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# Intangible Cultural Heritage: The Living Culture of Peoples

Federico Lenzerini\*

## Abstract

*Intangible cultural heritage (ICH), made up of all immaterial manifestations of culture, represents the variety of living heritage of humanity as well as the most important vehicle of cultural diversity. The main 'constitutive factors' of ICH are represented by the 'self-identification' of this heritage as an essential element of the cultural identity of its creators and bearers; by its constant recreation in response to the historical and social evolution of the communities and groups concerned; by its connection with the cultural identity of these communities and groups; by its authenticity; and by its indissoluble relationship with human rights. The international community has recently become conscious that ICH needs and deserves international safeguarding, triggering a legal process which culminated with the adoption in 2003 of the UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage. This Convention correctly highlights the main elements of ICH and is based on the right philosophical rationale, but its operational part – structured on the model provided by the 1972 World Heritage Convention – appears to be inadequate to ensure appropriate safeguarding of the specificities of intangible heritage. This article argues that to correct such inadequacy, international safeguarding of ICH must rely on the concomitant application, even though in an indirect manner, of international human rights law, for the reason that ICH represents a component of cultural human rights and an essential prerequisite to ensure the actual realization and enjoyment of individual and collective rights of its creators and bearers.*

## 1 Introduction. Intangible Cultural Heritage: Our Living Heritage

In 1960, an influential thinker of the 20th century wrote that culture cannot be abridged to its tangible products, because it is continuously living and evolving.<sup>1</sup>

\* Professor of International Law and EU Law, University of Siena, Italy. The author wishes to thank Professor Francesco Francioni, European University Institute, Florence, Italy, for his very useful comments on an earlier draft of this article

<sup>1</sup> See R. Williams, *Border County* (1960), at 11.

He actually caught the essence of cultural heritage, which is composed not only of tangible properties, but also and especially of the essential elements representing the living culture of human communities, their evolution, and their continuing development. Therefore, it includes all immaterial elements that are considered by a given community as essential components of its intrinsic identity as well as of its uniqueness and distinctiveness in comparison with all other human groups. In other terms, the culture of a people is composed by the totality of elements representing the very heart of its distinctive idiosyncrasy.

Until the very last decades of the 20th century this holistic perception of culture had not been adequately perceived by the international community. The main legal instruments adopted with the purpose of protecting cultural heritage, either applicable exclusively in the event of armed conflict<sup>2</sup> or also in time of peace,<sup>3</sup> were solely devoted to tangible cultural expressions, the significance of which was to be evaluated on the basis of an objective and standardized perception of their artistic, aesthetic, architectural, visual, scientific, and economic value. Thanks to these instruments, this perspective, developed in the Western world, became the globalized evaluation method used by the international community as a whole in order to establish the value of cultural heritage. In meta-juridical terms, this lack of perception of the need to provide adequate safeguarding for immaterial cultural heritage was presumably the result – consciously or not – of the confidence that this heritage, being an essential part of the cultural and social identity of human communities, was automatically and appropriately preserved and developed at the local level, in the context of the social evolution of the communities concerned. In other words, the depositaries of intangible cultural heritage (IHC) were considered to accomplish spontaneously and appropriately the mission of transmitting to future generations the necessary knowledge to preserve and perpetuate their own immaterial heritage, with no need of any international action in that respect. Although this spontaneous process could be considered as having worked out fine for many centuries, its dynamics were abruptly broken by the advancement of the process of globalization which has marked the most recent decades. In fact, intensification of intercultural contacts, which in many cases has translated into cultural prevarication and the imposition of certain cultural models over others, has quickly put under threat the capacity of the oldest generations to transmit their knowledge and knowhow to the youngest.

At present, we are aware on a daily basis of the definitive loss – throughout the world – of languages, knowledge, knowhow, customs, and ideas, leading to the progressive impoverishment of human society. In August 2004, at a meeting organized by UNESCO in Tokyo, the Minister of Culture, Education, Science, and the Church of Greenland, after expressing her view that ‘globalization is nothing but another form of

<sup>2</sup> See, in particular, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240, and its two Protocols, respectively of 1954 (249 UNTS 358) and 1999 (38 ILM 769).

<sup>3</sup> See, in particular, the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), 1037 UNTS 151.

colonization', stressed that in her country they 'have dozens of names for snow and ice because it is important to the hunters to differentiate them, but many children today know only a few of these names'.<sup>4</sup> This example epitomizes a process widespread in and characteristic of our contemporary world, in the context of which the cultural archetypes and interests of dominant societies globalize, to the prejudice of minority cultures, leading to cultural hegemony and uniformity at the local, national, regional, and international level. Such a process will eventually lead to the crystallization of uniform and stereotyped cultural models and to the contextual mortification of the value of cultural diversity.

In synthesis, the rich cultural variety of humanity is progressively and dangerously tending towards uniformity. In cultural terms, uniformity means not only loss of cultural heritage – conceived as the totality of perceptible manifestations of the different human groups and communities that are exteriorized and put at the others' disposal – but also standardization of the different peoples of the world and of their social and cultural identity into a few stereotyped ways of life, of thinking, and of perceiving the world. Diversity of cultures reflects diversity of peoples; this is particularly linked to ICH, because such a heritage represents the living expression of the idiosyncratic traits of the different communities. Preservation of cultural diversity, as emphasized by Article 1 of the UNESCO Universal Declaration on Cultural Diversity,<sup>5</sup> 'is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind'. Being a 'source of exchange, innovation and creativity', cultural diversity is vital to humanity and is inextricably linked to the safeguarding of ICH. Mutual recognition and respect for cultural diversity – and, *a fortiori*, appropriate safeguarding of the ICH of the diverse peoples making up the world – is essential for promoting harmony in intercultural relations, through fostering better appreciation and understanding of the differences between human communities.

## 2 The Evolution of the International Safeguarding of Intangible Cultural Heritage

As previously noted, at first the affirmation of the Western-rooted idea of cultural heritage – conceived as embodied in the material products of arts and architecture – prevented the immaterial portion of culture from emerging as an interest belonging to international law. This notwithstanding, since the early 1970s part of the international community has been aware that the scope and meaning of culture go beyond its mere tangible products, and that appropriate safeguarding is to be devoted

<sup>4</sup> See International Conference, 'Globalization and Intangible Cultural Heritage', Tokyo, Japan, 24–26 August 2004, available at: <http://unesdoc.unesco.org/images/0014/001400/140090e.pdf> (last accessed 6 Oct. 2010), at 49, 51.

<sup>5</sup> Adopted by the UNESCO General Conference on 2 Nov. 2001. The text of the Declaration is available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13179&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last accessed 6 Oct. 2010).

to its spiritual side. As early as in 1972, during the negotiations leading to the adoption of the World Heritage Convention, a number of state representatives shared the idea that the scope of that Convention was too narrow, and that the action of the international community in the field of cultural heritage should extend to its immaterial manifestations.<sup>6</sup> Then, a year later, the government of Colombia proposed that a Protocol be added to the Universal Copyright Convention<sup>7</sup> in order to protect folklore.<sup>8</sup> More generally, the driving force for the safeguarding of ICH originated from countries of Africa, Asia, and Latin America, motivated by their own conception of culture centered on living traditions, ultimately leading to the achievement of what an author has defined a ‘global heritage balance’.<sup>9</sup> The very term ‘intangible cultural heritage’ is considered to represent a ‘loose English translation’ of the Japanese expression *mukeyi bunkazai*.<sup>10</sup>

In 1982, the Mexico City Declaration on Cultural Policies offered a new holistic definition of culture as ‘the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.’<sup>11</sup> The cultural heritage of a people is therefore to be understood as including ‘both tangible and intangible works through which the creativity of that people finds expression: languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries’.<sup>12</sup>

On 15 November 1989 the UNESCO General Conference adopted the first specific international legal instrument on ICH, the Recommendation on the Safeguarding of Traditional Culture and Folklore (RSTCF).<sup>13</sup> Although still limited in scope (since the concept of ‘folklore’ is more restrictive than ICH), the RSTCF emphasized the importance of folklore as ‘part of the universal heritage of humanity and [its role as] a powerful means of bringing together different peoples and social groups and of asserting their cultural identity’,<sup>14</sup> as well as the danger ‘it faces from multiple factors’.<sup>15</sup> The first of these two sentences clearly shows that the idea of the ‘subjective’ relevance of

<sup>6</sup> See UNESCO, ‘Brief history of the Convention for the Safeguarding of the Intangible Cultural Heritage (2003)’, available at: [www.unesco.org/culture/ich/index.php?pg=00007](http://www.unesco.org/culture/ich/index.php?pg=00007) (last accessed 28 Mar. 2010).

<sup>7</sup> 943 UNTS 178.

<sup>8</sup> See UNESCO, *supra* note 6.

<sup>9</sup> See Soós, ‘Communities and the Convention for the Safeguarding of Intangible Cultural Heritage (2003) – a New Tool for Development’, in ARCADE, *Culture as a Tool for Development. Challenges of Analysis and Action* (2009), available at: [http://arcade.acted.org/images/arcade\\_livre\\_et\\_couv\\_BD.pdf](http://arcade.acted.org/images/arcade_livre_et_couv_BD.pdf) (last accessed 18 Dec. 2010), at 29, 34.

<sup>10</sup> See Kurin, ‘Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention’, 2 *Int’l J Intangible Heritage* (2007) 9, at 10.

<sup>11</sup> See UNESCO, *Declaration on Cultural Policies*, World Conference on Cultural Policies, Mexico City, 26 July–6 Aug. 1982, available at: [http://portal.unesco.org/culture/en/files/12762/11295421661mexico\\_en.pdf/mexico\\_en.pdf](http://portal.unesco.org/culture/en/files/12762/11295421661mexico_en.pdf/mexico_en.pdf) (last accessed 6 Oct. 2010), at 6th preambular para.

<sup>12</sup> *Ibid.*, at para. 23.

<sup>13</sup> The text of the Recommendation is available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13141&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last accessed 6 Oct. 2010).

<sup>14</sup> See *ibid.*, Preamble, first sentence.

<sup>15</sup> *Ibid.*, fifth sentence.

immaterial heritage was already perceived within UNESCO. This idea is also expressed in paragraph A, which defines folklore (considered tantamount to ‘traditional and popular culture’) as

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 cultural and social 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 arts [emphasis added].

In any event, the most innovative principle included in the RSTCF is incorporated in paragraph B, which proclaims that ‘[f]olklore, as a form of cultural expression, *must be safeguarded by and for the group* (familial, occupational, national, regional, religious, ethnic, etc.) *whose identity it expresses*’ (emphasis added). The RSTCF then establishes a set of principles providing guidelines for the identification, conservation, preservation, dissemination, and legal protection of folklore, as well as for promoting international cooperation.

During the 1990s a number of initiatives for the safeguarding of ICH were undertaken in the context of UNESCO.<sup>16</sup> Among such initiatives the launch by UNESCO, in 1994, of the *Living Human Treasures* programme is to be highlighted.<sup>17</sup> It was aimed at encouraging member states to grant official recognition to exceptionally talented tradition bearers and craftspeople – who possess to a very high degree the knowledge and skills required for performing or creating specific elements of the ICH – as well as to encourage the transmission of their knowledge, knowhow, and skills to the younger generations.

In 1996, the Report of the World Commission on Culture and Development emphasized that

[d]evelopment presents new challenges for heritage conservation. Not only is there a huge gap between means and ends but our definitions are still too narrow. They are biased towards the elite, the monumental, the literate and the ceremonial. There is a need to reassess such conceptions as well as to develop better methods of identifying and interpreting our heritage. It is essential to understand the values and aspirations that drove its makers, without which an object is torn from its context and cannot be given its proper meaning. The tangible can only be interpreted through the intangible.<sup>18</sup>

A year later, the UNESCO General Conference adopted a resolution in which it decided ‘to highlight the importance of the ICH for peoples and nations by proclaiming spaces or forms of cultural expression part of the “oral heritage of humanity”’.<sup>19</sup> This led the

<sup>16</sup> For a more comprehensive assessment of such initiatives see Francioni, ‘The Protection of Intangible Cultural Heritage: A New Challenge for UNESCO and International Law’, in Various Authors, *Symposium: The Transmission and Present State of Cultural Heritage* (2002), at 68, 69 ff.

<sup>17</sup> See [www.unesco.org/culture/ich/index.php?pg=00061&lg=EN](http://www.unesco.org/culture/ich/index.php?pg=00061&lg=EN) (last accessed 6 Oct. 2010).

<sup>18</sup> See J. Pérez de Cuéllar *et al.*, *Our Creative Diversity* (1996), available at: <http://unesdoc.unesco.org/images/0010/001055/105586e.pdf> (last accessed 6 Oct. 2010), at 31.

<sup>19</sup> See ‘The oral heritage of humanity’, Res. No. 23 of 12 Nov. 1997.

Executive Board to launch, in 1998,<sup>20</sup> the Programme of the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity. The purpose of this Programme, which represented the immediate predecessor to the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (CSICH),<sup>21</sup> was to honour the most remarkable expressions of ICH, selected on the basis of the nominations presented by UNESCO member states. It encompassed a definition of ICH drafted by a group of UNESCO experts during the first experts' meeting of the negotiations of the CSICH,<sup>22</sup> the formulation of which is very close – even though, maybe, a little wider in its scope – to that used in the final text of the Convention.<sup>23</sup> Its rationale was based on the understanding that

[t]he oral and intangible heritage has gained international recognition as a vital factor in cultural identity, promotion of creativity and the preservation of cultural diversity. It plays an essential role in national and international development, tolerance and harmonious interaction between cultures. In an era of globalization, many forms of this cultural heritage are in danger of disappearing, threatened by cultural standardization, armed conflict, the harmful consequences of mass tourism, industrialization, rural exodus, migration and environmental deterioration.<sup>24</sup>

The Masterpieces of the Oral and Intangible Heritage of Humanity were selected according to six criteria, which were applied with a view to ascertaining that those masterpieces meet the requirements of 'a strong concentration of ICH of outstanding value' or 'a popular and traditional cultural expression of outstanding value from a historical, artistic, ethnological, linguistic or literary point of view'.<sup>25</sup> Although these terms of reference were based on the concept of 'outstanding value', such exceptional character existed when the nominations, *inter alia*, 'give wide evidence of their roots in the cultural tradition or cultural history of the community concerned' and 'demonstrate their role as a means of affirming the cultural identity of the peoples and cultural communities concerned'.<sup>26</sup> In addition, the 'subjective' orientation of the criteria in point was demonstrated by the Guide for the Presentation of Candidature Files of

<sup>20</sup> See Dec. 155 EX/3.5.5, UNESCO, Executive Board, 155th Session, Decisions adopted by the Executive Board at its 155th Session, Doc. 155 EX/Decisions of 3 Dec. 1998, available at: <http://unesdoc.unesco.org/images/0011/001142/114238e.pdf> [Last accessed 15 January 2011], at 8.

<sup>21</sup> Adopted by the UNESCO General Conference on 17 Oct. 2003; the full text of the Convention is available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=17716&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last accessed 6 Oct. 2010).

<sup>22</sup> The meeting took place in Grinzane Cavour, Turin, Italy, from 14 to 17 Mar. 2001. The definition in point reads as follows: 'peoples' learned processes along with the knowledge, skills and creativity that inform and are developed by them, the products they create, and the resources, spaces and other aspects of social and natural context necessary to their sustainability; these processes provide living communities with a sense of continuity with previous generations and are important to cultural identity, as well as to the safeguarding of cultural diversity and creativity of humanity' (document on file with the author).

<sup>23</sup> See *infra*, sect. 3.

<sup>24</sup> Document on file with the author.

<sup>25</sup> See [www.unesco.org/bpi/intangible\\_heritage/backgroundde.htm](http://www.unesco.org/bpi/intangible_heritage/backgroundde.htm) (last accessed 6 Oct. 2010).

<sup>26</sup> *Ibid.*

the Masterpieces,<sup>27</sup> which, in explaining the criterion of ‘outstanding value as masterpieces of the human creative genius’, stated that in order to prove such value a nomination must demonstrate its ‘outstanding value to the community concerned . . . for the maintenance of cultural diversity in relation to (a) other forms of expression within the same culture/cultural group, (b) the expressions of nearby related cultures and (c) universally’.<sup>28</sup> The concept of ‘outstanding value’ was thus conceived under a ‘subjective’ perspective, i.e., on the basis of the special significance of the nomination for the community concerned. Three proclamations of the Programme were made, respectively in 2001, 2003, and 2005, ascribing the qualification of Masterpieces of the Oral and Intangible Heritage of Humanity to 90 expressions of ICH in total. These expressions were automatically incorporated in the Representative List of the Intangible Cultural Heritage of Humanity set up by the CSICH at the moment of its entry into force, pursuant to the provision of its Article 31.

UNESCO’s action in the field of safeguarding of ICH was eventually completed on 17 October 2003, when the General Conference adopted the CSICH. The Convention entered into force on 20 April 2006, and – at the moment of writing – has been ratified by 134 countries.<sup>29</sup>

### 3 The Concept and Significance of Intangible Cultural Heritage: A Critical Assessment

‘Intangible cultural heritage’ is defined by Article 2 CSICH as:

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.

It consists of, *inter alia*, ‘(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’, on the condition that they are ‘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’.

There are some main factors, which emerge implicitly or explicitly from the definition just reproduced, which are of special significance in fully understanding the inherent meaning and worth of ICH for the international community. These factors

<sup>27</sup> Available at <http://unesdoc.unesco.org/images/0012/001246/124628eo.pdf> (last accessed 6 Oct. 2010).

<sup>28</sup> *Ibid.*, at para. 23(b)(i).

<sup>29</sup> See <http://portal.unesco.org/la/convention.asp?language=E&KO=17116> (last accessed 2 Feb. 2011).

are, in particular: a) the self-recognition, by the communities, groups, and individuals concerned, of ICH as part of their cultural heritage; b) the constant recreation of ICH as a response to the historical and social evolution of the communities and groups concerned; c) the deep connection of the heritage concerned with the idiosyncratic identity of its creators and bearers; d) the condition of ‘authenticity’ as an implicit requirement of ICH; and e) the profound interrelationship of ICH with human rights, under the twofold perspective of human rights standards as a parameter for the ‘legitimacy’ of the heritage concerned and of the latter as a tool for fostering the actual enjoyment of human rights. As will clearly emerge below, the factors in point are deeply interrelated to each other.

### ***A Self-identification***

The element of self-identification is essential for a proper understanding of the radical difference in the ‘philosophical’ rationale underlying the protection/safeguarding of tangible and intangible cultural heritage respectively. In fact, while according to the approach of the World Heritage Convention tangible heritage deserves international protection in light of its outstanding *universal* value,<sup>30</sup> i.e., according to criteria (almost) universally considered as indicators of value, the nature of ICH of a given heritage rests in the self-recognition of it as part of the cultural heritage of the communities, groups, and (if the case) individuals concerned. In other words, categorization of material cultural heritage is carried out through an *objective* evaluation of its outstanding worth from the standpoint of a presumed universally valid appreciation of value. On the contrary, the presence of self-identification among its constitutive elements makes ICH valuable in light of the *subjective* perspective of its creators and bearers, who recognize the heritage concerned as an essential part of their idiosyncratic cultural inheritance, even though it may appear absolutely worthless to external observers.

### ***B Constant Recreation***

Self-identification is strictly linked to the trait of ICH as being ‘transmitted from generation to generation, [and] constantly recreated by communities and groups in response to their environment, their interaction with nature and their history’. In fact, one self-identifies something as representing one’s own cultural heritage only whether and to the extent that the thing concerned appropriately reflects the characteristics and features of such a heritage. In this respect, in consideration of the fact that culture is a living and changeable entity, one given cultural manifestation can represent a culture through the passing of time only if such a manifestation is capable of continuously modifying itself in parallel to the transformations characterizing the cultural whole of which it is part. ICH is by definition a living entity, and its capacity constantly to adapt itself in response to the historical and social evolution of its creators and bearers represents one of its main distinguishing features. Therefore, ICH is not to be considered as something to be preserved under a glass case, as happens (in

<sup>30</sup> See Art. 1 of the World Heritage Convention, *supra* note 3.

metaphorical terms) for monumental heritage, but rather as a cultural space which must be the object of a twofold safeguarding strategy, aiming at simultaneously fostering its preservation and its constant adaptation to the cultural evolution of its creators and bearers.

This dynamic characterization of intangible cultural heritage may apparently raise a problem in terms of legal theory. In fact, in order to work properly, law needs a precise definition of the entity to which it applies, and such a definition must be characterized by constitutive elements allowing one precisely to identify the object of a legal rule at any time. With respect to ICH, one could wonder how it is possible constantly to ensure its safeguarding if it is continuously recreating itself, and therefore changing its constitutive elements on a permanent basis. In other words, if safeguarding is structured – in its elements and strategies – according to the specific physical and cultural elements shaping ICH at any given moment, how can this safeguarding continue to be effective once such elements have changed (especially if they change incessantly)? In reality, this characterization of ICH would not represent an obstacle to its proper safeguarding. The word ‘safeguarding’ must not be considered tantamount to ‘protection’; on the contrary, it encompasses a more dynamic concept, meaning that international action should ‘simply’ provide a favourable environment within which ICH is allowed to flow freely according to the expectations and needs of its creators and bearers. In other words, what law should do properly to safeguard ICH is to create the conditions for its creators and bearers unaffectedly to develop their intangible heritage, through avoiding the possibility that external interferences brought about by the dominant sectors of society may corrupt this spontaneous evolutionary process. By following such an approach, law could adequately provide proper and lasting safeguarding for ICH despite its constantly changeable nature.

Unfortunately, as we will see below, the CSICH does not entirely meet the necessary conditions to make this possible.

### ***C Connection of ICH with the Identity of its Creators and Bearers***

Closely related and in a sense consequential to the elements of self-identification and constant recreation is another inherent characteristic of ICH, i.e. its deep connection with the identity and cultural distinctiveness of its creators and bearers. This connection is well evidenced by the definition included in Article 2 CSICH, which depicts ICH as an entity providing the communities and groups concerned ‘with a sense of identity and continuity’. This is probably the main value of ICH. Its significance for its creators and bearers, as a fundamental element of their intimate identity, greatly outweighs its ‘externally perceivable’ value, which may be identified in the interest that communities extraneous to such heritage can have in its preservation, on account of the pleasant sensations it gives their senses due to its aesthetic, artistic, or other externally-perceivable qualities. Therefore, the element in point confirms that the safeguarding of ICH is particularly important under a *subjective* perspective, on account of its special significance for its creators and bearers. Once this primary requirement is satisfied, a sort of transitive property operates, allowing the preservation and transmission to

future generations of the sense of identity and continuity which ICH provides for its creators and bearers to translate into a tool for ‘promoting respect for cultural diversity and human creativity’, as emphasized by the final part of the definition of ICH.

The reality of ICH mirroring the cultural identity of its creators and bearers (together with the element of self-identification) makes it clear that the approach adopted by CSICH – through reproducing the idea underlying the World Heritage Convention and organizing the safeguarding of ICH by means of a system of lists – cannot be considered appropriate in light of the inherent nature of the heritage concerned.<sup>31</sup> The very fact of listing inherently presupposes a taxonomy of the different manifestations of ICH, leading to an instinctive perception that the listed examples have a degree of exceptionality – arising from the very fact of being listed – which is not possessed, at least to the same extent, by non-listed expressions of ICH. In other words, establishment of a *hierarchy* among the different examples of cultural heritage (as noted by the Norwegian delegation during the negotiations of the CSICH)<sup>32</sup> ultimately leads to an understanding – especially among the general public – that certain examples of ICH are *better* than others. While this approach can be appropriate – at least partially – for monumental heritage, it is totally improper for intangible heritage, exactly for the reason that its main significance rests not on its exterior qualities, but rather on the degree of significance it has for its creators and bearers. Therefore, the listing of ICH implicitly amounts to classification of the different communities which create such a heritage, implying that the communities whose ICH is listed are *more valuable* than others. It is like a contest in which there is a challenge among different artists: in deciding which work of art is to be awarded a prize, the jury tries to establish what is the best work in the contest, and, therefore (although implicitly), who is the best artist participating in the competition. This is certainly not the purpose which the safeguarding of ICH should pursue if it is true that such a purpose is to safeguard the ICH *tout court* and ‘to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned’, as emphasized by Article 1 CSICH.

The validity of the reasoning just developed could be objected to by asserting that the Representative List of the Intangible Cultural Heritage of Humanity is contemplated only ‘[i]n order to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural

<sup>31</sup> During the Second Meeting of Experts appointed by UNESCO for the preparation of the draft text of the CSICH, held in Rio de Janeiro on 22–25 Jan. 2002, the present writer expressed the idea that, due to the intrinsic nature of intangible cultural heritage, the (then) forthcoming convention should not have adopted the scheme of the World Heritage Convention based on lists, but a model which would allow the protection of any manifestation of intangible heritage on the basis of the self-identification of the communities concerned. However, this idea, which was shared by the majority of the other experts, did not allay the political concerns of several state representatives during the phase of the negotiations of intergovernmental meetings: see International Meeting of Experts, Intangible Cultural Heritage: Priority Domains for an International Convention, Rio de Janeiro, Brazil, 22–24 Jan. 2002, Final Report, available at: [www.unesco.org/culture/ich/doc/src/00074-EN.pdf](http://www.unesco.org/culture/ich/doc/src/00074-EN.pdf) (last accessed 18 Dec. 2010), at 8.

<sup>32</sup> See J. Blake, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage* (2006), at 79.

diversity',<sup>33</sup> and that, therefore, it does not imply any classification among the different manifestations of ICH which is based on their quality or value. However, even though this can be true in theory, in practice it is unlikely that the existence of a list will not be perceived by the public as creating a value-based classification among the existing examples of ICH, especially between those which are of similar kind (e.g., examples of music or theatre representations which are apparently very similar to each other but in reality are profoundly different on account of the fact that they are part of the cultural identity of *different communities*). This is ultimately demonstrated by the experience of the World Heritage Convention (used, as previously noted, as the model for the CSICH), in the context of which, despite the fact that a provision exists affirming that the protection accorded by the Convention must not be limited to listed properties,<sup>34</sup> in practice such a provision has remained virtually unapplied and attention has been devoted only to properties inscribed on the World Heritage List.<sup>35</sup>

Furthermore, it can hardly be asserted that the Representative List of the Intangible Cultural Heritage of Humanity, round which the safeguarding of the ICH at the international level is centred, may represent a legal guarantee for the heritage concerned; it rather appears as a tool for states to obtain visibility for the ICH located in their own territory. In this respect, it is to be noted that the whole CSICH is quite devoid of legal guarantees for ICH. In fact, also with regard to the safeguarding of ICH at the national level, most relevant provisions of the Convention simply affirm that states parties *shall endeavour* to take appropriate measures for such safeguarding; this formulation prevents the provisions in point from creating effective legal obligations (and, *a fortiori*, legal guarantees for ICH), although a general obligation exists for states to 'take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in [their] territory', contemplated by Article 11(a).

This approach is confirmed by the provisions of the CSICH concerning the involvement of the communities and groups (as well as individuals) concerned in the identification and management of ICH. In light of the connotation of ICH as strictly interrelated with the cultural identity of its creators and bearers (as well as in consideration of the related elements of self-identification and constant recreation), it is self-evident that proper safeguarding of the heritage in point can be achieved only through ensuring the deepest possible involvement of such communities, groups, and individuals. Unfortunately, the state-oriented approach which prevailed during the negotiations of the CSICH relegated the element of community participation to a very minor role. In fact, although – thanks to the strenuous resistance of a few delegations (of Italy and Hungary in particular) – it was eventually possible to retain in the final

<sup>33</sup> See Art. 16(1) CSICH.

<sup>34</sup> See Art. 12, which states that '[t]he 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 Art. 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'.

<sup>35</sup> See Lenzerini, 'Article 12. Protection of Properties Not Inscribed on the World Heritage List', in F. Francioni, with F. Lenzerini (eds.), *The World Heritage Convention. A Commentary* (2008), at 201 ff.

text of the Convention a very few provisions relating to the aspect in point, these provisions do not express real obligations capable of forcing states parties actually to ensure the participation of the communities concerned. In particular, Article 11(b) requires a state party to ‘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 organizations*’ (emphasis added). Similarly, Article 15, using a quite toothless formulation in terms of legal effectiveness, stresses the duty of states to ‘endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit [intangible cultural] heritage, and to involve them actively in its management’. It is crystal clear that – for the reasons previously explained – identifying and managing ICH without properly involving the groups and communities (and individuals) concerned represents a manifest contradiction in terms. A state-oriented approach in the management of ICH may not be effective in achieving its proper safeguarding, the heritage concerned being a product and an element of the identity of groups and communities the interests of which may not coincide with those of state governments. States can probably develop a general strategy for the safeguarding of the ICH located in their territory that does not adequately address the diversity existing between the different manifestations of such heritage. In the long run the development of a generally applicable approach may lead to standardizing the heritage to which it applies or, at least, to adapting certain aspects of its different examples to the requirements of the national model generally used, with the consequence of impairing the authenticity of ICH to the detriment of the value of cultural diversity and, therefore, of the very rationale of ICH safeguarding. The situation in this respect, however, can be improved in the implementing practice of the CSICH. An encouraging symptom is offered in this regard by the Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage (Operational Directives), adopted by the General Assembly of the states parties to the Convention in June 2008 and amended in June 2010.<sup>36</sup> In fact, the Operational Directives recommend that the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (established by Article 5 CSICH) encourages states parties ‘to establish functional and complementary cooperation among communities, groups and, where applicable, individuals who create, maintain and transmit intangible cultural heritage’.<sup>37</sup> States parties are also encouraged to ‘create a consultative body or a coordination mechanism to facilitate the participation’ of these entities in the identification, definition, and management of ICH,<sup>38</sup> as well as to adopt other measures of various kinds in order to facilitate their involvement in the achievement of the purposes of the Convention.<sup>39</sup> In addition, it is significant that at their second paragraph the Operational Directives

<sup>36</sup> The full text of the Operational Directives is available at: [www.unesco.org/culture/ich/index.php?lg=en&pg=00026](http://www.unesco.org/culture/ich/index.php?lg=en&pg=00026) (last accessed 18 December 2010).

<sup>37</sup> *Ibid.*, at para. 79.

<sup>38</sup> *Ibid.*, at para. 80.

<sup>39</sup> *Ibid.*, at paras 81ff.

include among the criteria for the inscription of an element of ICH on the Representative List of the Intangible Cultural Heritage of Humanity the requirement that '[t]he element has been nominated following the widest possible participation of the community, group or, if applicable, individuals concerned and with their free, prior and informed consent', although states retain the primary role in deciding which manifestations of ICH are to be proposed for inscription.

### D Authenticity

The condition of authenticity – referred to at the end of the previous section – is not explicitly mentioned in the definition in Article 2 CSICH. This notwithstanding, it appears to be an implicit requirement for ICH to be considered as a value worth safeguarding from a legal perspective. In fact, it is essential that ICH retain its authenticity in light of its strong connection with the cultural identity of its creators and bearers. Therefore, loss of authenticity can lead to the creation of an artificial ICH, which is no longer connected to the cultural idiosyncrasy of the communities, groups, and/or individuals to which it culturally belongs, hence lacking its main distinctive element. When this process takes place, the heritage concerned can no longer be considered 'intangible cultural heritage' according to the meaning of this expression as representing a value safeguarded by international law.

Loss of authenticity is particularly likely to occur when ICH is managed by state authorities through according priority to interests which are external to its creators and bearers. For example, states may tend to accommodate the characteristics of ICH to the expectations of the dominant sectors of the society, which can be different from the interests of the specific communities especially concerned by the heritage in point. Or it is possible that the driving force of ICH management is economic interests, for example when the competent authorities try to make the heritage concerned a tourist attraction, which makes it necessary for such heritage to be adapted to the needs and expectations of tourists. Another situation of loss of authenticity of ICH which is likely to occur takes place when it is accommodated to the stereotypes of the 'public conscience' prevailing at a given moment, which may not view with favour some of its aspects (for example when a given manifestation of ICH involves the use of animals). These (and other) approaches irremediably corrupt the authenticity and, *a fortiori*, the cultural and legal value of ICH.

It may be opportune to emphasize that, with respect to ICH, the term 'authenticity' cannot be considered tantamount to 'originality'. This equation works for tangible cultural heritage, the level of authenticity of which is usually measured according to the extent to which such heritage retains its original characterization. Even where the cultural value of a tangible property is determined by the transformations by which it has been characterized throughout history, the authenticity of such property is 'fixed' at the moment when the international community decides to make it the object of protection, the purpose of which is precisely to crystallize its status as existing at that precise moment, to be preserved for the benefit of future generations. ICH, on the contrary, is a dynamic heritage which – as previously emphasized – constantly recreates

itself as a response to the historical and social evolution of its creators and bearers. Therefore, safeguarding the authenticity of ICH means allowing such heritage to be constantly tailored to the cultural identity of the communities, groups, and/or persons concerned, through automatically recreating itself so as to reflect the cultural and social evolution of such communities, groups, and/or persons.

### *E Relationship between ICH and Human Rights*

The existence of the relationship between ICH and human rights is crystal clear from various perspectives. First, it is precisely the peculiarity of ICH as a fundamental element of the identity of its creators and bearers that presupposes relevant implications in terms of human rights (i.e., cultural rights) protection. In particular, it is a fact that a huge part of ICH is interconnected with religious beliefs. Consequently, where this heritage is not adequately safeguarded, the (in)action of a state may result in a breach of the right to freedom of thought, conscience, and religion – expressed, *inter alia*, by Article 18 of the Universal Declaration of Human Rights<sup>40</sup> and Article 18 of the International Covenant on Civil and Political Rights (ICCPR).<sup>41</sup> In fact, the right in point entails the ‘freedom, either individually or in community with others and in public or private, to manifest [one’s] religion or belief in worship, observance, practice and teaching’.<sup>42</sup> In its General Comment to Article 18 ICCPR, the Human Rights Committee (HRC) declared that:

[t]he freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as *various practices integral to such acts*, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.<sup>43</sup>

As can easily be observed, most of the examples included in this passage represent manifestations of ICH that are linked to the identity of the community to which the persons concerned belong.

Furthermore, Article 27 ICCPR, specifically dealing with cultural rights, affirms that ‘[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’. According to the HRC, the correct implementation of such a provision requires that the collective rights of the community of which the persons concerned are members are properly safeguarded, since,

<sup>40</sup> UN GA Res. 217A (III), 1948, UN Doc. A/ 810 (1948).

<sup>41</sup> 999 UNTS 171.

<sup>42</sup> See *ibid.*, Art. 18.

<sup>43</sup> See Human Rights Committee, General Comment 22, Art. 18 (Forty-eighth session, 1993), UN Doc. HRI/ GEN/1/Rev.1 at 35 (1994), para. 4 (emphasis added).

'[a]lthough the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion'.<sup>44</sup> It follows that 'positive measures by States may . . . be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group'.<sup>45</sup> The proper accomplishment of the obligation in point is evidently subordinated to the requirement of ensuring proper safeguarding of ICH, as confirmed by a further statement of the HRC, which stresses the need for protection of the rights contemplated by Article 27 ICCPR to be 'directed towards ensuring the survival and continued development of the *cultural*, religious and social *identity* of the minorities concerned, thus enriching the fabric of society as a whole'.<sup>46</sup> It is to be noted that Article 27 ICCPR is reproduced, in virtually identical terms, in Article 30 of the 1989 International Convention on the Rights of the Child.<sup>47</sup> This Convention also affirms, at Article 29(d), that a child's education shall be directed, *inter alia*, to the development of 'his or her own cultural identity, language and values'.

The provisions just described evidently show that ICH safeguarding constitutes an essential prerequisite to ensuring the effectiveness of certain human rights in favour of the individuals and communities concerned. In practical terms, this translates into a requirement for states to ensure for such individuals and communities appropriate access to, and participation in the management of, their ICH. In fact, as epitomized by the HRC, proper implementation of human rights obligations 'does not depend solely on constitutional or legislative enactments, which in themselves are often not *per se* sufficient. [It is also necessary] . . . that States parties have . . . undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States . . . to enable individuals to enjoy their rights.'<sup>48</sup> With respect to ICH, this translates into an obligation not only to avoid direct interference by state officials with the enjoyment by the communities and persons concerned of their intangible heritage, but also to create the proper conditions to *ensure* that the heritage in point is *concretely* and *effectively* enjoyed by such communities and persons, in light of their specific expectations and needs.

The principles expressed by the HRC have also been applied in the practice of the Inter-American Court of Human Rights (IACHR). The leading case in this respect relates to an event which occurred in Suriname, where an indigenous community was denied the opportunity to honour its dead according to its own traditions (which is an intangible element of its culture). In its judgment, released in 2005, the IACHR affirmed that this conduct had resulted in a violation by the government of Suriname

<sup>44</sup> See General Comment 23, Article 27 (Fiftieth session, 1994), UN Doc. HRI/GEN/1/Rev.1 at 38 (1994), para. 6.2.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, at para. 9 (emphasis added).

<sup>47</sup> UN GA Res. 44/25 (1989).

<sup>48</sup> See Human Rights Committee, General Comment 3, Article 2 – Implementation at the national level (Thirteenth session, 1981), UN Doc. HRI/GEN/1/Rev. 1 at 4 (1994), para. 1.

of Article 5(1) of the American Convention of Human Rights<sup>49</sup> – providing for the right to physical, mental, and moral integrity – to the prejudice of the members of the community concerned. This conclusion was reached in light of the fact that:

[i]f the various death rituals are not performed according to N'djuka tradition, it is considered a profound moral transgression, which will not only anger the spirit of the individual who died, but also may offend other ancestors of the community . . . This leads to a number of 'spiritually-caused illnesses' that become manifest as actual physical maladies and can potentially affect the entire natural lineage . . . [O]ne of the greatest sources of suffering for the Moiwana community members is that they do not know what has happened to the remains of their loved ones, and, as a result, they cannot honor and bury them in accordance with fundamental norms of N'djuka culture.<sup>50</sup>

In his Separate Opinion, Judge Cançado Trindade emphasized that only by allowing the indigenous community concerned to honour its dead according to its own traditional rites was it possible duly to preserve its collective memory against oblivion. This outcome represented an essential prerequisite in view of 'safeguarding their right to life *lato sensu*, encompassing the right to cultural identity, which finds expression in their acknowledged links of solidarity with their dead'.<sup>51</sup> The same Judge, in a Separate Opinion attached to a subsequent judgment of the IACHR interpreting the decision just referred to,<sup>52</sup> declared that the law applied by the IACHR in such a case found its *material source* in the *universal juridical conscience* which 'has evolved towards a clear recognition of the relevance of cultural diversity for the universality of human rights, and vice-versa'.<sup>53</sup> He explicitly added that 'one of the many contemporary manifestations of the human conscience to this effect' is represented by the CSICH.<sup>54</sup>

Finally, the Committee on Economic, Social and Cultural Rights (CESCR) has also established a link between the intangible side of culture and human rights, in interpreting the right to health contemplated by Article 12 of the International Covenant on Economic, Social and Cultural Rights.<sup>55</sup> In fact, according to the CESCR, health services specifically designed for certain communities (especially indigenous peoples) 'should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines'<sup>56</sup> (practices of traditional medicine being typical examples of ICH).

<sup>49</sup> OAS Treaty Series No. 36.

<sup>50</sup> See *Case of Moiwana Village v. Suriname*, Series C No. 124, Preliminary Objections, Merits, Reparations and Costs, judgment of 15 June 2005, available at: [www.corteidh.or.cr/docs/casos/articulos/seriec\\_124\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf) (last accessed 6 Oct. 2010), at paras 98ff.

<sup>51</sup> See Separate Opinion of Judge Cançado Trindade, at para. 92.

<sup>52</sup> See *Case of Moiwana Village v. Suriname*, Series C No. 145, Interpretation of the Judgment of Merits, Reparations and Costs, judgment of 8 Feb. 2006, available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_145\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_145_ing.pdf) (last accessed 6 October 2010)

<sup>53</sup> See *ibid.*, Separate Opinion of Judge Cançado Trindade, at para. 24.

<sup>54</sup> *Ibid.*, at paras 21, 22, and 24.

<sup>55</sup> 993 UNTS 3.

<sup>56</sup> See General Comment No. 14 (2000), 'The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/2000/4 of 11 Aug. 2000, at para. 27.

The other side of the coin concerning the relationship between ICH and human rights is represented by the condition that the former must be consistent with the latter, as emphasized by the final sentence of the definition included in Article 2 CSICH. While this assumption is plain in terms of legal theory, it can create problems in practice, in consideration of the fact that ICH represents the main concrete 'product' into which the idea of cultural diversity translates.<sup>57</sup> Indeed, the operation of placing limits on diversity, on whatever basis, can appear a contradiction in terms. In fact, if the value of diversity is based on differences, the very fact of limiting these differences within certain borders – which must be acceptable according to generally acknowledged conditions – is tantamount to including an element of *uniformity* in the appreciation of diversity. This operation, therefore, inevitably leads to a degree (although quite limited) of homogeneity and standardization of diversity. On the other hand, however, the international community cannot tolerate cultural expressions translating into effects which are absolutely unacceptable in light of the paramount value of human dignity. Or should we accept, in the name of cultural diversity, phenomena such as, for instance, cannibalism, sexual exploitation of infants, human sacrifice, or female genital mutilation? It is therefore essential that any manifestation of ICH is compatible with a few basic legal rules, which reflect values the fundamental character of which supersedes even the significance of cultural diversity. It is necessary, in particular, for any cultural expression to be consistent with *jus cogens* norms on human rights. This does not mean, however, that no derogation from internationally recognized human rights can be accepted in the name of cultural diversity. In fact, in light of the decisive role played in many instances by ICH for the realization of human rights, a prohibition on upholding such heritage and transmitting it to future generations would itself translate into a breach of internationally recognized human rights. Therefore, in each concrete case in which a manifestation of ICH is capable of producing a human rights breach, a balance is to be struck in order to ascertain whether the inconsistency with those rights resulting from the operation of ICH would, in terms of severity, override the restriction on the enjoyment of the same rights determined by the prohibition on practising and benefiting from that manifestation. In the event that the operation of ICH resulted in the infringement of fundamental human rights which are considered absolutely inderogable by the international community, such an operation should not be allowed. In practical terms, this would lead to a plurality of effects. On the one hand – inconsistently with the definition of ICH provided in Article 2 CSICH – the heritage concerned would lie outside the ambit of the CSICH and could not be inscribed on the Representative List of the Intangible Cultural Heritage of Humanity. At the same time, the fact of tolerating the relevant manifestation of ICH would result in an infringement of a fundamental rule of international law, with the consequence of binding states to take the necessary measures to prevent and suppress the practice of such manifestation.

<sup>57</sup> On the topic of cultural diversity see Lenzerini, 'Riflessioni sul valore della diversità culturale nel diritto internazionale', 56 *Comunità Internazionale* (2001) 671.

The indissoluble relationship between ICH and human rights makes it possible to look at state obligations concerning the safeguarding of the heritage in point from a different and more effective angle. In fact, as long as ICH (as an element of cultural identity) represents an essential condition for the realization of human rights, the obligation to protect the latter inherently extends to ICH safeguarding, for the reason that, if this heritage is not properly safeguarded, the human rights the realization of which depends on ICH would lack effectiveness. In other words, ICH often represents an element the preservation of which is indispensable for the enjoyment of certain human rights of its creators and bearers. Therefore, to the extent that this correlation between ICH and human rights exists, the safeguarding of the former is to be considered as (also) falling within an area of international law which transcends the CSICH, i.e., international human rights law. When this inference applies, the obligation to safeguard intangible cultural heritage extends in the perspective of both its effectiveness and its geographical expanse. It extends in terms of effectiveness because ICH is to be safeguarded not (only) in the interest of the state in the territory of which it is usually located – according to the approach followed by the CSICH – but especially in a way which is appropriate to ensure the realization of the (individual and collective) human rights of its creators and bearers, of which the safeguarding of ICH represents an indispensable requirement. And it extends geographically because it corresponds to an obligation of customary international law (being therefore of binding character for all the countries of the world) to the extent that the human rights of which it constitutes an essential condition are also part of general international law. Therefore, although it may appear to be a paradox, the most effective legal safeguard available at present for ICH is outside the system of the CSICH, in light of the deep interaction between the heritage in point and human rights protection.

#### 4. Conclusion

Unlike tangible heritage, ICH is, by its own nature, of a markedly dynamic nature. This nature actually represents the two sides of a coin. On the one hand, it allows ICH persistently to recreate itself in order constantly to reflect the cultural identity of its creators and holders. In fact, such a heritage has the intrinsic capacity to modify and shape its own characteristics in parallel to the cultural evolution of the communities concerned, and is therefore capable of representing their living heritage at any moment. On the other hand, this inherent flexibility – or, in other words, the ‘ephemeral’ character of ICH – makes it particularly vulnerable to being absorbed by the stereotyped cultural models prevailing at any given time. In an age when globalization is virtually uncontrolled, such characterization puts the very identity of peoples in peril of being curtailed and absorbed by the dominant society. In consideration of the fact that cultural identity is inextricably linked to the safeguarding of ICH and to its transmission to future generations, modern society, with its typical models and customs, may lead to the cultural ‘extinction’ of peoples – considered as distinct social and cultural communities – which would be concomitant with the disappearance of their distinctive culture.

There is no doubt that the CSICH represents an important step forward in the context of international action for the safeguarding of cultural heritage. From a 'philosophical' point of view, its main merit consists in transcending, at least in principle, the central idea of the pre-existing relevant conventions (particularly the World Heritage Convention), according to which the heritage to be protected is to be identified on the basis of criteria qualifying the worth of any single cultural manifestation according to its outward qualities. These qualities, when reaching a given degree of visual impact, are presumed to be symptomatic of the existence of a general concern for their protection within the international community as a whole. However, even though inspired by the best intentions, the CSICH has created a model of safeguarding which does not appear totally appropriate to address the inherent nature of such heritage as well as the values and implications attached to it. As has been stressed by an author, the cultural heritage which is inventoried, classified, declared an official treasure, and kept under surveillance by committees of governmental control is often destined to experience a loss of 'much of the spontaneous creativity that gave it meaning in the first place', to the same extent that recreated ecosystems (generated and kept under control by humans through, *inter alia*, promoting the selective reproduction of endangered animal species and vegetation) lead to an environment which can only imitate nature.<sup>58</sup> This threat is particularly serious in the case of ICH, in light of its 'intrinsic' fragility. ICH, in the context of the implementation of the CSICH, may risk losing its authenticity as a result of its adaptation to the needs of the Convention and the requirements of the different actors implicated in its safeguarding. In order to prevent this, it is necessary for the widest possible scope to be given to Article 15 CSICH, as well as for a favourable environment for the preservation of the authenticity and integrity of ICH to be constructed, especially with the purpose of ensuring adequate participation by the peoples and communities concerned in the management of their own intangible heritage. Contextually, appropriate measures for the safeguarding of ICH are to be shaped based on its significance for its creators and bearers, consistently with the definition of ICH offered by Article 2 CSICH. In order to reach this outcome, it is also essential to create an adequate social substrate in which ethnic minorities, who are the depositary of a huge part of the world's ICH, can enjoy decent living conditions on their ancestral lands and are given the last word when it comes to deciding about management strategies concerning their own heritage. This is the main challenge arising from the safeguarding of ICH at both the national and international levels, especially because states tend to follow a different approach – actually favoured by the structure and content of the CSICH – in the context of which priority is given to the general interests of the nation. Though understandable – as ICH can represent a formidable tool to foster economic income (especially through tourism) as well as to improve the international visibility of the state – such an approach may conflict with the main values attached to ICH, i.e., its vital role in pursuing the cultural identity of

<sup>58</sup> See Brown, 'Safeguarding the Intangible', Cultural Comment, Nov. 2003, available at: [www.culturalpolicy.org/commons/comment-print.cfm?ID=12](http://www.culturalpolicy.org/commons/comment-print.cfm?ID=12) (last accessed 13 May 2010).

its creators and bearers and, *a fortiori*, the fundamental human rights of the members of the groups and communities especially concerned by its safeguarding. In addition, the approach in point leads to the progressive impoverishment of cultural diversity to the prejudice of the whole of humanity. It is for these reasons that in safeguarding ICH the 'individual' perspective of local communities must be considered to override the interests of society at large. What is at stake, in fact – in addition to the preservation of the rich diversity of the human family – is a paramount value pursued by contemporary international law: that is the human dignity of the people who consider the ICH as an essential part of their own identity and personality.

Safeguarding the ICH means neither collecting samples, as can be done with animal species in a zoo or with vegetable matter in a botanical garden, nor classifying the alleged best manifestations according to the views of external observers. In light of the special spiritual link between the heritage in question and the identity of the communities who create and transmit it from generation to generation, such an approach would be tantamount to classifying certain human communities (i.e., those whose identity is mirrored on their own ICH) as better than others. On the contrary, safeguarding ICH means preserving its link with living cultures and its role in the identity of its holders, as well as allowing the transmission of its different shades and colours to future generations. To return to the words of the Minister of Culture of Greenland – referring to the circumstance that the indigenous communities of Amazonia use more than 500 names for the word 'green', despite the fact that for a person living in the West green usually appears simply green – '[i]t is important for cultural diversity that green is not just green'.<sup>59</sup>

<sup>59</sup> See International Conference, 'Globalization and Intangible Cultural Heritage', *supra* note 4, at 51.