

Abstract

This article discusses the international protection of intangible cultural heritage (ICH) by a UNESCO-based regime created by the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. This Convention has experienced very fast ratification (127 states parties less than seven years after its approval), but this is in no small part attributable to a certain lack of 'legal bite' of the instrument. There are several layers of state sovereignty imbued in the instrument, as well as weak mechanisms for community participation. These are reflected by a state prerogative in determining what the intangible heritage within their territories is for international safeguarding purposes, therefore having the chance to stifle internal dissent by ignoring minority cultures or even appropriating them and depriving them of political meanings. The early practice under the Convention, including the first nominations, puts these structural shortcomings in further evidence. However, recent reforms to the operational directives for the implementation of the Convention have already taken decisive steps towards increasing community participation, even when this means eroding state privileges with regard to the Convention.

1 Introduction

In 2003, UNESCO approved the Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention), which came into force in 2006 and has been ratified by 127 states (as of July 2010).¹ This Convention aims at protecting traditional *82 cultural expressions and other manifestations of heritage classified as intangible cultural heritage, which is a concept which stems from deeply entrenched perceptions of community identity.

The Convention, however, leaves to the states, and not the communities, the faculty of determining which manifestations of heritage should be inventoried and protected, both at the national and, most importantly, at the international level, through the List of Representative Intangible Heritage of Mankind. Even though the list's name contains the word 'representative', one must wonder whether this representativeness is really translated into practice. As states are the only ones which can nominate manifestations of heritage for the list, it is very easy to see that states will prefer those manifestations of heritage that are not politically controversial.

Many communities striving for statehood in the past have used cultural heritage as a means to promote a distinctive national identity (Norway under Swedish domain in the mid- to late nineteenth century is one example),² and today states where politically active minorities exist fear that minorities will use their distinctive intangible heritage as a means to increase their political appeal internally and internationally, with the ultimate goal of forcing the state into agreements on autonomy, or even

creating the conditions for secession. This article offers an analysis and critique of the current UNESCO mechanisms, based on national inventories and nominations to the lists. Based on this, I will propose exploring some gaps in the system as a means to enhance community participation in the future action of the Intangible Heritage Committee, one of the supervising bodies of the Convention.

There is a wide range of regimes which could possibly be used to protect intangible cultural heritage, and the UNESCO regime, although central, is but one of the possible regimes. Others include international initiatives by the WIPO, for instance, and a wide range of regional initiatives under organizations as varied as the Organization of American States, the European Union,³ the Andean Community of Nations, the African Union, and the Council of Europe, not to mention the rich array of national solutions to ICH protection. While these are all important initiatives, and ones which can certainly contribute to filling in the gaps of the UNESCO regime, this article will *83 focus only on the UNESCO regime, and treat it as the all-encompassing and central regime for ICH protection it aspires to be.

This article shall then proceed as follows: the first section will analyse the key features of the Convention and the safeguarding system created by it, taking into consideration the early practice under the Convention, through the first round of nominations to the lists created by it. Next, some criticism will be offered of this system, especially in what concerns the very limited community involvement in crucial steps of the safeguarding process. This critique will then serve as a springboard for a broader critique of the power struggles over identity and heritage and the way they have been accommodated in the UNESCO system.

2 The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage: Basic Tenets

The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage is in many ways a remarkable instrument⁴ which offers a holistic approach to heritage protection.⁵ It was drafted within two years,⁶ and less than seven years after its approval it has already been ratified by 127 states.

One important definitional issue in the 2003 Convention is the idea that ICH refers not to the cultural objects, but rather to the social and cultural processes of which these objects are but the products. Intangible cultural heritage can be defined in two different ways. On the one hand, as a concept which is dependent on tangible cultural heritage, it acts as the underlying culture to any given expression, encompassing the processes, skills, and beliefs leading to the creation of tangible works. In a way, it is the relationship of a people with its tangible cultural heritage. On the other hand, as an independent type of heritage, it also involves story-telling, songs, dances, among other forms of expression which cannot be ordinarily fixated in material means. The move towards intangible cultural heritage as a conceptual category was an important change of focus which happened gradually in heritage studies, and one which was decisively pushed into the 2003 Convention by the Organization of African Unity (later replaced by the African Union), alongside the group of experts responsible for the initial drafting of the Convention.⁷

Another important basic conceptual pillar of the Convention is its stress on the survival of ICH and its importance for cultural diversity and sustainable development.⁸ *84 The survival of ICH depends on the survival of the way of life of a certain community or group, and therefore on its economic viability.⁹ There is thus a much closer connection between ICH and development than the normal connection between 'general' cultural heritage and development: while the latter connection is based on external

elements, and the development brought by the exploitation of that heritage is not necessarily directed at the preservation of that heritage, in the former connection development is a necessary element for the very survival of ICH.¹⁰

The connection between human rights and ICH is also important to the conceptual framework of the Convention. This was stated in the Preamble, by making reference to the international covenants on human rights, and also in the definition of ICH. Regarding the definition of ICH, human rights play out in the fact that ICH can be recognized as such only when the social practices in question are in accordance with internationally recognized human rights.¹¹ It is also present in the domains of ICH, particularly the one referring to rituals and other social practices, since this necessarily interacts with rights such as freedom of association, freedom of religion, and privacy.¹²

As a legal category, intangible cultural heritage is highly dependent on an appropriate definition, which must take into account ideas regarding human rights and the very notion of culture. The latter is a relational concept, and depends quite a bit on the participation of communities and other non-state actors, because they are the ultimate bearers of culture. The next section is devoted to the ways in which these ideas of complementarity play out in the Convention.

3 Complementarity and Participation of Non-state Actors

Community involvement is an important part of the system created by the 2003 Convention.¹³ It is in fact one of the basic purposes of the Convention, and it is related to complementarity in the sense that the Convention sees communities as not only the bearers of ICH entitled to assistance, but also the primary responsible parties for the safeguarding of intangible heritage. The use of the term 'communities' raised several issues during the drafting of the 2003 Convention, as it was unclear what the word meant as a legal term, and also because it raised the possibility of claims for group rights, which was not something all the drafters were willing to accept.¹⁴

*85 This doubt regarding the definition of community persists to this day in the implementation phase of the Convention, but the Intergovernmental Committee has adopted the position that a definition of community was not necessary, and the one adopted by each state party was sufficient to indicate community participation in the inscription of manifestations of heritage in the lists, for instance.¹⁵ According to the Operational Directives of the Convention, states parties should consult not only communities, groups, and individuals who are bearers of ICH, but also experts and research institutes. States parties are encouraged to create consultative bodies to bring together communities and experts to help in the identification of ICH, the drawing of inventories, and the preparation of nomination files, among other activities.¹⁶

This is an important shift from the original text of the Convention, which did not really speak about expert participation in the implementation of the Convention. It is seen, however, as an important element, since one of the great shortcomings of the Convention is precisely the lack of expert knowledge on intangible heritage. The Subsidiary Body on modalities of participation created under the Convention has studied the matter, and concluded that communities must be given the research results of work on ICH.¹⁷

Another important element of community participation is that states parties commit to efforts to sensitize communities to the importance and value of their heritage. This is a means to ensure that the

bearers of ICH may fully benefit from the Convention as a standard-setting instrument.¹⁸ Naturally, if one of the core goals of the Convention is to raise awareness as to the importance of ICH, this should be done primarily at the local level, because it is only by creating a sense of 'pride' binding a community to its heritage that one can guarantee its survival.

As to the participation of NGOs at the international level of implementation of the Convention, the Operational Directives determine that NGOs may be accredited to participate in the meetings of the Intergovernmental Committee and General Assembly as long as they fulfil certain requirements: (1) proven competence, expertise, and experience in the safeguarding of ICH; (2) a local, national, regional, or international nature; (3) objectives in conformity with the spirit of the Convention; (4) that they cooperate with communities, groups, and individuals involved in the creation, transmission, and practice of ICH; and (5) that they possess 'operational capacities' ^{*86} to take part in the meetings.¹⁹ Their accreditation is determined by the Operational Directives,²⁰ as well as by a specific form attached to the Directives.²¹

After this examination of some of the basic tenets of the Convention, as well as of complementarity as an overarching idea within it, it is now necessary to analyse the system created by the Convention. Bearing the core tenets in mind, I will now proceed to look into how the system designed by the Convention can accommodate these core values and concepts.

4 The Safeguarding System

The purposes of the Convention, as determined in Article 1, are four: (1) to safeguard ICH; (2) to ensure respect for the ICH of communities, groups, and individuals; (3) to raise awareness; and (4) to provide international cooperation and assistance. This provision lays down the foundations of the safeguarding system created by the Convention. And there are two organs for this: the Intangible Heritage Committee and the General Assembly of States Parties. I will look at each of these organs in turn.

The General Assembly of States Parties is created by Article 4 of the 2003 Convention, and it represents a substantial shift from the 1972 World Heritage Convention, which does not contain provisions for a similar organ. This shift is symptomatic of a greater concern over sovereignty among states participating in the drafting, especially when dealing with matters as sensitive as culture (living cultures, to be more specific) and claims by communities and groups. Thus, it was felt that sovereignty should be strengthened, and one of the tools for that purpose was to create an Assembly of Parties to be the supreme authority on most matters regarding the Intangible Heritage Convention.²²

The Intangible Heritage Committee was created with the idea that intangible heritage is an area which requires a high level of expertise, due to its complexity, and that this level of expertise could only be reached by a Committee, inspired by similar experiences in the area of international environmental law.²³ It is created by Article 5 of the 2003 Convention, which determines that it shall be composed of representatives of 24 states parties to the Convention, elected by the General Assembly. It is yet another intergovernmental organ, but one with reduced participation of states parties. In this sense, then, the General Assembly is yet another layer of sovereignty imposed upon the regulation of ICH concerns.

Regarding the safeguarding of intangible heritage at the international level, this happens primarily through the establishment of lists of intangible heritage. One of them is the 'Representative List of the

Intangible Cultural Heritage of Humanity' *87 (Article 16), while the other is the 'List of Intangible Cultural Heritage in Need of Urgent Safeguarding' (Article 17). It is important to note that only the first list is called a 'representative' list, while the other includes, at least in theory, all forms of intangible heritage at grave risk of disappearing.

The listing mechanism was opposed by some states, notably Norway, during the negotiations of the Convention. Norway was of the opinion that a list-based mechanism would create a hierarchy of manifestations of heritage (the 'listed', which would somehow be 'better', and the 'unlisted'). Norway thought that a catalogue of best practices alone would suffice to accomplish the objectives of the Convention. India, on the other hand, thought that the listing approach was an effective one, even though it should be approached carefully so as not to create any sort of hierarchy. The latter was generally the accepted argument, as the listing would help in the awareness-raising that was necessary for the achievement of the Convention's objectives. Further, as highlighted by the Brazilian delegation, the listing mechanism at the international level mirrored the national obligation of inventorying, thus being also a desirable means of implementing the Convention.²⁴

The criteria for inscription of manifestations of heritage in these lists have been the object of discussion of the Intergovernmental Committee. A first set of criteria has already been approved into the operational directives for implementation of the Convention.

Regarding inscription on the list of intangible heritage in need of urgent safeguarding there are several criteria, all of which must be met. They are: (1) that it is intangible heritage in accordance with Article 2 of the Convention; (2) that it is in need of urgent safeguarding 'because its viability is at risk' or 'because it is facing grave threats as a result of which it cannot be expected to survive without immediate safeguarding'; (3) that there is a plan of safeguarding measures elaborated to enable the element to be practised and transmitted; (4) that free, prior, and informed consent was obtained from the community, group, or individuals concerned; (5) that the element is in the national inventory of intangible heritage of the state party concerned; and (6) that the state has given the authorization for such inscription.²⁵

These requirements are verified through standard forms for inscription, annexed to the Operational Directives.²⁶ The explanatory notes to these forms indicate that the safeguarding measures which must be indicated in the request for inscription must be a detailed plan within a timeframe of approximately four years. These measures must be described so as to indicate the objectives of the safeguarding measures and results expected, the key activities to be carried out, the mechanisms for participation of *88 communities, groups, and individuals, and the timetable and budget.²⁷ Also, this form requires that states prove that the communities, groups, or individuals concerned are willing and committed to the preservation of the intangible heritage the protection of which is sought.²⁸ And the free, prior, and informed consent of the community, group, or individuals must be proved. According to the wording of the explanatory note, this consent 'may be demonstrated through written or recorded concurrence, or through other means, according to the legal regimens of the State Party and the infinite variety of communities and groups concerned'.²⁹ This is so because the Committee has chosen to leave the door open for demonstrations of consent more in accordance with cultural traditions of the parties concerned, instead of imposing a single format. Free, prior, and informed consent was highlighted by scholars as a necessary element for dealing with ICH from the very beginning of the process leading to the adoption of the 2003 Convention, even though many states opposed the idea of involving communities.³⁰

Twelve manifestations were added during the first round of inscriptions in the list of intangible heritage in need of urgent safeguarding.³¹ Of these, the Suiti Cultural Space in Latvia can be taken as an example for analysis.³² The Suiti is a small Catholic community in a predominantly Lutheran part of Latvia. The cultural space, comprising some 400 square kilometres, has a population of about 2,000 people, down from 10,000 at the beginning of the 20th century. The once flourishing community was deeply affected by World War II and the following Soviet occupation, and this led to the near-disappearance of its culture, which is currently mastered by roughly 60 members of the community. Safeguarding measures proposed then include not only the immediate preservation of the culture, but also the creation of a more favourable economic environment which will prevent younger generations from leaving the region in search of better employment.³³ The state has been endeavouring to increase awareness of the Suiti heritage for the past several years, mostly through educational ^{*89} activities in schools and cultural festivals. It has also created a website cataloguing the Suiti heritage, and has set up a weaving workshop to perpetuate traditional Suiti craftsmanship. A five-year framework has been designed for the revitalization of the Suiti heritage, including educational activities and the restoration of religious buildings, among other initiatives.

Local communities have been involved in the consultation as to whether this manifestation of heritage should be proposed for inscription in the list, as well as in the design of the safeguarding measures, through workshops aimed at gathering ideas for specific safeguarding needs and planning of activities. The free, prior, and informed consent of the communities was established by a show-of-hands vote during a community meeting. It has also been established through motions approved by city council bodies of the cities within the cultural space.³⁴

The criteria for inscription on the representative list are slightly different,³⁵ and in many ways impose a lesser burden on states seeking inscription. The criteria for inscription on the list of representative intangible heritage, which must all be met by states seeking inscription, are: (1) that the manifestation of heritage falls within the concept of Article 2 of the Convention; (2) that the inscription will contribute to the visibility and awareness of the significance of ICH and will encourage dialogue, thereby enhancing cultural diversity and being a testimony to human creativity; (3) that safeguarding measures are elaborated to protect and promote the element; (4) free, prior, and informed consent of the affected communities, groups, and individuals; and (5) that the element is present in one of the inventories required from states parties.³⁶ Also, communities must be involved in the preparation of the nominations for this list.³⁷

The manifestation of heritage to be inscribed must be described by reference to its significant features at the present (that is, the Committee is clearly aware that the element may, and probably will, change in the future),³⁸ also including the discussion of the social and cultural functions played by it. The history of the element is not a required element.³⁹ The free, prior, and informed consent of the communities, groups, or individuals must also be secured and proven, in the same fashion as the consent for inscription in the urgent list.⁴⁰

^{*90} One of the problems here is determining who are the 'real' or 'qualified' representatives of a certain community or group where a certain manifestation of heritage develops. Practice under the 2003 UNESCO Convention system shows that, in the case of manifestations of heritage belonging to an entire national group or to a segment of society which cannot be easily identified and isolated, there are many

segments which should be consulted. This type of practice is contained in the documents proving the expression of consent to inscription on the list, attached to the nomination forms.⁴¹

For instance, when proposing a joint nomination between Buenos Aires and Montevideo (the capitals of Argentina and Uruguay, respectively) for inscription of the Tango in the Representative List of the Intangible Heritage of Mankind, entities consulted included the Argentinean National Secretariat of Culture, the Uruguayan Ministry of Culture, the Legislative City Council of Buenos Aires, a number of citizens through a signed petition, the Uruguayan Association of Musicians, the Demilonga association (which calls itself the First Uruguayan Tango Forum), Joventango, the Uruguayan Tango Academy, the General Association of Tango Authors, the Montevideo City Legislature, and a list of Uruguayan artists and intellectuals who supported the inscription. In this example of a manifestation of heritage that is by no means limited to a single community or even to a single nation, UNESCO considered that nongovernmental entities, natural persons associated with the manifestation of heritage, and the legislature (considered to be the democratic representative of the people par excellence) were the ones whose agreement was sufficient to meet the requirement of community participation and consent for inscription.

In the process leading up to the inscription of the Holy Blood Procession of Bruges (therefore, a single city, as opposed to two entire countries), the following parties showed their consent: the Flemish Commission for UNESCO, the Flemish Minister of Culture, the Noble Confraternity of the Holy Blood (which pushed for the nomination at the national level), the Arts and Heritage Agency, the Bishop of Bruges, the Governor of West Flanders, the Town Clerk and Burgomaster of Bruges, the President of the College of Europe (located in Bruges),⁴² natural persons, schools, a traditional musical group involved in the Procession, groups of expats who return to Bruges solely for the Procession (and who see in the Procession a vital part of their identity, and a main reason why they still feel attached to the Belgian culture), and the Confrérie du Saint-Sang (another group which participates in the organizing of the Procession). For this city-level manifestation of heritage, then, bodies linked to the Executive Branch ^{*91} of government were asked for their assent, along with several segments of the local community and even from abroad, in an attempt to show the international relevance of the festivity.

The nomination for the Tibetan Opera (further discussed below) shows a smaller effort in consulting with interested parties. All there is regarding free, prior, and informed consent (which is the rubric under which community participation is proven in the nomination forms) is the signature of a single individual who is identified as an 'inheritor of Tibetan Opera', and the stamps of two associations of Tibetan Opera. In the nomination for Chinese Sericulture and Silk Craftsmanship, however, many more actors were consulted, including the Chinese Silk Museum, provincial Departments of Culture, municipal governments, local silk museums and institutes, individuals identified as 'inheritors' of the practice, and a silk factory. This process, much more inclusive than that for the Tibetan Opera, looked at several segments of society and government, mostly within the Executive Branch.

Finally, one example of a practice which can be geographically restricted is the Candombe Cultural Space (Uruguay). For this practice, only actual practitioners and members of the community were consulted, since there was no specific local association which could be consulted. This means that the range of actors to be consulted in order to create agency necessary for decision-making relative to ICH will necessarily vary in direct relationship with the geographical expansion of the manifestation of heritage.

Therefore, a more 'local' manifestation of heritage can count on its practitioners alone for the proof of consent (or a representative entity of them, when there is one).⁴³ But when it comes to manifestations of heritage of larger presence, the number of actors multiplies, and representative bodies become the rule, along with 'samples' of individuals involved with the practice and non-governmental organizations and other segments of society.

Seventy-six manifestations of heritage were inscribed during the first round of inscriptions in October 2009.⁴⁴ These first inscriptions indicate that the range of safeguarding initiatives to be adopted under the Convention is very wide, and can go from the preservation of tangible elements necessary for the perpetuation of the activity, the enactment of specific laws, the institution of national holidays aimed at celebrating the cultures that served as the source for the manifestations of heritage inscribed, to educational and awareness-raising activities. Traditional norms of the communities involved have been taken into account when discussing community ⁹²involvement, and also as important starting points for the preservation of the practices themselves.

Article 18 provides for programmes, projects, and other activities for the safeguarding of intangible heritage, and determines that the Committee (upon approval by the Assembly) shall select the ones which best reflect the objectives of the Convention. In this way, an inventory of best practices, so important for the implementation of the Convention for the reasons listed above, can be created.⁴⁵ One of the issues raised regarding this repository of best practices was whether it should be a selective listing, or a more inclusive one,⁴⁶ but it was early on decided, in the first draft of this part of the Operational Directives, that the listing should be selective.⁴⁷

The Operational Directives determine the criteria which must be met for the selection of a best practice: (1) the programme involves safeguarding, as defined in Article 2(3) of the Convention; (2) the programme coordinates efforts for safeguarding at the regional, subregional, and/or international levels; (3) the programme reflects the principles and objectives of the Convention; (4) if already completed, it has demonstrated effectiveness in contributing to the viability of the ICH concerned, or, if under way, it can reasonably be expected to do so; (5) it counts on the participation of the community, group, or individuals with free, prior, and informed consent; (6) it can serve as a subregional, regional, or international model for other safeguarding initiatives (that is, it can be 'transplanted' or emulated in other contexts); (7) the state(s), communities, groups, or individuals involved are willing to cooperate to the dissemination of best practices; (8) it is possible to assess the results of the programme, project, or activity; and (9) the programme 'is primarily applicable to the particular needs of developing countries'.⁴⁸ These criteria are further developed in a standardized form attached to the Operational Directives, accompanied by explanatory notes.⁴⁹

The first round of nominations of best practices selected three programmes for inscription as a best practice to promote the goals of the Convention.⁵⁰ Of these, one is particularly interesting. The project called 'Safeguarding the intangible cultural heritage of Aymara communities in Bolivia, Chile and Peru' is a subregional project, involving more than one state party to the Convention. It aims at promoting initiatives ⁹³in primary schools 'aimed at ensuring the viability of endangered cultural expressions and which constitute the cultural identity of Aymara communities of Bolivia (La Paz-Oruro-Potosí), Chile (Tarapacá-Arica-Parinacota-Antofagasta) and Peru (Tacna-Puno-Moquegua)'.⁵¹ The project has a strong focus on the importance of preserving the Aymara language as a vehicle to enable the transmission of intangible heritage relating to agricultural methods, traditional music and dance, and textile techniques.

The project involves the ethnographic study of the communities involved, as well as teacher-training programmes and the production of manuals. It also involves, at a later phase, regional artistic contests and the exchange of experiences amongst policymakers involved.⁵²

As to the actors involved in the process, the nomination form highlights that the project creates a network of 'individuals, communities, groups, cultural managers, specialists, indigenous organizations, research centers, NGOs and government among others, promoting the permanent exchange of experience, information and training in order to strengthen capacities in the region, achieving this way a wide participation of all the concerned actors'.⁵³ The project has secured the consent of a governing body of Aymara communities in all three countries involved, and has committed itself to guaranteeing Aymara participation in all stages of the project. Thus, by involving the community in the way they do, the states give them control over their heritage, and act as facilitators for the strengthening of this intangible heritage. At the same time, the states benefit from having a prime example of a well-developed initiative which gives credence to their claims associated with indigeneity (being an indigenous or plurinational country, or simply one which respects its indigenous minorities).

Article 19 determines international cooperation for the safeguarding of intangible heritage, including the exchange of information and joint initiatives by states parties. Article 20 determines the purposes of international assistance, while Article 21 outlines the forms of international assistance. Of these, 'standard-setting' is a particularly relevant one, and one which refers to the establishment of international standards to be subsequently translated into regional and national legislative initiatives.⁵⁴ In this sense, the Convention is not a product of input from previous national initiatives, but it is created to be precisely the catalyst of national measures for the safeguarding of intangible heritage.

After discussing the system created by the Convention and its early practice, it is important to recall some of the criticisms that can be raised against it, and which prevent it from becoming the central piece of the international machinery for the protection of intangible heritage. To this criticism I move next.

*94 5 Criticism of the Convention

One of the important features of the Convention is the resistance to creating a system of 'legal guarantees' for safeguarding intangible heritage. There seemed to be resistance among the drafters of the Convention in establishing specific obligations to create systems of legal protection to intangible heritage. For instance, 'legal protection' was seen by an experts' meeting on the implementation of the 2003 Convention as a potentially complementary form of protection of ICH, but not one which was required, and which warranted legal protection becoming a separate element of safeguarding activities.⁵⁵

This is in part a reflection of the 1989 Recommendation on the Safeguarding of Traditional Cultures and Folklore.⁵⁶ In evaluating that Recommendation, only 17 per cent of the states had taken up legal measures as a form of policy aimed at protecting intangible heritage.⁵⁷ And only 3 per cent of states at the time thought that an international convention was suitable to enhance the legal protection of intangible heritage.⁵⁸ This may help to explain why the obligations in the 2003 Convention are to create not a legal system of protection, but rather a system based on listing and 'policy-oriented' protection, including educational programmes and awareness-raising generally.

It was also said at the time of the 1989 Recommendation that the role of law in the efforts to protect ICH should not be overestimated. Because law in this field would run counter to prevailing social processes (such as globalization, commodification, and the interplay of economic interests relating to the exploitation and misappropriation of ICH), one should not expect it to be the sole tool to protect intangible heritage. Rather, law should be seen in this context as one of several social controls, including education and awareness-raising. Law's role alongside these other initiatives would be to try to empower custodian communities.⁵⁹

Another criticism that can be raised against the ICH Convention is its excessive focus on sovereignty. This strongly sovereignty-based approach may have been the necessary compromise to achieve the approval of the Convention, and may explain why it is such a fast-ratifying instrument, but at the same time it substantially weakens the reach of the instrument. Plus, it does not protect intangible heritage from being harmed by the states in which ICH may exist, at least to the extent that the ultimate control over what constitutes intangible heritage and what may be worthy of protection, for the purposes of the Convention, still rests upon the states parties. In this sense, then, the Convention is incapable of offering remedies for misappropriation by third parties, particularly when the third party is the state.

*95 One example of this excessive focus on sovereignty is the fact that the General Assembly is the controlling body behind the Convention, as explained above. If states parties choose to overlook the recommendations of UNESCO (done in the framework of the UNESCO Secretariat's role of assisting the operation of the Intergovernmental Committee), then there is really very little one can do about it. Intangible heritage, then, becomes a highly politicized matter, as are all matters relating to identity.

Further, part of this excessive focus on sovereignty stems from the same justification used to explain the international initiative which led to the drafting of the Convention. According to commentators, there was a deep concern about the protection of ICH at the international level, and what it could imply. States were concerned that elevating local cultures to international status might give rise to claims against the state, including claims for statehood, in the long run. Most importantly, though, there was a concern expressed by several scholars and some states that to elevate intangible heritage to an international concern would necessarily take the heritage outside its original cultural context, therefore destroying intangible heritage by the very act of attempting to give it international protection. This paradox was solved by the affirmation that intangible cultural heritage is not the heritage of mankind; rather, it is the interest in the protection of local cultures and the intangible heritage associated with it which is an international concern.⁶⁰ The international concern is thus an instrumental, rather than a substantive, one. This is reflected in Article 19(2) of the Convention, which determines that 'States Parties recognize that the safeguarding of intangible cultural heritage is of general interest to humanity'. The interest is the safeguarding, not the heritage per se.

Further, the internationalization of intangible heritage can also be beneficial for the very perpetuation of it. There have been instances (the Argentinean Tango being one of the most prominent⁶¹) in which communities felt pride in their heritage only after its exposure to the 'outside world', where it was well-received and praised.⁶² In this sense, 'heritage loses its territorial identity, loosens its material ties in order to survive'.⁶³

This scholarly concern seems to be present also in the actual practice of the Convention. For instance, China has successfully inscribed Tibetan Opera in the Representative List of Intangible Heritage.⁶⁴ This can be read as a laudable outreach initiative *96 aimed at including Tibetan culture as part of the

national Chinese culture, ultimately giving it legitimacy that is denied in political fora. At the same time, however, a more critical reading of this is that, by inscribing Tibetan cultural manifestations in this list (and consequently in the national inventory), the Chinese government actually asserts control over the cultural manifestations, and the culture as a whole, subordinating its political caveats to tourism, promotion, and other economic interests, as well as to a larger national Chinese identity, ultimately diminishing the political strength of the Tibetan culture and all political claims of Tibetans.⁶⁵

Another sovereignty-related issue is the participation of communities. Janet Blake, in her study which served as the basis for the drafting of the ICH Convention, highlighted the importance of the involvement of communities in the implementation of the Convention.⁶⁶ According to the Convention and the early practice under it, however, community participation is restricted to the national level, and communities seem not to have a space at the international level of implementation of the Convention. Instead, it seems that communities are gradually being replaced by experts at the international level. Bulgaria has warned against this shift, and the need to preserve communities as the essential non-state actor in terms of ICH safeguarding.⁶⁷

Such shift refers back to the criticism of Laurajane Smith, in which what she calls the Authorized Heritage Discourse is perpetuated by the prominent role of heritage professionals over that of heritage bearers.⁶⁸ This differentiation between communities and experts has been supported by several states, most notably Norway. According to the Norwegian delegation during the negotiations of the 2003 Convention, communities must be excluded from participation at the international level because ⁹⁷ they lack the required expertise to contribute effectively to international cooperation, and should thus have the primary role of performing, maintaining, and distributing ICH, but at the local/national level.⁶⁹ Further, experts would have roles to play at both the national and international levels, while communities would be restricted to the national level.⁷⁰

This was the adopted text of modalities of participation of communities and experts.⁷¹ Communities, groups, and individuals play a role in the following instances: (1) consultation for inscription in one of the Lists; (2) evaluation and selection of best practices; (3) the provision of experts and practitioners to evaluate requests for international assistance; (4) the evaluation of the status of safeguarding of elements concerning them; (5) the preparation of documents on manifestations of ICH concerning them; and (6) the establishment of operational directives for the implementation of the Convention.⁷²

Regarding experts, on the other hand, their role includes the following functions: (1) the evaluation of nomination files for inscription on the lists; (2) the evaluation and selection of best practices; (3) the provision of experts and practitioners to evaluate requests for international assistance; (4) the examination of reports of implementation of safeguarding measures; (5) the examination of requests for international assistance; and (6) the examination of the periodic reports by states parties and the Intergovernmental Committee.⁷³

Not all is gloomy in the domain of community participation, however. A new set of operational directives for raising awareness about intangible heritage was approved in June 2010, which advances much stronger forms of community involvement, and uses much stronger language in referring to states' obligation to involve communities. Even though these rules refer to a rather 'harmless' aspect of the Convention, they can be read as a 'back door' through which stronger views about the legal bite of the Convention and more effective means of community involvement are 'sneaked into' the system. These revised directives include principles on awareness-raising, which require not only that free, prior,

and informed consent be sought, but also that control over the uses of heritage be ultimately given to the communities, rather than the state seeking an eventual nomination.⁷⁴

*98 Also, for the first time the operational directives specifically mention the financial side of ICH, that is, the tension between the safeguarding and commercialization of intangible heritage. This acknowledgment of the economic side, largely unseen in the first set of operational directives, is a very welcome step forward, especially because it determines that communities must be taken into account at all times, and are ultimately empowered by all attempts at economic exploitation of their heritage.⁷⁵

In this sense, there are then two different levels of implementation of the Convention: when it comes to the relatively high-profile listing mechanism, control still rests with the states. When it comes to other safeguarding activities, the Convention has within a little over a year of the publishing of its first set of operational directives moved from a state-centric to a more community-oriented approach (thanks to the work of the Committee). This mirrors to a certain extent what happened to the WHC, but it is happening at a quicker pace here.

Therefore, it seems that communities are once again placed on the back seat of international standard-setting and safeguarding of cultural heritage. There are positive steps forward, but they still fall short of fully empowering communities to control their own heritage and influence decision-making regarding it internationally.⁷⁶ Communities must be able to control the meaning of their heritage and the different uses of it. It is in this sense that commodification can be positive, to the extent that it means empowerment.⁷⁷ This type of commodification should be promoted by the UNESCO system, but it looks as if the many layers of sovereignty imposed by the system may be an obstacle to this pursuit of cultural local empowerment.

Inventorying implies mummification and commodification of heritage (even though the early practice of the Committee is aware of these concerns and trying to avoid them). However, it was already felt, during the drafting of the Convention, that the need to grant some form of legal protection to ICH overcame the potential downsides of commodification, as it would raise awareness of this heritage and thus avoid some other, more pressing, problems relating to ICH, most importantly its total disappearance for lack of support for its continuation.⁷⁸

When thinking of drafting what became the 2003 Convention, the experts involved in the process had three alternatives: (1) to draft an instrument based on IP solutions and sui generis mechanisms adapted from IP tools (which was soon seen as limited in reach and generally inappropriate for intangible heritage protection);⁷⁹ (2) to draft an instrument based upon the model of the 1972 World Heritage Convention; or *99 (3) to draft an instrument in between these two alternatives. Early thinkers about this process thought that the hybrid would be the best alternative.⁸⁰

However, in the end the choice was made by intergovernmental experts to follow the model of the 1972 World Heritage Convention, as a means to guarantee immediate acceptance of the Convention and fast ratification, and also because the listing model of the 1972 Convention had proven to be an effective tool in raising awareness of cultural heritage and stimulating the development of policies aimed at the protection of heritage.⁸¹ This choice offered several advantages, as it would promote awareness of ICH, it created a financial mechanism to foster ICH, and it created necessary machinery to oversee the implementation of the treaty. There was, however, a concern with the idea that the listing would create an unnecessary hierarchy by safeguarding only a limited number of manifestations of intangible

heritage.⁸² It must be highlighted that, even though the initial draft as proposed was in many ways a copy of the 1972 Convention, the experts who worked in the drafting of the Convention managed to move away from it in several aspects, highlighted above. The effort of the experts is noteworthy, as it produced a document which was easily recognizable and acceptable to states, while at the same time moving away from such a model in important ways.

Be that as it may, the fact is that the main goals of the model (to raise awareness and stimulate the development of protective policies) were achieved. One must wonder, however, whether the price paid for it (that is, the lack of a more tailored international instrument, or one with more 'legal bite') was worth it in the long run.

6 Concluding Remarks: Art and Politics in the Struggle for Identity

Struggles over heritage often showcase deeper underlying political issues, especially when it comes to the recognition of cultural minorities, which may or may not have political agendas. In this sense, it is important that communities have a say in every initiative that involves their heritage, so that the necessary control can be asserted by the community. The much-dreaded commodification of heritage can then become a tool in favour of the groups involved, as it can also mean these groups' empowerment. On the other hand, the state can also make use of this commodification process to assert control over the meanings to be attributed to such heritage, ultimately making them devoid of any political content.

The experience of UNESCO with the Intangible Heritage Convention can be interpreted through these two different sets of lenses. On the one hand, it is required that communities be involved in the preparation of nominations for the UNESCO lists. ^{*100} Ultimately, however, it is the state which determines which manifestations of heritage in its territory are even worth being considered in the first place. The several layers of sovereignty existent in the UNESCO system for ICH protection seem to be a rather cumbersome obstacle to the international validation of political claims through the assertion of cultural distinctiveness. As the Committee's practice evolves, however, it may happen that community participation at the international level is increased, and the states become more deferential to communities and their cultural claims. One can only hope.

Footnotes

a1

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1

'Status of ratifications to the Convention for the Safeguarding of the Intangible Cultural Heritage' (2003), available at: <http://portal.unesco.org/la/convention.asp?KO=17116&language=E> (last accessed 18 July 2010).

2

In the 19th century Norway, then under Swedish rule, ventured into creating the concept of 'True Norwegianness', built precisely round the celebration of folk culture, including costumes and festivals. Folk culture was then re-introduced in smaller villages, an improved version of a cultural distinctiveness then disappearing or vanished. The use of costumes and dialects generated a sense of pride and spurred the quest for authentic Norwegian identity, which ultimately fuelled the political independence movements in the country. See Oxaal, 'Bunaden: stagnasjon eller nyskapning', in <<EmptySet>>ystein Sørensen (ed.), *Jakten på det norske. Perspektiver på utviklingen av en nasjonal identitet på 1800-tallet* (1998), at 141; and Seip, 'Det norske "vi":kulturnasjonalisme i Norge', in <<EmptySet>>ystein Sørensen (ed.), *Jakten på det norske. Perspektiver på utviklingen av en nasjonal identitet på 1800-tallet* (1998), at 95. Interestingly enough, Sweden also engaged in this process of identity-building through folk culture during the same period. See B. Ehn, J. Frykman and O. Löfgren, *Försvenskningen av Sverige; Det nationallas förvandlingar, Natur och Kultur* (1993), at 140. Many thanks go to Mats Ingulstad for his assistance with the Norwegian and Swedish sources.

3

See Lixinski, 'The Future of the EU Cultural Policy in the Protection of Intangible Cultural Heritage', 1 *Prague Yrbk Comparative L* (2009) 119.

4

See Blake, 'UNESCO's 2003 Convention on Intangible Cultural Heritage: The implications of community involvement in "safeguarding"', in L. Smith and N. Akagawa (eds), *Intangible Heritage* (2009), at 45, 45.

5

See Bouchenaki, 'A Major Advance towards a Holistic Approach to Heritage Conservation: the 2003 Intangible Heritage Convention', 2 *Int'l J Intangible Heritage* (2007) 106.

6

See J. Blake, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage* (2006), at 15.

7

See Aikawa-Faure, 'From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage', in Smith and Akagawa (eds), *supra* note 4, at 13, 23.

8

On the connection between intangible heritage and sustainable development see Kono, 'UNESCO and Intangible Cultural Heritage from the Viewpoint of Sustainable Development', in A.A. Yusuf (ed.), *Standard-Setting in UNESCO Volume 1: Normative Action in Education, Science and Culture* (2007), at 237.

9

See Blake, *supra* note 6, at 25.

10

See Blake, *supra* note 4, at 48.

11

See G.J. Ashworth, B. Graham, and J.E. Tunbridge, *Pluralising Pasts: Heritage, Identity and Place in Multicultural Societies* (2007), at 3; and Blake, *supra* note 6, at 35. On how indigenous culture has been translated as heritage and what this means in terms of the weakening of their political claims see K. Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (2010), at 141-161.

12

See Blake, *supra* note 4, at 38. On the connection between human rights and cultural heritage generally see Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage', in Yusuf (ed.), *supra* note 8, at 237, pointing out that this is one of the factors behind the shift from 'cultural property' to 'cultural heritage'.

13

See Blake, *supra* note 4, at 62; and Aikawa-Faure, *supra* note 7, at 37.

14

See Blake, *supra* note 6, at 29.

15

See Form ICH-02 (2009) -- Representative List, Explanatory Note, available at: www.unesco.org/culture/ich/index.php?lg=en&pg=00184.

16

General Assembly of States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage, Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage (June 2008), available at: www.unesco.org/culture/ich (last accessed 9 Apr. 2009). Rule 77.

17

See Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, 'Report of the Rapporteur of the subsidiary body on the modalities for the participation of communities or their representatives, practitioners, experts, centers of expertise and research institutes in the implementation of the Convention', presented at the Second Extraordinary Session (Sofia, Bulgaria, 18-22 Feb. 2008), Doc. ITH/08/2.EXT.COM/CONF.201/INF.4, of 12 Feb. 2008, at para. 12.

18

General Assembly of States Parties, *supra* note 16, Rule 78.

19

Ibid., Rule 88.

20

Ibid., Rule 94.

21

See Form ICH-09 (2009) -- Request from an NGO for Accreditation, available at: www.unesco.org/culture/ich/index.php?lg=en&pg=00184.

22

See Blake, *supra* note 6, at 46.

23

See *ibid.*, at 45.

24

See *ibid.*, at 79.

25

General Assembly of States Parties, *supra* note 16, Rule 1.

26

See Form ICH-01 (2009) -- Urgent Safeguarding List and Form ICH-01 (2010) -- Urgent Safeguarding List, both available at: www.unesco.org/culture/ich/index.php?lg=en&pg=00184. The two forms are virtually identical, except for the timeframe they propose, as the first form refers to the first round of inscriptions in the urgent safeguarding list, while the other form refers to the second round.

27

See Form ICH-01 (2009) -- Urgent Safeguarding List and Form ICH-01 (2010) -- Urgent Safeguarding List, Explanatory Note, at para. 4(b). Both forms are available at: www.unesco.org/culture/ich/index.php?lg=en&pg=00184.

28

See Form ICH-01 (2009) -- Urgent Safeguarding List and Form ICH-01 (2010) -- Urgent Safeguarding List, Explanatory Note, at para. 4(c). Both forms are available at: www.unesco.org/culture/ich/index.php?lg=en&pg=00184.

29

See Form ICH-01 (2009) -- Urgent Safeguarding List and Form ICH-01 (2010) -- Urgent Safeguarding List, Explanatory Note, at para. 5(b). Both forms are available at: www.unesco.org/culture/ich/index.php?lg=en&pg=00184.

30

See Simon, 'Global Steps to Local Empowerment in the Next Millenium: An Assessment of UNESCO's 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore', in P. Seitel (ed.), *Safeguarding Traditional Culture: A Global Assessment* (2001), at 111, 113.

31

See UNESCO, The Intangible Heritage Lists, available at: www.unesco.org/culture/ich/index.php?pg=00011&inscription=00003&type=00003 (last accessed 28 Dec. 2009).

32

See Intangible Heritage Convention, Nomination Form for Inscription on the Urgent Safeguarding List -- Suiti Cultural Space, available at: www.unesco.org/culture/ich/index.php?USL=00314 (last accessed 27 Dec. 2009).

33

Ibid.

34

See Suiti Cultural Space, Documentation on Consent of Communities, available at: www.unesco.org/culture/ich/doc/src/00314-Community%20consent-EN.pdf (last accessed 27 Dec. 2009).

35

For a comparison see Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Second Extraordinary Session (Sofia, Bulgaria, 18-22 Feb. 2008), Decision 2.EXT.COM 17 (Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage on its activities between the first and second sessions of the General Assembly of the States Parties to the Convention, at paras 11-19).

36

General Assembly of States Parties, *supra* note 16 Rule 19.

37

Ibid., Rule 21.

38

See UNESCO, Report on the Expert Meeting on Criteria for Inscription on the Lists Established by the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 5-6 Dec. 2005).

39

See Form ICH-02 (2009) -- Representative List, Explanatory Note, at para. 2.

40

See *ibid.*, at para. 5(b).

41

All the information regarding these nominations is available as downloadable files along with the description of each element inscribed in the list. See UNESCO Intangible Heritage, The Intangible Heritage Lists, available at: www.unesco.org/culture/ich/index.php?pg=00011 (last accessed 14 Mar. 2010).

42

The College of Europe is an international institution (and thus not a Belgian Academic Institution), and in many ways a sister institution to the European University Institute, receiving students from numerous countries across Europe and the world. The letter of support of its President is noteworthy for indicating how the Holy Blood Procession is an important part of the College's efforts to integrate its international studentship into the Bruges local community.

43

One important factor to be taken into account regarding the existence of representative entities is the example of the PROMAYA incident. In this project, relating to the exploitation of Maya traditional culture by an outsider, an association was created by the developers of the research project themselves in order to represent the Mayan community and give free, prior, and informed consent. This entity failed genuinely to connect with the Mayan people, however, and was discredited, eventually harming the research project. For a detailed account see Dalibard and Kono, 'Prior Informed Consent: Empowering the Bearers of Cultural Traditions', in T. Kono (ed.), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* (2009), at 247, 253-258.

44

All the forms referring to these practices are available at UNESCO Intangible Heritage Convention, The Intangible Heritage Lists, *supra* note 31.

45

See Blake, *supra* note 6, at 86-88.

46

See Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, First Extraordinary Session (Chengdu, China, 23-27 May 2007), Discussion on the Implementation of Article 18 of the Convention for the Safeguarding of the Intangible Cultural Heritage, Doc. ITH/07/1.EXT.COM/CONF.207/11, of 20 Apr. 2007.

47

See Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Second Session (Tokyo, Japan, 3-7 Sept. 2007), Preliminary draft directives for implementing Article 18 of the Convention for the Safeguarding of the Intangible Cultural Heritage, Doc. ITH/07/2.COM/CONF.208/12, of 30 July 2007.

48

General Assembly of States Parties, *supra* note 16, Rule 52.

49

See Form ICH-03 (2009) -- Programmes, Projects and Activities, available at:
www.unesco.org/culture/ich/index.php?lg=en&pg=00184.

50

See UNESCO, The Intangible Heritage Lists, *supra* note 31.

51

See Intangible Heritage Convention, Nomination Form for Best Practice -- Safeguarding the Intangible Cultural Heritage of Aymara Communities in Bolivia, Chile and Peru, available at:
www.unesco.org/culture/ich/index.php?Art18=00299 (last accessed 27 Dec. 2009).

52

Ibid.

53

Ibid.

54

See Blake, *supra* note 6, at 95.

55

See UNESCO, *supra* note 38.

56

For an extensive analysis of this Recommendation and its impact see Seitel (ed.), *supra* note 30.

57

See Kurin, 'The UNESCO Questionnaire on the Application of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Preliminary Results', in Seitel (ed.), *supra* note 30, at 20, 24.

58

See *ibid.*, at 29.

59

See Prott, 'Some Considerations on the Protection of the Intangible Heritage: Claims and Remedies', in Seitel (ed.), *supra* note 30, at 104, 109.

60

See generally Blake, *supra* note 6, at 90.

61

The Tango made it to the Representative List through the first round of inscriptions. For more information, including the nomination forms, see UNESCO Intangible Heritage Convention, The Intangible Heritage Lists: The Tango, available at: www.unesco.org/culture/ich/index.php?RL=00258 (last accessed 27 Dec. 2009).

62

For the account of how Tango was 're-appropriated' by Argentineans and became their national intangible heritage after being praised abroad see S. Scafidi, *Who Owns Culture? Appropriation and Authenticity in American Law* (2005), at 28-31.

63

See Skounti, 'The Authentic Illusion: Humanity's Intangible Cultural Heritage, the Moroccan Experience', in Smith and Akagawa, *supra* note 4, at 74, 76.

64

See UNESCO Intangible Heritage Convention, The Intangible Heritage Lists: Tibetan Opera, available at: www.unesco.org/culture/ich/index.php?RL=00208 (last accessed 27 Dec. 2009).

65

See in this regard Silverman and Ruggles, 'Cultural Heritage and Human Rights', in H. Silverman and D.F. Ruggles (eds), *Cultural Heritage and Human Rights* (2007), at 3, 11-12, using a different example of subordination of the Tibetan culture, involving a road construction project which created a cultural route. A similar situation happens in Burma, where identities and manifestations of intangible heritage which are ethnically Burman and Buddhist are given preferential treatment by the government, at the expense of minority groups. On the Burma example see Philp, 'The Political Appropriation of Burma's Cultural Heritage and its Implications for Human Rights', in M. Langfield, W. Logan, and M. Nic Craith (eds), *Cultural Diversity, Heritage and Human Rights: Intersections in Theory and Practice* (2010), at 83. Another example is the declaration of Macao religious figure carving as intangible heritage. This type of woodwork creates religious figures related to the Chinese ancestry, and a recent exhibition in the Macao Museum around these wooden figures can be considered as promoting a perennial intangible heritage which survived in Macao despite the Portuguese control of the peninsula. As Macao has been reincorporated into China, there is obviously an interest in promoting a surviving political national identity which can relate Macao to 'mainland China'. See *Trabalhos com Engenho: Escultura de Ídolos Sagrados de Macau* (2008) (the book of the exhibition of the same title, which is proclaimed as national intangible heritage. The exhibition ran from Dec. 2008 to Apr. 2009).

66

See J. Blake, *Developing a New Standard-Setting Instrument for the Safeguarding of Intangible Cultural Heritage: Elements for consideration* (2001), at 70.

67

See Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Report of the Rapporteur of the subsidiary body on the modalities for the participation of communities or their representatives, practitioners, experts, centers of expertise and research institutes in the

implementation of the Convention, presented at the Second Extraordinary Session (Sofia, Bulgaria, 18-22 February 2008), Doc. ITH/08/2.EXT.COM/CONF.201/INF.4, of 12 Feb. 2008. Annex 1.

68

See L. Smith, *The Uses of Heritage* (2006), at 44.

69

UNESCO, Extracts of States Parties' comments on possible modalities for the participation of communities or their representatives, practitioners, experts, centers of expertise and research institutes in the implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage, Working document prepared by the Secretariat of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (Jan. 2008), at para. 62.

70

Ibid., at paras 76 and 82.

71

See Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, *supra* note 17, Annex 2, at paras 1.2 and 1.3.

72

See *ibid.*, Annex 2, at para. 3(1)(h).

73

See *ibid.*, Annex 2, at para. 3(2)(3).

74

See General Assembly of the States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage, Third Session (UNESCO Headquarters, 22-24 June 2010), Resolutions, Resolution 3.GA 5, Doc. ITH/10/3.GA/CONF.201/RESOLUTIONS, of 24 June 2010, at paras 100-102.

75

Ibid., at paras 116-117.

76

For a more positive outlook on the matter see Kurin, 'Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention', 2 *Int'l J Intangible Heritage* (2007) 10, at 15.

77

Regina Austin, for instance, has argued that the commodification of black culture through the creation of the Kwanzaa holiday has led to the empowerment of black identity: see Austin, 'Kwanzaa and the Commodification of Black Culture', in M.M. Ertman and J.C. Williams (eds), *Rethinking Commodification: Cases and Readings in Law and Culture* (2005), at 178.

78

See Blake, *supra* note 6, at 7.

79

See *ibid.*, at 13.

80

See Prott, *supra* note 59, at 110; and Blake, *supra* note 6, at 6.

81

See UNESCO, *Final Report International Meeting of Experts on Intangible Cultural Heritage: Priority Domains for an International Convention* (Rio de Janeiro, Brazil, 2002); and Blake, *supra* note 6, at 4.

82

See *ibid.*, at 13.