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Safeguarding intangible cultural heritage under the 2003 UNESCO Convention: strengths and pitfalls.

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INDEX

METHODOLOGICAL FRAMEWORK AND INTRODUCTION.....	1
1. HISTORY OF THE UNESCO CONVENTION ON INTANGIBLE CULTURAL HERITAGE.....	6
1.1. UNESCO: a brief history of its genesis.....	6
1.2. The Convention for the protection of World Cultural and Natural Heritage (1972).....	7
<i>1.2.1. Limits and problems of the World Heritage Convention.....</i>	<i>9</i>
1.3. Toward the Intangible Cultural Heritage Convention of 2003..	10
<i>1.3.1. Recommendation on the Safeguarding of Traditional Culture and Folklore (1989).....</i>	<i>11</i>
<i>1.3.2. Living Human Treasure system (1993) and the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity (1998).....</i>	<i>13</i>
<i>1.3.3. Washington Conference (1999).....</i>	<i>15</i>
<i>1.3.4. Turin Meeting (2001).....</i>	<i>15</i>
<i>1.3.5. The Convention Draft.....</i>	<i>16</i>
- <i>First Meeting of the Selection Drafting Group.....</i>	<i>16</i>
- <i>Second Meeting of the Selection Drafting Group.....</i>	<i>17</i>
- <i>The session of the Intergovernmental Meeting of Experts.....</i>	<i>18</i>
1.4. The Convention on the Safeguarding of the Intangible Cultural Heritage (2003).....	18
2. THE STRUCTURE OF THE CONVENTION.....	21
2.1. The aim of the Convention and the definition of Intangible Cultural Heritage.....	22
<i>2.1.1. Main aims and objectives.....</i>	<i>22</i>
<i>2.1.2. Article 1: purposes of the Convention.....</i>	<i>24</i>
<i>2.1.3. Article 2: defining Intangible Cultural Heritage.....</i>	<i>25</i>
2.2. Object of protection.....	26
<i>2.2.1. Oral tradition and expressions.....</i>	<i>26</i>
<i>2.2.2. Performing arts.....</i>	<i>27</i>
<i>2.2.3. Social practices, rituals and festive events.....</i>	<i>28</i>
<i>2.2.4. Knowledge and practices concerning nature and the universe.....</i>	<i>29</i>
<i>2.2.5. Traditional craftsmanship.....</i>	<i>29</i>

2.3. Actors involved in the protection of cultural heritage.....	31
2.3.1. <i>The role of States Parties.....</i>	32
- <i>Ensuring the safeguarding of ICH.....</i>	32
- <i>Participation of the communities, groups and individuals.....</i>	33
2.3.2. <i>Actors who creates Intangible Cultural Heritage: communities, groups and individuals.....</i>	34
2.3.3. <i>Relationship and differences between Article 15 and Article 11.....</i>	35
2.3.4. <i>The role of States in multinational heritage.....</i>	36
2.4. The instrument for safeguarding ICH at International level.....	37
2.4.1. <i>Exegesis of Article 16 and 17 and Operation of the Representative List and Urgent Safeguarding List.....</i>	39
- <i>Article 16: Representative List.....</i>	39
- <i>Article 17: Urgent List.....</i>	41
- <i>The procedure for the inscription.....</i>	42
3. UNESCO CONVENTION: STRENGTHS AND PITFALLS.....	44
3.1. The notion of ICH and its relevance for the enforcement of the Convention.....	44
- <i>The overcoming of the Western perspective of cultural heritage... </i>	45
- <i>The artificial dichotomy of tangible/intangible cultural heritage and the recovery of a holistic dimension of cultural heritage.....</i>	47
- <i>The cases of Sand Drawing of Vanuatu and the Amalfi Coast view.....</i>	48
3.2. Object of protection and instruments for safeguarding ICH at International level.....	50
3.2.1. <i>The listing system: the fear of hierarchization of heritage and the risk to distort the nature of ICH registered in the lists.....</i>	50
3.2.2. <i>The risk of fossilization of ICH: the mechanism of listing and the necessity of delisting.....</i>	52
3.2.3. <i>The cultural rights and the enforcement based on an Intellectual Property approach (IP).....</i>	54
- <i>The collaboration of UNESCO and WIPO's work.....</i>	56
- <i>The misappropriation of ICH from the communities concerned... </i>	58
- <i>Indigenous culture and applicability of IP Rights.....</i>	59
3.3. Actors involved in the creation of UNESCO Intangible Cultural Heritage.....	61
3.3.1. <i>The role of communities and State Parties.....</i>	61
3.3.2. <i>The enforcement of the Convention and the problematic relation State/Communities: two case studies.....</i>	64
- <i>The case of Alevi Semah ritual.....</i>	65
- <i>The Karagöz case.....</i>	68

<i>3.3.3. The multinational heritage</i>	71
CONCLUSIONS	74
ANNEX I – CONVENTION FOR THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE	81
REFERENCE	99

ACRONYMS AND ABBREVIATIONS

AKP	Justice and Development Party
CAME	Conference of Allied Ministers for Education
CGIs	Community, Groups and Individuals
ICH	Intangible Cultural Heritage
ICHC	Intangible Cultural Heritage Convention
IP	Intellectual Property
NGO	Non-Governmental Organisation
OD	Operational Directives
RL	Representative List
TCH	Tangible Cultural Heritage
TMCT	Turkish Ministry of Culture and Tourism
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
USL	Urgent Safeguarding List
WHC	World Heritage Convention
WHO	World Health Organisation
WTO	World Trade Organisation
WIPO	World Intellectual Property Organisation

METHODOLOGICAL FRAMEWORK AND INTRODUCTION

This work is concerned with the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage (ICH). Specifically, it analyses the intended role of the 2003 UNESCO Convention in pursuing its aims and objectives (research question).

The main points of the Convention (independent variable) – i.e. the definition of ICH; the role reserved to the States Parties and communities; the characteristics of manifestation and practices eligible for inclusion in the safeguarding Lists provided by the Convention (Representative and Urgent List) – are examined in order to understand whether and why the effective enforcement of 2003 Convention reaches its purpose or it risks to be used surreptitiously.

The juridical framework of the Convention assigns a prominent role to States, while ICH pertains to those cultural communities which created and maintains it. As for the way the Convention is actually implemented (dependent variable) State interests in safeguarding the heritage can coincide with those of the communities to which the ICH belongs. However, State and communities' interests can also differ and be sometimes even antagonistic.

Starting from an overview of the main criticisms towards the 2003 UNESCO Convention raised by the doctrine, this thesis formulates three hypotheses to verify the strengths and pitfalls of this international tool for safeguarding ICH.

These are:

- i. the more the safeguarding process of an ICH is directed by the communities that created it, the higher is the chance for the Convention to achieve its declared aims;
- ii. the less the ICH is tied to the territoriality of a single State, the more it risks to generate conflicts between countries who have some claim concerning that particular ICH – e.g. as part of their own national heritage;
- iii. the more power is assigned to States, the higher the probability that local communities and their cultural (re)production will not be adequately protected.

These hypotheses will be supported by analysis of case studies, specifically the Alevi *Semah* ritual and the shadow theatre called *Karagöz* as they are

particularly relevant for controlling hypotheses ii and iii. The Alevi *Semah* Ritual is a sacred dance which is traditionally performed by Turkey's Alevi. It represents a paradigmatic case of how the voice of communities can be set aside from the ICH candidacy process.

The *Karagöz* case explains how nationalistic approaches to manage ICH constitute one of the major obstacles for the effective safeguarding. From a national(istic) perspective, the Convention can in fact work as a 'patent approval system', so that the safeguarding lists can be used by States to inscribed shared local/transnational traditions as national heritage.

Regarding the structure of this work, the organisation of its contents and the approach adopted, it should be noted that the analysis of the safeguarding of the ICH can be developed across several disciplines. The issue can be approached from a mere juridical perspective (being the Convention an agreement falling into the scope of international law) or from an historical one (through the analysis of the pathway that led to the signing of the Convention and other agreements and working documents on the same subject that preceded or followed it). Yet, it can also be approached from the most diverse fields of social sciences and humanities -e.g. sociology, aesthetic philosophy, anthropology, ethnography, ethology, art, and culture.

Not surprisingly, since 2003 a vast literature has been produced on this subject by scholars of the most diverse fields who have investigated the subject of the international protection and the very notion of ICH and the related or underlying aspects. As such, it is first essential to provide clear definitions of the terms and concepts used in the 2003 Convention and related to the ICH. The very notion of culture, which is central to UNESCO Conventions, is profoundly different in sociological terms based for instance on organicistic or intercultural perspectives¹.

For the purposes of applying the provisions of the Treaty, the 2003 UNESCO Convention limited itself to define only the notion of ICH, at Article 2, paragraph 1; the different sectors in which this heritage is manifested, at Article 2, paragraph 2; and the meaning of safeguard, at Article 2, paragraph 3.

This was a precise strategic choice, because it was difficult to reach the consensus among the intergovernmental experts drafting the 2003 Convention. Furthermore, it was probably also motivated by the fact that being bound by *ad hoc* normative definitions would have limited the possibilities for the interpretation of the Convention. In fact, it is not uncommon in recent practices for the legislator to deliberately chose not to

¹ GOLDONI (2007: 71).

crystallize principles and prescriptions in precise definitional formulas when regulating sectors that present a continuous evolution - such as for example the economic one or the antitrust field.

Therefore, in an area almost completely unexplored at the time, such as the safeguarding of the ICH, it seems reasonable and acceptable that the scope of the 2003 Convention was limited to a definition of the object and purpose of the Convention.

Interestingly, the drafting of the text of the Convention required several and intense rounds of international sessions, meetings of intergovernmental experts, conferences and working groups aiming at compiling a glossary of the terms used in the text of the Convention. As a result, it was decided to exclude the use of certain terms or expressions.

In this respect, the process started with the 1989 UNESCO Recommendation aimed at the “Safeguarding of traditional culture and folklore” and developed till the Consultation with Member States on identification (inventory) and documentation of folklore, held in Italy in 2001, ended it with the final decision to shift the focus of the Convention on the notion of ICH rather than on that of folklore, which had been investigated for a long time.

This term, in fact, was considered inadequate not only for negative lexical sediments of historical and cultural nature (the traditional culture and folklore notions evolved from an earlier system of colonialist thought and domination). A core issue was indeed its static dimension with respect to the concept of living culture, which is linked to the community that generated it, and which the 2003 Convention started to focus on.

On the other hand, proving that renouncing to precise definitions was a specific choice, the ICH Glossary which was finalized by an international meeting of UNESCO experts held in June 2002, was finally omitted. The Glossary, which identified thirty-three terms grouped into five categories (Cultures, Social Practice, Safeguarding, Community, Agency), was not even taken up either for use in the text of the Convention, or as an attachment.

This said, the document – that has been defined as a “work in progress”² – can represent a useful tool with reference to the terms used, but not defined in the Convention and in this work, which is not intended to carry out this type of in-depth analysis.

This dissertation is structured in three main chapters. The first chapter offers a general framework for placing the Convention within the long international debate that preceded its signing. In practice, the chapter constitutes a historical

² VAN ZANTEN (2004: 36).

analysis that allows us to understand how the current international safeguarding system of the World Heritage is ensured by the two Conventions on Tangible Heritage of 1972 and ICH of 2003. Importantly, the distinction that matters the most is not the one between tangible or intangible cultural patrimony. In fact, the key innovations introduced with the 2003 Convention are the living character of cultural heritage and the link made with the communities that (re)produce(d) it. As underlined in Article 2, the heritage is

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 creativity³.

The second chapter legally analyses the main articles that govern the concrete application of the provision to safeguard the ICH. In order to facilitate such assessment, the Articles of the Convention's will not be examined in their sequential order or commented in their entirety but they will be rather grouped into four different categories: 1. Aim of the Convention and definition of ICH; 2. Object of protection; 3. Actors involved in the protection of cultural heritage; 4. Instrument for safeguarding ICH at International level

Based on the same four categories, the third chapter concentrate on the two case studies of the *Semah* ritual and the *Karagöz* shadow theatre to analyse the enforcement of the 2003 Convention by emphasizing its main strengths and pitfalls. In particular, the focus is on the ICH/community relationship which stays at the core of the whole architecture of the Convention. It will also discuss the failures in giving to the communities an effective and mandatory power of initiative – a competence which is instead reserved only to State Parties - as the main limitation to the functioning of an effective protection system. This misalignment is at the origin of the main critical issues relative to the enforcement of the Convention after nearly fifteen years since its introduction.

The method of data collection for this thesis is the qualitative in nature, since this research examines and analyses multiple perspectives to have a better understanding of the work of the 2003 Convention. As for the period of time considered, it has been adopted a pooled analysis process strategy by examining several cases at different points in time.

In practice, this thesis takes into consideration:

- i) official document such as the several Conventions and official act that the UNESCO produced in this field;

³ See *Annex I* (p. 80).

- ii) interviews and speeches made by politicians or ambassadors during the Convention;
- iii) study of particular cases like the aforementioned *Karagöz* case.

The process of operationalization consists in translating an abstract theory and a general hypothesis into precise and measurable phenomena. Due to the qualitative nature of the research, the process of operationalization will be more difficult and complex. For instance, in the definition of the concept of safeguarding of the ICH, the thesis will: (i) analyse the definition of ICH; (ii) use the juridical structure of the 2003 Convention and its strengths and pitfalls identified by the doctrine as indicators; (iii) given the hypotheses, it will investigate how the local communities are safeguarded and involved in the enforcement of the 2003 Convention.

1. HISTORY OF THE UNESCO CONVENTION ON INTANGIBLE CULTURAL HERITAGE

1.1. UNESCO: a brief history

The political, economic, and social consequences of the Second World War were catastrophic. Among other issues, right after the end of the conflict, the reconstruction and protection of cultural heritage started to receive attention at the global level, becoming central to the activities of international organisations such as the United Nations (UN).

This explains why, in 1946, the UN Educational, Scientific and Cultural Organisation (UNESCO) was born. At the beginning of the preamble of its Constitution, the UNESCO's main objective is defined within the general UN mission: that is, the defence of peace⁴. The UNESCO was founded due to the acknowledgment that governmental political and economic arrangements were not enough to secure peace⁵. In fact, there was a general awareness that one of the triggers in post-modern conflicts was exactly the lack of mutual recognition among States of the value of each other's national culture⁶. As such, it is possible to say that:

since its inception in 1945, the preservation of cultural diversity has been a principle underlying UNESCO's standard setting activity and its international Conventions and Recommendations in the cultural heritage field have played a signification role in this⁷.

⁴ The UNESCO preamble states that "The Governments of the States Parties to this Constitution on behalf of their peoples declare: That since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed (...)" (UNESCO Constitution, Preamble).

⁵ UNESCO (2010).

⁶ In social sciences, the significance and implications of the term "national culture" have been extensively investigated. In the impossibility of recalling, in this context, even in summary, the debate that has developed on the subject, it is relevant to cite the positions taken, at different times, by Max Weber (1864-1920) and Benedict Anderson (1936-2015) with reference to the correlations existing between ethnicity, nation and culture. These positions, in fact, emblematically express the value that culture can assume in national identity, helping to understand how this can be used to support nationalistic tendencies. According to Weber, the notion of ethnicity can be found in human groups that entertain a belief in their common descent because of similarities of physical type or of custom or both, or because of memories of colonization and migration; this beliefs must be important for the propagation of group formation; conversely, it does not matter whether or not an objective blood relationship exists. Anderson, on the other hand, argues that the nation is a social constructed community, imagined by the people who feel part of a given national group. And so also nationality is a cultural artefact. In this sense, recalling what Gellner observed, Anderson notes that "nationalism is not the awakening of nations to self-consciousness: it invents nations where they do not exist" (ANDERSON (1983)).

⁷ BLAKE (2020: 3).

The process for the creation of UNESCO had already started in 1942, when the British Prime Minister Richard Austen Butler convened the Conference of Allied Ministers for Education (CAME) in London⁸. In this Conference, the 15 States which participated could draft the UNESCO guidelines.

Article 1⁹ of the UNESCO Constitution expresses the purposes and functions of the Organisation. As for other UN agencies, the main aim of UNESCO is to strengthen collaborations between nations. The peculiarity here is that this goal is meant to be achieved by using tools different from more traditional ones relative to political or economic cooperation. For the first time, education, science and culture are in fact used as vectors for the spreading of universal respect for justice, law, human rights and fundamental freedoms as recognized in the Charter of the UN – thus regardless of race, sex, language or religion¹⁰.

In order to achieve this general goal, UNESCO's mandate is expressed in three specifications: (i) to promote mutual knowledge and understanding of nations, facilitating the free flow of ideas by word and image; (ii) to spread culture and boost education for gradually implementing the ideal of equal opportunities for education – with particular attention to the younger generations; (iii) to help the conservation, progress and dissemination of knowledge, facilitating its circulation among all peoples and overseeing the protection and safeguarding of universal heritage¹¹.

One of the first steps made by UNESCO right after the war was the introduction of the Convention for the Protection of Cultural Property in the Event of Armed Conflict on the 14th of May 1954 – the so-called Hague Convention. Such Convention is extremely significant since it recognized an explicit connection between cultural heritage, national identity, and the use of heritage in nation building¹².

1.2. The Convention for the protection of World Cultural and Natural Heritage (1972)

At the end of the fifties, in Egypt, Gamal Abdel Nasser, Second President of the Egyptian Republic, decided to build the imponent Aswan dam. While the project brought a lot of improvements in those otherwise deserts areas, one main problem with this infrastructure was that the water would have

⁸ Russo (2016: 5).

⁹ Constitution of the United Nations Educational, Scientific and Cultural Organisation, London, 16 November 1945, 1.

¹⁰ Constitution of the United Nations Educational, Scientific and Cultural Organisation, London, 16 November 1945, 1, paragraph 1.

¹¹ Constitution of the United Nations Educational, Scientific and Cultural Organisation, London, 16 November 1945, 1, paragraph 2.

¹² HARRISON (2013: 57).

submerged the entire archaeological site of Abu Simbel. This is why, in 1960, an international operation was launched by the UNESCO to tackle the issue by moving the monuments to safer places.

For the first time, international awareness was raised on the issue of protecting both cultural and natural sites whose existence was threatened by all kinds of different factors. This mobilization led to the drawing of a new and important document: the 1972 Convention for the protection of World Cultural and Natural Heritage. This document did mark a turning point in the field of the protection and enhancement of cultural heritage. Since it was drafted, it included two lists: the List of World Heritage in Danger and the World Heritage List which “contains a list of properties forming part of the cultural heritage and natural heritage (as they have) outstanding universal”¹³.

The criteria according to which monuments and other sites are included in the list, are established at the Articles 1 (cultural heritage) and 2 (natural heritage) of the Convention. Accordingly, the following items count as “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 of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view¹⁴.

As for the “natural heritage”, this refers to:

- 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 beauty¹⁵.

From 1977, another category was included, that of mixed heritage – that is, about items with cultural but also natural value. This includes assets that

¹³ HARRISON (2013: 62).

¹⁴ UNESCO (1972).

¹⁵ *Ibidem*.

correspond in part or in whole to both definitions of cultural and natural heritage.

The process of nominating World Heritage sites was determined by State Parties. In fact, there was a sort of expectation for each State to have at least one or more of such places within their national territory, so that States were expected to be willing to add their records in the spirit of collective international interest and cooperation¹⁶.

Importantly, the Convention has thus a strong universalist perspective. It has been suggested that the idea of the universal significance of heritage values is made of two parts:

- 1) all human necessarily share an interest in the physical aspects of the past as heritage;
- 2) people in one country would necessarily be interested and concerned for the conservation of certain types of physical remains of heritage in another country¹⁷.

Even though the 1972 Convention has been considered a real success, also considering the number of States who have ratified it¹⁸, it surely presents some pitfalls that will be analysed in the following paragraph.

1.2.1. Limits and problems of the World Heritage Convention

The aim of the World Heritage Convention (WHC) is to protect elements of cultural heritage that are considered to possess “outstanding universal value” (as expressed at Article 49 of the Operational Guidelines) in the context of human history, art, science or aesthetics. But, the questionability of the parameter of exceptional universal value is an element which weakens the construction of the Convention itself. UNESCO’s idea of universal significance of this category of cultural properties must be often balanced with the opposing principle of national belonging, conveyed by State’s claims of exclusive sovereignty over a set of forms of artistic expressions with whom they share a powerful connection based on feelings of identity attachment¹⁹. Therefore, conflictual sentiments and confrontations at the international stage did constitute an obstacle for the good functioning of the Convention.

¹⁶ HARRISON (2013: 64).

¹⁷ BYRNE (1991: 269 -276).

¹⁸ Only the “Convention on the Right of the Child” has a higher number of States who had ratified it.

¹⁹ CONTRAFATTO (2017: 31).

An equally weak element is the Eurocentric architecture of the Convention, which neglected large areas of the planet, such as Africa, Asia, Latin America and the Pacific region – and local understandings of what a cultural heritage might be. This means that claims on the universalism of the Convention were not totally realistic. This helps explaining why, in the first half of the 1990s, many UNESCO Member States and especially the so-called ‘developing countries’ required serious consideration of the protection not only of what was defined as tangible cultural heritage (TCH), but also of the intangible cultural heritage (ICH). Many countries, mainly of the southern hemisphere, started protesting against the imbalance intrinsic to UNESCO policies, which aimed mainly at protecting the heritage of Western Europe.

The aforementioned Word Heritage List did not reflect a geographical balance and its selection criteria did not fit the cultural characteristics of many non-European countries – e.g. in places rich in intangible rather than tangible cultural artefacts. This explains why the UNESCO was thus pushed to undertake corrective measures against this imbalance by including intangible components as worthy of protection and enhancement.

The route toward this goal passed through various steps which brought to the formulation of the ICH Convention of 2003. Tracing back the stages of this process is not a mere enlistment of facts. On the contrary, to analyse the key transformations undergone in the world stage between 1972 and 2003 is fundamental for understanding the by then fervent debate on the nature of cultural heritages.

This was possibly the first time in history when a global confrontation between even very distant cultures took place to safeguard the interest of the entire human community. The history of cultures teaches that different civilizations have developed very distant concepts of what a cultural heritage is, thus implying different ways to preserve it.

1.3. Toward the Intangible Cultural Heritage Convention of 2003

It is important to go through the main steps toward the creation of the ICH Convention of 2003. First of all, the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore (paragraph 1.3.1.) is fundamental for the definition of folklore, but not particularly effective and efficient as an instrument of soft law. Next to this document, the analysis of the 1993 Living Human Treasure system and the 1998 Proclamation of Masterpieces of the Oral and ICH of Humanity (paragraph 1.3.2), is also extremely relevant. Furthermore, the thesis concentrates on the two important meetings that preceded the 2003 Convention: the Washington Conference in 1999 (paragraph 1.3.3.) and, two years later, the Turin Meeting (paragraph 1.3.4.), both of which were fundamental for the definition and scope of the

ICH. The last paragraph will focus on the meetings that led to the drafting the ICH Convention (paragraph 1.3.5.).

1.3.1. Recommendation on the Safeguarding of Traditional Culture and Folklore (1989)

The Recommendation on the Safeguarding of Traditional Culture and Folklore was the first attempt to set the standards for the protection of the ICH. At the time, ICH referred to what was called more commonly traditional culture or folklore. The document underlines the political, economic and social importance of folklore²⁰ and its role in the history of the formations of communities. It recognized the need to safeguard not only cultural traditions, but also the communities that (re)produce these traditions.

The notion of ‘folklore’ has been at the centre of international debate across the seventies and the eighties, as early attempts to safeguard it were made through the deployment of Intellectual Property (IP) approaches – i.e. copyright. In this direction, in 1973 “it had been proposed that the conservation, promotion and diffusion of folklore be regulated under Copyright Convention”²¹.

Such kind of solution was subject to severe criticisms, since it was evident that a copyright-based approach constituted a limitation. In general, a broader cultural approach was promoted against this more particularistic approach, so that the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore provided “a new way of thinking about ‘traditional culture and folklore’ through a cultural and interdisciplinary approach”²².

In particular, the term folklore was so defined in the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore:

Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its social and cultural identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts²³.

Nevertheless, also this definition was considered too limited and inadequate. In fact, it does not consider the social, cultural and intellectual context for the

²⁰ “Folklore” is a very dense and contested term in social sciences. In this chapter the use of the term folklore makes reference to the definition that has been provided by the 1989 Recommendation, reported below.

²¹ BLAKE, LIXINSKI (2020: 7).

²² *Id.* 8.

²³ UNESCO (1989).

creation and maintenance of folklore. It refers, in general, to the traditional knowledge, but does not take into account Indigenous Heritage – an ICH which will instead take a prominent role in the 2003 Convention²⁴.

From the beginning, the 1989 Recommendation did have only little impact on the politics of the signatory countries. Its inefficiency was evident mainly due to the fact that, as a recommendation, it was an instrument of soft law – that is, without binding force²⁵. With the end of the Cold War, Central and Eastern Europe started to look at their own popular culture mainly by operationalizing the concept of ethnicity. As such, these countries welcomed international cooperation programs that would endeavour to safeguard and preserve local cultures.

Since the beginning of the 1990s a lot of member States, mainly from the so-called ‘developing world’, demanded greater consideration for the protection of ICH. The reasons that led these countries to make such pressures were mainly three:

- 1) As previously said, countries from Africa, Asia, Latin America and Pacific areas were protesting that the World Heritage List was hardly reflecting any geographical balance since its selection criteria were not necessarily suitable for the cultural features of non-European/Western(ised) countries²⁶. As they argue, their culture was expressed much more in everyday living, rather than through monuments or other sites.
- 2) In 1992, the Rio Summit²⁷ took place, bringing attention to the knowledge of indigenous people. The international community was now aware of indigenous people’s (and their cultural mores) vulnerability vis a vis the economic exploitation of multi-national corporations.
- 3) In 1996, thanks to the report “Our Creative Diversity”, by the fifth UN Secretary General Javier Pérez De Cuéllar²⁸, the fact that ICH had been neglected was put on paper. In this report, Pérez De Cuéllar tried

²⁴ GASPARINI (2013: 55).

²⁵ SMITH, AKAGAWA (2008: 21).

²⁶ More than 50% of the assets protected by the Convention are located in Europe and North America; 90% of European countries have at least one asset of this type while 56% of Asian and Pacific countries have one; and although the forty States in Africa, with the exception of the Arabian area, have ratified the Convention, only 7% of the cultural heritage as considered by the terms of the Convention is located on this continent.

²⁷ The Rio Summit was a major UN Nations conference held in Rio de Janeiro from 3 to 14 June in 1992. In this summit twenty – seven principles of sustainable development were formulated and a central role was given to socio cultural factors: see TOLLEFSON, GILBERT (2012).

²⁸ Fifth Secretary General of the United Nations from January 1, 1982 to December 31, 1991.

to stress the concept that the term cultural heritage should be redefined and enlarged to include both tangible and intangible aspects²⁹.

The international debate on ICH, of the early 1990s, led the General Director of UNESCO Federico Mayor to declare that the “UNESCO could no longer remain a stranger to the interest in (...) ICH expressed by the international community”³⁰. This actively demonstrates that UNESCO was going through a change and was taking its next step toward the creation of the 2003 Convention.

1.3.2. Living Human Treasure system (1993) and the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity (1998)

Another relevant change is related to the Living Human Treasure program. Set up in 1993, the aim of this program was to encourage member States to grant official recognition to “talented tradition bearers and practitioners, thus contributing to the transmission of their knowledge and skills to the younger generations”³¹. The State selected these persons on the basis of their accomplishment and willingness to transmit their knowledge to the others.

Moving from the discussions generated by the Living Human Treasure system, four years later the Cultural Heritage Division and the Moroccan National Commission for UNESCO organized to gather, in June 1997, an International Consultation on the Preservation of Popular Cultural Spaces in Marrakesh³².

The underlying concepts at the base of the Masterpieces program were elaborated during this meeting. The participating experts decided to recommend the marking of an international and official distinction by UNESCO to draw attention to outstanding intangible forms of heritage³³.

In a report published by the World Commission on Culture and Development of 1995, it was underlined that:

in order to be a reliable basis for development, the notion of culture must be broadened considerably. One important way in which this could be done was to give more weight to the intangible aspects of culture and heritage, helping the global society to move forward from a predominantly economic growth-driven view of development (which had been dominant in the 1970s and continues to dominate policies in many countries today) towards one in which the social and cultural dimension are fully acknowledged. Rather than viewing traditional cultures as inevitably a break on development, it can help to demonstrate that

²⁹ PEREZ DE CUELLAR (1996).

³⁰ SMITH, AKAGAWA (2008: 15).

³¹ UNESCO (2005).

³² UNESCO (2001).

³³ *Ibidem*.

they are often an essential part of sustainable forms of development and that, as a consequence, supporting the diversity of such cultural traditions globally is an essential aspect in achieving sustainable development³⁴.

During the Marrakech Meeting, Albert Sasson, who was then the Assistant General Director for the Bureau of Program Planning at UNESCO, started his opening speech with the following words:

UNESCO tries to raise awareness of its Member States that the majority of their ICH are threatened with disappearing if they do not take urgent measures for the safeguarding these treasures which constitute their source of identity³⁵.

The Meeting was attended by Moroccan authorities and supported by 11 international experts. They submitted a draft resolution which was adopted in 1997 by the General Conference, proposing the creation of an international distinction for manifestation of ICH and associated cultural spaces.

Consequently, in the 155th session of the UNESCO's Executive Board of November 1998, the regulations relative to the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity were drafted³⁶. More broadly, the Proclamation aimed at:

- raising awareness on the importance of oral and ICH, and the need to safeguard it;
- evaluating and listing the world's oral and ICH;
- encouraging countries to establish national inventories and to take legal and administrative measures for the protection of their oral and ICH³⁷;
- promoting the participation of traditional artists and local practitioners in identifying and revitalizing their ICH.

The Masterpiece programme was very well received and had a significant and immediate impact. It was seen as a corrective of the World Heritage List³⁸. In fact, while that list usually excluded many States because they lacked monuments and sites, the Masterpiece programme “offered a form of international recognition more suited to the particularities of those cultures with strong intangible traditions”³⁹.

³⁴ BLAKE, LIXINSKI (2020: 4).

³⁵ SMITH, AKAGAWA, (2008: 16).

³⁶ UNESCO (2001).

³⁷ *Ibidem*.

³⁸ KURIN (2004: 67).

³⁹ *Ibidem*.

1.3.3. Washington Conference (1999)

In June 1999 an international Conference was held in Washington under the title “A global assessment of the 1989 Recommendation on the Safeguarding of the Traditional Culture and Folklore: Local Empowerment and International Cooperation”. The Conference was meant to respond to the inadequacies of the 1989 Recommendation. It was clear that a more binding and mandatory instrument was necessary. What more, the majority of the critics concentrated on the definition of folklore and cultural tradition.

First, differently from other concepts such as popular culture, living culture, oral culture or traditional culture, the term folklore could add a pejorative connotation. It “was much too product oriented, while related symbols, values and processes were neglected”⁴⁰. What more, another important critique was linked to the fact that the Recommendation emphasized too much the role research as a tool to catalogue these traditional intangible cultural practices, but much less that of the communities holding those cultural mores.

There is no surprise if the slogan of the Conference became “No folklore without folk” and, for the first time, the need to safeguard traditions by supporting those who practice them was recognized – somehow in opposition to the UNESCO’s emphasis on scientific institutions to study or document them⁴¹.

1.3.4. Turin Meeting (2001)

The “International Roundtable on ICH – Working Definition” was held in Turin, in March 2001. It was the first time for researchers and other experts to come together for discussing the structure of the future Convention. The purpose of this meeting was to clarify the definition, scope and relevant terminology of ICH. As a result, the definition of folklore given in previous years was turn less relevant, while new normative instruments were defined and introduced.

This happened based on surveys that the UNESCO did among member States, international organisations, NGOs and other institutions. With them, the UN agency asked for definitions of the following terms: ‘intangible cultural heritage’, ‘folklore’, ‘traditional culture’, ‘oral culture’, ‘traditional knowledge’, ‘indigenous heritage’. In 2002, the results of this survey were presented by Professor Manuela da Cunha, from the Anthropologist Department of Chicago’s University.

⁴⁰ SMITH, AKAGAWA (2008: 21).

⁴¹ BORTOLOTTI (2008: 169).

Da Cunha showed the importance of the protection of the (re)producers of cultural heritage as agents who actively participate to its protection and conservation. After all, “the protection of cultural heritage necessarily entails the protection of the social and environmental context in which it exists”⁴². The importance of the active involvement of communities, individuals and groups who (re)create the heritage will be a milestone of the 2003 Convention and one of the elements that differentiate ICH from TCH.

In order to ensure the equal participation to the Turin meeting, experts were selected not only on the basis of their different geographical provenience but also based on their competences within the social sciences and humanities. As such, the meeting was joined by four anthropologist, two folklorists, three specialists in international law studies, one linguist, one ethnomusicologist, two members of the Executive Board of UNESCO, one diplomat, one official of a cultural administration and one specialist in biotechnology⁴³.

As they gathered in the Italian town, they drafted the following six priorities and included them in the final act:

1. to conserve human creations that may disappear forever;
2. to give world recognition to a certain kind of ICH;
3. to strengthen identity;
4. to enable social co-operation;
5. to provide historical continuity;
6. to foster enjoyment⁴⁴.

Thanks to the work of the Turin Meeting, the basis for the 2003 Convention were finally provided.

1.3.5. The Convention Draft

The next paragraph discusses the most important meetings that preceded the creation of the 2003 UNESCO Convention – that is, the First and Second meetings of the Select Drafting Group, and the three sessions of the Intergovernmental Meeting of Experts that preceded the final redaction of the text of the ICH Convention.

- First Meeting of the Select Drafting Group

The first meeting of the “Select Drafting Group” for the drafting the 2003 Convention was held between the 20th and the 22nd of March 2002. In that

⁴² SMITH, AKAGAWA (2008: 23).

⁴³ *Id.* 22.

⁴⁴ UNESCO (2001a).

occasion, the issue of the “advisability of drawing up a heritage list”⁴⁵ along the same lines of the 1972 Convention was debated. At first, some countries were worried that the proposed list could attract “an excessively large number of items or objects, on account of the sheer size of the field covered by the intangible heritage”⁴⁶. A critique which was easily dealt with “by making a selection of the items of the ICH on the basis of certain criteria”⁴⁷.

Several other issues were raised as well, in particular concerning the use of the term ‘property’ which, for many, had to be replaced by the words ‘manifestations’, ‘expressions’, or ‘means of expressions’. Similarly, also the reference to some sort of ‘universal value’ was questioned. While such expression was used in Article 11 of the WHC, it was agreed that it would be impossible to establish a scale of value which would be truly ‘universal’ so that all references to ‘universal’ and ‘world’ were dropped.

Finally, another matter which was debated was to avoid including the requirement of “the consent of the State concerned” for the inscription of a manifestation of ICH. Instead, the term “candidatures presented by a State Party” was preferred, also considering the role played by the communities, individuals and groups for the (re)production of ICHs.

- *Second Meeting of the Select Drafting Group*

In the Second Meeting which was held between the 13th and the 15th of June 2002, participants proposed a significant “departure from the model of the 1972 Convention”. The key issue was to replace the “List of ICH in danger” with a “List of ICH in need of Urgent Safeguarding”. Such proposition was justified by the fact that,

the threats that may place ICH in this situation are quite different from those in the 1972 Convention [so that such change in terminology represented] an attempt to address the specificity of ICH⁴⁸.

During this Second Meeting, another key controversial issue surrounded the use of the formula ‘outstanding value’ in the Article. The worry was that its utilization could “result in misinterpretation or misunderstanding if it [was] not explained somewhere”, especially for the reason that representative value is distinct from exceptional value (which is based on a comparison and demonstrates excellence in intrinsic qualities: skill, craft ...) ⁴⁹.

⁴⁵ UNESCO (2001a).

⁴⁶ *Ibidem*.

⁴⁷ UNESCO (2002c).

⁴⁸ UNESCO (2002d).

⁴⁹ *Ibidem*.

- *The sessions of the Intergovernmental Meeting of Experts*

Many of the issues mentioned for the previous meetings were also discussed during the three sessions of the intergovernmental meeting of experts that preceded the final redaction of the text of the ICH Convention. During the first session, there were divergent views on the decision of drawing up either:

- i) a list of items of the intangible cultural heritage of specific and exceptional value, including the intangible cultural heritage in danger;
- ii) a list of items of the intangible cultural heritage at risk;
- iii) a world inventory of the intangible cultural heritage;
- iv) a list of 'best practices'⁵⁰.

During the second session the decision was taken for creating “a register or a List of Intangible Cultural Heritage in Need of Urgent Safeguarding”⁵¹. According to what debated in that occasion, the creation of an international register aimed at give “visibility [to] the ICH and promote cultural diversity”⁵². Finally, during the third session the listing mechanism of the future 2003 Convention became clearer. During this meeting the safeguarding of ICH at the international level was rearranged into three Articles:

- Article 16: Representative List of the Intangible Heritage of Humanity (RL),
- Article 17: List of Intangible Cultural Heritage in Need of Urgent Safeguarding (USL),
- Article 18: Programmes, projects and activities for safeguarding the ICH.

This formulation proved to be efficient in appeasing most of the negotiators who, in principle, were not in favour of the lists.

1.4. Convention on the Safeguarding of Intangible Cultural Heritage (2003)

The UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage (ICHC) was adopted by the UNESCO General Conference at its 32nd session, in October 2003. The Convention was passed without dissenting votes⁵³ so that it entered into force by the 20th of April 2006. The Convention

⁵⁰ BLAKE, LIXINSKI (2020: 313).

⁵¹ UNESCO (2002d).

⁵² UNESCO (2003c).

⁵³ According to Article 32, the Convention shall be subject to ratification, acceptance or approval by States Members of UNESCO in accordance with their respective constitutional

received great adhesions, so that in September 2008 more than 100 States were already party of it.

The structure of the Convention was adapted to the WHC. This is why – like for the 1972 Convention – the ICHC included two lists: the “List of the Intangible Cultural Heritage in need of urgent safeguarding” (Urgent List or USL) and the “Representative List of the ICH of Humanity” (Representative List or RL).

This choice was the result of an extensive debate aimed at identifying “which legal approach should have been taken towards safeguarding and what obligations could be imposed on States Parties”⁵⁴. At that moment, in fact, three main potential types of instruments were discussed: (i) a treaty applying sui generis IP approaches to protection; (ii) a treaty taking a mainly cultural approach alongside sui generis IP measures; (iii) a treaty taking a cultural approach that was modelled on the 1972 Convention, but with the appropriate adaptations to meet the needs of ICH and its cultural communities⁵⁵.

As reported above, the third approach prevailed. The reason was,

that this would help to raise awareness of what was a relatively unknown aspect of heritage, it could avoid problems over the potential scope of the treaty, and it would provide a financial mechanism allied to a system of international co-operation and assistance to support State Parties in their implementation actions⁵⁶.

One of the differences between this Conventions and the one of 1972 was the absence of the parameter of exceptionality as a criterium to include items in the lists. This was meant to avoid creating even just conceptually a hierarchy among the various manifestations of ICH⁵⁷. In fact:

it was important to give recognition to representative examples of ICH rather than “outstanding” ones (i.e., to avoid creating a hierarchy of items of ICH) and to avoid the ‘fossilization’ of this living and evolving heritage that the use of a listing mechanism might risk⁵⁸.

It is implicit that, since both UNESCO Conventions for TCH and ICH are based on the listing mechanism, this may over the years lead to a

procedure. Moreover Article 34 States that the Convention shall enter into force three months after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States that have deposited their respective instrument of ratification, acceptance, approval, or accession on or before the date. It shall enter into force with respect to any other State Party three months after the deposit of its instrument of ratification, acceptance, approval or accession (UNESCO (2003a)).

⁵⁴ BLAKE, LIXINSKI (2020: 8).

⁵⁵ *Ibidem*.

⁵⁶ BLAKE, LIXINSKI (2020: 9).

⁵⁷ GASPERINI (2013: 83).

⁵⁸ BLAKE (2006: 616).

‘fossilization’ of the cultural heritage thus identified. This danger was one of the main concerns expressed by some Member State during the intergovernmental negotiations⁵⁹.

Finally, from the point of view of institutional functioning, the Convention established the formation of two main important organs: the General Assembly of member States and an Intergovernmental Commission for the protection of ICH, whose task is to ensure the enforcement of the provisions of the Convention itself.

⁵⁹ BLAKE, LIXINSKI (2020: 9).

2.THE STRUCTURE OF THE CONVENTION

This chapter aims at analysing from a legal point of view the 2003 Convention. As mentioned before, the structure of this convention was modelled on the 1972 WHC⁶⁰.

The Convention is divided into nine Parts as followed:

- Part 1 – Articles 1-3: aims (safeguarding, ensuring respect, raising awareness, promoting international cooperation), definition of terms (in particular ‘intangible cultural heritage’ and ‘safeguarding’), relations with other international instruments.
- Part 2 – Articles 4-10: the organs of the Convention: the Intangible Heritage Committee and the General Assembly of States Parties.
- Part 3 - Articles 11-15: measures to be adopted at national level to ensure the protection of the ICH, especially what is not included in the list.
- Part 4 - Articles 15-18: concerns the safeguarding of ICH at the international level and establishes the creation of the two lists.
- Part 5 - Articles 19-24: measures regarding international cooperation and assistance.
- Part 6 - Articles 25-28: the modalities of the fund for intangible assets are established and expressed.
- Part 7 - Articles 29-30 and Part 8 – Article 31: they include transitional rules regarding the masterpieces to be incorporated in the RL before the Convention enters into force
- Part 9 - Articles 32-38: final rules.

The following paragraphs shortly analyse and comment the articles of the Convention. The examination of the juridical structure of the Convention is the starting point for evaluating the effective functioning of the protecting system of ICH. For this purpose, the articles of the Convention are evaluated through four different lenses: (i) the aim of the Convention and the definition of ICH; (ii) the object of protection; (iii) the actors involved in the protection of cultural heritage; (iv) the instruments for safeguarding ICH at International level.

The organs of the Convention, their functioning, the financing measures and the transitional rules are instead not taken into account since they will not be object of analysis in the final analytical chapter.

⁶⁰ BLAKE, LIXINSKI (2020: 5).

2.1. The aim of the Convention and the definition of Intangible Cultural Heritage

Here the attention is on the Convention's preamble and first two articles. It is important to highlight that, in the 1989 Recommendation, different words such as 'protection', 'preservation' and 'revitalisation' were utilized to be 'blamed' for owning a "paternalistic connotation in some parts of the world"⁶¹. Hence, the concept of ICH and the emphasis on safeguarding were decided during a meeting of experts at the UNESCO Headquarter in June 2002, which gave birth to the 2002 glossary. Yet, today this glossary is not included in the Convention as it is still considered a work in progress⁶².

2.1.1. Main aims and objectives

The 2003 Convention for Safeguarding the ICH has been the final achievement of a long process that had led to adjusting the understanding of the concept of heritage⁶³. The Convention was fundamental in raising awareness on a relatively unknown dimension of cultural heritage which up to that moment was considered as necessarily tangible.

The main aims and objectives of the Convention are stated in the operational clauses. In fact, the Preamble of the Convention works primarily at three levels:

- the first articulates goals and purposes of Member States in developing a new standard-setting instrument for safeguarding ICH;
- the second concerns setting out the wider international law and policy context, and how the new treaty will fit into it;
- the third relates to the implementation of the treaty and the key areas for future developments of international law⁶⁴.

In particular we will focus on recitals two, three, four, six and ten, which better emphasise what in the Convention that we want to analyse.

The second recital⁶⁵ underlines the importance of ICH as an element of cultural diversity and a factor that is vital to ensure the realization of

⁶¹ VAN ZANTEN (2004: 36).

⁶² *Ibidem*.

⁶³ VAN ZANTEN (2004: 3).

⁶⁴ *Id.* 34.

⁶⁵ "Considering the importance of the ICH 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".

sustainable development. The third recital⁶⁶, instead, focuses on the important linkage between TCH and ICH. The use of the term “deep-seated interdependence” emphasizes the connection between these two. The fourth recital⁶⁷ lists some of the actual threats to ICH – i.e. deterioration, disappearance and destruction – and the causes of these dangers – i.e. globalization, social transformation, and intolerance.

Vis a vis the intolerance as cited in the recital, the Convention introduces “the need of mutual respect between different cultural groups and communities, in order to avoid loss or damage to this heritage. This also reminds us of the value of cultural diversity underpinning in the treaty”⁶⁸. This principle can be better understood also by looking at the sixth recital⁶⁹ which refers to the linkage between ICH and the socio-economic activities of the communities owning it. Local communities cover a crucial role within the Convention since they are considered key actors in (re)producing ICH.

As for the tenth recital⁷⁰, it designs the role of the Convention and its Member States: that is, to raise awareness on the importance of ICH among younger generations. This explains the choice of the term ‘safeguarding’ to distinguish ICH from TCH. The term safeguarding, in fact, “reminds us that recognizing the importance of this heritage is not enough; it is vital that measures be taken for its safeguarding (of which building awareness is one), given its current vulnerable condition”⁷¹. So, the use of the term ‘safeguarding’ was central to distinguish the TCH from the ICH, – as the first must be protected but not transmitted among generations in order to survive, while the second can be alive only through the safeguard and the passage from one generation to another.

⁶⁶ “Considering the deep-seated interdependence between the ICH and the tangible cultural and natural heritage”.

⁶⁷ “Recognizing that the process of globalization and social transformation, alongside the condition they create for renewed dialogue among communities, also give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the ICH, in particular owing to a lack of resources for safeguarding with such heritage”.

⁶⁸ BLAKE, LIXINSKI (2020: 28).

⁶⁹ “Recognizing that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and recreation of the ICH, thus helping to enrich cultural diversity and human creativity”.

⁷⁰ “Considering the need to build greater awareness. Especially among the younger generations, of the importance of the ICH and of its safeguarding”.

⁷¹ BLAKE, LIXINSKI (2020: 33).

2.1.2. Article 1: purposes of the Convention

Article 1

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 level of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;
- (d) to provide for international cooperation and assistance.

It is important to highlight that of the four main objectives of the Convention as outlined in Article 1, the first – “to safeguard the ICH” – is the most important, with the other three being “handmaidens of the first purpose”⁷². Importantly, the 2003 Convention foresees the presence of two lists: a Representative List (RL) (Article 16) and a List of Intangible Heritage in Need of Urgent Safeguarding (USL) (Article 17). The presence of these two lists and the resulting process of inscription of ICH has been a core effort generating from the Convention and de facto one of the most important strategies to fulfil the purposes outlined in Article 1.

Establishing a list is not an end in itself. [On the contrary,] it is one instrument among others to safeguard ICH. Two fundamental aspects of safeguarding include a) identify best practices, and b) implementing national legislation and implanting the Convention with international cooperation⁷³.

A broader process to fulfil the purposes set in Article 1 is gradually emerging within the Operational Directive for the Implementation of the Convention for the Safeguarding of the ICH (hereinafter also “Operational Directive” or “OD”). This directive was adopted by the General Assembly⁷⁴ and it is intended to cover a broad range of safeguarding, awareness-raising and co-operative measures to actually implement Article 1. This OD foresees national compliance with best practices, public education, community participation in all phases of safeguarding heritage, and international cooperation and assistance.

⁷² BLAKE, LIXINSKI (2020: 36).

⁷³ UNESCO (2002a).

⁷⁴ The General Assembly adopted for the first time Operational Directives for the implementation of the Convention for the Safeguarding of ICH (OD) in 2008 and amended them in 2010, 2012, 2014, 2016. Among other things, the OD indicate the procedures to be followed for inscribing ICH on the lists of the Convention, the provision of international financial assistance, the accreditation of non-governmental organisations to act in an advisory capacity to the Committee or the involvement of communities in implementing the Convention.

2.1.3. Article 2: Defining Intangible Cultural Heritage

Article 2, paragraph 1:

The intangible cultural heritage means the practices, representations, expressions, knowledge, skills, as well as the instruments, objects, artifacts and cultural spaces associated therewith, that communities, groups and in some cases, individuals recognize as part of their cultural heritage. The 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. For the purpose of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirement of mutual respect among communities, groups and individuals, and of sustainable development”.

Article 2 is of primary importance since it provides the definition of ICH. As we know, attempts of defining the emerging concept of ICH can be tracked to the 1989 UNESCO Recommendation and its definition of folklore. Such concept “contained useful elements for understanding the human dimension of cultural creativity in the context of the traditional social and intellectual life of a society”⁷⁵. As for the new definition of ICH, it also questioned the use of the term culture: “culture is now looked at as a site of contestation and no longer of homogenous agreement between all people in a community; it is continually re-created by people”⁷⁶.

According to the first paragraph, ICH must manifest itself in “practices, representations, expressions, knowledge skills”. Therefore, ICH must be embodied in practice, and this idea can be again explained looking at the tenth recital of the Preamble of the Convention: it is only by raising awareness and passing the heritage on to future generations that ICH can exist and survive.

The following section offers an analysis of the five domains listed in paragraph 2 of Article 2 oral heritage, performing arts, social practices and rituals, traditional knowledge and craftsmanship and an explanation of what cannot be qualified as ICH according to the 2003 definition.

⁷⁵ BLAKE, LIXINSKI (2020: 49).

⁷⁶ VAN ZANTEN (2004: 37).

2.2. Object of protection

Article 2, paragraph 2:

For the purpose of this Convention,
The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested *inter alia* in the following domains:

- (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) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship.

The ICH is thus delineated around four essential elements. First, the heritage should be manifested, which means that “it cannot be confined to a person’s private thoughts or kept secret in [their] private home but must be manifested by [them] to the external world and to someone else”⁷⁷. Second, the paragraph provides concrete examples of five domains where ICH can be manifested. Yet, third, the ICH is not limited to these five domains, as it can also include elements from multiple domains. A proper example in this respect is the Neapolitan Pizza. Not only it is part of the culinary tradition of Italy and Naples in particular, but it is also part of the

local social practices given the important role of the ‘pizzaiuolo’ as an agent of social cohesion and identity because of their interaction with local communities and the role they play in training younger people and providing opportunities of employment in the trade⁷⁸.

Fourth, the list provided in Article 2 is not ‘exhaustive’⁷⁹ since States may have different form of listing their ICH. As such, ICH can also be defined somehow differently from the five domains that we are about to explain in more details next.

2.2.1. Oral tradition and expressions

Oral tradition should be intended as the “passing on by word of mouth and memorizing information from the past”. On the other side, oral expressions are those “aspects of ICH expressed though the spoken word or in song”⁸⁰. Languages do not fall within the scope of this definitions, but “they can be

⁷⁷ SCOVAZZI (2012: 180).

⁷⁸ BLAKE, LIXINSKI (2020: 54).

⁷⁹ UNESCO (2003b).

⁸⁰ BLAKE, LIXINSKI (2020: 52).

eligible for recognition as ICH when they are the vehicle for the expression of oral traditions that qualify as ICH”⁸¹.

Here, an interesting example is that of the “Language, dance and music of the *Garifuna*” which is practiced in Belize, Guatemala, Honduras, and Nicaragua. In this case the *Garifuna* language is included as ICH since it is one of the languages that has survived centuries of discrimination and linguistic domination⁸².

2.2.2. *Performing arts*

The second domain recognized as part of ICH are performing arts as already defined in the 1989 Recommendation to include music and dance. This domain includes instrumental and vocal music, dance, theatre, storytelling, sung poetry, pantomime and other practices representing the creativity of communities⁸³.

The framing of the domain was really controversial since countries such as Japan, Vietnam and India thought that ICH should include also high forms of arts, such as opera, together with more popular performing arts. On the other hand, the Western tradition regards ICH and high art as two mutually exclusive aspects of art and culture.

In this domain we can find several examples of ICH that are part of multiple domains: “vocal music, storytelling and sung poetry” are identified as cases where “the distinction between performing arts and oral traditions and expressions becomes blurred”⁸⁴.

The definition of ‘performing arts’ as including “other spectacular practices representing the creativity of the communities”⁸⁵, has allowed the inclusion in the List of very diverse items. In fact, the performing arts domain contains “much of the best-known and most popular ICH”⁸⁶. One example is *Yoga* that was inscribed by India in 2016 and “consists of a series of poses, meditation, controlled breathing, word chanting, and other techniques designed to help individuals build self-realization, ease any suffering they may be experiencing and allow for a state of liberation”⁸⁷. Another example is the *Oshi Palav*, that is a traditional meal in Tajikistan which is often accompanied by celebrations, rituals and gathering.

⁸¹ *Ibidem*.

⁸² UNESCO (2008b).

⁸³ VAN ZANTEN (2002: 5).

⁸⁴ SCOVAZZI (2012: 183).

⁸⁵ VAN ZANTEN (2002: 5).

⁸⁶ BLAKE (2006: 37).

⁸⁷ UNESCO (2016a).

2.2.3. *Social practices, rituals and festive events*

Social practices and rituals can be described as “activities, which manifested ever-changing concepts, knowledge and skills, related, among other things, to social relations, status, methods of decision-making, conflict resolution, and collective aspirations”⁸⁸. On the other hand, festive events are “collective gathering as which events of significance for a cultural community are proclaimed, celebrated, commemorated or otherwise highlighted, usually including dance, music and other performances”⁸⁹.

The firsts occur in the everyday life, while the latter are occasionally and connected to specific days or period of the year.

Social, ritual and festive practices are connected to a community’s worldview and perception of its own history and memory and may be of a small gatherings nature or of a large-scale social celebrations and commemorations character⁹⁰.

There are a lot of practices included in this domain. They are: worship rites, rites of passage, birth, wedding and funeral rituals, oaths of allegiance; traditional legal systems, traditional games and sports, kinship and ritual kinship ceremonies; settlement patterns; culinary traditions; seasonal ceremonies; hunting, fishing, or practices specific to men or women only.

Culinary traditions are not a domain included in the second paragraph of Article 2, but there are several ICH which consider elements of culinary traditions. One example is the ‘Mediterranean Diet’ (Cyprus, Croatia, Spain, Greece, Italy, Morocco and Portugal), which concerns

a set of skills, knowledge, rituals, symbols and traditions concerning crops, harvesting, fishing, animal husbandry, conservation, processing, cooking, and particularly the sharing and consumption of food⁹¹.

Moreover, elements involving law and customary system of dispute resolution are also included among social practices, rituals and festive events. A key example is ‘Irrigators’ tribunals of the Spanish Mediterranean coast which were inscribed by Spain in 2009 as “traditional law courts for water management that date back to the al-Andalus period”⁹².

Religion and the professional sports fall out of this domain. Even if religion has been excluded, there are a lot of rituals that are connected to religious practices such as processions or sacred dances. One example is the “Procession of the Holy Blood in Bruges” (Belgium) that started in 2020 the

⁸⁸ VAN ZANTEN (2002: 6).

⁸⁹ *Ibidem*.

⁹⁰ BLAKE, LIXINSKI (2020: 67).

⁹¹ UNESCO (2013).

⁹² UNESCO (2009).

procedure to be enlisted as an ICH and which is very similar to the “Cult of *San Gennaro*” in Naples, (Italy).

As for traditional games and sports, even if they could account for social practices, rituals and festive events, they may fall outside the ICH scope as they might lose the character of ICH. One example is the *Kok-boru*⁹³, which is a traditional horse game that was proposed as ICH by Kyrgyzstan in 2017. The refusal to include it was justified by the Committee based on the need to provide “more detailed information [...] to demonstrate *Kok-boru*’s identity as ICH, in contrast to its evolution as a professional sport”⁹⁴.

2.2.4. *Knowledge and practices concerning nature and the universe*

This domain includes: “knowledge, knowhow, skills, practices and representations developed by communities by interacting with the natural environment”⁹⁵. They are “expressed through language, oral traditions, feelings of attachment towards a place, memories, spirituality and worldview”⁹⁶.

ICH is not limited to manifestation of human creativity that reinterpret or recreate nature, but also includes manifestation of human creativity that are based on a profound knowledge of nature as aiming at exploiting it for the satisfaction of concrete human needs. The “Dragon Boat festival” (China) is a clear example of a manifestation of human creativity that reinterprets and recreates nature and add the imaginary element of the dragon, which is not an existing animal in nature, as it is a product of human imagination. It is a memorial ceremony combined with sporting events such as dragon races, dragon boating and willow shooting. This festival strengthens bonds within families and establishes a harmonious relationship between humanity and nature. It also encourages the expression of imagination and creativity, contributing to a vivid sense of cultural identity.

2.2.5. *Traditional craftsmanship*

Finally, the fifth domain which was proposed by Italy during the negotiations includes “tools, clothing and jewellery, costumes and props for festivals and performing arts, storage containers, objects used for storage, transport and

⁹³ “Kok boru, a traditional horse game, is a synthesis of traditional practices, performances and the game itself. It is a traditional game played by two teams on horseback, where players try to maneuver with a goat’s carcass (replaced with a mould in modern-day games), or ‘ulak’, and score by putting it into the opponents’ goal”: UNESCO (2017a).

⁹⁴ UNESCO (2017b).

⁹⁵ UNESCO (2006).

⁹⁶ *Ibidem*.

shelter, decorative art and ritual objects, musical instruments and household utensils, and toys both for amusement and education”⁹⁷.

ICH cannot be entirely separated from its tangible counterpart⁹⁸. In fact, the last domain is the most tangible of those listed in paragraph 2 since it includes several tangible tools, being them instruments, jewellery and so like. As for these tangible items, they are considered as ICH because “the tangible can only be interpreted through the intangible”⁹⁹.

In the end, we have seen how ICH can take different forms. They are source of human creativity and cultural diversity. Living heritage brings human beings and communities closer together. In the first fifteen years of enforcement of the Convention, UNESCO have listed 500 ICH. The UNESCO website provide the 548 elements listed by UNESCO on the ICH list as they are distributed over the five domains of the 2003 Convention¹⁰⁰ - see Figure 1 below.

⁹⁷ UNESCO (2007).

⁹⁸ VAN ZANTEN (2004: 39).

⁹⁹ BLAKE (2015: 76).

¹⁰⁰ UNESCO (2019).

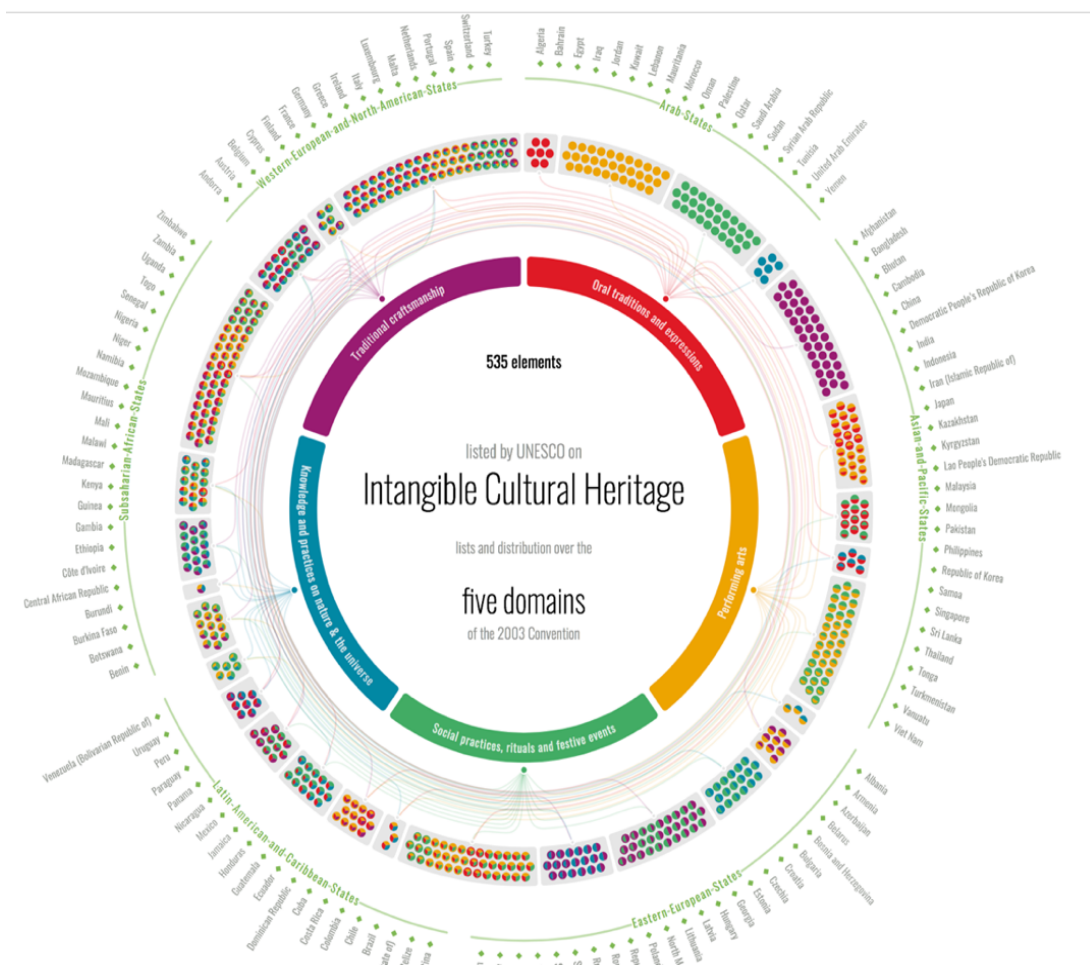


Figure 1. Intangible Cultural Heritage

Figure 1 shows the five domains in different colours and indicate their geographical distribution in those countries part of UNESCO. The ICH are the little circles right between the domains and the countries: as it is easy to spot, there are some ICH which are part of just one domain (the one with just one colour), with the majority of records which are instead a mix of multiple domains (the one with different colours).

2.3. Actors involved in the protection of cultural heritage

The 2003 Convention is peculiar and different from that of 1972, especially with reference to the ICH “that communities, groups and in some cases, individuals recognize as part of their cultural heritage”¹⁰¹. The role of

¹⁰¹ VAN ZANTEN (2004: 38).

communities, groups and individuals is regulated in Article 15 of the Convention.

What more, the Convention assigns a prominent role to States even though the ICH belongs to the cultural communities which (re)produce it. In fact, the Convention is “born by people, so the ICH is not tied to the territory, nor it is necessarily found within the borders of a single country”¹⁰². This heritage can coincide with the ‘national’ heritage, but it can also be different and sometimes even antagonistic. The role of States Parties is defined in Article 11 of the Convention.

2.3.1. The role of States Parties

Article 11

Each State Party:

- (a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory;
- (b) among the safeguarding measures referred to in Article 2, paragraph 3, identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant nongovernmental organisations.

In this paragraph we analyse Article 11 dealing with the role of the State Parties under the 2003 Convention. This Article sets the mandatory role of State Parties around two legal obligations. The first is established in Article 11 and it is the duty to ensure the safeguarding of ICH present in the national territory. Second, and most important, State Parties must involve communities in selecting and safeguarding ICHs.

A State Party would be in breach of the Convention if it disattends such obligations. Nonetheless, a State Party can also decide to move somehow further these obligations, as it can introduce more restrictive legislation to better safeguarding ICH.

- Ensuring the safeguarding of ICH

To take the necessary measures to ensure the safeguarding of the ICH on the national territory is a key prerogative for States participating to the Convention. Such duty is however subject to a territorial restriction, meaning

¹⁰² AYKAN (2015: 951).

that a State can only deal with ICH present in the national territory. However, ICHs are different from ordinary TCH:

- first, the ICH has not a natural situs as it often is for tangible heritage;
 - second, the ICH naturally evolves, improves, enriches or simply varies in its forms and contents within a given community. In fact, according to Article 12¹⁰³, States Parties have the obligation to draw up inventories of ICH present on their territory which must be periodically updated;
 - third, an ICH can be owned by two or more communities in neighbouring countries, across national borders. As such, the same ICH may be shared by two countries. If this is the case, the Convention addresses to the State Parties and, necessarily, to their authorities and their territories. The fact that Article 11 applies only to ICH present in the territory of a State is a problem for communities who migrate across countries. One example is the transhumance which has been inscribed to the list of ICH in 2019 by Austria, Italy and Greece. This could happen only after that Operational Directives as emended in 2010 established the chance of a multinational registration as ICH.
- *Participation of the communities, groups and individuals*

The second paragraph of the Article establishes the obligation of State Parties to identify and define the various elements of the ICH present in their territories. This must happen by involving communities, groups and relevant non-governmental organisations. More specifically such obligation implies i) refraining from State-centred identification and definition of ICH; ii) distinguish the 2003 Convention from the one about TCH; it also iii) shows the clear continuity between Article 2 and 11 of the Convention; and iv) confirms the centrality of communities and groups for safeguarding ICH, as they have the obligations to identify and define preliminarily their presence in a given territory.

¹⁰³ According to Article 12: “(1) to ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the ICH present in its territory. These inventories shall be regularly updated. (2) when each State Party periodically submits its report to the Committee, in accordance with Article 29, it shall provide relevant information on such inventories” (UNESCO: 2003a).

2.3.2. *Actors who creates intangible cultural heritage: communities, groups and individuals*

Article 15:

“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”.

Article 15 stays somehow at the core of the 2003 Convention: “it represents the culmination of the contemporary understating of cultural heritage”¹⁰⁴. As already clarified in the brief summary on the history of Convention, the change of focus from tangible expressions of cultural heritage to intangible ones is considered to be “one of the most significant recent development of international cultural heritage law”¹⁰⁵. Yet, one of the most revolutionary innovation that the Convention brought on was the inclusion of the “communities, groups and individuals”.

[In fact] the safeguarding and transmission of the ICH is essentially based on the will and effective intervention of the actors involved in this heritage. In order to ensure [the] sustainability of this process, governments have a duty to take measures [that] facilitate the democratic participation of all stakeholders¹⁰⁶.

Thus, Article 15 emphasizes the necessity for governments to collaborate with practitioners and those individuals and communities who are the bearers of all expressions of ICH. All stakeholders must be consulted, them being national governments, local and regional communities, the scientific community, academic institutions, the civil society, the public and private sector as well as the media¹⁰⁷.

At first, the term communities was adopted even though such terminology was considered inappropriate and too unspecific. In 2002 a glossary with several important definitions was provided to define communities as groups of “people who share a self- ascribed sense of connectedness”¹⁰⁸. As stated in the previous chapters, this glossary was rejected since there was no consensus among the intergovernmental experts drafting the 2003 Convention. An

¹⁰⁴ BLAKE, LIXINSKI (2020: 290).

¹⁰⁵ BLAKE (2001).

¹⁰⁶ BLAKE, LIXINSKI (2020: 275).

¹⁰⁷ BLAKE (2006: 76-77).

¹⁰⁸ VAN ZANTEN (2002).

agreement was found, instead, on specifying that “communities, groups and, where appropriate, individuals”¹⁰⁹ could all account for stakeholders.

As the President of *Maison des cultures du monde - Centre français du patrimoine culturel immatériel*, Chérif Khaznadar emphasized, one of the most important reason for not including the 2002 glossary in the Convention was its “vagueness and non-definition, [which] allowed interpretations going as far as making community the very core of the Convention and holder of the ICH”¹¹⁰.

The issue was tentatively talked by providing new definitions of Communities, Groups and Individuals (CGIs). As a member of the UNESCO Chair for Human Rights, Professor Janet Blake suggested that:

the community is placed at the centre of this Convention than the heritage itself and the safeguarding of ICH must take into account the wide human, social and cultural contexts in which the enactment of ICH occurs¹¹¹.

Indeed, the researchers in international law keep on downplaying the groups and individuals, and positively discriminating the communities since, besides the mention in this Convention, they do not have any legal status per se in international law¹¹². However, today, concerning CGIs there is “a general anthropological consensus in the sense of thinking of ICH as belonging to collectivities, rather than identifiable individuals”¹¹³.

To sum up, the purpose of Article 15 is well explained in the Article itself where stating that: “when safeguarding ICH, the widest possible participation and active involvement of CGIs is the right thing to do”¹¹⁴.

2.3.3. *Relationship and differences between Article 15 and Article 11*

Article 11 is the first of the five Articles (11-15) that are part of the “Safeguarding of the ICH at the national level”, and it emphasizes the participation of the States Parties in safeguarding ICH. However, also Article 15 is about participation, as it specifies the role of CGIs. Importantly, Article 15 differs from Article 11 at three levels:

¹⁰⁹ BLAKE, LIXINSKI (2020: 290).

¹¹⁰ BLAKE (2020: 280).

¹¹¹ *Ibidem*.

¹¹² BLAKE (2017: 125).

¹¹³ LIXINSKI (2013: 147-148).

¹¹⁴ Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO, 2003.

- first, it addresses communities, groups and, where appropriate, individuals that create, maintain and transmit ICH - individuals instead of nongovernmental organisation;
- second, it reads that State Parties “shall endeavour to ensure” their widest possible participation. This corresponds to a soft requirement, while under Article 11 State Parties have an obligation to engage with safeguarding ICH;
- finally, Article 16 of the Convention requires this participation to be active for both the managements and the identification and definition of the ICH - as under Article 11.

The above mentioned norms that make reference to the involvement of the CGIs, do not find a similar correspondence in the provisions relating to the organs of the Convention (not specifically examined in the context of this work), which composition is reserved exclusively to State Parties.

2.3.4. The role of States in multinational heritage

The 2003 ICH Convention assigned thus a prominent role to States, establishing a legal obligation for them to involve communities throughout the process. It was also underlined that Article 11 applies only to ICH present in the territory of State Party, but also that the ICH could be developed and practised by two or more communities in different States.

In this direction the Operational Directives for the Implementation of the Convention for the Safeguarding of the ICH as emended in 2010, brought important correctives to the initial disposals, establishing the following provisions.

Operational Directives

1.5 Multi- national files

13. States Parties are encouraged to jointly submit multi-national nominations to the List of Intangible Cultural Heritage in Need of Urgent Safeguarding and the Representative List of the Intangible Cultural Heritage of Humanity when an element is found on the territory of more than one State Party.

14. The Committee encourages the submission of subregional or regional programmes, projects and activities as well as those undertaken jointly by States Parties in geographically discontinuous area. States Parties may submit these proposals individually or jointly.

15. States Parties may submit to the Committee requests for international assistance jointly submitted by two or more State Parties.

1.6 Inscription on an extended or reduced basis

16. The inscription of an element on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding or on the Representative List of the Intangible Cultural Heritage of Humanity can be extended to other communities, groups and, if applicable, individuals at the national and/or international level upon the request of the State(s) Party(ies) in whose territory(ies) the element is present, with the consent of the concerned communities, groups and, if applicable individuals.

17. The inscription of an element on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding or on the Representative List of the Intangible Cultural Heritage of Humanity can be reduced at the national and/or international level if the State(s) Party(ies) in whose territory(ies) the element is present so request(s), with the consent of the concerned communities, groups, and, if applicable, individuals.

18. The State(s) Party(ies) concerned submit(s) a new nomination showing that the nomination, as extended or reduced, satisfies all of the required criteria for inscription. Such a nomination shall be submitted according to the established procedures and deadlines for nominations.

19. In the event that the Committee decides to inscribe the element on the basis of the new nomination file, the new inscription shall replace the original inscription. In the event that the Committee, on the basis of the new nomination file, decides not to inscribe the element, the original inscription shall remain intact.

The examination of the ICH as multinational files allows to appreciate and recover the cultural unity of rituals, traditions and others forms of cultural expressions that are sometimes artificially separated from the national borders. Moreover, the registration as multinational heritage can take on further importance in order to contrast a surreptitious use of the Convention for nationalistic purposes. An in-depth study of these aspects, as well as a statistical analysis of the cases of multinational files in the application of the Convention, are examined in the final Chapter (Chapter 3 paragraph 3.3.3.).

2.4. The instruments for safeguarding ICH at International level

The Convention also foresees a listing mechanism as established in Articles 16 and 17. These two provisions are the main instrument for regulating the

international activity of the 2003 Convention, as they determine its practical functioning¹¹⁵.

The model for the proposed listing mechanism was taken from the 1972 WHC. As noted in March 2002 during the Final Report of the first meeting of drafters of the Convention, this seemed a natural and logic development.

The discussion on the establishment of heritage lists indicates a general consensus about the value of such listing and the credibility that the screening process lends it¹¹⁶.

However, the decision of using a listing mechanism also for the ICH Convention was not uncontroversial. Indeed, during the several meetings that led to the adoption of the 2003 Convention, experts underlined that:

the scheme of the 1972 World Heritage Convention might not be suitable for ICH... a legal approach should perhaps avoid the establishment of a List based on selective criteria of importance. The latter might give rise to arbitrary discrimination among cultures¹¹⁷.

The idea was to promote a model which would allow the safeguarding of all manifestation of ICH on the basis of a self-identification run by the communities concerned - thus ensuring the maximum possible participation¹¹⁸.

Some State delegations, such as the Norwegian one, opposed the adoption of a listing mechanism similar to the one of the 1972 Convention. The opinion was that such mechanism would lead to determining a hierarchy among the different expressions of ICH. As such, they proposed that only a catalogue of best practices had to be contemplated by the future Convention. Indeed, the very fact of listing implied a sort of taxonomy of the different manifestations of ICH, leading to the perception of those ICH having somehow a greater value compared to that attributed to non-listed expressions of the same heritage. Despite this risk of establishing a hierarchy between different ICH, the listing mechanism was anyway adopted since it was considered as the most effective tool to ensure the appropriate safeguarding of ICH.

There were three reasons that lead to the adoption of the two lists. First, the lists were expected to ensure better visibility for the Convention, especially outside the circles of experts in the field. Second, the two lists make the international system of safeguarding of ICH more concrete and it makes the Convention more likely to attract the consent of States and help fostering

¹¹⁵ BLAKE, LIXINSKI (2020: 315).

¹¹⁶ UNESCO (2002b).

¹¹⁷ UNESCO (2002e).

¹¹⁸ BLAKE (2006: 79).

awareness. Last, as underlined by the Brazilian delegation, the listing system ensures consistency with the duty of State Parties to build inventories of the ICH present in their respective territories.

2.4.1. *Exegesis of Article 16 and 17 and Operation of the Representative and the Urgent Safeguarding Lists*

Articles 16 and 17 are central for determining the practical functioning of the 2003 Convention. The rules and modalities for registering an ICH in the two lists are established by the OD, as adopted by the General Assembly of State Parties in 2008 to be revised in 2016¹¹⁹.

- *Article 16: Representative List*

Article 16:

1. In order to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respect cultural diversity, the Committee, upon the proposal of the State Parties concerned, shall establish, keep up to date and publish a Representative list of the Intangible Cultural Heritage of Humanity.
2. The Committee shall draw and submit to the General Assembly for approval the criteria for the establishment, updating and publication of this Representative List.

The first list is only ‘representative’ to reduce the risk of giving the impression that a hierarchy exists among listed and non-listed ICHs. In fact, the main purpose of the list is: “to ensure better visibility of the ICH and awareness of its significance, and to encourage dialogue which respect cultural diversity”¹²⁰. Nonetheless, the presence of a list can be in itself perceived as creating a value-based classification, as noted by the Brazilian delegation during the very first session of the Committee.

Another danger is represented by the possibility that, in its practical enforcement, the scope of the 2003 Convention is limited simply to the ICH inscribed on the lists. In this respect, the WHC was able to address the problem thanks to Article 12¹²¹ stating that the fact that a heritage has not been included in the two lists, does not mean that it does not have an outstanding universal

¹¹⁹ BLAKE, LIXINSKI (2020:315).

¹²⁰ The rationale underlying the Representative List is therefore different from that characterizing the World Heritage List.

¹²¹ “The fact that a property belonging to the cultural or natural heritage has not been included in either of the two lists mentioned in paragraphs 2 and 4 of Article 11 shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists” (UNESCO: 1972).

value for purposes other than those resulting from inclusion in these lists. The absence in the 2003 Convention of a provision corresponding to this Article may increase such danger.

Furthermore, the strictness of the obligation for State Parties as defined in the 2003 Convention does not help in ensuring the effective safeguarding of those ICH that are not included in the list established by Article 16 and 17.

The criteria for the establishment, updating and publishing the RL are defined in paragraph 2 of Article 16, and they are determined by the ODs. Accordingly, for being inscribed to the RL, ICH must simultaneously satisfy the following criteria:

- the element constitutes ICH as defined in Article 2 of the Convention;
- inscription of the element will contribute to ensure visibility of and awareness on the significance of the ICH and to encourage dialogue among WHO, thus reflecting cultural diversity worldwide and testifying to human activity;
- safeguarding measures are elaborated to protect and promote the ICH item;
- the ICH 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 ICH is included in an inventory of all similar items present in the territory of the submitting State(s) Party(ies), as defined in Article 11 and 12 of the Convention¹²².

There are two aspects of these criteria that are noteworthy: first, an element of ICH may obtain access to international protection only when it is already adequately safeguarded at the national level. This means that only States which concretely commit to safeguard their ICH at the domestic level have the opportunity to obtain access to the international mechanism set by the 2003 Convention. Second, the fourth criterion ensure much higher standards than the 2003 Convention itself in terms of effective participation and the involvement of communities, groups and individuals that recognize the item concerned as part of their cultural heritage.

Finally, the OD establishes that an element of ICH may be proposed by governments only when the “free, prior and informed consent” of “the community, group or, if applicable, individuals (CGIs) concerned”¹²³ has been obtained. Such provision gives the veto to such CGIs, who may therefore impede that their ICH is inscribed on the RL.

¹²² BLAKE, LIXINSKI (2020: 315-316).

¹²³ *Id.* 319.

As such, CGIs concerned can de facto control the management of their own ICH, i.e. to decide that a given manifestation of such heritage should (not) be inscribed on the List¹²⁴. However, these actors cannot propose the registration of a certain ICH without the permission of the national government. Besides, in the periodical report on the status of a registered ICH, States Parties must also mention and describe how CGIs and sometimes also non-governmental organisations participated in past and future actions relative to safeguarding. In other words, the Convention establishes a strong connection between States Parties and relevant local communities, groups or individuals - even if the involvement of the latter risks often to be only formal. As the Brazilian delegation emphasized:

communities are the main difference between tangible and ICH. It is therefore important to look at the conditions under which ICH is enacted and to see whether it still has a social function; an expression that is not enacted anymore cannot be imposed on a community, since it would be artificial¹²⁵.

This said, in practice such collaboration between state and non-State Parties may be problematic, as we will see in more details in the final chapter of this work.

- *Article 17: Urgent List*

Article 17:

1. With a view to taking appropriate safeguarding measures, the Committee shall establish, keep up to date and publish a List of Intangible Cultural Heritage in Need of Urgent Safeguarding, and shall inscribe such heritage on the List at the request of the State Party concerned.
2. The Committee shall draw up and submit to the General Assembly for approval the criteria for the establishment, updating and publication of this List.

The main purpose of the USL is to arrange appropriate safeguarding measures for ICH which is considered to be under threat for whatever reason. The fourth recital of the Preamble of the 2003 Convention provides some guidance concerning the specific threats to which ICH may be subjected¹²⁶. In general, “extreme urgency” is defined in the OD as a situation when an element of ICH “is facing grave threats as a result of which it cannot be expected to survive

¹²⁴ BLAKE, LIXINSKI (2020: 319).

¹²⁵ UNESCO (2008a).

¹²⁶ The fourth recital of the Preamble of the 2003 Convention reads as follows: “the process of globalization and social transformation, alongside the conditions they create for renewed dialogue among communities, also give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the ICH, in particular owing to a lack of resources for safeguarding such heritage”.

without immediate safeguarding”¹²⁷. An ICH may be added to the List established by Article 17 only when all the following criteria are satisfied:

- the element constitutes ICH as defined in Article 2 of the Convention;
- the element is in urgent need of safeguarding because its viability is at risk despite the efforts of the CGIs and State(s) Party(ies) concerned;
- a safeguarding plan is elaborated that may enable the CGIs concerned to continue the practice and transmission of the element;
- the element has been nominated following the widest possible participation of the CGIs concerned and with their free prior and informed consent;
- the element is included in an inventory of the ICH present in the territory(ies) of the submitting State(s) Party(ies), as defined in Article 11 and 12 of the Convention.

Now that the two Lists have been presented, let us see how a heritage can be enlisted, and which procedure should be followed for the registration.

- The procedure for the inscription

For the procedure on inscription of ICH, the UNESCO created two forms named ICH-01 and IHC-02. Preparatory assistance may be required by a State Party for the elaboration of the nomination for being included in the USL. Through the process, the States must also involve the communities concerned in the preparation of their application.

One difference between Article 16 and Article 17 of the Convention is that to include an ICH in the RL “the proposal of the State Parties concerned” is necessary. Instead, according to Article 17, including a new element to the list is possible only “at the request of the State Party concerned”. In principle, the functioning of the two lists is useless without a request made by the State(s) in the territory of which the heritage concerned is located.

Moreover, the Committee has the power to inscribe a heritage not ‘at the request of’, but ‘in consultation with’ the concerned State Party. The evaluation of candidatures in both lists is run by the Evaluation Body, which is in charge of recommend application to the attention of the Committee which will decide “to inscribe or not to inscribe the nominated element on the list”¹²⁸.

¹²⁷ UNESCO (2008c: paragraph 1).

¹²⁸ *Id.* paragraph 30.

It is not possible to have a heritage that is inscribed on both lists. Moreover, inscribed expressions of ICH may also be removed from both lists when they no longer satisfy the previously mentioned criteria. The process of listing and delisting will be better explained in the following chapter - Chapter 3 – which is concerned with the strengths and pitfalls of the UNESCO Convention.

3. UNESCO ICH CONVENTION: STRENGTHS AND PITFALLS

In the previous chapters we analysed the genesis of the Convention on the Safeguarding of ICH and its legal framework.

In this part of the thesis we will analyse the strengths and pitfalls of the safeguarding of ICH by looking at the work of the Convention over its almost fifteen years of enforcement. We will do so by concentrating on the core related debates and critics.

For the purpose of a good and clear exposition, this analysis will develop along the same scheme adopted in the previous chapter: first, the focus on the analysis and relevance of the definition of ICH; second, the strengths and pitfalls related to the object of the Convention and the instruments for safeguarding ICH at international level; third, the actors involved in the protection of the ICH and how States and CGIs interact in the application process of the heritage and the problems that can arise from it.

It is clear, though, that – although separately examined – some necessary and obvious interconnections, between the different points exist.

3.1. The notion of ICH and its relevance for the enforcement of the Convention

The definition adopted in the ICH Convention must be considered a satisfactory point of arrival for the broad international reflection developed between 1972 and 2003.

The definition attributes a new and more active role to the bearers of such heritage¹²⁹, that is, the local communities. It is only from the point of view of a very close heritage-community link that it is possible to understand the further references contained in the definition of Article 2. In this Article it is stated that the heritage to safeguard must be “compatible with existing international human rights instruments, as well as with the requirement of mutual respect among communities, groups and individuals and of sustainable development”. The scope is to guarantee local identities, protect cultural, social and religious rights, and preserve diversity by avoiding protecting social practices and cultural traditions which can be offensive and/or harmful to people or the environment. Therefore, the focal point of the Convention lies in the fact that the protection of the ICH is not aimed at safeguarding the national interest of each State, but rather the collective heritage of the

¹²⁹ LAPICCERELLA ZINGARI (2015a: 130).

international community as a whole - namely the cultural diversity of humanity.

This evolutionary and dynamic understanding of the notion of ICH also impacts the adopted terminology. It determines the decreased use of terms such as 'protection' and 'conservation' which mostly referred to a static vision of heritage, to adopt a more comprehensive term such as 'safeguard' which best expresses the vital, dynamic and multifaceted nature of the heritage targeted by specific public policies¹³⁰.

In conclusion, as noted by Francioni¹³¹, the international debate contributed to the dynamic evolution of international law on cultural heritage toward a more complex concept of heritage, linked to living culture and Human Rights. In this sense, and in a broader perspective, it can be considered a fundamental step towards the reconciliation between cultural pluralism and the universality of Human Rights.

- *The overcoming of the Western perspective of cultural heritage*

After the approval of the 1972 Convention, due to the pressure of countries in Africa, Asia, Latin America and the Pacific, the need emerged to safeguard what was not protected in the first Convention. Countries complained that the World Heritage List hardly reflected a geographical balance since its selection criteria were not necessarily suited to the cultural characteristics of non-European/Western countries. In fact, for many cultures material heritage is only of little importance.

Importantly, the Western conception refers to monuments, artefacts, objects: all tangible and material objects. This kind of objects have not the same value in other cultures. The *Vodoun* temples can be used as a perfect example of 'non-monument' buildings, according to the Western meaning of the term 'monument'. Those African temples are rebuilt regularly. They are made of simple materials and regularly moved to other cities: they have no architectural or aesthetic value¹³². Many cultures that manifest little consideration for their heritage, have nonetheless developed the ability to conserve their material culture. For example, in the Japanese culture the materiality of monuments is not considered, being the monuments only a symbol of knowledge. The Japanese temple of Ise, the greatest temple of Shintoism, is made of wood and has completely preserved all its perpetuity thanks to an integral renewal process. Every twenty years, the temple is completely reconstructed. The temple remains the same, as the builders use

¹³⁰ The Convention moves away from the logic of protection, understood in its essential core as the conservation of heritage and accepts the concept of safeguard in its stead to highlight the dynamic and vital nature of a complex of practices in continuous evolution that require contexts propitious for their transmission (LAPICERELLA ZINGARI (2015b)).

¹³¹ BLAKE, LIXINSKI (2020: 57).

¹³² SINOU (1993: 33-51).

the same type of wood. Yet, it is renewed without undergoing any material or spiritual changes¹³³.

As such, the notion of ICH represents a clear recognition at the international level of a type of heritage that was neglected in the past. It allowed for revisiting Western/European mainstream understandings of the very concept of ‘heritage’.

After about 15 years of enforcement of the Convention on intangible heritage, it can be said that a significant rebalancing in favour of non-Western countries has been achieved, considering that European and North American countries have almost half of the heritage registered in the lists of the 1972 Convention (47%)¹³⁴.

From our elaboration based on the data relating to the elements included in the UNESCO 2003 lists (see Chart 1) it is possible to see how the ICH of both Lists (Representative and Urgent) is distributed per geographical areas. To simplify the work, the geographical areas within the chart are the same that the UNESCO database used to classify the different heritage¹³⁵.

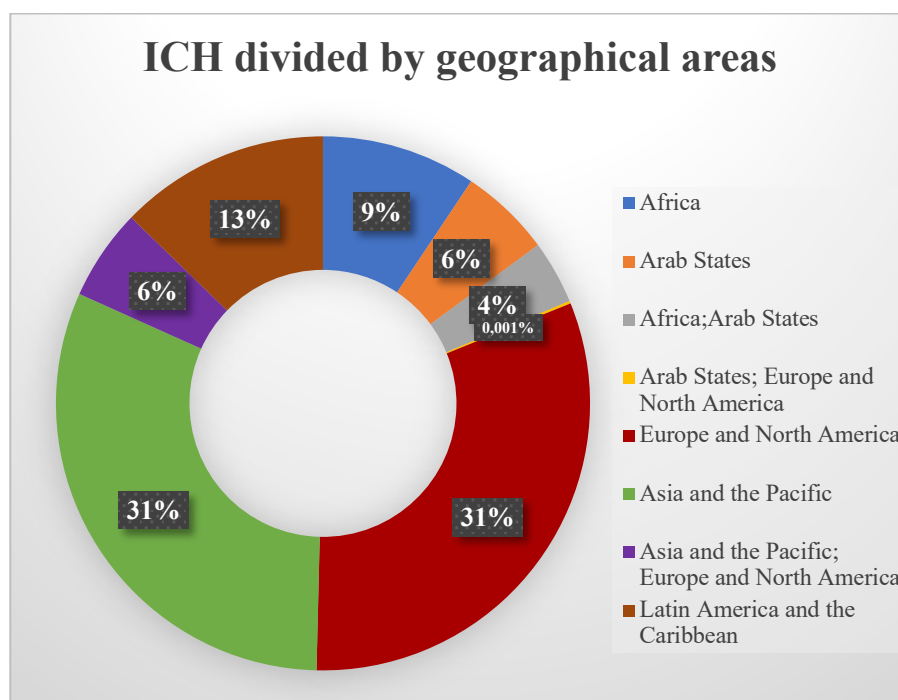


Chart 1: ICH divided by geographical areas

¹³³ VECO (2010: 324).

¹³⁴ UNESCO (2021).

¹³⁵ UNESCO (2019).

The first thing that emerges is that both “Asian and the Pacific” and “European and North America” cover the 31% of the enlisted ICH. Moreover, we can see that the second highest percentage (13%) is located in “Latin America and the Caribbean”. The African continent has only 9% of the ICH and the Arab States the 6%, with a 4% of ICH located both in Africa and the Arab States. So, it clearly shows that the 2003 Convention has given to the other part of the world a more balanced representation of their heritage and culture, in terms of registered elements. The analysis of the heritage enlisted as UNESCO ICH, shows that some areas are almost completely absent¹³⁶. Only two countries of Oceania (Tonga and Vanuatu) have registered ICH on the UNESCO lists. In the same lists, Australia and New Zealand are completely absent, even if they have respectively 19 and 3 assets included in the World Heritage list.

We may find a similar situation in some Latin America and Caribbean areas, where there are only intangible elements enlisted from the Greater Antilles (Cuba, Dominican Republic and Jamaica). Moreover, it stands out the complete absence of the United States and Canada (that have respectively 21 and 17 TCH protected by UNESCO). It is surprising that, up to now, these two great countries did not consider safeguarding, for example, some elements of culture of the native population - although the situation of the United States is peculiar, since this country recently decided to exit UNESCO for political reason.

- *The artificial dichotomy of tangible / intangible cultural heritage and the recovery of a holistic dimension of cultural heritage*

In addition to practices, representations, expressions, knowledge and know-how, the Convention specifies in the paragraph 1 of Article 2 that ICH also includes “the tools, objects, artefacts and cultural spaces associated with them that communities, groups and in some cases individuals recognize as part of their cultural heritage”. As such, for “tangible heritage, the asset itself is protected, while the knowledge of the process of its creation is safeguarded for ICH”¹³⁷. It follows that the cultural value of these assets must be grasped in the contemporaneity of observation and in the vitality of a living heritage in which each individual execution takes on the character of uniqueness and unrepeatability, unlike movable and immovable property whose stability over time is in direct function of their materiality¹³⁸.

Based on sociological and anthropological approaches, when referring to cultural heritage the artificial dichotomy between tangible and intangible is often harmful. In this regard, it has been highlighted the holistic nature of the world cultural heritage and how this separation within UNESCO is owed only

¹³⁶ DELLI ZOTTI (2018: 182).

¹³⁷ *Id.* 175.

¹³⁸ TUCCI (2018: 26).

to the historical process that led to the creation of the 1972 and 2003 Conventions. As noted by D'Ambrosi, the physical heritage is not fully expressed except in its underlying values and reciprocally the intangible dimension, for its conservation, must be embodied in tangible manifestations, in visible signs¹³⁹.

From this holistic perspective on cultural heritage, the aforementioned institutional and dichotomous approach to safeguard tangible and intangible can lead to an institutional compartmentalization and polarization. Accordingly, as it has been observed¹⁴⁰, the erroneous perception that tangible stands for dead civilizations or monumental and intangible for living cultures can be generated.

- *The cases of Sand Drawing of Vanuatu and the Amalfi Coast view*

The case of the Sand Drawing of Vanuatu registered in the RL in 2008 is emblematic of how the 2003 Convention refers to a broader and more comprehensive understanding of cultural heritage which goes beyond the dichotomy between tangible or intangible cultural property. This is a unique tradition which consists in tracing geometric figures in dust, sand or ashes. Sometimes this tradition is accompanied by songs, rituals, and stories. Importantly, sand drawings are used to teach children about social responsibilities or to explain philosophical concepts to adults. At the heart of sand drawing there is the Vanuatu concept of *jalus* which derives from the English term 'jealousy', but its meaning extends beyond petty envy, and it is often used in a positive note. In fact, it describes "the pride that people take in their regional difference"¹⁴¹. Again, we see how the creation of an ICH can be deeply connected to the formation and identification of a cultural community. There are more than 300 different sand drawing designs and the local communities want to preserve them through oral knowledge.



Figure 2 Vanuatu Sand Drawing

¹³⁹ D'AMBROSI (2008: 61).

¹⁴⁰ ALIVIZATOU (2008: 3).

¹⁴¹ ZAGALA (2004: 33).

For the exact purpose of preserving this tradition, creating just a catalogue of sand drawing would be “to disregard and potentially destroy the intimate processes of concealing and revealing information through the performance of this tradition”.

In this particular case, the creation of the concept of ICH is useful and places particular emphasis on the transmission of knowledge rather than on the mere preservation of the objects¹⁴² of that knowledge – as it is the case for the TCH.

As such,

the expansion in the scope of heritage management from tangible to intangible products has made heritage preservation a much more complex and political question than it was when such preservation was restricted to monuments and artefacts; because ICH is rooted in the social and cultural lives of the cultural communities¹⁴³.

Linking the heritage to the identity of a cultural community has also caused some difficulties in preserving it, especially because of the multiplicity of actors that are involved in safeguarding that heritage – i.e. the local communities, groups and individuals and the national States.

Such holistic understanding of heritage is also captured by the case of the Amalfi Coast, an area in the South of Italy near Salerno and not far from Naples, of great physical beauty and natural diversity. It has been intensively settled by human communities since the early Middle Ages. The rural areas show the versatility of the inhabitants in adapting their use of the land to the diverse nature of the terrain, which ranges from terraced vineyards and orchards on the lower slopes to wide upland pastures.

In this area the ‘landscape unity’ cannot be considered only as the tangible element mountain-hill-villages-sea. The living heritages are directly connected to the territory where they are created¹⁴⁴. The territorial dimension of the heritage is linked to the contemporaneity since it is possible to observe them in living, real and social contexts. The ICH models the territory, qualifying it and, representing the real, local and tangible potentialities of each community¹⁴⁵.

The Amalfi Coast epitomizes the close interconnection between ICH and the territory that is evident in the physical relationship existing between the mountain structure, the hillsides, the coasts, the water systems, the botanical systems, and the immateriality of traditions, knowledge, communities and

¹⁴² ZAGALA (2004: 33).

¹⁴³ BLAKE (2008: 46).

¹⁴⁴ NIGLIO (2016: 48).

¹⁴⁵ GOLINO (2016: 181- 182).

festivals. The intangible is always linked to the territory: the intangible culture lives in the tangible, in the sense that it generates, settles, regenerates across people, relationships, artefacts and institutions.

3.2. Object of protection and instruments for safeguarding ICH at international level

As stated in the previous chapter, the second paragraph of Article 2 of the Convention enlists the five categories included under the definition of ICH. Considering the vulnerability of the ICH and the growing societal concern for the loss of cultural diversity consequent to globalization, the Convention calls upon its Member States to take the necessary measures to guarantee the survival of such heritage. As for the instruments adopted according to the Convention to achieve such goal, the elements identified as ICH can be registered in the two lists outlined in Article 16, the RL, and Article 17, the USL. Concerning the rules and modalities for inscribing items within either of the two lists, these are established by the OD. As such, the safeguarding mechanism of the Convention provides that for a heritage to be considered for registration in the RL it must cumulatively comply with the selection criteria provided by the OD.

The criteria for registering items in the USL are fundamentally the same, with only the second criterion being significantly modified. Indeed, in the case of the RL, this criterion requires that the registration of the element will promote world-wide knowledge, proving its importance, bearing witness to cultural diversity and human creativity. Instead, for enrollment in the USL, the heritage must be at risk despite the efforts of the community or of the individuals interested or be threatened with probable extinction without immediate counter-measures.

3.2.1. The listing system: the fear of hierarchization of heritage and the risk to distort the nature of the enlisted ICH.

The safeguarding system with the establishment of lists reproduces the same mechanism and some of the problematics already recorded with the 1972 Convention. Yet, despite the adoption of a similar safeguarding mechanism, in the 2003 Convention the risk of hierarchization of heritages does not seem to recur with the same intensity. The mitigation of such risk results from the removing of exceptionality as a parameter to include items in the lists. This risk seems to be neutralized by the very nature of the ICH, identified in the Convention as directly related to the communities that generated them and that keep them alive. As such, the RL is not meant to become an elitist catalogue of the 'best of the best' of ICH. Rather, it intends to contribute to ensuring a better visibility of this heritage and to make people aware of what it means and represents by encouraging a dialogue that respects cultural

diversity. In this sense, the 2003 Convention reconnects to its real purposes as it focuses on the culture bearers themselves, thus reducing the risk of becoming an instrument of political struggle in the hands of national governments.¹⁴⁶

Anthropological and ethnographic studies¹⁴⁷ highlighted the presence of a different sort of dangers inherent to the very process of registration of intangible elements in the UNESCO lists. Such procedure could determine 'glocal short circuits' linking the local and global dimension of identity formation, legitimation and enhancement of ICH. In particular, the critical claims point to the fact that the establishment of a control system, often imposed by local institutions or by the presence of UNESCO, could tend to homologate and standardize traditions and rituals and normalize what are considered their 'excesses' of the feast. In this way, the local cultural diversity risks to become a merchandising item, insofar tradition is standardized and local practices are universalised by the tourism marketing agencies of the various territories.

An example is the process that led to the enlisting of the 'Festa dei Gigli' of Nola, in the province of Naples. This event includes nine artefacts built every year for the occasion by specialized craftsmen and carried on the shoulders by organized groups of hundreds of '*cullatori*' (so called as during the feast they carry the obelisks, cradling them), which together form the '*paranza*'. The obelisks are moved through the streets of the city for about twenty-four hours, responding to the sound of music. Furthermore, a boat is carried in procession along the narrow streets of the historic city centre.

Following the controls imposed by institutions, there was a change in the rules due to safety issues about the obelisks, with respect to the building process and in their positioning in specific places in the historic centre during the week of the festival. According to the ethnographic analysis of the festive practice of last years, this led to a change in the local values mobilized for the Giglistic tradition. One of the paradoxes lies in the fact that starting from the begging system ('questue') and, therefore, starting from self-management and self-financing, the ownership of the asset is claimed by the powers within the community ceremonial, which however does not receive concrete support by the institutions. For this reason, the community that actually owns the heritage does not accept institutional regulation, sanctions or fines in monetary terms, seen as limitations on the expression of freedom and creativity and as a threat of loss of local patrimonial values.

As pointed out by ethnography, when local institutions enforce the respect for legality, security and attention to cultural diversity and human rights, as

¹⁴⁶ ZAGATO (2008: 51-52).

¹⁴⁷(LUCARELLI-MAZZACANE, D'UVA, BALLACCHINO).

supported by UNESCO¹⁴⁸, a process of institutionalization, normalization and constraint to hegemonic rules, that often misrepresents the local nature of the cultural heritage, is likely to develop.

3.2.2. The risk of fossilization of ICH: the mechanism of listing and the necessity of delisting

The late modern period has witnessed an exponential increase in the numbers of objects and practices that have been defined, listed and conserved as heritage. Importantly, over the same period there has also been an important shift from the tangible forms of heritage to the intangible one.

The exponential increase of the lists has been the cause for debate between the Committee and the General Assembly of State Parties in the 2003 Convention. Discussions arose about the opportunity of keeping inscribed items on the list on an open-ended basis or, on the contrary, to remove them from the lists after a given period of time. The reason to include a so-called “sunset clause¹⁴⁹” - as a condition that allows the delisting of some heritage - respond to the need to regularly replace inscribed items with other elements. Such turnover would facilitate making ICH visible “in all its diversity” and prevent elements inscribed on the List to be “carved in stone for eternity”. It also responded to the necessity of avoiding an excessively long exposure of a given cultural expression of ICH in a list which could “lead to erosion or freezing and to a loss of function of an ICH element in the life of the groups and communities concerned”¹⁵⁰. Such dynamism also prevents that “the international listing system would become a repetitive and static encyclopaedia of ICH”¹⁵¹.

Moreover, the inscription in the list may so bring to an unsuitable level of public attention and lead to standardization of artistic expressions, commercialization, breach of tradition-bearers privacy, trade secrets, or know-how traditionality transmitted within the family or restricted social groups.

¹⁴⁸ ZAGATO (2008: 182).

¹⁴⁹ “Following the discussion on limiting the number of inscriptions of ICH on the Representative List, and bearing in mind the evolving nature of ICH, the experts positively considered the application of a “sunset clause” to limit the duration of inscriptions. They noted that the main objective of the List is to increase the visibility of ICH and raise awareness on the need of its safeguarding. Once a specific time limit is reached, elements would be removed. They recommended not to use the word delisting, but rather to transfer the ICH element to an archive or register”- see Report of the Expert Meeting on criteria for inscription on the lists established by the 2003 convention for the safeguarding of the ICH, UNESCO, Paris 5-6 December 2005.

¹⁵⁰ Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, UNESCO, Algiers, Algeria, 18-19 November 2006, 1st session.

¹⁵¹ Expert Meeting on Community Involvement in Safeguarding of the Intangible Cultural Heritage: Towards the Implementation of the 2003 Convention, 12.

As a result of the exponential growth of listed objects, places or practices of heritage in the contemporary world, has caused, as noted by Harrison, a “crisis of accumulation of the past”¹⁵². To deal with this crisis, the management of heritage should refer not only to the process of preservation and conservation of a heritage, “but also to active decisions to delist or cease to conserve particular forms of heritage once their significance to contemporary and future societies can no longer be demonstrated”¹⁵³.

The literature regarding this crisis of accumulation of the past, derives from the relationship between modernity and memory¹⁵⁴. One of the main causes of such accumulation of heritage is the sense of risk and vulnerability of the cultural heritage itself. The fourth recital of the Preamble of the 2003 Convention includes the risks of deterioration, disappearance and destruction that heritage can face. This fear of vulnerability is a response to liquid¹⁵⁵, late modernity’s self-defining speed of technological, social, cultural and environmental change.

This has led to a persistent and pervasive ‘heritagisation’ of society¹⁵⁶: there seems to be a general perception that once objects, places or practices are listed, they will very rarely revert or transform into something else. “The heritage list or register comes to act as a ‘second life’ by way of various regimes of management, which remove them from the realm of the everyday and exhibit them as fragments and relics of a threatened past or present”¹⁵⁷.

In this regard, Andreas Huyssen has argued that the late modern period has become saturated with memory. But the excessive memorialisation of the late modern world can only exacerbate this obsession with social memory, as it ultimately leads to an inability to form collective memories¹⁵⁸. For building a collective memory it is important also to forget. The process of collective forgetting is thus not opposed to the formation of collective memories, but an active component of it.

Remembering or forgetting is doing gardener’s work, selecting, pruning. Memories are like plants: there are those that need to be quickly eliminated in order to help the others burgeon, transform, flower. [Indeed,] memories are crafted by oblivion as the outlines of the shore are created by the sea¹⁵⁹.

¹⁵² HARRISON (2013:580).

¹⁵³ *Ibidem*.

¹⁵⁴ Richard Terdman in 1993 wrote “Present past: modernity and the memory crisis”; Kammen, M.G in his book of 1995 “Memory distortion: how minds, brains and societies reconstruct the past” situates the roots of the post-war heritage movement in the development of a modern sense of nostalgia and an obsession with preservation, the forcible act of not forgetting.

¹⁵⁵ “The liquid modernity is the belief that change is the only permanent thing and that uncertainty is the only certain thing” (BAUMAN (2000)).

¹⁵⁶ WALSH (1992: 131).

¹⁵⁷ HARRISON (2013: 582).

¹⁵⁸ CONNERTON (2009: 146).

¹⁵⁹ AUGÉ (2004: 17-20).

In the same way as individuals need to disregard certain memories to remember, we have a collective ‘duty’ to forget¹⁶⁰.

3.2.3. *The cultural rights and the enforcement based on an Intellectual Property approach (IP)*

Among the first documents who consider the right of culture as a basic human right there is the Universal Declaration on human rights of 1948 (see Article 27, paragraph 2). Indeed, Article 15 of the UN Pact on the economic, social and cultural rights of 1966 mentions the right of everyone to safeguard the “moral and material interest resulting from any scientific, literary or artistic production of which he is the author”¹⁶¹. Interestingly, for both documents the protection of cultural rights pertains to the individual rather than to the collective sphere.

Among the documents that enunciate the right to culture for a community of individuals – thus expanding the protection beyond individual rights - the UNESCO Declaration on the Principles of International Cultural Cooperation, adopted on November 4, 1966, declares that “every people has the right and duty to develop its culture”¹⁶². This implies the collective right of people to their own cultural integrity, including the right to define, interpret and determine the nature of the evolution of their own artistic expressions.

The term Intellectual Property (IP) refers to “the creations of the mind such as inventions, designs, literary and artistic works, and symbols, names, images, and performances”¹⁶³. The aim of most forms of IP is to establish the private property rights over creations, in order to control their commercial exploitation and provide incentives for further creativity. An example of IP right is the copyright, that aims at protecting the original artist works from reproduction or other forms of communication to the public¹⁶⁴.

The system of protection of cultural heritage through registration in safeguarding lists, common to both UNESCO Conventions, helps providing an economic value from both a commercial and industrial point of view to the protected item. The term ‘cultural property’ was originally used to define the term ‘cultural heritage’¹⁶⁵.

¹⁶⁰ AUGÉ (2004: 89).

¹⁶¹ DI BLASE (2007: 30).

¹⁶² UNESCO (1966).

¹⁶³ WENDLAND (2004: 99).

¹⁶⁴ *Ibidem*.

¹⁶⁵ The first international legislative instruments aimed at protecting cultural assets concerned the case of armed conflicts - see, in particular, the Convention on the Protection of Cultural Property in the Event of Armed Conflict - Convention, The Hague, May 14, 1954.

Over time, the need arose to replace the term ‘property’ – in favour of the term ‘heritage’ – to give priority to other social objectives that had to be protected. The legal concept of ‘property’ in the context of the protection of cultural heritage began to be considered limitative, as it can be assimilated to a matter of private law of a predominantly economic nature.

One of the fundamental aspects of property as a right, the *ius utendi et abutendi*: that is, the owner's right to use and consume and, indeed, to destroy the object owned. This cannot be exercised in relation to the conservation of cultural heritage, where it is essential to ensure that the protection of the interests of the community and of future generations prevail. It is this consideration that led eventually to the use of the term ‘cultural heritage’. This change highlights a gradual, albeit debated, understanding that the protection of cultural heritage concerns the relationship between assets and the communities linked to them¹⁶⁶.

In the complex scenario of the (re)production of cultures, between the centralism of States, the imposition of international standards, local development and virtual communities, the emergence of a right to recognition is the real challenge of contemporary societies in the global world. The 2003 Convention opened a strategic construction site, causing and accompanying changes that are crucial for the future, orienting the definition of cultural policies at the national, transnational and local level¹⁶⁷.

In particular, with regard to the relationship between the 2003 UNESCO Convention and the international protection system of IP rights, it should be noted that Article 3, letter b, establishes that:

Nothing in this Convention may be interpreted as affecting the rights and obligations of State Parties deriving from any international instrument relating to IP rights or to the use of biological and ecological resources to which they are parties¹⁶⁸.

The solution adopted incorporated the indications that had been provided in the ad hoc Report of the Intergovernmental Committee for the Protection of ICH of 2001. The report warned that the new UNESCO instrument should limit itself to treat ICH from a strictly cultural point of view, leaving the task of developing *sui generis* mechanisms of the economic rights of holders of traditional knowledge to organisations with the necessary skills and tools, one example being the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO).

¹⁶⁶ TREVISAN (2016: 70-71).

¹⁶⁷ LAPICCIRELLA ZINGARI (2015a:136).

¹⁶⁸ AKAGAWA, SMITH (2019: 40).

In conclusion, according to the solution incorporated in the text of the Convention, UNESCO is only responsible of protecting the integrity of the ICH (and the moral rights of its owners). IP rights, instead, have a different purpose than the UNESCO instrument, as they do not create protection *in situ* or favouring the socio-cultural context in which the cultural heritage arose and was maintained¹⁶⁹.

- *The collaboration of UNESCO and WIPO's work.*

UNESCO Committee has largely debated the necessity or not of an IP right approach to the protection of ICH and the communities (re)producing it. The reason for this it that the IP right approach could help better preserving the rights of the community and the bearers of the heritage. On the other hand, it creates an appropriation of the heritage, in the sense that there is a monopoly over ICH, its meaning and uses¹⁷⁰.

There is an important relationship between the protection of IP and safeguarding the ICH - in the sense referred to in the Convention. It is a relationship which requires balance and coordination, including through continued cooperation between WIPO and UNESCO¹⁷¹. In fact, there is a long history of collaboration between UNESCO and WIPO with respect to ICH¹⁷². The WIPO is a specialized agency within the UN system and it is responsible of the protection of traditional knowledge and expressions of traditional cultures¹⁷³. So, in accordance with its mandate, WIPO's primary focus in this regard is related to intellectual property.

[The WIPO Committee] is actively examining possible sui generis adaptations to existing IP rights as well as entirely new sui generis IP-type laws, designed to respond to the particular characteristics of traditional knowledge and traditional cultural expressions and the needs of their holders and custodians¹⁷⁴.

Before dealing with the main issues at stake, it is appropriate to briefly look at IP rights' interaction with ICH.

There has been a considerable debate about the usefulness of the IP rights systems in protecting traditional cultural practices. Under the 2003 Convention for the safeguarding of ICH, the relationship between IP rights protection and ICH safeguarding has not received much attention¹⁷⁵. Moreover, the Convention did not address some of the IP related questions,

¹⁶⁹ ZAGATO (2007: 57).

¹⁷⁰ AKAGAWA, SMITH (2019: 55).

¹⁷¹ *Ibidem*.

¹⁷² LIXINSKI (2013: 5-6).

¹⁷³ WIPO (2020).

¹⁷⁴ WIPO (2003).

¹⁷⁵ AKAGAWA, SMITH (2019: 36).

such as who is going to enjoy the exclusive right to exploit commercially intangible traditional creativity.

Since 1973, when the international debate was still focusing on the term folklore, Bolivia requested UNESCO to promote State ownership of IP rights for traditional expressions of collective or anonymous origin. De facto, a request of intellectual protection not on the basis of a private individual creation, as normally happens. Bolivia also proposed that the disputes between States over shared heritage would be decided by an intergovernmental committee. As already mentioned the 2003 Convention now include an Intergovernmental Committee and Intergovernmental Lists for ICH safeguarding and visibility. Anyway, no IP rights is granted on ICH.

While the Convention does not create new IP rights in ICH or provide remedies for the misuse of ICH or explicitly allocate ownership thereof to any parties, it still recognizes the need to support the stewardship of bearer communities. The idea of respecting the community control over access to their ICH, which is the key to making IP regimes compatible with safeguarding outcomes¹⁷⁶, had been raised in the debate on IP rights in the intersessional meeting of 2003.

Article 13 of the 2003 Convention, which encourages the State Parties to take legal measures for the safeguarding of ICH, could also include the IP protection. Still, the Convention does not have a procedure for recognizing IP rights. To deal with IP rights, the OD recognizes that IP rights protection can actually help to ensure the moral rights of communities or help them to control their use of or access to symbols and ritual art¹⁷⁷. So, in the ODs for the Convention, the legal measures that States can adopt are deemed to specifically include “IP rights, privacy rights and any other appropriate form of legal protection”¹⁷⁸.

Nevertheless, “some communities vehemently oppose IP-based options, which they see as fundamentally at odds with their values and interests”¹⁷⁹. In fact, while the IP right can be a useful tool for safeguarding heritage, on the other hand the IP protection could somehow freeze ICH. Importantly, communities, groups and individuals concerned should benefit from IP protection and not State Parties - as it frequently happens¹⁸⁰.

In this sense, WIPO has a prominent role in maintaining constant consultation with communities¹⁸¹. With its work, WIPO has demonstrated that IP can be

¹⁷⁶ AKAGAWA, SMITH (2019: 36).

¹⁷⁷ UNESCO (2016b: OD 104).

¹⁷⁸ AKAGAWA, SMITH (2019: 42).

¹⁷⁹ UNESCO (2016b: OD 102).

¹⁸⁰ *Ibidem*.

¹⁸¹ *Ibidem*.

one of the several measures needed for the preservation of traditional cultures and practices.

To sum up, the protection of IP rights can prevent the misappropriation of ICH from the communities concerned and ensure that benefits are channelled back to communities, for example, by allowing them to exert a monopoly over the sale of their cultural products or services¹⁸². Moreover, IP rights can be particularly useful to maintain the confidentiality of certain practices, as in the cases of a cultural practice that is sacred to the community. On the other hand, IP can provide a legal venue for communities who want to exclude others from their culture. Such approach has been widely criticised, since “IP protection cannot be justified as a blanket solution in order to exclude others”¹⁸³.

IP rights systems differ from country to country and are interpreted differently in different jurisdiction and cultural contexts. Moreover, the effect of the IP protection also depends on the definition that ICH and its beneficiaries give to it, and how the scope of the protection is defined. As such, it is difficult to come to a general view on the most effective way in which IP rights can play a role in promoting the safeguarding of ICH.

Surely, there is not just one single solution that can facilitate the effective protection of ICH, but “a wish for flexibility at the national and community levels will also need to be balanced with the desire on the part of many stakeholders for a form of international enforcement”¹⁸⁴.

In conclusion, from a legal perspective there may be flaws in the definitions and the 2003 Convention text. However, it would be beneficial if this Convention were to act as a stimulus for the discussion on IP rights. Anyway, at the moment, IP right legislation is still very much based on the rights of individuals. So, although many researchers invoke innovative solution in this field – “it is time to re-think these issues, especially in the field of [ICH], in which the creativity of both communities and individuals plays such an important role”¹⁸⁵ – at the moment the possibility of IP protection for ICH is limited only to a conventional protection to provide, for example, to recording of ICH and databases and compilations of ICH.

- *The misappropriation of ICH from the communities concerned*

By looking at international cases concerned with the relationships between communities holding traditional knowledge and the exercise of IP rights, attempts to misappropriate ICH from the communities concerned are not

¹⁸² *Ibidem*.

¹⁸³ AKAGAWA, SMITH (2019: 62).

¹⁸⁴ WENDLAND (2004: 10).

¹⁸⁵ FISH (2006: 189-206).

infrequent. The case of commercial *Yoga* is probably the most known among many other similar cases.

Yoga is an important manifestation of ICH in India and has gained prominence across the world for the mental and physical benefit it can produce on individual practicing it. Despite its widespread presence around the world, a specific variation of *Yoga (Bikram Yoga)* has been subject to IP protection in the United States. IP essentially created a monopoly over specific *Yoga* techniques. *Yoga* became a valuable competitive market commodity, which was enabled by a specific legal and ethical framework that privileges individualism¹⁸⁶.

Local organisations in the United States and India have responded by using arguments reminiscent of the Open Source movement, rejecting the possibility of privatisation and commodification of what they consider as a public asset. The Indian State stepped in as well, by constructing a digital *Yoga* library to put *Yoga* in the public domain and thus disallow most claims on IP rights.

The example of *Yoga* shows that IP rights can lead to stifling outcomes, and that the private by and large facilitates the propertisation of culture. It was only when the State intervened, by making ICH public that the status of *Yoga* as belonging in the cultural commons was restored¹⁸⁷.

Another famous case is that of *curcuma longa*, in which successful judicial initiatives have been undertaken for the revocation of the patent in a foreign country. In 1996 the Indian Council for Sciences and Research filed an appeal for the revocation of the patent granted to the Medical Centre of the University of Mississippi for the use of this medicinal plant which was used since immemorial times in India to heal wounds and ulcers. The success obtained in the trial filed before the United States Patent and Trademark Office can be explained by the fact that the characteristics of that product had already been extensively documented by authoritative scientific journals¹⁸⁸.

- *Indigenous culture and applicability of IP Rights*

The recognition of an IP right on ICH could generate significant advantages for the communities owning them. In particular, the applicability of international IP rules to indigenous culture can be one of particular relevance. According to the UN the expression 'indigenous culture' refers to the cultural practices of communities that directly descend from the populations present on a given territory before it became object of conquest from external powers. These communities must have kept their languages, ethical values, social and religious traditions distinct from the rest of the population of the State where

¹⁸⁶ *Ibidem*.

¹⁸⁷ AKAGAWA, SMITH (2019: 62).

¹⁸⁸ DI BLASE (2007: 30).

they are located. Recurring features of indigenous communities are the bond with the land and the sharing of resources between individual members.

The collective heritage of these communities includes knowledge and practices handed down from generation to generation, through which their specificity is manifested. This wealth of knowledge is essentially aimed at (i) medical treatment; (ii) methods of cultivation, use and conservation of plants, (iii) artistic or ritual manifestations - referred to as folklore.

Here, the knowledge own by indigenous communities could provide scientists with useful references in relation to organisms whose properties are still unknown to medical and pharmacological science; it could give valuable information to official science relating to the treatment of local resources and biological varieties; or, their traditions can be a source of artistic inspiration and cultural promotion in the most advanced industrial societies.

The standard of living of these populations risks worsening as a result of uncontrolled appropriation and exploitation by foreign companies – the so-called ‘biopiracy’.

The traditions pertaining to a culture, once discovered and exploited by operators outside that culture (e.g. industrial farms, food plants, etc.), may be re-introduced in the communities that originated them. Those communities may eventually find more convenient to discard the previous system of production, thus contributing to depriving them of their cultural identity. Importantly, the protection of the cultural identity may also be considered as a protection of the environment as a whole. Moreover, it can prevent the overexploitation of resources and guarantee the protection of biodiversity¹⁸⁹.

From this perspective, the 2003 Convention which does not take a clear stance with respect to the problems concerning IP rights has played a stimulating function to the international debate within the WIPO and the WTO. These organisations have been solicited to examine issues related to traditional culture. However, it should be noted that, so far, the international rules on IP have not included the principles set out in the international acts and declarations concerning the ownership of cultural rights for indigenous peoples.

In the absence of such transposition, the approach followed by the State Courts has led to the denial of the protection of indigenous culture. In some States there has been the attempt to resolve the problem with *ad hoc* legislation which considers these rights as *sui generis* with respect to those provided for by the legislation on IP. The case of *Bulun Bulun* can be cited as a paradigmatic example. In this case, the application of copyright effective in

¹⁸⁹ *Id.* 5-6.

Australia, which exclusively protect the material creator of the work, prevented the patent rights on artistic works to be recognised in favour of indigenous communities. Here, the law in force among the aborigines was not considered relevant, as it was based essentially on the notion of collective ownership¹⁹⁰.

Specifically, in the case *Bulun Bulun v. R. & T. Textiles* judged by the Federal Court of Australia in 1998, the applicant - an indigenous artist from the *Ganalbingu* community - had filed a claim for copyright infringement against a company that had imported and sold a fabric with a copy of his painting. The painting was realised in the respect of the laws of the indigenous communities. Because of that, the oldest member of the community also filed a claim against the company.

Even by recognising the “equitable relationship” between the author and the Ganalbingu community who allowed him to made the painting, the judge refused the claim affirming the collective ownership of the work in favour of the indigenous community. The judge also rejected the notion of “joint ownership” in favour of an entity that do not have contributed to the production of the artwork.

3.3. Actors involved in the creation of UNESCO intangible cultural heritage

In drafting the text of the 2003 Convention a problematic aspect was the relationship between States and communities. There was the consciousness that ICH belongs to the communities, groups and individuals who generated it. Nevertheless, the normative structure and the institutional mechanisms established by the 2003 Convention tend to assure to the States the effective power to ask for the recognition of the heritage.

3.3.1. The role of States Parties and communities

Article 15 of the UNESCO Convention states that “communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, [must be involved] actively in its management”. What matters is the recognition of the role of groups and individuals, as culture relates to their identity, and their collaboration is central in transmitting ICH across generations.

As for who can account for local communities, there are municipalities, local authorities, local associations which aim to transmit, enhance and protect a specific cultural element, research centres that deal with the identification and cataloguing of culture, the individual holders of the specific file. A more

¹⁹⁰ DI BLASE (2007: 12).

specific definition of the role that communities should play according to the Convention is provided by the report of the subsidiary body of the Bali Intergovernmental Committee in 2011. Accordingly,

Communities are at the centre of each of the five criteria for inclusion in the UNESCO Lists. They must actively collaborate at all levels of the application process, in particular in the identification of the element and the design of the safeguard measures, not only as recipients and beneficiaries of these measures but as their initiators and developers¹⁹¹.

This means that communities should have a primary role in all the phases of the enlisting process, in the implementation of the safeguarding measures, and in all the five *criteria* that UNESCO asks for the inscription of a heritage in the Representative list and in the USL¹⁹². According to the first *criterion*, communities should actively collaborate in the phase of redaction of the application dossier to identify the heritage. Groups or individuals are those that should provide the contents regarding the social and cultural functions that the heritage carries within the given community, as well as the method of transmission from generation to generation. They are also in charge of defining the specific roles that each community plays towards such ICH.

According to the second parameter, communities should become the carriers of the intercultural dialogue. They are meant to become pivotal for the realization of the 2003 Convention for the safeguarding of ICH, that is the dialogue across communities. This implies that, third, communities do not represent only an object of ICH protection, as they are the actual actors of safeguarding measures. In fact, communities should proactively collaborate in the definition of adequate measures for safeguarding a given ICH and they should actively collaborate with the State for the implementation of these measures.

According to the fourth criterion, communities must identify their input into the application process, and prove it through letters, videos or any other tangible item. Finally, fifth, communities should become the main actors asking for the inscription in the national or local register of the specific intangible cultural practices. Or they must contribute in creating participatory inventories for cataloguing and identifying their own cultural heritage.

When providing the modalities for operationalizing community participation as explicitly enunciated in Articles 11(b) and 15 and implied elsewhere in the treaty, the 2003 UNESCO Convention can be considered a starting point in the area of international cultural heritage law.

¹⁹¹ ZAGARELLA (2013).

¹⁹² *Ibidem*.

However, besides the declared intention of favouring the involvement of communities in safeguarding ICH, the concluding agreement does not guarantee that this participation always occurs in an effective way.

Although community participation was understood to be a significant principle from the inception of the Convention and the intergovernmental negotiations, the requirements placed on the States Parties to involve communities (groups and individuals) in safeguarding is more exhortatory than obligatory¹⁹³.

Even after issuing the OD in 2010, the Convention allows communities, groups and individuals to decide that a given manifestation of such heritage should not be inscribed on the List. However, they cannot obtain the inscription if the State is not willing to do so. Therefore, the initiative power has remained in the sphere of competence of State Parties, while communities have a mere veto power.

The first and more evident consequence of not granting an autonomous, direct initiative power to the communities is that when a given State does not join the Convention, the ICH belonging to a community living in that State will not be safeguarded. This is the case of some indigenous communities in Australia, who strongly opposed the decision to do not ratify the 2003 Convention by the State they belonged to. This disagreement represents obviously the voice of a national minority that see the Convention as a positive instrument to valorise and safeguard them, even though they are not heard by the State they belong to¹⁹⁴.

In fact, what it is intended to be safeguarded has a universal value recognized from the entire international community. Its protection or, at least, its recognition as a world cultural heritage should not depend from the will of a State.

Indeed, one of the most challenging but also fascinating aspects of this question relates to how non-State actors can be better integrated into the work of the intergovernmental Committee. This is a relatively poorly understood issue in international law generally, with the human rights bodies ... and environmental treaty bodies leading the way in finding workable mechanisms for integrating non-State actors into the intergovernmental process¹⁹⁵.

The cited above OD added new paragraphs in order to favour the participation of communities, groups, as well as experts and research institutes in various safeguarding activities. It encouraged parties to create a consultative body or similar coordinating mechanisms for this purpose.

Despite such moves, the mechanisms for ensuring real and effective community participation in the operation of the Convention remain weak and communities

¹⁹³ BLAKE (2019: 11-12).

¹⁹⁴ DAVID RAMOS (2019: 217).

¹⁹⁵ BLAKE (2019: 15).

(groups and individuals) as yet enjoy no formal role in the work of the Convention's organs¹⁹⁶.

Possibly the weakest part of the 2003 Convention with regard to the actual involvement of communities concerns the institutional functioning mechanisms which are inadequately defined. In Article 5, the body entitled to establish and publish a representative list of this heritage – the Committee for the Safeguarding of Cultural Heritage - is described as a State body that does not include representatives of local communities.

This generates seriously doubts on how the ICH can actually be safeguarded by a diplomatic body, which does not admit an institutional participation of the representatives from the communities that create and maintain this heritage¹⁹⁷.

This weakness in the institutional architecture is the main cause of the issues emerged in the enforcement of the 2003 Convention.

3.3.2. The enforcement of the Convention and the problematic relation between State and Community actors: two case studies

The relative lack of involvement of communities in the process of protecting intangible heritage risks to cause a significant gap between the objectives pursued by the Convention, and the actual outcomes achieved through the implementation of its provisions. If, on the one hand, the paradigm shift towards the immaterial was essential to broaden the scope of practices relating to the safeguarding of cultural heritage, such institutionalization increased the dangers for cultural heritages to be used as an ideological tool - often in nationalistic terms.

In this regard, as noted by Professor Mark Thatcher¹⁹⁸, a wide literature¹⁹⁹ on 'cultural nationalism' underlines the political nature of heritage and its functions in creating political identity.

This literature shows that nationalists, including state actors, created much cultural heritage as part of strategies to establish national identities ... In similar vein, studies on contemporary 'heritage' underline that state actors produce an 'authorised heritage discourse' (an 'official' view of the past and its relevance for today) and use heritage to attract popular support for the nation²⁰⁰.

In particular, according to Hans Kohn²⁰¹ whereas in 'Western' nations, such as France, Britain and the US, nationalism found its expression predominantly

¹⁹⁶ BLAKE (2019: 12).

¹⁹⁷ FRANCONI (2007: 30-31).

¹⁹⁸ THATCHER (2019: 4).

¹⁹⁹ (HUTCHINSON (2013); HUTCHINSON (1987); LERSSEN (2006); ANDERSON (1983); HOBBSAWM AND RANGER (1983)).

²⁰⁰ THATCHER (2019: 4).

²⁰¹ KOHN (1944: 574).

in political and economic changes, in ‘non-Western’ countries “nationalism found its expression predominantly in the cultural field”²⁰².

Throughout the nearly fifteen years of implementation of the Convention there are plenty of examples of virtuous community involvement in proposing candidacies and drafting the related dossiers. One is the case of the Mediterranean Diet, which was registered in the RL of 2013 by Cyprus, Croatia, Spain, Greece, Italy, Morocco, and Portugal. This multinational candidacy was realised through a full involvement of the interested communities and their participation was favoured through an internet portal dedicated to the Mediterranean Diet that emphasized the “role of communities in the Convention for the protection of ICH”²⁰³.

Nonetheless, there have been cases in which divergences emerged between the applicant States and the communities whose patrimony was intended to be protected. Similarly, nationalistic disputes arose between different States with respect to the same ICH - as demonstrated by the case of the Alevi *Semah* Ritual and the *Karagöz*.

The Alevi *Semah* Ritual, which is a sacred dance traditionally performed by Turkey’s Alevi, represents a paradigmatic case of how the voice of the communities can be sometimes set aside from the intangible heritage nomination process. As discussed in a vast scholarship²⁰⁴, State Parties often treat ICH as strategic tool for nation-building. Another example is the *Karagöz*, the shadow theatre, which generated a conflict between Greece and Turkey over its origin and ownership.

- *The case of Alevi Semah ritual*

According to Article 12 of the 2003 Convention, State Parties are encouraged to draw inventories of ICH located in their territories, submitting proposals for the inscription of ICH. Yet, it must be considered that “recent attempts to protect selected cultural traditions as ICH have wider political effects beyond just guaranteeing their sustainability”²⁰⁵. One of the criticisms²⁰⁶ to UNESCO is that it sometimes prioritizes national perspectives and interests on heritage. Overall, the criticism is that UNESCO can exclude and not consider alternative interpretations of heritage, “especially that of the marginalized groups, such as ethnic and religious minorities, immigrants, and indigenous people”²⁰⁷. From this perspective UNESCO projects become a strategic

²⁰²THATCHER (2018a: 1).

²⁰³DELLI ZOTTI (2018: 178-179).

²⁰⁴LIXINSKI (2011); LOGAN (2010); MOUNTCASTLE (2010).

²⁰⁵AYKAN (2013: 382).

²⁰⁶RUGGLES, SILVERMAN (2009: 3-22).

²⁰⁷AYKAN (2013: 382).

political tool for non-democratic countries to “further policies of cultural domination and even eradication”²⁰⁸.

To better understand this process and in order to underline the difficulties that can emerge in countries struggling with diversity issues, the case of Alevi *Semah* ritual is extremely significant. It constitutes an example of how the community participation criteria of the ICH Convention can be easily disregarded by States Parties for pursuing specific political and nationalistic objectives.

Semah is a religious ritual that is practiced by Turkey’s Alevis. It is a sacred dance that is accompanied by music made by stringed instruments and religious songs. Such ritual has a central role in the Alevi’s religious culture. In 2010 the Turkish Ministry of Culture and Tourism (TMCT) successfully nominated *Semah* for the UNESCO RL of the Intangible Heritage of Humanity. However, the candidacy was not welcomed with enthusiasm by the Alevi’s community. In fact, the organisations that were invited for the redaction of the text and the candidacy of *Semah* actually had rejected the nomination. They claimed that the TMCT “had misrepresented the meanings and values they attribute to *Semah* and submitted the nomination without their consent and knowledge”²⁰⁹. In fact, Alevis feel *Semah* neither as a performance nor a folk dance and so the TMCT had not taken in consideration its sacred character.

Some of the organisations that were invited to the meeting did not refuse the TMCT’s proposal right away, as they believed that the UNESCO’s recognition could help for the recognition of Alevism at the international level. Even though Alevism constitutes the second largest religious group after the Sunni-Muslim in Turkey, it is not officially recognized in the country²¹⁰. Following the 1980 military coup, Alevis have increasingly been subjected to the policy of ‘Sunnification’ and they became victims of the Islamic radicalization.

Since 2002, Turkey has been ruled by the single-party government of the Justice and Development Party (AKP)²¹¹ which strongly identifies itself with

²⁰⁸ MOUNTCASTLE (2010: 348).

²⁰⁹ AYKAN (2013: 392).

²¹⁰ The only exceptions to this model have been the Armenian, Greek Orthodox, and Jewish populations, recognized as non-Muslim minorities. (ORAN (2007: pp. 35- 56)).

²¹¹ The November 2002 general elections in Turkey resulted with a landslide electoral victory of the then recently established AKP, which received 34% of the votes and became the first one-party government since 1987 (Cinar, “The Justice and Development Party and the Kemalist Establishment,” 112). Since then, AKP has been functioning as a one-party government for three consecutive terms and with each single election there has been an increase in its popular vote. AKP was able to fortify its position by securing 47% of the votes in the 2007 general elections, and 50% of the votes in the 2011 general elections. AKP gained yet another electoral

Sunni Islam. Given this ruling class, some of the Alevi respondents believed that *Semah* nomination could help their recognition at international level, thus somehow protecting them from the Sunnification of the nation. Yet, they withdrew from the process when they saw that “the ministry excluded them from the decision making, and ignoring the religious significance of *Semah*, represented it as a folk dance”²¹². For many, the designation of *Semah* was a move to sunnify this religious ritual and an effort of the government to redefine Alevism within Sunni Islam²¹³.

What emerges from the *Semah* case confirms that the “ICH Convention needs to come up with better measures for ensuring genuine community participation, where culture bearers could take part directly in decision making without the intermediation of State heritage authorities”²¹⁴.

States Parties have a full control over the implementation of the ICH Convention, so that they can impose their choices on the actual bearers of a given cultural heritage. State-led ICH programs of UNESCO can easily turn into a tool for cultural domination:

the World Heritage List and others (now including ICH) validates the continuing activities of UNESCO as an arbiter of cultural status and inclusion— it is a harmony that obscures the forms of suppression and manipulation of symbols by its Member States which pursue their own ideological agendas by appropriating globally-endowed status. Despite the best intentions of its advocates, ... UNESCO is a complicit partner in nation-states’ domestic projects of cultural reification and domination²¹⁵.

Such limitation can constitute an obstacle to fulfilling the main goals of the 2003 Convention.

The Intergovernmental Committee should devote greater attention to this problem of State-sponsored community participation and should explore ways to facilitate direct communication and information exchange between UNESCO and culture bearers. The Committee, for instance, could modify the nomination procedure and ask community representatives to submit informed consent forms directly to UNESCO’s ICH section (which assumes the function of the Convention’s secretariat), if they have the possibility to do so. It could also consider developing mechanisms to allow community representatives to contact the secretariat directly if they have any questions or concerns regarding the nomination and safeguarding processes²¹⁶.

victory when a package of constitutional amendments (recommended by the government) was approved by 58% of the population in a referendum held on 12 September 2010.

²¹² AYKAN (2013: 393).

²¹³ *Ibidem*.

²¹⁴ AYKAN (2013: 398).

²¹⁵ ASKEW (2010: pp. 40–41).

²¹⁶ AYKAN (2013: 398).

Of course, these minor modifications are not sufficient to resolve the issue. From a structural point of view, it remains true that “the Convention needs to change its State-centric approach on ICH to a community-centric one and seek ways to facilitate greater control of culture bearers over their ICH”²¹⁷. Moreover, in order to strengthen international cooperation for safeguarding ICH and to prevent conflicts among States Parties over its ownership, the registration of multinational heritage should be strongly encouraged and favoured (see *ultra*). Lastly, there should also be a change of cultural perspective to reverse the tendency for the ICH Convention to be seen as a ‘patent approval system’, erroneously perceiving the registration of ICH from a State Party as a form that guarantees an exclusive ownership.

- *The Karagöz case*

According to Article 15 the nature of cultural heritage appears to call into question the dichotomy between public interest-oriented institutional and private entities. In countries with a civil law system, participation finds an obstacle in those norms preventing public officials from dealing with private interests and businesses alike. Furthermore, the communitarian essence of heritage which the ICH promotes also brings into question whether there is such thing as ‘the community’ somehow owning a given heritage. Or, rather, a network of different communities of stakeholders, who are constantly struggling to maximize their own interest while recognizing to themselves some sort of responsibility with respect to the consequences of heritage protection – as a Human Right based relation that every human has toward present, past, and future generations.

One of the main problems of State Parties’ misuse of the Convention for nationalistic purposes, concerns the promotion of shared national identities to (forcibly) integrate minorities into the so-called ‘mainstream society’. Even if the communities are central for the existence of cultural heritages through their daily social practice, and they also operate as custodians, heirs and agents of the intergenerational transmission of culture, for various countries that subscribed the Convention involving locals constitutes a real challenge. Guaranteeing the active participation of communities means also relying on rationalities which differ from the technical and bureaucratic ways of operating of the State.

What frequently happens today is that nationalistic claims on ICH cause disputes among countries over its ownership. One example is the conflict between Greece and Turkey about the shadow theatre *Karagöz*. As explained in the first paragraph of this chapter, the huge evolution of the notion of heritage in the 20th century has impacted both the meanings and ways in which heritage is managed, with a myriad of political, economic and philosophical

²¹⁷ *Ibidem*.

implications. The ICH Convention is not an exception in this respect²¹⁸. While it aims to promote international cooperation and dialogue for the safeguarding of ICH, due to its actual functioning the Convention can be used to foster nationalist claims on ICH and, consequently, cross-border conflicts among different countries claiming some form of ownership on such heritage.

The *Karagöz* case explains how the nationalistic approaches to protecting ICH represents one of the major obstacles for their actual protection. One of the main problems of the 2003 Convention is that the lists can be used to register shared traditions as national heritage. *Karagöz* has always been performed in the Ottoman Palace. The show is played out by two-dimensional figures behind a white curtain that is illuminated by an oil lamp. Transmitted from the master puppeteer to his apprentices orally, this ritual consists of an improvised performance. A single puppeteer presents the whole show, performing all the figures, singing the songs and voicing each character with a specific accent.

This tradition was popular both in Greece and Turkey, even though due to the spread of modern form of entertainment such performances lost popularity. Anyway, currently there are more *Karagözis* – i.e. the puppeteers - in Greece than in Turkey²¹⁹. In March 2007, the rumour that Greece was going to patent *Karagöz* spread in the media. As a response, the Turkish Ministry of Culture and Tourism (TMCT) began plans for registering *Karagöz* on the RL. Regardless of UNESCO's declared goal of encouraging multinational inscriptions of shared cultural elements, the TMCT did not contact the Greek Culture Ministry for a joint nomination. Here, the listing of the *Karagöz* heritage was seen as an opportunity to prove the Turkish origin of such tradition at the international level, thus preventing Greece from asserting ownership claims over it. In 2009 the *Karagöz* was successfully listed by Turkey in the UNESCO RL of the Intangible Heritage of Humanity.

After the registration, a lot of articles in important Turkish newspaper – like *Today's Zaman* – emphasized that UNESCO had concluded its debate, stating that *Karagöz* belonged to Turks. The listing of *Karagöz* clearly went against the original purpose and intent of the ICH Convention. States Parties are supposed to register cultural elements on the Convention's lists to demonstrate their willingness to safeguard these elements for the world's future generations, not to claim ownership over them. What is more, UNESCO has neither the authority nor the willingness to assign 'patents' or nationality to ICH. The subcommittee evaluates whether the submitted nomination fulfils the criteria for inscription on the ICH list. But it does not decide or discuss which tradition belongs to which country.

²¹⁸ AYKAN (2015: 949).

²¹⁹ *Id.* 954.

As immaterial expressions of culture that are usually shared beyond national borders, intangible forms of heritage are particularly vulnerable to conflicts of ownership among countries. In fact, unlike most material forms of cultural heritage which can be found in a specific place (i.e. monuments, buildings or historic sites), ICH is not necessarily tied to territory. This form of heritage is “embodied in people rather than in inanimate objects and places²²⁰”. Due to its immateriality, ICH exists only when it is performed. People, as the bearers of cultural traditions, are fundamental to it.

Due to its nature, ICH is often transnational and the location and distribution of it is contingent upon the location and distribution of its bearers²²¹. National borders can divide bearers of shared cultural knowledge. While ICH can also spread as people move and interact with each other, people migrate and bring their traditions with them - not only to neighbouring countries, but also to geographically distant ones. Even when cultural bearers do not move, their traditions may diffuse and may be adopted by other groups elsewhere²²².

The ICH Convention recognises this transnational character of ICH. As we have seen in the previous chapter, the definition of ICH provided in Article 2, paragraph 1 of the Convention, crucially emphasises the dynamism of ICH as living culture that is constantly recreated by people. ICH also considers all groups of people and individuals that put such heritage into practice and identify themselves as the culture bearers. It recognises that ICH might have multiple producers and take on multiple forms, meanings and uses in different cultural contexts: these variances are not hierarchically valued.

However, if we look at the number of cultural elements that are enlisted in both the RL and the USL, only 58 ICH are multinational over a total of 584 elements corresponding to 131 countries²²³. The ICH Convention “continues to empower the State”²²⁴ as key actor in the implementation and management of the Convention. They have complete control on deciding which cultural elements are to be identified, listed and managed as ICH. Such power position often results in the use of the Convention “to obtain political goals that are essentially unrelated to heritage conservation”²²⁵. States are in fact fundamental to all UNESCO heritage programmes:

despite the laudable universalist ideals of many dedicated intellectuals and practitioners involved in UNESCO’s array of heritage conservation programs today, the globalised and institutionalised heritage system has not overcome

²²⁰ LOGAN (2007: 207- 223).

²²¹ CURTIS (2010).

²²² *Ibidem*.

²²³ UNESCO (2019).

²²⁴ KEARNEY (2009: 209-225).

²²⁵ LOGAN, LANGFIELD, NIC CRAITH (2010).

nation-state-based power structures and nationalist agendas but has rather enhanced them²²⁶.

The ICH Convention does not hand out ‘patents’ for ICH. Yet, it is not uncommon that States Parties use its lists to claim national ownership over shared cultural traditions. When States Parties register cultural elements to the Convention’s lists, they usually assume that they have in some way to obtain their ‘patent’ or to have them registered officially as their own traditions.

UNESCO should seriously work towards establishing policies and programmes in order to encourage the international community to consider ICH in transnational terms and to reverse the tendency for the ICH Convention to be understood as a ‘patent approval system’²²⁷.

In conclusion, this conflict exhibits the influence of nationalistic understandings of heritage within the functioning of the ICH Convention. States Parties may use it as a mean to claim ownership over shared cultural traditions and to prevent other countries from doing the same. The general public may also treat nominations to the Convention’s lists as apparent ‘patent’ applications. Once a cultural element is listed, it is announced and tends to be widely perceived as national property of the listing country.

3.3.3. *The multinational heritage*

UNESCO is aware of nationalistic approaches to ICH and the consequences of such views. In order to contrast these tendencies, UNESCO decided to integrate the juridical provisions of the 2003 Convention. Since 2008, the OD include the possibility of enlisting an expression of ICH as “multinational files [when] an element is found on the territory of more than one State Party”²²⁸.

Nonetheless, modifications in the Convention’s procedures may not be sufficient to overcome nationalistic interpretation of ICH. For these reasons, starting from 2009²²⁹ UNESCO has promoted international meetings aimed at

²²⁶ ASKEW (2010: 19-44).

²²⁷ AYKAN (2015: 11).

²²⁸ BLAKE, LIXINSKI (2020: 322).

²²⁹ In 2009, the organisation held a regional meeting on the East Asian shared intangible heritage in Gangneung city, in South Korea. The meeting gathered experts from the region, the USA and the United Arab Emirates, to discuss possible measures for increasing a number of multinational enrollments. The Gangneung Recommendation, which was adopted during the meeting, invited States Parties of the Convention as well as governmental and non-governmental organisations to encourage joint research for identifying shared heritage, create regional inventories and cooperate in organising education programmes, cultural festivals and workshops on shared heritage. The recommendation also called upon the Inter-governmental Committee to adopt criteria, guidelines and procedures for promoting multinational nominations. UNESCO held another regional meeting on shared heritage in Bangkok in 2010. Thirty government representatives from the Asian-Pacific region took part in this meeting; the Intergovernmental Committee addressed problems surrounding multinational nominations in its 7th session and agreed to establish a voluntary information sharing mechanism to allow States

favouring multinational enlisting, to strengthen international cooperation for the safeguarding of ICH and to prevent conflicts among States Parties over its ownership²³⁰. Notwithstanding these efforts, the risk of a surreptitious use of the 2003 Convention for nationalistic purposes remains one of the most critical points in the enforcement. In this regard, it has been noted that:

UNESCO should devote greater attention to this problem. It should seriously work towards establishing policies and programmes in order to encourage the international community to consider intangible heritage in transnational terms and to reverse the tendency for the ICH Convention to be understood as a ‘patent approval system’²³¹.

The following table, elaborated on the basis of UNESCO databases²³², shows an increasing number of multinational registrations occurred in the last years to date.

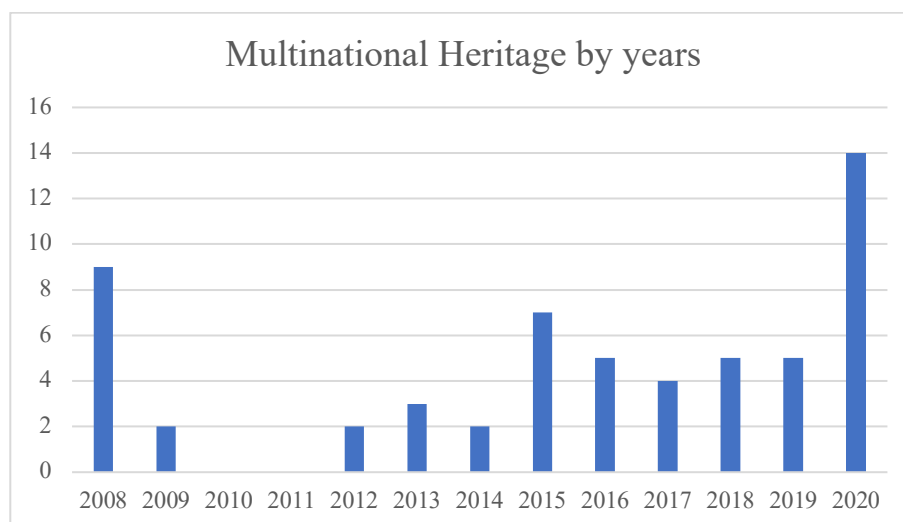


Table 1 Multinational Heritage divided by years

With respect to the analysis of multinational heritage registrations, it has also been noted that, when the proposal of safeguarding an ICH is formulated by two States jointly, this kind of heritage assumes a symbolic value with regard

Parties to announce their plans for nominating an element and contact one another to prepare a joint application. This mechanism was made public on the website of the Convention in 2013. It provides a brief description of the element planned to be nominated as well as the contact information of the public institution responsible for preparing its nomination form. (AYKAN (2015: 958)).

²³⁰ AYKAN (2015: 958).

²³¹ LABADI (2013:140).

²³² Personal elaboration on UNESCO Database (UNESCO (2019)).

to the artificiality of national borders²³³. This is the case of the pair United Arab Emirates-Oman (three heritages enlisted), which have registered other two ICH with Qatar and Saudi Arabia. Romania-Moldova and Kazakhstan-Kyrgyzstan have enlisted two ICH under joint protection too.

Other examples of joint protection are found in Europe (France-Belgium, Switzerland-Austria, Czech Republic-Slovakia and Macedonia-Turkey), Latin America (Colombia-Venezuela, Argentina-Uruguay, Colombia-Ecuador and Ecuador-Peru), Asia (Uzbekistan-Tajikistan, China-Mongolia and Azerbaijan-Iran) and Africa (Gambia-Senegal).

²³³ DELLI ZOTTI (2018: 181).

CONCLUSIONS

From the historical overview developed for the first chapter, it clearly emerges the relevance of the two UNESCO Conventions of 1972 and 2003 for how today's international protection of the World Heritage of Humanity is organized. Based on the two Conventions, the safeguarding system developed formally as based on the distinction between TCH and ICH. Besides the tragic number of victims, World War II had collaterally brought to the attention of the world's public opinion the theme of the safeguard of artistic and monumental heritages. Yet, the stipulation of the first Convention of 1972 was triggered by the events concerning the archaeological site of Abu Simbel, in Egypt, whose safety was threatened by the construction of the Aswan Dam. A danger which was partly overcome as the site was moved elsewhere thanks to an international technical cooperation project launched by UNESCO in 1960.

This event marked a decisive turning point in the long global public debate for an international Convention aiming at the protection of archaeological sites, monuments and works of art as well as landscape beauties as 'World Heritage'. However, with decolonization, the following decades were characterised by the pressure of countries in Africa, Asia, Latin America and the Pacific area for safeguarding what was not protected with the first Convention. According to those countries, the World Heritage List was hardly reflecting any geographical balance, since its selection criteria were not necessarily suitable for the cultural specificities of non-European/Western countries. As they argue, their culture was expressed much more in the everyday life, rather than through monuments or other permanent and physical sites. Thus, the Convention on the ICH was born as opposed to the first, which stopper being identified only as World Heritage but as the Convention on TCH.

However, the distinction between TCH and ICH risks to be misleading. The factitious nature of the tangible and intangible dichotomy is not compatible with the holistic nature of the World Cultural Heritage. Yet, also the legal analysis of the text of the 2003 Convention opens to doubts and contestations. The text outlines that the object of protection of intangible elements can be songs, rituals, know-how, but also to very tangible ones, such as traditional craftsmanship. This aspect also emerges in relation to the "Good Safeguarding Practices" for which, in order to preserve certain assets, the creation of museums and craft centres is promoted.

Instead, the international debate that preceded the signing of the Convention shows how the central moment is represented by the overcoming of the notion of 'folklore'. Statically understood as a set of "traditional uses and habits as instruments of identity", the definition of ICH conclusively acknowledged by

the Convention, understood it as a living culture within the communities that generated it and continue to cultivate it; as an identity system.

Therefore, the *fulcrum* of the entire 2003 Convention is what we can define “ICH/Community relationship”, which also represents a benchmark around which strengths and weaknesses of the Convention are analysed in this work. It is only from the perspective of a very close heritage-community bond that it is possible to understand the additional references defined in Article 2. This article states that the heritage to be safeguarded must be “compatible with existing international Human Rights Instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development”. That is the reason why ritual practices such as infibulation that contradict human rights cannot find protection in the ICH Convention. For the same reason, protecting cultural heritage means implicitly and indirectly safeguarding the community identified with such heritage. This means contrasting both the phenomena of cultural homologation derived from the processes of globalization, and situations of denial of the rights of freedom of expression and cultural, religious and linguistic representation of minorities in non-democratic States.

From a formal point of view thus the Convention on ICH represents a traditional instrument that creates obligations between States by mutual consent. Yet, from a substantive point of view, it establishes a system of international obligations assumed by the contracting states towards cultural communities established in their territory, for safeguarding their traditions and living culture, similar to the protection of human rights. Therefore, the real base of the Convention lies on the fact that the safeguarding of the ICH is not aimed at safeguarding the national interest of each State, but rather at the conservation of a collective good of the international community as a whole - namely the variety and cultural diversity of humankind.

Nonetheless, there was no lack of criticism from scholars. While appreciating the introduction of a condition of compatibility with human rights and consequently of ‘mutual respect’ between different cultural identities, many noted also that the 2003 Convention is to some extent filled with a basic idealism, insofar as it tends almost exclusively to consider the different cultural traditions as manifestations of cultural freedom of groups and communities. Sometimes, however, many rites and traditions can result by themselves offensive or disrespectful towards other communities, groups and minorities (think of the Orange Parade in the Catholic settlements of Northern Ireland), discriminatory on the basis of gender (for example, in addition to the practices of sexual mutilation/self-mutilation, traditions related to religious clothing and segregation between the sexes) or in violation of animal rights (such as, for example, fox hunting, bullfighting or pigeon shooting). In this sense, the condition of compatibility with human rights and mutual respect set out in Article 2, paragraph 1, runs the risk of operating in grey areas with

respect to the existing instruments of international human rights law. In this way, the protection of ICH could be asserted with regard to practices that, even without violating human rights, equally affect widespread sensitivities.

These objections seem shareable in identifying the complexities and underlying problems to the objectives of safeguarding the ICH of humanity. But they cannot deny the merits of the legal formulation adopted and of the obtained political-diplomatic consensus on the aforementioned clause of Article 2, paragraph 1 of the Convention. In conclusion, the definition adopted in the ICH Convention should be considered a satisfactory endpoint for the broad international debate developed between 1972 and 2003. A debate which, as noted by Francesco Francioni, “has contributed to the dynamic evolution of international cultural heritage law towards a more complex concept of heritage, linked to living culture and human rights, including social rights. In this sense, and in a broader perspective, it can be considered a fundamental step toward reconciliation between cultural pluralism and the universality of Human Rights”²³⁴.

With regard to the analysis of the subject matter of the Convention and its safeguarding mechanisms through the establishment of the two lists, it should be noted that this system is also an inheritance of the historical process of continuity with the previous Convention (1972). Despite the adoption of a safeguarding mechanism similar to the one provided by the 1972 Convention, the risk of reproducing a hierarchy of cultural heritages, has not been repeated with equal intensity. In reality, the mitigation of this risk depends only partially by the elimination of the parameter of exceptionality as a criterium to include items in the lists. Instead, this risk seems to be neutralized by the very nature of ICH, identified in the Convention as directly related to the communities that generated them and keep them alive.

In this way the RL does not become, in an elitist sense, the catalogue of the ‘best of the best’ of ICH; instead, it is intended to help ensure a better visibility of this heritage and raise awareness of what it means and represents, encouraging a dialogue that respects cultural diversity. Considering its real purposes and attention to the bearers of culture themselves, the 2003 Convention mitigates the risk of becoming an instrument of political struggle in the hands of national governments that could take advantage of it to proclaim the richness of their cultural heritage.

The innovation of the 2003 Convention does not manifest itself in the immaterial nature of the legally protected assets - which is also common to the international guarantee systems of IP rights that apply to cultural products such as music, visual arts and literature. However, while the latter protect the interest of the author of a work or an invention inherent in its economic

²³⁴ BLAKE, LIXINSKI (2020: 57).

exploitation, with the 2003 Convention it was intended to protect cultural or artistic expression as such, and even more the social structures and institutions created by their cultural expressions.

At the origins of the international debate on the scope of the concept of 'cultural heritage', the definition of 'cultural property' was used. Over time, the need arose to replace the term 'property' in order to give priority to other social objectives that had to be guaranteed. The legal concept of 'property' in the context of the protection of cultural heritage thus began to be perceived as limitative, as it can be assimilated to an object of private law of a predominantly economic nature. This gradually led to the use of the term 'cultural heritage'. This change highlighted a gradual, albeit debated, understanding of the fact that the protection of cultural heritage concerns the relationship between assets and the communities linked to them.

The cultural and not private economic nature of the ICH also emerges from how the communities themselves consider sometimes their own heritage. For example, indigenous cultures consider protection as a secret - i.e. the possibility of exclusion from access, in order to preserve it and prevent the economic exploitation of knowledge and cultural expressions that could be totally distorted by similar processes. One example was the enforcement of the Convention for the aforementioned case of drawings on the sand of the indigenous people of *Vanuatu*.

From this perspective, the Convention's approach tends to reconcile two different needs: Article 13, letter d), sub ii), requires States to adopt adequate measures aimed at "ensuring access to the ICH" and, on the other hand, prescribes that such access should be made by "respecting customary practices governing access to specific aspects of such heritage". However, by looking at the overall layout of the Third Section of the Convention, in which the aforementioned provision is inserted, one realizes that the overall approach is certainly aimed at privileging access to intangible assets.

With regard to the object of protection, therefore, a gap may arise between the interests of the communities and those of the State to which they belong. Conflicts can be mainly aimed at obtaining control over the economic exploitation of a specific cultural knowledge and expression. In particular, the system of protection of cultural heritage through registration in the safeguard lists, common to both UNESCO Conventions, contributes to assigning particular economic value to the enlisted elements – e.g. in commercial and/or touristic terms.

In this regard, in continuing the debate opened with the 1972 Convention, questions were raised about the relationship between the ICH and IP rights. From this point of view, a challenge emerges linked to the very nature of the object of protection – i.e. intangible cultural manifestations - which almost

always fall into the public domain for some time. Thus, it should be noted that Article 3 letter b established that: “nothing in this Convention may be interpreted as affecting the rights and obligations of State Parties deriving from any international instrument relating to IP rights or to the use of biological and ecological resources to which they are parties”.

This is a so-called ‘savings clause’, which declares that the Convention has no effect on any right or obligation related to IP rights, thus postponing the discussion concerned with the ownership of the cultural heritage and leaving the Convention to a more programmatic orientation. The adoption of this mechanism favoured a more rapid approval of the Convention, also considering that many Countries, especially Anglo-Saxon ones, viewed with distrust the introduction of protection mechanisms that could limit the free competition. The solution adopted is therefore limited to addressing ICH from a strictly cultural point of view, leaving the task of developing *sui generis* mechanisms of the economic rights of ‘traditional knowledge’ owners to organisations equipped with the necessary skills and tools, such as WIPO and WTO.

Ultimately, according to the solution incorporated in the text of the Convention, UNESCO is responsible to protect the integrity of the ICH (and the moral rights of its owners), while IP rights are instead situated downstream. As observed by Zagato, IP rights have a different object and purpose with respect to the UNESCO instrument, neither creating protection *in situ* nor favouring the socio-cultural context in which the cultural heritage arose and/or was maintained. Nevertheless, the recognition of a property right on intangible assets to the communities to which they belong is likely to create significant economic advantages. Furthermore, it confers to the system established by the Convention, which does not provide for sanctions against any non-compliant States, a useful mechanism of rewards to sum up to the contributions provided for in Article 25 of the Convention.

Anyway, from the approval of the 2003 Convention until today, no relevant innovative solutions have emerged in the activities of WIPO and WTO. In fact, IP right legislation is still very much based on individual rights, aimed at protecting the original artist works from reproduction. At the moment, therefore, the possibility of IP protection for ICH is limited only to a conventional system, which can provide, for example, protection to recording of ICH or databases and compilations of ICH.

The cases of *Bikram Yoga* or *Cucuma longa* show that the communities to which the ICH belongs continue to encounter significant difficulties in preventing attempts of misappropriation. Or, in seeing their collective right on the ICH directly recognized (see case *Bulun Bulun*), that could assure them a ‘positive protection’ - therefore an exclusive property right to authorize the use of ICH by third parties and for obtaining a remuneration.

Governments are among the actors to whom the Convention delegates the power to safeguard ICH, together with communities, groups and individuals, by virtue of the above-mentioned fundamental link between the heritage to be protected and the those who generated it and continues to maintain it alive., By providing the modalities for making the community participation effective as expressly called for in Articles 11(b) and 15 and implied elsewhere in the treaty, the 2003 UNESCO Convention marks the transition to a unitary and community-based consideration of cultural heritage.

It is envisaged that communities must actively collaborate at all levels of the application process, and particularly in that of identifying the element and planning safeguard measures, not only as recipients and beneficiaries of these measures, but as initiators and developers. However, besides the declared intention of involving communities in the process of safeguarding the ICH, the final agreement reached in the Convention was not able to assure that this participation always occurs in an effective way. The weakest point of the Convention, with regard to the involvement of communities in the process of protecting ICH, has been identified in the institutional functioning mechanisms, which are inadequate.

The Committee for the protection of cultural heritage has the role of establishing and publishing a RL of this heritage. It is in fact a State body that does not include representatives of the communities. It follows that, as noted by Francioni, it is very difficult for the ICH to be effectively safeguarded by a diplomatic body that does not admit institutional participation of the representatives of the communities that create and maintain this heritage. Moreover, even after the additional parts provided by the OD in 2010, the Convention allows communities, groups and individuals to decide that a given manifestation of such heritage should not be registered on the List. Yet, they cannot obtain the registration if their Country is not willing to do so. Therefore, the effective initiative power has remained in the sphere of competence of the Countries, while the communities have a mere veto power.

This possible misalignment between the ICH to be protected and the community to which it belongs originates significant criticalities occurring in the application of the rules by the Countries adhering to the Convention. These problematic aspects emerge clearly from the analysis of the case studies examined, in which there is a surreptitious use of the Convention both externally - in terms of nationalistic disputes between States regarding the belonging of a specific ICH - and internally - when the value of a tradition or a rite of a community is ascribed to the national heritage with the purpose of cultural assimilation and eradication of diversity. In this respect, the ICH Convention needs to come up with better measures to ensure genuine community participation, where culture bearers could take part directly in

decision-making process without the intermediation of country heritage authorities.

As for claims about ICH that can cause disputes among countries - one example being about the shadow theatre *Karagöz* - subscribing governments are supposed to register cultural elements on the Convention's lists to safeguard them for the world's future generations, not to claim ownership. What is more, UNESCO has neither the authority nor the willingness to assign 'patents' or nationality to ICH. The subcommittee evaluates whether the submitted nomination fulfils the criteria for inscription on the ICH list, but it does not decide or debate which tradition belongs to which country.

The 2003 Convention can be considered an innovation in international cultural heritage law, since it provides for the participation of communities at all levels of the application process. Certain weaknesses, especially in the participation mechanisms of the communities in the key organs of the Convention, however, place the effective power of registering an element on the UNESCO lists in the hands of the national governments. From this misalignment follow the applicative distortions that have been examined in particular in the two case studies. Moving from an awareness of these limits, subsequent international Conventions on the protection of cultural heritage - such as the Council of Europe Framework Convention of 2005 on the value of cultural heritage, commonly known as the Faro Convention - have tried to favour the introduction of 'bottom-up' mechanisms for the effective participation of communities as the sole entities capable of identifying and transmitting cultural heritage.

In conclusion, the 'ICH/Community relationship' represented the parameter on which the analysis of the strengths and weaknesses of the Convention carried out in this work was conducted. From this analysis, it is possible to note that where the protection mechanisms or the activation power of these mechanisms are misaligned with respect to the ICH/Community relationship, critical elements have been identified. On the contrary, the Convention has operated consistent with the purposes of protection, aligned to respect for human rights and sustainability, and aiming to contrast the cultural homologation process, as far as the protection mechanisms and the related powers provided for by the Convention, and the respect for ICH/community relationship have been taken into account.

"Intangible heritage is a reflection of the vitality of peoples, the result of the meeting of different cultures, fragile flowers of humanity".

(Claude Lévi Strauss)



ANNEX 1

CONVENTION FOR THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE

Paris, 17 October 2003

The General Conference of the United Nations Educational, Scientific and Cultural Organisation hereinafter referred to as UNESCO, meeting in Paris, from 29 September to 17 October 2003, at its 32nd session,

Referring to existing international human rights instruments, in particular to 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,

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,

Considering the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage,

Recognizing that the processes of globalization and social transformation, alongside the conditions they create for renewed dialogue among communities, also give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage, in particular owing to a lack of resources for safeguarding such heritage,

Being aware of the universal will and the common concern to safeguard the intangible cultural heritage of humanity,

Recognizing that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity,

Noting the far-reaching impact of the activities of UNESCO in establishing normative instruments for the protection of the cultural heritage, in particular the Convention for the Protection of the World Cultural and Natural Heritage of 1972,

Noting further that no binding multilateral instrument as yet exists for the safeguarding of the intangible cultural heritage,

Considering that existing international agreements, recommendations and resolutions concerning the cultural and natural heritage need to be effectively enriched and supplemented by means of new provisions relating to the intangible cultural heritage,

Considering the need to build greater awareness, especially among the younger generations, of the importance of the intangible cultural heritage and of its safeguarding,

Considering that the international community should contribute, together with the States Parties to this Convention, to the safeguarding of such heritage in a spirit of cooperation and mutual assistance,

Recalling UNESCO's programmes relating to the intangible cultural heritage, in particular the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity,

Considering the invaluable role of the intangible cultural heritage as a factor in bringing human beings closer together and ensuring exchange and understanding among them,

Adopts this Convention on this seventeenth day of October 2003.

I. General provisions

Article 1 – 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.

Article 2 – Definitions

For the purposes of this Convention,

1. The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

2. The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains:

- (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) knowledge and practices concerning nature and the universe;

(e) traditional craftsmanship.

3. “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.

4. “States Parties” means States which are bound by this Convention and among which this Convention is in force.

5. This Convention applies *mutatis mutandis* to the territories referred to in Article 33 which become Parties to this Convention in accordance with the conditions set out in that Article. To that extent the expression “States Parties” also refers to such territories.

Article 3 – Relationship to other international instruments

Nothing in this Convention may be interpreted as:

(a) altering the status or diminishing the level of protection under the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage of World Heritage properties with which an item of the intangible cultural heritage is directly associated; or

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

II. Organs of the Convention

Article 4 – General Assembly of the States Parties

1. A General Assembly of the States Parties is hereby established, hereinafter referred to as “the General Assembly”. The General Assembly is the sovereign body of this Convention.

2. The General Assembly shall meet in ordinary session every two years. It may meet in extraordinary session if it so decides or at the request either of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage or of at least one-third of the States Parties.

3. The General Assembly shall adopt its own Rules of Procedure.

Article 5 – Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage

1. An Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, hereinafter referred to as “the Committee”, is hereby established within UNESCO. It shall be composed of representatives of 18 States Parties, elected by the States Parties meeting in General Assembly, once this Convention enters into force in accordance with Article 34.

2. The number of States Members of the Committee shall be increased to 24 once the number of the States Parties to the Convention reaches 50.

Article 6 – Election and terms of office of States Members of the Committee

1. The election of States Members of the Committee shall obey the principles of equitable geographical representation and rotation.

2. States Members of the Committee shall be elected for a term of four years by States Parties to the Convention meeting in General Assembly.

3. However, the term of office of half of the States Members of the Committee elected at the first election is limited to two years. These States shall be chosen by lot at the first election.

4. Every two years, the General Assembly shall renew half of the States Members of the Committee.

5. It shall also elect as many States Members of the Committee as required to fill vacancies.

6. A State Member of the Committee may not be elected for two consecutive terms.

7. States Members of the Committee shall choose as their representatives’ persons who are qualified in the various fields of the intangible cultural heritage.

Article 7 – Functions of the Committee

Without prejudice to other prerogatives granted to it by this Convention, the functions of the Committee shall be to:

(a) promote the objectives of the Convention, and to encourage and monitor the implementation thereof;

- (b) provide guidance on best practices and make recommendations on measures for the safeguarding of the intangible cultural heritage;
- (c) prepare and submit to the General Assembly for approval a draft plan for the use of the resources of the Fund, in accordance with Article 25;
- (d) seek means of increasing its resources, and to take the necessary measures to this end, in accordance with Article 25;
- (e) prepare and submit to the General Assembly for approval operational directives for the implementation of this Convention;
- (f) examine, in accordance with Article 29, the reports submitted by States Parties, and to summarize them for the General Assembly;
- (g) examine requests submitted by States Parties, and to decide thereon, in accordance with objective selection criteria to be established by the Committee and approved by the General Assembly for:
 - (i) inscription on the lists and proposals mentioned under Articles 16, 17 and 18;
 - (ii) the granting of international assistance in accordance with Article 22.

Article 8 – Working methods of the Committee

1. The Committee shall be answerable to the General Assembly. It shall report to it on all its activities and decisions.
2. The Committee shall adopt its own Rules of Procedure by a two-thirds majority of its Members.
3. The Committee may establish, on a temporary basis, whatever ad hoc consultative bodies it deems necessary to carry out its task.
4. The Committee may invite to its meetings any public or private bodies, as well as private persons, with recognized competence in the various fields of the intangible cultural heritage, in order to consult them on specific matters.

Article 9 – Accreditation of advisory organisations

1. The Committee shall propose to the General Assembly the accreditation of non- governmental organisations with recognized competence in the field of the intangible cultural heritage to act in an advisory capacity to the Committee.
2. The Committee shall also propose to the General Assembly the criteria for and modalities of such accreditation.

Article 10 – The Secretariat

1. The Committee shall be assisted by the UNESCO Secretariat.
2. The Secretariat shall prepare the documentation of the General Assembly and of the Committee, as well as the draft agenda of their meetings, and shall ensure the implementation of their decisions.

III. Safeguarding of the intangible cultural heritage at the national level

Article 11 – Role of States Parties

Each State Party shall:

- (a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory;
- (b) among the safeguarding measures referred to in Article 2, paragraph 3, identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non- governmental organisations.

Article 12 – Inventories

1. To ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated.
2. When each State Party periodically submits its report to the Committee, in accordance with Article 29, it shall provide relevant information on such inventories.

Article 13 – Other measures for safeguarding

To ensure the safeguarding, development and promotion of the intangible cultural heritage present in its territory, each State Party shall endeavour to:

- (a) adopt a general policy aimed at promoting the function of the intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning programmes;
- (b) designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory;
- (c) foster scientific, technical and artistic studies, as well as research methodologies, with a view to effective safeguarding of the intangible cultural heritage, in particular the intangible cultural heritage in danger;
- (d) adopt appropriate legal, technical, administrative and financial measures aimed at:
 - (i) fostering the creation or strengthening of institutions for training in the management of the intangible cultural heritage and the transmission of such heritage through forums and spaces intended for the performance or expression thereof;
 - (ii) ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage;
 - (iii) establishing documentation institutions for the intangible cultural heritage and facilitating access to them.

Article 14 – Education, awareness-raising and capacity-building

Each State Party shall endeavour, by all appropriate means, to:

- (a) ensure recognition of, respect for, and enhancement of the intangible cultural heritage in society, in particular through:
 - (i) educational, awareness-raising and information programmes, aimed at the general public, in particular young people;
 - (ii) specific educational and training programmes within the communities and groups concerned;

(iii) capacity-building activities for the safeguarding of the intangible cultural heritage, in particular management and scientific research; and

(iv) non-formal means of transmitting knowledge;

(b) keep the public informed of the dangers threatening such heritage, and of the activities carried out in pursuance of this Convention;

(c) promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage.

Article 15 – Participation of communities, groups and individuals

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.

IV. Safeguarding of the intangible cultural heritage at the international level

Article 16 – Representative List of the Intangible Cultural Heritage of Humanity

1. In order to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity, the Committee, upon the proposal of the States Parties concerned, shall establish, keep up to date and publish a Representative List of the Intangible Cultural Heritage of Humanity.

2. The Committee shall draw up and submit to the General Assembly for approval the criteria for the establishment, updating and publication of this Representative List.

Article 17 – List of Intangible Cultural Heritage in Need of Urgent Safeguarding

1. With a view to taking appropriate safeguarding measures, the Committee shall establish, keep up to date and publish a List of Intangible Cultural Heritage in Need of Urgent Safeguarding, and shall inscribe such heritage on the List at the request of the State Party concerned.

2. The Committee shall draw up and submit to the General Assembly for approval the criteria for the establishment, updating and publication of this List.

3. In cases of extreme urgency – the objective criteria of which shall be approved by the General Assembly upon the proposal of the Committee – the Committee may inscribe an item of the heritage concerned on the List mentioned in paragraph 1, in consultation with the State Party concerned.

Article 18 – Programmes, projects and activities for the safeguarding of the intangible cultural heritage

1. On the basis of proposals submitted by States Parties, and in accordance with criteria to be defined by the Committee and approved by the General Assembly, the Committee shall periodically select and promote national, sub regional and regional programmes, projects and activities for the safeguarding of the heritage which it considers best reflect the principles and objectives of this Convention, taking into account the special needs of developing countries.

2. To this end, it shall receive, examine and approve requests for international assistance from States Parties for the preparation of such proposals.

3. The Committee shall accompany the implementation of such projects, programmes and activities by disseminating best practices using means to be determined by it.

V. International cooperation and assistance

Article 19 – Cooperation

1. For the purposes of this Convention, international cooperation includes, inter alia, the exchange of information and experience, joint initiatives, and the establishment of a mechanism of assistance to States Parties in their efforts to safeguard the intangible cultural heritage.

2. Without prejudice to the provisions of their national legislation and customary law and practices, the States Parties recognize that the safeguarding of intangible cultural heritage is of general interest to humanity, and to that end undertake to cooperate at the bilateral, sub regional, regional and international levels.

Article 20 – Purposes of international assistance

International assistance may be granted for the following purposes:

- (a) the safeguarding of the heritage inscribed on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding;
- (b) the preparation of inventories in the sense of Articles 11 and 12;
- (c) support for programmes, projects and activities carried out at the national, sub regional and regional levels aimed at the safeguarding of the intangible cultural heritage;
- (d) any other purpose the Committee may deem necessary.

Article 21 – Forms of international assistance

The assistance granted by the Committee to a State Party shall be governed by the operational directives foreseen in Article 7 and by the agreement referred to in Article 24, and may take the following forms:

- (a) studies concerning various aspects of safeguarding;
- (b) the provision of experts and practitioners;
- (c) the training of all necessary staff;
- (d) the elaboration of standard-setting and other measures;
- (e) the creation and operation of infrastructures;
- (f) the supply of equipment and know-how;
- (g) other forms of financial and technical assistance, including, where appropriate, the granting of low-interest loans and donations.

Article 22 – Conditions governing international assistance

1. The Committee shall establish the procedure for examining requests for international assistance and shall specify what information shall be included in the requests, such as the measures envisaged and the interventions required, together with an assessment of their cost.
2. In emergencies, requests for assistance shall be examined by the Committee as a matter of priority.
3. In order to reach a decision, the Committee shall undertake such studies and consultations as it deems necessary.

Article 23 – Requests for international assistance

1. Each State Party may submit to the Committee a request for international assistance for the safeguarding of the intangible cultural heritage present in its territory.
2. Such a request may also be jointly submitted by two or more States Parties.
3. The request shall include the information stipulated in Article 22, paragraph 1, together with the necessary documentation.

Article 24 – Role of beneficiary States Parties

1. In conformity with the provisions of this Convention, the international assistance granted shall be regulated by means of an agreement between the beneficiary State Party and the Committee.
2. As a general rule, the beneficiary State Party shall, within the limits of its resources, share the cost of the safeguarding measures for which international assistance is provided.
3. The beneficiary State Party shall submit to the Committee a report on the use made of the assistance provided for the safeguarding of the intangible cultural heritage.

VI. Intangible Cultural Heritage Fund

Article 25 – Nature and resources of the Fund

1. A “Fund for the Safeguarding of the Intangible Cultural Heritage”, hereinafter referred to as “the Fund”, is hereby established.
2. The Fund shall consist of funds-in-trust established in accordance with the Financial Regulations of UNESCO.
3. The resources of the Fund shall consist of:
 - (a) contributions made by States Parties;
 - (b) funds appropriated for this purpose by the General Conference of UNESCO;
 - (c) contributions, gifts or bequests which may be made by:

- (i) other States;
 - (ii) organisations and programmes of the United Nations system, particularly the United Nations Development Programme, as well as other international organisations;
 - (iii) public or private bodies or individuals;
- (d) any interest due on the resources of the Fund;
 - (e) funds raised through collections, and receipts from events organized for the benefit of the Fund;
 - (f) any other resources authorized by the Fund's regulations, to be drawn up by the Committee.
4. The use of resources by the Committee shall be decided on the basis of guidelines laid down by the General Assembly.
5. The Committee may accept contributions and other forms of assistance for general and specific purposes relating to specific projects, provided that those projects have been approved by the Committee.
6. No political, economic or other conditions which are incompatible with the objectives of this Convention may be attached to contributions made to the Fund.

Article 26 – Contributions of States Parties to the Fund

1. Without prejudice to any supplementary voluntary contribution, the States Parties to this Convention undertake to pay into the Fund, at least every two years, a contribution, the amount of which, in the form of a uniform percentage applicable to all States, shall be determined by the General Assembly. This decision of the General Assembly shall be taken by a majority of the States Parties present and voting which have not made the declaration referred to in paragraph 2 of this Article. In no case shall the contribution of the State Party exceed 1% of its contribution to the regular budget of UNESCO.
2. However, each State referred to in Article 32 or in Article 33 of this Convention may declare, at the time of the deposit of its instruments of ratification, acceptance, approval or accession, that it shall not be bound by the provisions of paragraph 1 of this Article.

3. A State Party to this Convention which has made the declaration referred to in paragraph 2 of this Article shall endeavour to withdraw the said declaration by notifying the Director-General of UNESCO. However, the withdrawal of the declaration shall not take effect in regard to the contribution due by the State until the date on which the subsequent session of the General Assembly opens.

4. In order to enable the Committee to plan its operations effectively, the contributions of States Parties to this Convention which have made the declaration referred to in paragraph 2 of this Article shall be paid on a regular basis, at least every two years, and should be as close as possible to the contributions they would have owed if they had been bound by the provisions of paragraph 1 of this Article.

5. Any State Party to this Convention which is in arrears with the payment of its compulsory or voluntary contribution for the current year and the calendar year immediately preceding it shall not be eligible as a Member of the Committee; this provision shall not apply to the first election. The term of office of any such State which is already a Member of the Committee shall come to an end at the time of the elections provided for in Article 6 of this Convention.

Article 27 – Voluntary supplementary contributions to the Fund

States Parties wishing to provide voluntary contributions in addition to those foreseen under Article 26 shall inform the Committee, as soon as possible, so as to enable it to plan its operations accordingly.

Article 28 – International fund-raising campaigns

The States Parties shall, insofar as is possible, lend their support to international fund-raising campaigns organized for the benefit of the Fund under the auspices of UNESCO.

VII. Reports

Article 29 – Reports by the States Parties

The States Parties shall submit to the Committee, observing the forms and periodicity to be defined by the Committee, reports on the legislative, regulatory and other measures taken for the implementation of this Convention.

Article 30 – Reports by the Committee

1. On the basis of its activities and the reports by States Parties referred to in Article 29, the Committee shall submit a report to the General Assembly at each of its sessions.
2. The report shall be brought to the attention of the General Conference of UNESCO.

VIII. Transitional clause

Article 31 – Relationship to the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity

1. The Committee shall incorporate in the Representative List of the Intangible Cultural Heritage of Humanity the items proclaimed “Masterpieces of the Oral and Intangible Heritage of Humanity” before the entry into force of this Convention.
2. The incorporation of these items in the Representative List of the Intangible Cultural Heritage of Humanity shall in no way prejudice the criteria for future inscriptions decided upon in accordance with Article 16, paragraph 2.
3. No further Proclamation will be made after the entry into force of this Convention.

IX. Final clauses

Article 32 – Ratification, acceptance or approval

1. This Convention shall be subject to ratification, acceptance or approval by States Members of UNESCO in accordance with their respective constitutional procedures.
2. The instruments of ratification, acceptance or approval shall be deposited with the Director-General of UNESCO.

Article 33 – Accession

1. This Convention shall be open to accession by all States not Members of UNESCO that are invited by the General Conference of UNESCO to accede to it.

2. This Convention shall also be open to accession by territories which enjoy full internal self-government recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV), and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters.

3. The instrument of accession shall be deposited with the Director-General of UNESCO.

Article 34 – Entry into force

This Convention shall enter into force three months after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date. It shall enter into force with respect to any other State Party three months after the deposit of its instrument of ratification, acceptance, approval or accession.

Article 35 – Federal or non-unitary constitutional systems

The following provisions shall apply to States Parties which have a federal or non-unitary constitutional system:

(a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States Parties which are not federal States;

(b) with regard to the provisions of this Convention, the implementation of which comes under the jurisdiction of individual constituent States, countries, provinces or cantons which are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption.

Article 36 – Denunciation

1. Each State Party may denounce this Convention.
2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of UNESCO.

3. The denunciation shall take effect twelve months after the receipt of the instrument of denunciation. It shall in no way affect the financial obligations of the denouncing State Party until the date on which the withdrawal takes effect.

Article 37 – Depositary functions

The Director-General of UNESCO, as the Depositary of this Convention, shall inform the States Members of the Organisation, the States not Members of the Organisation referred to in Article 33, as well as the United Nations, of the deposit of all the instruments of ratification, acceptance, approval or accession provided for in Articles 32 and 33, and of the denunciations provided for in Article 36.

Article 38 – Amendments

1. A State Party may, by written communication addressed to the Director-General, propose amendments to this Convention. The Director-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the next session of the General Assembly for discussion and possible adoption.

2. Amendments shall be adopted by a two-thirds majority of States Parties present and voting.

3. Once adopted, amendments to this Convention shall be submitted for ratification, acceptance, approval or accession to the States Parties.

4. Amendments shall enter into force, but solely with respect to the States Parties that have ratified, accepted, approved or acceded to them, three months after the deposit of the instruments referred to in paragraph 3 of this Article by two-thirds of the States Parties. Thereafter, for each State Party that ratifies, accepts, approves or accedes to an amendment, the said amendment shall enter into force three months after the date of deposit by that State Party of its instrument of ratification, acceptance, approval or accession.

5. The procedure set out in paragraphs 3 and 4 shall not apply to amendments to Article 5 concerning the number of States Members of the Committee. These amendments shall enter into force at the time they are adopted.

6. A State which becomes a Party to this Convention after the entry into force of amendments in conformity with paragraph 4 of this Article shall, failing an expression of different intention, be considered:

(a) as a Party to this Convention as so amended; and

(b) as a Party to the unamended Convention in relation to any State Party not bound by the amendments.

Article 39 – Authoritative texts

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.

Article 40 – Registration

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General of UNESCO.

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SUMMARY

This research intends to analyse how the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage (ICH) should properly work in order to pursue its aims and objectives.

The main points of the Convention – the definition of ICH; the role reserved to the States Parties and communities; the characteristics that manifestation and practices should have to be inserted in the two safeguarding Lists provided by the Convention (Representative and Urgent Lists) – are examined in order to understand if the effective enforcement of 2003 Convention reaches its purpose or it risks to be used surreptitiously and why.

The work is structured in three main chapters.

The first chapter - besides serving as a general framework for placing the Convention within the long international debate that preceded its signing - is a synthetic historical analysis that allows us to understand how the current international safeguarding system of the World Heritage, is ensured by the two Conventions on Tangible Heritage of 1972 and Intangible Heritage of 2003.

The real distinction, anyway, is not represented by the tangible or otherwise intangible nature of the patrimony safeguarded by the second Convention. The nodal point of the 2003 Convention should be identified in the character of a living heritage and in the link existing with the communities that generated it. This heritage which, as underlined in Article 2, being “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”.

In the second chapter, instead, is carried out an analysis of the text of the main articles that govern the concrete application of the mechanisms for the safeguard of intangible heritage from a legal perspective. The Articles of the Convention’s text are not examined in their sequential order or commented in their entirety but grouped into four different categories: 1. Aim of the Convention and definition of Intangible Cultural Heritage; 2. Object of protection; 3. Subjects involved in the protection of cultural heritage; 4. Instrument for safeguarding ICH at International level

On the basis of the same categories, the third chapter analyses the enforcement of the 2003 Convention emphasizing its strengths or pitfalls. This analysis identifies the failure to give to the communities an effective and mandatory power of initiative, reserving it only to the States, as the main limitation to the

optimal functioning of the protection system. This misalignment is at the origin of the main critical issues deriving from the enforcement of the Convention in its nearly fifteen years of operation.

The international debate that preceded the signing of the Convention shows how the central moment is represented by the overcoming of the notion of “folklore”, statically understood as a set of “traditional uses and habits as instruments of identity”, towards the definition of ICH conclusively acknowledged by the Convention, understood as a living culture within the communities that generated it and continue to cultivate it, as an identity system.

Therefore, the *fulcrum* of the entire 2003 Convention is what we can define “ICH / Community relationship”, which also represents a benchmark on which strengths and weaknesses of the Convention are analysed in this work. It is only from the perspective of a very close heritage-community bond that it is possible to understand the additional references defined in Article 2, which states that the heritage to be safeguarded must be “compatible with existing international Human Rights Instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development”. That is the reason why ritual practices such as infibulation that are harmful to human rights cannot find protection in the ICH Convention. For the same reason, protecting cultural heritage means implicitly and indirectly safeguarding the community identified with such heritage, thus contrasting both the phenomena of cultural homologation derived from the processes of globalization, and situations of denial of the rights of freedom of expression and cultural, religious and linguistic representation of minorities in non-democratic States.

In this sense, if from a formal point of view the Convention on ICH represents a traditional instrument that creates obligations between the States by mutual consent, then, from a substantive point of view, it establishes a system of international obligations assumed by the Contracting States towards cultural communities established in their territory, in order to safeguard their traditions and living culture, in a way similar to the case of the protection of human rights. Therefore, the real base of the Convention lies on the fact that the safeguarding of the ICH is not aimed at safeguarding the national interest of each State, but rather at the conservation of a collective good of the international community as a whole, namely the variety and cultural diversity of humankind.

In conclusion, the definition adopted in the ICH Convention should be considered a satisfactory endpoint for the broad international debate developed between 1972 and 2003, which, as noted by Francesco Francioni,

“has contributed to the dynamic evolution of international cultural heritage law towards a more complex concept of heritage, linked to living culture and human rights, including social rights. In this sense, and in a broader perspective, it can be considered a fundamental step toward reconciliation between cultural pluralism and the universality of Human Rights”.

With regard to the object of protection, a gap may arise between the interests of the communities and those of the State to which they belong, which is mainly aimed at obtaining control over the economic exploitation of their cultural knowledge and expressions. In particular, the system of protection of cultural heritage through registration in safeguarding lists, common to both UNESCO Conventions, contributes to assigning particular value to the elements included in it, making them assume an economic value not only in terms of tourism, but also commercial.

In this regard, in continuing the debate that had opened with the 1972 Convention, questions were raised about the relationship between the ICH and IP rights.

In this regard, it should be noted that Article 3 letter b established that: “nothing in this Convention may be interpreted as affecting the rights and obligations of State Parties deriving from any international instrument relating to IP rights or to the use of biological and ecological resources to which they are parties”.

This is a so-called “savings clause”, which declares that the Convention has no effect on any right or obligation related to IP rights, so postponing the discussion on the owner of the cultural heritage and leaving the Convention to a more programmatic orientation. The adoption of this mechanism favoured a more rapid obtaining of consent to the approval of the Convention, also considering that many Countries, especially Anglo-Saxon, opposed to or viewed with distrust the introduction of protection mechanisms that could limit the free competition. The solution adopted is therefore limited to addressing ICH from a strictly cultural point of view, leaving the task of developing *sui generis* mechanisms of the economic rights of “traditional knowledge” owners to organizations equipped with the necessary skills and tools, such as WIPO and WTO.

Ultimately, according to the solution incorporated in the text of the Convention, UNESCO is responsible to protect the integrity of the ICH (and the moral rights of its owners), while IP rights are instead situated downstream. It is possible to say that IP rights have a different object and purpose with respect to the UNESCO instrument, neither creating protection *in situ* nor favouring the socio-cultural context in which the cultural heritage

arose and was maintained. Nevertheless, the recognition of a property right on intangible assets to the communities to which they belong is likely to create significant economic advantages for the same. Furthermore, it confers to the system established by the Convention, which does not provide for sanctions against any non-compliant States, a useful mechanism of rewards to sum up to the contributions provided for in Article 25 of the Convention.

Anyway, from the approval of the 2003 Convention until today, no relevant innovative solutions have emerged in the activities of WIPO and WTO. In fact, IP right legislation is still very much based on individual rights, aimed at protecting the original artist works from reproduction. At the moment, therefore, the possibility of IP protection for ICH is limited only to a conventional system, which can provide, for example, protection to recording of ICH or databases and compilations of ICH.

The examined case studies (Bikram yoga or Cucuma longa) show that the communities to which the ICH belongs continue to encounter significant difficulties in preventing attempts of misappropriation, but above all in having a collective right on the ICH directly recognized (see case *Bulun Bulun*), that could be able to assure them a “positive protection” (therefore an exclusive property right to authorize the use of ICH by third parties and for obtaining a remuneration).

Among the subjects to whom the Convention delegates the power to safeguard ICH are the Governments, but also communities, groups and individuals, by virtue of the above-mentioned fundamental link between the heritage to be protected and the community that generated it and continues to maintain it alive.

It is in facts envisaged that communities must actively collaborate at all levels of the application process, and particularly in that of identifying the element and planning safeguard measures, not only as recipients and beneficiaries of these measures, but as initiators and developers. However, besides the declared intention regarding a necessary involvement of the communities in the process of safeguarding the ICH, the final agreement reached in the Convention, which also provides a specific obligation by Governments to that purpose, was not able to assure that this participation always occurs in an effective way. The weakest point of the Convention, with regard to the involvement of communities in the process of protecting ICH, has been identified in the institutional functioning mechanisms, which are inadequate and disappointing with respect to the ambitions pursued.

The Committee for the protection of cultural heritage has the role of establishing and publishing a representative list of this heritage. It is in fact a

State body that does not include representatives of the communities. It follows that, as noted by Francioni, it is very difficult for the ICH to be effectively safeguarded by a diplomatic body that does not admit institutional participation of the representatives of the communities that create and maintain this heritage. Moreover, even after the additional parts provided by the OD in 2010, the Convention allows communities, groups and individuals to decide that a given manifestation of such heritage should not be registered on the List, but they cannot obtain the registration if their Country is not willing to do so. Therefore, the effective initiative power has remained in the sphere of competence of the Countries, while the communities have a mere veto power.

This possible misalignment between the ICH to be protected and the community to which it belongs originates significant critical issues occurring in the application of the rules by the Countries adhering to the Convention, through a use not only outside the purposes pursued by the same, but sometimes even in stark contrast with it.

These problematic aspects emerge clearly from the analysis of the case studies examined, in which there is a surreptitious use of the Convention both externally - in terms of nationalistic disputes between States, regarding the belonging of a specific ICH - and internal to the Countries, in which the value of a tradition or a rite that for the community to which it belongs assumes an identity value from a socio-cultural or religious point of view is ascribed to the national heritage with the different purpose of cultural assimilation and eradication of diversity.

An example of this issue is the case of the rite of *Semah*, successfully registered by Turkey in 2010 for the UNESCO Representative List of the ICH of Humanity. *Semah* is a sacred dance that is accompanied by music made by stringed instruments and religious songs and has a central role in the Alevi's religious rituals. In Turkey, following the 1980 military coup, Alevi community have increasingly been subjected to the policy of "Sunnification", becoming victims of the Islamic radicalization. Given this political framework, some of the Alevi respondents believed that *Semah* nomination could help their recognition at international level, but they withdrew from the process when they realized they were excluded from the decision-making process, and that the religious significance of *Semah* had been ignored, and the dance itself was being represented as a folk dance. For this reason, the organizations that had been invited to prepare a text and the candidacy of *Semah* rejected the nomination. They claimed that the Turkish Ministry of Culture and Tourism had misrepresented the meanings and values they attribute to *Semah* and submitted the nomination without their consent and knowledge.

In conclusion, as said on this matter by Aykan, the ICH Convention needs to come up with better measures to ensure genuine community participation,

where culture bearers could take part directly in decision-making process without the intermediation of country heritage authorities. Instead, on the external basis, claims about ICH can cause disputes among countries over its ownership. One example is what happened between Greece and Turkey about the shadow theatre *Karagöz*, in which the Convention was used as like as a patent approval system, using its lists to register shared traditions as one's own national heritage.

In March 2007, rumours that Greece was going to patent *Karagöz* spread through media. As a reply, the Turkey's Ministry of Culture and Tourism (TMCT) began plans for registering *Karagöz* on the Representative List. Irrespective of UNESCO documents encouraging multinational registrations of shared cultural elements, the TMCT did not contact Greece's Culture Ministry for a joint nomination. Instead, *Karagöz's* heritage listing was seen as an opportunity to prove its Turkish origins at the international level and to prevent Greece from asserting ownership over it. So, in 2009 *Karagöz* was successfully nominated by Turkey in the UNESCO Representative List of the ICH of Humanity.

After the registration, Turkish newspaper and televisions celebrated the event as if UNESCO had stated that *Karagöz* belongs to Turks.

The *Karagöz* case shows how nationalistic governments may misrepresent the original purpose and intent of the ICH Convention. Subscribing governments are supposed to register cultural elements on the Convention's lists to demonstrate their willingness to safeguard these elements for the world's future generations, not to claim ownership over them. What is more, UNESCO has neither the authority nor the willingness to assign 'patents' or nationality to ICH. The subcommittee evaluates whether the submitted nomination fulfils the criteria for inscription on the ICH list, but it does not decide or debate which tradition belongs to which country.

In conclusion, the "ICH / Community relationship" represented the reference parameter on which the analysis of the strengths and weaknesses of the Convention carried out in this work was conducted. From this analysis, it is possible to note that where the protection mechanisms or the activation power of these mechanisms are misaligned with respect to the ICH / Community relationship, critical elements have been identified, while, on the contrary, the Convention has operated in a manner consistent with the purposes of protection, aligned to respect for human rights and sustainability, and aiming to contrast the cultural homologation process, as far as the protection mechanisms and the related powers provided for by the Convention, and the respect for ICH / community relationship have been taken into account.