for being too Western-oriented, leading to the 1994 Nara document, only annexed in 2005 to the World Heritage convention, to put special emphasis on cultural diversity as an irreplaceable source of spiritual and intellectual richness and to recognise the strong link between cultural heritage and the cultural contexts to which it belongs and needs to be judged.

Ten years later a meeting held in Japan produced the Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage (2004), during which the experts, “considering that intangible cultural heritage is constantly recreated”, asserted that “the term ‘authenticity’ as applied to tangible cultural heritage is not relevant when identifying and safeguarding intangible cultural heritage” (Bortolotto, 2013).

The Nara International Conference, which was attended by 42 experts in safeguarding the theme of the tangible and intangible heritage from 23 countries around the world, along with many observers with various skills, was organized to celebrate the tenth anniversary of the Nara Document on authenticity (1994)<sup>114</sup>, Together with the fortieth anniversary of *Paper Venice for the restoration and preservation of monuments and sites* of 1964.

The meeting was held in the context of the imminent entry into force of the *International Convention for the Safeguarding of the Intangible Cultural Heritage* of 2003. At the same time there was an ongoing series of discussions to identify opportunities for collaboration between the Convention of 2003 and the UNESCO Convention on World Cultural and Natural Heritage of 1972. The Nara Conference was, in fact, even the ambitious goal of expanding the scope of these discussions fostering understanding and cooperation between experts of the two categories of

assets. Throughout the meeting they highlighted a series of cross perceptions on the "borderline" between the tangible and intangible heritage that made clear the need to continue on this path, as evidenced by Kristal Buckley, president of ICOMOS Australia (Buckley, 2004).

What has been highlighted in the Yamato Declaration is the importance of preserving the world's heritage and intangible heritage, taking into account their interdependence, but also their distinctive characters. The Conference received great resonance for having brought together leading experts in historical preservation and invited them to share an inclusive and contemporary vision on cultural heritage and diversity, and to discuss possible integrated approach to safeguard it.

With "possible integrated approaches" it is meant, in particular, to always take into account the peculiarities of the specific cultural context of the communities involved and interested to places and reference cultural expressions. This approach is critical to the implementation of the intangible heritage conservation: protecting the circumstances to enable communities to constantly recreate their cultural expressions is crucial (Buckley 2004).

Nonetheless communities bearers of their heritage practice are free to decide how to regulate their practices and whether to keep or change whatever they believe - this can take place even though the Yamato declaration is still not annexed to the 2003 convention.

Looking at the case study described in the previous Chapter, the proof of this convergence between the two conventions through the concept of authenticity can be found, in particular, looking at the use of materials and setting.

In the description of Gigli's festival it is necessary to mention the strong link between the historical centre of Nola, its pavement and the festival. The image of the city has changed due to the festival and how the wooden machines changed themselves.

According to a shifting shape of urban city center. For instance, in time it has been reported when the pavement of the city center had to be changed, however only the ancient *basolato* (a special



volcanic rock) could withstand the enormous weight of the machines, hence the paving remains similar to the one of the past.

In the book, *L'UNESCO et la tutelle du patrimoine immatériel. Les Fêtes Traditionnelles – Les Gigli de Nola*, the anthropologist Lello Mazzacane tries to describe the correlation between the festival, the wooden machineries and the urban structure:

*“It is surprising even how the space has been used during the festival. In this regard only some brief explanations. The historical city center of the city of Nola it is been used, literally in every sense. The structure of the Giglio itself has been made in a way that the structure cross vertically the alley: during the festival even the city lighting between the house has been removed, to avoid damage. The people from Nola who watch the festival from the balconies, the windows and the loggie have a unique perspective of the festivity, but at the same time they are themselves, unconsciously, part of the scenic design of the celebration. This “reciprocal” use of the space and the people enhanced the whole scene: it is not only the wooden machines and the alley the main focus, but the people watching from above as well. At the Duomo square everything became solemn: the scenography is impressive, the crowd gathered is composed by thousands of people and to create an empty corridor between the capo-paranza and the Giglio is regarded as one of the most difficult skill, especially when the corridor is long and the crowd start to pressure on the sides, and when that happens it is an achievement to be proud of. (Mazzacane, 1999: 89-90).*

This description is confirmed by Ballacchino’s ethnography, where she explains that for people of Nola, a Giglio can only be carried ‘ngopp ‘e Serici (in English: on the *basolato*, a special lavic stone ) (Ballacchino, 2015).

In the following paragraph, we are going to address the issue of the gong beaters in the Yamaboko festival. Fukami Shigeru, former director general of the Gion Matsuri Yamaboko Rengo-kai, addressing the issue of the kane-suri (gong beater), the instrument used to beat the gong.

In the past, the handle was made out whale’s plates and deer’s horns. After Japan ratified the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1975, it was virtually impossible to buy raw materials. So the festival has adopted plastic, kane-suri since the seventies.

In 2000 the Yamaboko Matsuri federation obtained a grant from the Agency for Cultural Affairs. With the unexpected stock of raw materials whaling before 1975, so perfectly legal, 360 new kane-suri have been made and 30 of them distributed to the 12 Yamas. This decision was strongly recommended by the Agency for Cultural Affairs in the name of use “authentic” material. However, several problems occurred. Firstly, all the handle broke due to the fact that the traditional techniques used to craft them had been lost and the musicians are too used to use plastic beater. Secondly, the price to buy new whale-made kane-suri to substitute the broken one is unsustainable. Lastly, it is impossible to obtain whale materials indefinitely and on a sustained basis. (ACCU, 2008).

Quoting Fukami’s words in the ACCU seminar: “For these and related reasons, plans for using only baleen kane-suri for the Gion Matsuri have been shelved for the time being. In sum, the task of trying to use whale baleen for traditional kane-suri is, from the noble perspective of preserving and passing on intangible cultural property, without doubt a legitimate one, but the issue of how to strike a smooth and sustainable balance with the use of plastic kane-suri, which has become the norm, cannot be solved with ideas that look sound only on paper.” (ACCU 2008).

As Bortolotto pointed out, often in the nominations are mentioned the word “authentic” or “authenticity”. The use is not related to the context of the practice in question, but in comparison with how this ICH “was” and how it “is” now. This approach is more related to “traditional” (Bortolotto 2013) Moreover, authenticity in the narrative of tradition could also be confuse with the “invention of tradition”.

In conclusion, several scholars, Dawson Munjeri in particular, pointed out that authenticity, despite not being the criteria of 2003 Convention, remains the link between the two conventions on tangible and intangible heritage. The distinction between the two types of heritage may be seen as artificial, In other words, authenticity can be surely defined with the schematic criteria of Venice Charter or the holistic approach of Nara and Yamato but it has to be find in the values and norms that communities and society can find in their tangible manifestation or intangible incarnations. (Munjeri 2004)

## CONCLUSIONS

In the last decades, the world has witnessed never-before-seen changes and developments.

Starting from the end of the Second World War, we have moved from a bipolar world, where socialism and capitalism were competing on a military and ideological level, to a multipolar world.

With decolonization, new States became part of the international community, bringing with them new perspectives and needs, often in conflict with what it is considered the “Western” approach to global issues.

The speed with which goods and services can move from one country to another made state’s economies interdependent. Mass migration, within the borders of nation states and on the international level, made possible for millions of people throughout the world to improve their living conditions. Technology has shortened the distances between people from any latitude.

If transcontinental instant commutation was a privilege for a small elite until a few decades ago, social media networks are now able to connect billions of people instantaneity troughs the Internet. These changes have occurred in less than seventy years and together they define what we call globalization.

Although this phenomenon can be seen as an opportunity and a threat at the same time and be interpreted in different ways, it is a matter of fact that globalization leads us to a homogenous global culture in which local cultures and the cultural identity of individuals are at risk of disappearing.

It is the opinion of many scholars that the Western world cannot provide a suitable response to cultural globalization. On the contrary, Western countries are often considered the responsible for the disappearance of cultural diversity. Critics, especially coming from developing the country or former colonies, perceive globalization as synonymous to Americanization and Westernization, arguing that cultural globalization will result in cultural dominance and supremacy. Accordingly, this whole dispute has deeply changed the approach and priorities on defending cultural heritage at the international level.

From the beginning of UNESCO's activity, the link between the protection of cultural heritage and human rights has influenced the shift from the legal category of "cultural property" to "cultural heritage". Although in the World Heritage convention of 1972 does not explicitly refer to Human Rights, with the idea of protecting heritage in the name of mankind, we can see the first steps towards that direction. It took years of debate between scholars and lawmakers, but now UNESCO is on the forefront of protecting Cultural Identity, and the richness of cultural diversity.

Cultural diversity emerged as a concept in international law following the adoption of the Universal Declaration on Cultural Diversity, approved unanimously - together with Essential Lines of an Action Plan for its implementation - during the 31st session of the UNESCO General Conference held in Paris on 2 November 2001 (UNESCO, 2001a:61).

The UNESCO, with the 2003 Convention on the Safeguarding of Intangible Cultural Heritage, tried to change the settings of cultural heritage protection.

From an elitist, top-down, and state-centric approach, they tried to give an all-encompassing, holistic view of cultural heritage, empowering local communities. This change has been determined by the evolution of international law and the changes in the world's societies but also has broadened the spectrum of guaranteed human rights.

In the first perambulatory clause of the 2003 Convention, there is a reference "to existing international human rights instruments, in particular to 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" (UNESCO, 2003). The empowerment of local communities is also in line with the efforts made by the international community. For instance, in the procedure of inscription of elements on the Lists of the 2003 Convention, one of the criteria for an element to be inscribed in the representative list was that it must have been nominated following the widest possible participation of the community, concerned and with their free, prior and informed consent (FPIC). The concept of FPIC has emerged from other treaties, such as 1992 Convention on Biological Diversity Regulated access to genetic resources and traditional knowledge (Lisinxki, 2012). Another important aspect is that the Convention clearly explains that states are required to recognize the importance of

safeguarding, not the heritage itself. In other words, intangible cultural heritage has to be protected because it is a defining element of cultural identity.

The measure to understand how much and how the obligations of the convention have been maintained must not, therefore, be sought in the number of ICHs on the representative list, nor in the notoriety of the aforesaid ones, but whether States have safeguarded the communities expressing their identity Cultural in the intangible manifestation they define as "heritage", thus also guaranteeing cultural diversity. It is not a case that two years later, in 2005, UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

In the Declaration's text it is remembered how UNESCO, based on its mandate and functions, has the responsibility to "enhance public sector strategic and management capacities in cultural public sector institutions, through professional and international cultural exchanges and sharing of best practices" (UNESCO, 2005:art. 12, par. b). Hence, the protection of human rights through the safeguard of ICH is present and gives to this one the legitimacy to be protected at international level. Furthermore, thanks to UNESCO, ICH has been brought to the debate about the existence and the potentials of this kind of heritage.

State parties, ratifying the convention, play a double role at international and national level.

At the international level, they are at the forefront of bringing a certain ICH to the representative list, and then in intergovernmental collaboration. At the national level, States must collaborate with communities to protect and manage their heritage. Communities, on the other hand, have the duty of helping the State and legislators to improve plans and policies aimed to do so. However, the State, through the top-down aspect of its laws, could crush and distort the values and nature of the community's heritage that is being sought to safeguard.

The risk of de-contextualization and/or commodification is therefore always around the corner. However, the convention legitimizes what is defined as "sustainable development". The challenge for state parties is to make policies where sustainable development is achieved but not turned into a "folklorization" of the intangible heritage.

As we could see in the festive rituals, relationship between the State, the community's local agencies and the community can be difficult, because the Gigli festival and the Yamaboko festival represent the fundamental independence and autonomy of the community behind them. It is also true that some patrimonialization attempts have been stopped or de-recognized by communities and perceived as a symbol of misappropriation by the government. Like the case of the *Giglio* "exported" to other similar festivals, or the re-use of *kane-suri* made with whalebones.

The future of the ICH passes through the awareness of States that national interests and communities' interest cannot always coincide. So the task is to accompany this process without stifling it, in order to adhere to what is the spirit of the 2003 convention.

States are protagonists, along with the experts' work on the inventory and through it, they can trigger the awareness of the importance of a heritage among communities. The work of ethnographers and anthropologists in this matter is therefore fundamental.

Nonetheless, states parties can guarantee the fulfillment of the Convention, especially in the case of festive rituals, respecting and fostering communities' autonomy on how to manage and regulate their heritage.

In conclusion, the UNESCO, with the Convention for the Safeguarding of the Intangible Cultural Heritage, has created the condition for the safeguard of this kind of heritage. It is now in the hand of international organizations, national states, communities, legal experts and scholars, to improve the mechanism of safeguarding in order to pass to future generations the enjoyment of this kind of heritage and the richness of world cultural diversity.

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# ***The Intangible Cultural Heritage: the Safeguarding of Traditional Festive Events in a Globalized World***

## **INTRODUCTION**

The identity of a people or community is of utmost importance to their very existence, representing a record of their culture that transcends generations.

An issue of such global importance requires a diligent and consistent response from the international community, particularly in efforts to safeguard cultural identities for future generations through the transfer of knowledge, skills, and meaning. When someone refers to Cultural Heritage it often means concrete objects such as drawings, mosaics, paintings, monuments, sculptures and buildings. However it means a wider range of objects: it represents all the evidence of human expression and creativity, which means photographs, books, manuscripts, instruments as well. Those could be in the form of single piece or a collection. In the present time even places, such as underwater temples, and environment can be counted as Cultural Heritage. There are communities who link their identity to a specific landscape, which expresses their faith. Furthermore cultural heritage is not only related to physical objects but it also counts abstract elements: traditions, oral history, performing arts, social practices and all the knowledge transmitted from a generation to another inside a community.

Manifestations of communities' identity are collectively referred to as "cultural heritage," which encompasses material expressions of community identity such as statues and monuments and intangible expressions like performances, rituals, and skills. Since intangible cultural heritage (ICH) is expressed through living traditions and practices rather than physical objects, it cannot be preserved or captured through strategies developed for tangible expressions of cultural heritage. Heritage is a property; it is something that is inherited, passed down from previous generations to the current generation and the next following. In the case of 'cultural heritage', it does not consist in money or property, but of culture, traditions values and identity.

Global cultural heritage is always in danger due to wars, confrontations and conflicts. Those acts continuously jeopardize both movable and immovable cultural properties and at the same time drain

the intangible global cultural heritage irreversibly. Destroying an enemy's cultural heritage to establish a stronger one is an old strategy that warmongers know well.

For instance, in the current climate, the destruction of Palmyra by Daesh can be seen as a strategy part of ethnic warfare, so if it is so easy to destroy ancient monuments, it should be presumed that ICH can be dissolved too, due to war but also to globalization and the subsequent cultural flattering.

For this and many other reasons the UNESCO (United Nations Educational, Scientific and Cultural Organization) was founded in 1954. In the later years, it has adopted several international conventions regarding the protection of cultural heritage, as it will be possible to understand in the next chapters. UNESCO made possible increasing intercultural understanding while underlining the value of international collaboration. As a matter of fact, the protection of cultural heritage is a well-known issue. It is often problematic to mediate between individual and community interest, as well as private and public rights.

Understanding the importance of ICH and the tools at hand to enforce its protection becomes fundamental on the national and international level. General Director Koichiro Matsuura in the 146<sup>th</sup> session of UNESCO in 1995, emphasized even more the protection of heritage and the promotion of diversity: "Stress should be laid, in particular, on the close links that exist between the conservation and protection of tangible and intangible cultural heritage, the need to assemble and provide access to information about them, and the need for scientific description and analysis of them" (UNESCO, 1995a, p. 11). The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage enforces the protection of ICH and adds one more layer to the safeguarding of culture as a human right: identity is not just made of monuments but also of traditions.

The methodology followed during the research and writing of this thesis was based on a qualitative model. The data was collected with two things in mind: the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the cases through which it will be analyzed. To reach an understanding of the 2003 Convention, it was necessary to research the decision taken by UNESCO in matters of Cultural Heritage conservation. Once that was done, the 2003 Convention itself presented a series of challenges, which led to formulating the following questions: what are the criteria it uses to define ICH? How do they apply to this thesis? With these in mind, the cases came

into play, requiring not only a thorough study of their peculiarities and the legal framework in which they take place, but also how the aspects of the Convention applied to them. The data allowed for a singular analysis in this field: a bottom-up (the bottom being the practical event or ICH, and the 'up' being the theoretical legal framework of the Convention), comparative and comprehensive inquiry into the most critical aspects of the 2003 Convention.

The thesis will examine fundamental international, national and local policies on safeguarding intangible cultural heritage, with a particular focus on festive rituals. The First chapter is focused on legal framework, and how the work of legal experts, state agencies, and international organizations, UNESCO *in primis*, has strived to enforce the international legal framework on legal protection of cultural heritage and intangible cultural heritage in particular.

The following chapter Two aims at presenting the two case studies: the *Gigli's* festival of Nola (Italy) and the Yamaboko floating parade inside the Gion matsuri of Kyoto (Japan). Those festive rituals are inscribed in the representative list of Intangible Cultural Heritage. In this chapter it will be possible to understand how the festivals work and also how the legal systems in Italy and Japan aid their safeguarding. Since the understanding of the 2003 Convention will be done through the lenses of these case studies, it is necessary to study them in depth through this brief but dense chapter.

In the last chapter, chapter Three, the thesis will focus on the main challenge and problems of safeguarding intangible cultural heritage. More specifically the thesis will stress arguments such as the complex relationship between Intangible cultural heritage and human rights, the relationship between communities and state parties to applicable treaties and the risk of de-contextualization or commodification of intangible cultural heritage.

Finally, a brief conclusion will address the research at hand, its findings and ongoing challenges and topics for further consideration.

***The Legal history of cultural heritage convention and its safeguard***

It is complicated to give a definition of Cultural Heritage, because it has different meanings regarding to a specific context. Cultural Heritage has a specific place and time and its history is tied with them. It links together the past, the present and the future.

The first attempts to protect Cultural Heritage were in the 16<sup>th</sup> and 17<sup>th</sup> centuries, when works of art gained a specific legal status and they were not counted as “ordinary objects”. Furthermore, a legal distinction to separate private property and “enemy state” property was developed for the first time.

The United Nation for Education Science Culture Organization was established on November 16<sup>th</sup> 1945 in London, by initiative of the British Ministry of Education, and the representatives of 37 countries who signed the Constitutive Act. The focus in the early years of this organization was the defense of cultural properties during war and conflict.

Nonetheless, in its name we can clearly see how natural was for UNESCO to widen its share of competences on other matters such as illiteracy, freedom of scientific research, protection of heritage.

In the first years of UNESCO investigation to protect and safeguard intangible Cultural Heritage a theoretical dilemma occurred. This problem survives even today and it is whether to safeguard folklore inside or outside copyright law.

The origins and scope of the concept of "cultural heritage" are found in the first international legal instruments meant to protect cultural property in armed conflicts (in particular the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, the Hague, 14 May 1954), where the definition of "cultural property" was used (Blake, 2000:61-85). Over time, the need of substituting the term "property" arose, in order to give priority to other social objectives that had to be guaranteed.

UNESCO's 1952 *Universal Copyright Convention* answered affirmatively to the dilemma. From this convention onward copyright and folklore are tightly tied together. The *Berne Convention, the International Union for the Protection of Literary and Artistic Works*, established standards of protection of the copyright, which each nation acknowledged to recognize in its national legislation. The laws injected into the national legislation would be the same for every signatory country. The aim of the Conventions was to circumscribe the international exploitation of intangible and tangible works

of art by creating laws that would give the possibility to judges to condemn people who infringed the copyright.

The Convention concerning the Protection of World Cultural and Natural Heritage was adopted at the 17th UNESCO General Conference Session in November 1972 and entered into force in December 1975, three months after the deposit of the twentieth instrument of ratification, acceptance or accession, as stated by art. 33.

International law on the cultural and natural heritage protection was being developed when the Convention was adopted and the concept of "heritage" - understood as a heritage transmitted from the experience and human knowledge - had yet to be clearly identified. Moreover, the jurisprudence dedicated to the sector was considered a prerogative internal to each individual state. Since 1972 the collective and public character of cultural heritage and the representative of the aggregate value of creative expression (recognized by the community as part of their tradition and cultural identity) had begun to be emphasized. These innovations were then merged in all the subsequent binding agreements, as well as in programs and in international

The 1972 Convention is characterized by two important innovative aspects: on the one hand it contains the first recognition in legal history of the strong relationship between culture and nature, having established a common system for the conservation and protection of both the most significant man-made monuments and the most wonders of the natural world; the other significant innovation is the adoption of the concept of "world heritage" to designate sites, monuments and goods which, for their exceptional value, are of primary importance to humanity as a whole and have, as a result, requirements to be placed under a special system of international protection represented by the inclusion in the World Heritage List (Francioni and Lenzerini, 2008:4-5).

During the 25<sup>th</sup> session the General Conference approved the *Recommendation on the Safeguarding of Traditional Culture and Folklore*. The recommendation protects the cultural heritage of the countries, especially from the danger of being abused or even manipulated by our own people and by foreigners for commercial purposes.



However the Folklore dilemma was not settled and the division between the overall question of folklore and its intellectual property aspect was a major point of conflict. Each representatives had different opinions regarding the question. For that reason the contents of the recommendation includes both of the perspective, trying to satisfying each representative.

### ***Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 17 October 2003)***

The Convention for the Safeguarding of the Intangible Cultural Heritage was adopted on 17 October 2003 with 120 votes in favor, 8 abstentions and no votes against, and entered into force on 20 April 2006, three months after the deposit, the thirtieth instrument of acceptance by Romania. The States Parties, according to the list updated to 10 May 2017, are 172.

After a long introduction that saw, in the course of over thirty years, a progressive and significant conceptual development aimed at providing formal recognition to intangible heritage (Blake, 2001), the new Convention was added to that of 1972 on the world cultural and natural heritage, with which "an item of the intangible cultural heritage is directly associated" (UNESCO, 2003:art. 3, para 1).

One of the most significant innovations in policies and international laws about the protection and enhancement of cultural heritage is undoubtedly the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), adopted October 17, 2003 in Paris at the UNESCO headquarters and came into force on 20 April 2006, which represented the outcome of a lengthy review and renewal process in this area of interest.

Another aspect highlighted in the Preamble is the important role played by the "*indigenous communities, groups and, in some cases, individuals*" for the preservation of intangible heritage and their essential contribution to "*enrich cultural diversity and human creativity*" (2003:Preamble, par 7). For the first time, in a legal instrument, the importance of communities in the preservation of cultural heritage is recognized. The topic was widely discussed during the various meetings of experts and the Intergovernmental Committee in the previous years (Blake, 2006:27). In the Convention text "*community, groups and in some cases individuals*" are identified as custodians of intangible cultural

heritage: those who shall recreate and transmit it from generation to generation (UNESCO, 2003:Art.2, par.1).

Turning our attention to the significant international debate that, over the past few decades, led to the development and drafting of the 2003 Convention, through a fervent discussion between different cultures, one can easily understand the main reasons that led to a profound redefinition of the meaning and the nature of cultural heritage and recognition of intangible heritage.

## ***Chapter 2: An introduction of the two case study and their regional and national legal framework***

In this Chapter it will be possible to find the description of two festive rituals, both inscribed in the UNESCO list of Intangible Cultural Heritage. They are the Gigli's festival of Nola (Italy) and the Yamahoko, the float ceremony of the Kyoto Gion festival.

Although the two cases are coming from a very different cultural background, there are several similarities between those two festivals. They are both celebrated in the summer; they both have a parade during which wooden structures are carried throughout a specific part of the city. And, in both cases, the music and the craftsmanship play a vital role in for the success of each year edition.

The chapter continues with a brief description of the European, Italian and Japanese legal framework on safeguarding cultural heritage.

## ***Chapter 3: Analyzing the 2003 Convention through the lenses of two case study***

### ***The relationship between Intangible Cultural Heritage and International Human Rights***

It is clear that through the safeguard and the protection of cultural heritage in general, international law tries to protect cultural identity. The use of the term 'safeguarding' in the Convention is meant to embody human rights concerns as a whole. Hence, it is matter of fact that there is a strong link between ICH and human rights protection (Lixindski: 2011,147).

The relationship between human rights and intangible cultural heritage has come under scrutiny for another important reason: at times human rights can become a limit to the protection of intangible heritage; as a matter of fact human rights are limited in their actions when manifestations of ICH go against the same human rights. The 2003 UNESCO Convention clearly stated that manifestations of ICH must conform and be compatible with human rights. The idea that cultural rights and distinctive cultural heritage should be protected as long as they don't violate human rights is called 'invisible asterisk'. For instance, some could argue that FGM (Female Genital Mutilation) is a cultural practice of certain communities, but in completely violating human rights it is not protected as cultural heritage and, actually, heavily condemned. It must be noted that this 'positive' approach to the 'asterisk' may not be positive at all at times. As a matter of fact, communities may feel pressured to erase their cultural heritage in order to gain recognition, etc., without a debate or a dialogue on its cultural habits and their clashes with human rights.

Nonetheless, the international community cannot disregard human rights in favor of cultural expressions violating them. For this reason ICH must conform to a some basic legal rules echoing the fundamental values of the UN - especially the *jus cogens* norms on human rights.

With the convention of 2003 the indissoluble relationship between cultural heritage, cultural diversity and cultural rights has been strengthened. State obligations concerning the safeguarding of the heritage can now be seen from the perspective of international human rights law.

If a ICH is perceived as an essential element of cultural identity, its safeguard, viability and continuity, and rights of access to and enjoyment of its creators and bearers represents an essential condition for the realization of human rights,

the obligation to protect the latter inherently extends to ICH safeguarding, for the reason that, if this heritage is not properly safeguarded, the human rights the realization of which depends on ICH would lack effectiveness.

Using Lenzerini world's "ICH often represents an element the preservation of which is indispensable for the enjoyment of certain human rights" (Lenzerini, 2011)

### ***The relationship between the State and communities***

The third and fourth sections of the 2003 Convention, as we already saw previously, are dedicated to the safeguard of the intangible heritage at national and international level. The articles concerning the safeguard of ICH at the international level are article 16, 17 and 18. The first is about the Representative List of the Intangible Cultural Heritage of Humanity. The Committee, upon the proposal of the States Parties concerned, shall establish a representative list *“in order to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity”* (UNESCO; 2003). Articles 17 and 18 relate to the List of Intangible Cultural Heritage in Need of Urgent Safeguarding and the programs or activities that the committee shall promote at regional, sub-regional or national level.

These three articles are the core around which all the other mechanisms and institutions of the convention revolve. The opportunity of using a system based on these lists has been the focus of heated discussions during the planning and preparation of the international instrument. Part of the States expressed their opposition, fearing that they had to establish a hierarchy as part of the intangible heritage, something that would have led to protect only the elements included in the lists at the expense of those excluded. Another supposed risk was that the inclusion of some assets on the lists would have caused their own fossilization (Blake, 2006:78-79)

As Kurin wrote a few months after the 2003 convention had been drawn up, working with communities is sociologically and legally challenging as they often represent themselves in an informal asset. It is also common finding a difference between public officials and political institution and experts on one side, and practitioners of the tradition on the other side (Kurin; 2004).

The registration process in the lists or in the registry of the projects requires the submission, by the proposing State (or States), of a nomination dossier to certify that the candidate asset meets all the required criteria. It's the Committee's duty to consider the applications submitted by Parties and approve their registration requests (UNESCO, 2003:art. 7 letter. G). The selection criteria and the procedures for registering in the lists were written by the Committee and reviewed by the General Assembly.

Among the defined criteria for the inclusion of the elements of intangible cultural heritage, both in the Representative List and in the heritage list of the ones that needed urgent safeguarding, it's worth

mentioning the application to provide evidence that: "*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*". The Committee wanted to further emphasize the need of involving the stakeholders from the moment the safeguard process starts.

On the other hand, the articles concerning what State Parties shall endeavor at national level, according to articles from 11 to 14 are related to the setting of regularly updated inventories, to the adoption of programs aimed at safeguarding intangible heritage and to raise awareness about the importance of the ICH. Article 15 is totally focused on the participation and mutual collaboration of Communities groups and individuals. It states:

*"Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management."*

It is clear from all the aforementioned articles, in particular from article 15, that the Convention strives to create an equal ground for State Parties and ICH bearers, although the it is clear that this Convention addresses national states. Despite all the remarks that the convention and the operational directives give to State Parties, community involvement, engagement and ownership, together with the possible relationship between national state and communities and the role played by communities in the implementation of the Convention was one of the most discussed topic. It is a matter of fact that the legal framework, either at national and international level generally privileges state agencies and experts opinion over the relevant communities' concerns (Smith, 2000). This shift was stressed during the negotiations by the Bulgarian delegation, pointing out that it is the community who creates the ICH, not the state-party to the Convention. Hence, communities must have a crucial role in the safeguarding. Norway, on the other hand, remarked the lack of expertise from communities to effectively contribute at the international level, but acknowledging them a primary role at local and national level (UNESCO; 2002). The Norwegian approach could be defined as State-centric, and it was the prevalent one in the early years. The committee, with its work, has moved to a more community-oriented stance since the first steps of the Operational Directives.

Identifying a group of people and label them as community and manage as “heritage” has also political implications. (Deacon & Smeets, 2013). This may create conflicts between and within the community and local and national government.

The relationship between state and communities lives a duality between the will of state to rule through the law and the resistance of local communities of being ruled, generating conflicts.

### ***The tension between safeguarding and the danger of decontextualisation and commodification***

While the relationship between state party and communities can be not easy to start due to many differences, it is even more challenging for the state to apply what are the norms endeavored by the convention without decontextualizing the ICH, or upsetting the balance inside the community whose members are trying to collaborate one with another.

In the UNESCO Internal Oversight Service of 2013 it is reported a wide sphere of comments about how the convention is applied by state parts and what are the main challenge on the matter.

In point 123 it says.

*“Another constraining factor is the lack of knowledge about ICH and culture in general by many legal experts in charge of drafting and amending existing legislation. The consequence of this is that even when sustainable development related policies and laws make reference to ICH, it is not always done in the spirit of the 2003 Convention.”*

This approach may be coming from by the legacy of the Masterpieces programme. Although the programme was a precursor of 2003 convention, the approach deeply changed from a model similar in many aspects to the World Heritage Convention to a model that could foster cultural diversity and guarantee cultural identities. (Blake, 2006).

The current director general Irina Bukova once declared, “UNESCO World Heritage isn’t a beauty contest. It’s at the heart of our efforts to create peace and sustainable development worldwide” (UNESCOdoc, 2012). In other points of the aforementioned report, it is pointed out that State Parties should create the conditions where legal experts, NGOs, experts of other fields such as sustainable

development or anthropology and communities can work together in order to set plans in the development of policy, legislation, safeguarding plans and sustainable development plans. The Law's role is to tackle social and political process as globalisation or commodification remains fundamental.

Avoiding instrumentalisation of the convention for communization proposes remains one of the main concerns of the Intergovernmental Committee.

Nonetheless, it is evident that ICH, in most of its manifestations, conceals in its nature an economic value of sorts. Quoting the work of the anthropologist Maguet: "it is remarkable that 85% of the representative elements which are presents on the UNESCO site concern activities which imply the existence of a 'public'

It must be reminded, as many anthropologists pointed out, that in none of the 90 first proclamations includes collective excesses, which can lead to physical violence, or even alcohol consumption or use of psychotropic drugs. The festivals on the list, where the subject matter more or less progressive domestication, work by aiming to make the spectacle acceptable.

So a possible mistake that communities might make is to develop a "socially acceptable" formula of their festivals so a larger number of public can take part or assist. In other words, they are giving a version of cultural traditions that is sufficiently euphemistic to be acceptable for a public of tourist, who in return will be educated in the sense of a reasonable and responsible consumption.

In case of festive rituals, there must be a clear distinction between the public (or tourists) and the concept of "host". As a matter of fact "a host is not a public. He/she is welcomed and protected, but for this he has to renounce his autonomy. For example he/she won't have access to certain space and will only be able to partly participate in collective activities. Unless he/she is adopted or initiated he/she stays a stranger." (Maguet, 2011)

### ***Convergence between tangible and intangible heritage on authenticity in values***

The use of term "Authenticity" was debated at length during the drafting phase of the 2003 convention. In the end, experts, decided not to use 'authenticity' as one of the criteria defining Intangible Cultural Heritage. The main concerns were that the use of this concept would lead to the idea of a static and "frozen" heritage.

What has been highlighted in the Yamato Declaration is the importance of preserving the world's heritage and intangible heritage, taking into account their interdependence, but also their distinctive characters. The Conference received great resonance for having brought together leading experts in historical preservation and invited them to share an inclusive and contemporary vision on cultural heritage and diversity, and to discuss possible integrated approach to safeguard it.

With "possible integrated approaches" it is meant, in particular, to always take into account the peculiarities of the specific cultural context of the communities involved and interested to places and reference cultural expressions. This approach is critical to the implementation of the intangible heritage conservation: protecting the circumstances to enable communities to constantly recreate their cultural expressions is crucial (Buckley 2004).

Nonetheless communities bearers of their heritage practice are free to decide how to regulate their practices and whether to keep or change whatever they believe - this can take place even though the Yamato declaration is still not annexed to the 2003 convention.

As Bortolotto pointed out, often in the nominations are mentioned the word "authentic" or "authenticity". The use is not related to the context of the practice in question, but in comparison with how this ICH "was" and how it "is" now. This approach is more related to "traditional" (Bortolotto 2013) Moreover, authenticity in the narrative of tradition could also be confuse with the "invention of tradition".

In conclusion, several scholars, Dawson Munjeri in particular, pointed out that authenticity, despite not being the criteria of 2003 Convention, remains the link between the two conventions on tangible and intangible heritage. The distinction between the two types of heritage may be seen as artificial, In other worlds, authenticity can be surely defined with the schematic criteria of Venice Charter or the holistic approach of Nara and Yamato but it has to be find in the values and norms that communities and society can find in their tangible manifestation or intangible incarnations. (Munjeri 2004)

## **CONCLUSIONS**

From Second World War to globalization, the world has witnessed never-before-seen changes and developments in the last decades.



Although this phenomenon can be seen as an opportunity and a threat at the same time and be interpreted in different ways, it is a matter of fact that globalization leads us to a homogenous global culture in which local cultures and the cultural identity of individuals are at risk of disappearing.

It is the opinion of many scholars that the Western world cannot provide a suitable response to cultural globalization. On the contrary, Western countries are often considered the responsible for the disappearance of cultural diversity. Critics, especially coming from developing the country or former colonies, perceive globalization as synonymous to Americanization and Westernization, arguing that cultural globalization will result in cultural dominance and supremacy. Accordingly, this whole dispute has deeply changed the approach and priorities on defending cultural heritage at the international level.

From the beginning of UNESCO's activity, the link between the protection of cultural heritage and human rights has influenced the shift from the legal category of "cultural property" to "cultural heritage". Although in the World Heritage convention of 1972 does not explicitly refers to Human Rights, with the idea of protecting heritage in the name of mankind, we can see the first steps towards that direction. It took years of debate between scholars and lawmakers, but now UNESCO is on the forefront of protecting Cultural Identity, and the richness of cultural diversity.

Cultural diversity emerged as a concept in international law following the adoption of the Universal Declaration on Cultural Diversity, approved unanimously - together with Essential Lines of an Action Plan for its implementation - during the 31st session of the UNESCO General Conference held in Paris on 2 November 2001 (UNESCO, 2001a:61).

The UNESCO, with the 2003 Convention on the Safeguarding of Intangible Cultural Heritage, tried to change the settings of cultural heritage protection.

From an elitist, top-down, and state-centric approach, they tried to give an all-encompassing, holistic view of cultural heritage, empowering local communities. This change has been determined by the evolution of international law and the changes in the world's societies but also has broadened the spectrum of guaranteed human rights.

In the first perambulatory clause of the 2003 Convention, there is a reference “to existing international human rights instruments, in particular to 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” (UNESCO, 2003). The empowerment of local communities is also in line with the efforts made by the international community. For instance, in the procedure of inscription of elements on the Lists of the 2003 Convention, one of the criteria for an element to be inscribed in the representative list was that it must have been nominated following the widest possible participation of the community, concerned and with their free, prior and informed consent (FPIC). The concept of FPIC has emerged from other treaties, such as 1992 Convention on Biological Diversity Regulated access to genetic resources and traditional knowledge (Lisinxki, 2012). Another important aspect is that the Convention clearly explains that states are required to recognize the importance of safeguarding, not the heritage itself. In other words, intangible cultural heritage has to be protected because it is a defining element of cultural identity.

The measure to understand how much and how the obligations of the convention have been maintained must not, therefore, be sought in the number of ICHs on the representative list, nor in the notoriety of the aforesaid ones, but whether States have safeguarded the communities expressing their identity Cultural in the intangible manifestation they define as "heritage", thus also guaranteeing cultural diversity. It is not a case that two years later, in 2005, UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

The future of the ICH passes through the awareness of States that national interests and communities’ interest cannot always coincide. So the task is to accompany this process without stifling it, in order to adhere to what is the spirit of the 2003 convention.

States are protagonists, along with the experts’ work on the inventory and through it, they can trigger the awareness of the importance of a heritage among communities. The work of ethnographers and anthropologists in this matter is therefore fundamental.

Nonetheless, states parties can guarantee the fulfillment of the Convention, especially in the case of festive rituals, respecting and fostering communities’ autonomy on how to manage and regulate their heritage.

In conclusion, the UNESCO, with the Convention for the Safeguarding of the Intangible Cultural Heritage, has created the condition for the safeguard of this kind of heritage. It is now in the hand of international organizations, national states, communities, legal experts and scholars, to improve the mechanism of safeguarding in order to pass to future generations the enjoyment of this kind of heritage and the richness of world cultural diversity.