

CHAPTER 8 The Definition of Intangible Cultural Heritage

Tullio Scovazzi*

1. A Complex Definition

In Article 2(1) of the Convention of the Safeguarding of the Intangible Cultural Heritage¹ the “intangible cultural heritage” is defined as follows:

The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. [...]²

* Professor of International Law, University of Milano-Bicocca, Milan. The author wishes to thank Ms Maria Clara Maffei and Ms Sabrina Urbinati for their contribution in the writing of this study.

¹ Convention for Safeguarding of the Intangible Cultural Heritage (Paris, 17 October 2003); 2368 UNTS 3; hereinafter “ICH Convention” or “the Convention”. The Convention entered into force on 20 April 2006 and as of December 2011 is binding on 142 States. See in general J. Blake, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage* (Institute of Art and Law, 2006); T. Kono, “UNESCO and Intangible Cultural Heritage from the Viewpoint of Sustainable Development”, in A. Yusuf (ed.), *Standard-Setting in UNESCO* (UNESCO Publishing, 2007), vol. I, p. 237; A. Sola, *Quelques réflexions à propos de la Convention pour la sauvegarde du patrimoine culturel immatériel*, in J. Nafziger and T. Scovazzi (eds), *Le patrimoine culturel de l'humanité – The Cultural Heritage of Mankind* (Martinus Nijhoff, 2008), p. 487; B. Srinivas, “The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage”, *ibid.*, p. 529; L. Zagato, “La Convenzione sulla protezione del patrimonio culturale intangibile”, in L. Zagato (ed.), *Le identità culturali nei recenti strumenti UNESCO* (Cedam, 2008), p. 27; T. Kono (ed.), *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* (Martinus Nijhoff, 2010); T. Scovazzi, “La Convention pour la sauvegarde du patrimoine culturel immatériel”, in B. Vukas and T.M. Šošić (eds), *International Law: New Actors, New Concepts – Continuing Dilemmas: Liber Amicorum Božidar Bakotić* (Brill, 2010), p. 301.

² For the third and last sentence of Article 2(1), see below, section 5. On the definition in an anthropological perspective see C. Bortolotto, “Il processo di definizione del concetto di ‘patrimonio culturale immateriale’: elementi per una riflessione”, in C. Bortolotto (ed.), *Il patrimonio immateriale secondo l'UNESCO: analisi e prospettive* (Istituto Poligrafico e Zecca

These two sentences provide more of a description than a definition. Yet in social sciences, concepts are frequently used which cannot be constrained into precise logical schemes, such as the concept of culture.³

In this short chapter an effort will be made to identify the essential components of the definition of intangible cultural heritage as provided by the ICH Convention. The analysis will be carried out in the light of the practice thus far developed by the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage⁴ in maintaining the two Lists established by the Convention, namely the Representative List of the Intangible Cultural Heritage of Humanity (“the Representative List”)⁵ and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding (“the Safeguarding List”),⁶ and in inscribing elements on them.⁷ This practice can shed light on how the definition provided by Article 2(1) is interpreted in the application of the ICH Convention.⁸

Despite the lengthy content of Article 2(1), the essential components of the concept of intangible cultural heritage seem to be three, namely: a manifestation of such heritage (objective component), a community of people (subjective or social component) and a cultural space (spatial component).

2. A Manifestation of Intangible Cultural Heritage

The intangible cultural heritage cannot be confined to a person’s private thoughts or kept secret in his private home but must be manifested by him to the external world and to someone else. This does not necessarily mean that access to the intangible cultural heritage should be open to everybody. States Parties to the ICH Convention are, *inter alia*, bound to respect “customary practices governing access to specific aspects of

dello Stato, 2008); C. Bortolotto (ed.), *Le patrimoine culturel immatériel* (Maison des Sciences de l’Homme, 2001).

³ See, among the many that can be envisaged, the definition of culture provided by W. van Zanten (ed.), *Glossary. Intangible Cultural Heritage* (Netherlands National Commission for UNESCO, 2002), p. 4: “The set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, encompassing, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs”. It is based on the definition suggested at the UNESCO World Conference on Cultural Policies (Mexico City, 1982).

⁴ Hereinafter “the Committee”.

⁵ As required by Article 31(1), the Committee has incorporated in this List the items previously proclaimed as Masterpieces of the Oral and Intangible Heritage of Humanity and inscribed in the relevant list established by UNESCO in 1998. It is consequently to be implied that all the masterpieces qualify for the definition provided by Article 2(1).

⁶ The present study will not consider the conditions for inscription on this List.

⁷ The items inscribed on the two lists are called “elements” in the practice of the Committee. In this sense the term element will be used in this study.

⁸ Under Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties for the interpretation of a treaty account shall be taken *inter alia* of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.

such heritage” (Article 13(d)(ii)). This provision is intended to apply to manifestations reserved only to certain people.

The intangible cultural heritage may consist of several manifestations, enumerated in Article 2(1), as practices, representations, expressions, knowledge, and skills. While quite broad, this list seems to be exhaustive, in the sense that something that does not belong to any of the five manifestations mentioned above cannot qualify as being intangible cultural heritage either.

Article 2(2) provides some concrete examples of domains where the intangible cultural heritage can be manifested. Under the provision in question,

The “intangible cultural heritage” [...] is manifested *inter alia* in the following domains:

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

It frequently happens that the same manifestation belongs to two or more different domains. For instance, in the conclusions of the Expert Meeting on food practices held in Vitré in 2009, it is remarked that food practices have an inter-sectoral dimension as regards the domains mentioned in Article 2(2).⁹

2.1. Oral Traditions and Expressions

The line between oral traditions, understood as the “passing on by word of mouth and memorizing information from the past”¹⁰ and oral expressions, understood as “aspects of intangible cultural heritage expressed through the spoken word or in song”,¹¹ is quite fine. Several instances of oral traditions and expressions can be found in the Representative List, such as *The Arts of the Meddah Public Storytelles* (Turkey) or the *Hudhud Chants of the Ifugao* (Philippines):

⁹ See *Compte-rendu des journées de Vitré sur les pratiques alimentaires, 3 avril 2009*: “Les experts ont estimé que, dans le cadre de la Convention, les pratiques alimentaires ont une dimension transversale vis-à-vis des domaines explicités à l'article 2 alinéa 2 en tant qu'elles s'intègrent à des systèmes articulés de relations sociales et de significations collectivement partagées. Les pratiques alimentaires concernent donc aussi bien les traditions et expressions orales, les arts du spectacle, les pratiques sociales, rituels et événements festifs, les connaissances et pratiques concernant la nature, ainsi que les savoir-faire liés à l'artisanat traditionnel”.

¹⁰ *Glossary* (above n. 3), p. 5.

¹¹ *Ibid.*

The term *meddah*, borrowed from Arabic *maddah* “to praise”, can be translated as “storyteller”. The *meddah* selects songs and comic tales from a repertory of popular romances, legend and epics and adapts his material according to the specific venue and audience. However, the quality of the performance largely depends on the atmosphere created between storyteller and spectators, as well as the *meddah*’s ability to integrate imitations, jokes and improvisation often relating to contemporary events. This art, which places great value on the mastery of rhetoric, is highly regarded in Turkey.¹²

The *Hudhud* consists of narrative chants traditionally performed by the *Ifugao* community, which is well known for its rice terraces extending over the highlands of the northern island of the Philippine archipelago. It is practised during the rice sowing season, at harvest time and at funeral wakes and rituals.¹³

The negotiators of the Convention discussed whether languages could be included among the manifestations of intangible cultural heritage. Some delegations asked for an explicit reference to languages. Others were of the opinion that the terms “oral expressions” already covered languages sufficiently. At the end, it was preferred to include a language only insofar as it can be considered as “a vehicle of the intangible cultural heritage”. The consequence of this choice seems to be that a language, such as English or Italian, cannot be considered *per se* as a manifestation of intangible cultural heritage. However, it could qualify as such if it becomes a means for the manifestation of what already belongs to the domain of intangible cultural heritage.

For instance, the element *Language, Dance and Music of the Garifuna* (Belize, Guatemala, Honduras, Nicaragua) includes the *Garifuna* language, which

[...] belongs to the Arawakan group of languages and has survived centuries of discrimination and linguistic domination. It is rich in tales (*úruga*) originally recited during wakes or large gatherings. The melodies bring together African and Amerindian elements, and the texts are a veritable repository of the history and traditional knowledge of the *Garifuna*, such as cassava-growing, fishing, canoe-building and the construction of baked mud houses.¹⁴

Within the *Oral Heritage and Cultural Manifestations of the Zápara People* (Ecuador, Peru) the language itself is the expression of a cultural heritage that is extremely rich as regards the understanding of nature possessed by the *Zápara* people:

¹² UNESCO, *Representative List of the Intangible Cultural Heritage – 2008* (UNESCO Publishing, 2009), Element No. 80 (this book, very interesting for its content, is a rare example of books without the numbering of pages). On the elements inscribed on the Lists see also F.-X. Freland, *Capturing the Intangible – Perspectives of the Living Heritage* (UNESCO Publishing, 2009).

¹³ *Representative List 2008* (above n. 12), Element No. 67. It is remarked that “the *Hudhud* is linked to the manual harvesting of rice, which is now mechanized”. Yet it is difficult to sing with the noise of the rice harvesting machines! On the question of modernization, see below, section 3.3.

¹⁴ *Representative List 2008* (above n. 12), Element No. 8.

This is demonstrated by the abundance of their vocabulary for the flora and fauna and by their medicinal practices and knowledge of the medicinal plants of the forest. [...] Their language is the depository of traditional knowledge and of oral tradition and constitutes the memory of the people and the region.¹⁵

The element *Whistled Language of the Island of La Gomera (Canary Islands)*, the *Silbo Gomero* shows that, while *per se* the Spanish language does not qualify for the definition of intangible cultural heritage, the situation completely changes if Spanish is not spoken, but whistled. The *Silbo Gomero* “[...] replicates the islanders’ habitual language (Castilian Spanish) with whistling. [...] It is the only whistled language in the world. [...] The whistled language replaces each vowel or consonant with a whistling sound: two distinct whistles replace the five Spanish vowels, and there are four whistles for consonants.”¹⁶

2.2. *Performing Arts*

Performing arts include “instrumental and vocal music, dance, theatre, storytelling, sung poetry, pantomime, and other spectacular practices representing the creativity of communities”.¹⁷ In certain cases, such as for vocal music, storytelling and sung poetry, the distinction between performing arts and oral traditions and expression becomes blurred. There are so many manifestations of performing arts in the Representative List that there is little need to provide examples here.

2.3. *Social Practices, Rituals and Festive Events*

Social practices and festive events have been considered as including, respectively “[a]ctivities, which manifest ever-changing concepts, knowledge and skills, related, among other things, to social relations, status, methods of decision-making, conflict resolution, and collective aspirations”,¹⁸ and “[a] collective gathering at which events of significance for a cultural community are proclaimed, celebrated, commemorated or otherwise highlighted, usually including dance, music and other performances.”¹⁹

Generally speaking, a social practice is something which occurs in everyday life, while a festive event is linked to specific days or periods of the year. Under certain circumstances, sport, law, medicine and food practices can also qualify as intangible cultural heritage. In the case of sports, the elements *Kirkpınar Oil Wrestling Festival* (Turkey),

¹⁵ *Ibid.*, Element No. 30.

¹⁶ UNESCO, *Representative List of the Intangible Cultural Heritage 2009* (UNESCO Publishing, 2009), Element No. 71.

¹⁷ *Glossary* (above n. 3), p. 5.

¹⁸ *Ibid.*, p. 6.

¹⁹ *Ibid.*, p. 5.

which is at the same time a competition and a traditional ceremony,²⁰ and *Naadam, Mongolian Traditional Festival*, based on the games of horseracing, wrestling and archery,²¹ have been included in the Representative List.

In the case of law, the elements *Irrigator's Tribunals of the Spanish Mediterranean Coast: The Council of Wise Men of the Plain of Murcia and the Water Tribunal of the Plain of Valencia* (Spain) and the *Wayuu Normative System, applied by the Pütchipü'üi (Palabrero)* (Colombia) are remarkable instances of the continuous application of customary systems of settlement of disputes. As regards the Spanish element,

[...] the irrigators' tribunals of the Spanish Mediterranean coast are traditional law courts for water management that date back to the al-Andalus period (ninth to thirteenth centuries). The two main tribunals – the Council of Wise Men of the Plain of Murcia and the Water Tribunal of the Plain of Valencia – are recognized under Spanish law. Inspiring authority and respect, these two courts, whose members are elected democratically, settle disputes orally in a swift, transparent and impartial manner. [...] They provide cohesion among traditional communities and synergy between occupations (wardens, inspectors, pruners, etc.), contribute to the oral transmission of knowledge derived from centuries-old cultural exchanges, and have their own specialist vocabulary peppered with Arabic borrowings. In short, the courts are long-standing repositories of local and regional identity and are of special significance to local inhabitants.²²

The Colombian element

[...] comprises a body of principles, procedures and rites that govern the social and spiritual conduct of the community. The system, inspired by principles of reparation and compensation, is applied by the local moral authorities, the Pütchipü'üi or palabreros (orators), who are experts in resolving conflicts and disputes between the local matrilineal clans. When problems arise, the authority of the Pütchipü'üi is sought by both parties in a dispute, the offender and those offended against. After analysing the situation, the Pütchipü'üi informs the authorities concerned of his intention to resolve the conflict peacefully. In the event that the word – *Pütchikalü* – is accepted, dialogue is established, wherein the Pütchipü'üi acts with diplomacy, caution and intelligence. The compensation system employs symbolism, represented primarily by the offering of necklaces made of precious stones or sacrifices of cattle, sheep and goats. Even the most serious crimes are compensated, compensations being offered at special events to which the disputing families are invited to re-establish social harmony through reconciliation.²³

A third legal element is the *Manden Charter, Proclaimed in Kurukan Fuga* (Mali), which is a customary constitution composed of a number of substantive provisions:

²⁰ UNESCO doc. ITH/10/5.COM/CONF.202/Decisions, 19 November 2010, p. 46.

²¹ *Ibid.*, p. 37.

²² *Representative List 2009* (above n. 16), Element No. 70.

²³ UNESCO doc. ITH/10/5.COM/CONF.202/Decisions (above n. 20), p. 17.

In the early 13th century, following a major military victory, the founder of the Mandingo Empire and the assembly of his wise men proclaimed in Kurukan Fuga the new Manden Charter, named after the territory situated above the upper Niger River basin, between present-day Guinea and Mali. The Charter, one of the oldest constitutions in the world albeit mainly in oral form, contains a preamble of seven chapters advocating social peace in diversity, the inviolability of the human being, education, the integrity of the motherland, food security, the abolition of slavery by *razzia* (or raid), and freedom of expression and trade. Although the Empire disappeared, the words of the Charter and the rituals associated with it are still transmitted orally from father to son in a codified way within the Malinke clans.²⁴

The *Acupuncture and Moxibustion of Traditional Chinese Medicine* (China) may be quoted in the field of medical practices.²⁵

In 2010 three quite general elements relating to food practices²⁶ were included in the Representative List, namely the *Gastronomic Meal of the French* (France), the *Traditional Mexican Cuisine – Ancestral, Ongoing Community Culture, the Michoacán Paradigm* (Mexico) and the *Mediterranean Diet* (Spain, Greece, Italy, Morocco). All of them have been considered as social practices as is clear from the following descriptions. Due to the controversial aspects these elements present,²⁷ they deserve to be quoted in full:

The gastronomic meal of the French is a customary social practice for celebrating important moments in the lives of individuals and groups, such as births, weddings, birthdays, anniversaries, achievements and reunions. It is a festive meal bringing people together for an occasion to enjoy the art of good eating and drinking. The gastronomic meal emphasizes togetherness, the pleasure of taste, and the balance between human beings and the products of nature. Important elements include the careful selection of dishes from a constantly growing repertoire of recipes; the purchase of good, preferably local products whose flavours go well together; the pairing of food with wine; the setting of a beautiful table; and specific actions during consumption, such as smelling and tasting items at the table. The gastronomic meal should respect a fixed structure, commencing with an *apéritif* (drinks before the meal) and ending with liqueurs, containing in between at least four successive courses, namely a starter, fish and/or meat with vegetables, cheese and dessert. Individuals called gastronomes that possess deep knowledge of the tradition and preserve its memory watch over the living practice of the rites, thus contributing to their oral and/or written transmission, in particular to younger generations. The gastronomic meal draws circles of family and friends closer together and, more generally, strengthens social ties.²⁸

²⁴ *Representative List 2009* (above n. 16), Element No. 59.

²⁵ UNESCO doc. ITH/10/5.COM/CONF.202/Decisions (above n. 20), p. 14.

²⁶ See in general R. Ardolino, "Tradizioni gastronomiche e Convenzione per la salvaguardia del patrimonio culturale immateriale, in Université d'été – VI édition, *Les paysages de l'alimentation responsable, de l'hospitalité, de la gastronomie et de l'aéologie* (Bruylant, 2010), p. 35.

²⁷ For an analysis of these three elements as regards the community of people involved see below, section 3.1.

²⁸ UNESCO doc. ITH/10/5.COM/CONF.202/Decisions (above n. 20), p. 21.

Traditional Mexican cuisine is a comprehensive cultural model comprising farming, ritual practices, age-old skills, culinary techniques and ancestral community customs and manners. It is made possible by collective participation in the entire traditional food chain: from planting and harvesting to cooking and eating. The basis of the system is founded on corn, beans and chili; unique farming methods such as milpas (rotating swidden fields of corn and other crops) and chinampas (man-made farming islets in lake areas); cooking processes such as nixtamalization (lime-hulling maize, which increases its nutritional value); and singular utensils including grinding stones and stone mortars. Native ingredients such as varieties of tomatoes, squashes, avocados, cocoa and vanilla augment the basic staples. Mexican cuisine is elaborate and symbol-laden, with everyday tortillas and tamales, both made of corn, forming an integral part of Day of the Dead offerings. Collectives of female cooks and other practitioners devoted to raising crops and traditional cuisine are found in the State of Michoacán and across Mexico. Their knowledge and techniques express community identity, reinforce social bonds, and build stronger local, regional and national identities. Those efforts in Michoacán also underline the importance of traditional cuisine as a means of sustainable development.²⁹

The Mediterranean diet constitutes a set of skills, knowledge, practices and traditions ranging from the landscape to the table, including the crops, harvesting, fishing, conservation, processing, preparation and, particularly, consumption of food. The Mediterranean diet is characterized by a nutritional model that has remained constant over time and space, consisting mainly of olive oil, cereals, fresh or dried fruit and vegetables, a moderate amount of fish, dairy and meat, and many condiments and spices, all accompanied by wine or infusions, always respecting beliefs of each community. However, the Mediterranean diet (from the Greek *diaita*, or way of life) encompasses more than just food. It promotes social interaction, since communal meals are the cornerstone of social customs and festive events. It has given rise to a considerable body of knowledge, songs, maxims, tales and legends. The system is rooted in respect for the territory and biodiversity, and ensures the conservation and development of traditional activities and crafts linked to fishing and farming in the Mediterranean communities of which Soria in Spain, Koroni in Greece, Cilento in Italy and Chefchaouen in Morocco are examples. Women play a particularly vital role in the transmission of expertise, as well as knowledge of rituals, traditional gestures and celebrations, and the safeguarding of techniques.³⁰

Food practices cannot be excluded from the domain of “social practices”, as was also remarked in the conclusions of the Expert Meeting on food practices held in Vitré in 2009, insofar as they are not limited to a satisfaction of biological needs but constitute a culturally elaborated experience.³¹ However, to consider a food practice merely as a way of bringing people together does not seem enough to distinguish it from several

²⁹ *Ibid.*, p. 35.

³⁰ *Ibid.*, p. 45.

³¹ See *Compte rendu* (above n. 9): “[...] Si les pratiques alimentaires ne sont pas explicitement mentionnées à l'article 2 ('Définitions') de la Convention, celles-ci sont néanmoins parties intégrantes du patrimoine culturel immatériel. [...] Il a été souligné d'emblée que les pratiques alimentaires ne devraient pas être considérées uniquement comme une réponse aux besoins biologiques, mais comme des expériences culturellement élaborées par les groupes humains tout au long de leur histoire. [...]”.

other social behaviours that are also aimed at bringing people together and have such a generic character that they cannot constitute intangible heritage (for example, playing bingo, showing holiday movies).³² There seems to be a need to identify a food practice by a reference to some specific food or food preparations. In fact, specific food references are easily found in the Mexican element (corn, beans, chili, tomatoes, squashes, avocados, cocoa, vanilla, nixtamalization). In the Mediterranean diet food references seem to be diluted into more general food categories (olive oil, cereals, fresh or dried fruit and vegetables, fish, dairy, meat, condiments, spices, wine, infusions).³³ In the French gastronomic meal the specific food references are almost non-existent and are replaced by a generic picture of social behavior (good eating and drinking, pleasure of taste, careful selection of dishes, setting of a beautiful table, drawing circles of family and friends closer together).

As regards “rituals”, during the negotiations it was generally accepted that religions were excluded from the notion of intangible cultural heritage as far as their theological and moral aspects are concerned. Nevertheless, the rituals associated with a religion, such as processions and sacred dances, do qualify as heritage. The Subsidiary Body for the Examination of Nominations to the Representative List of the Intangible Cultural Heritage of Humanity³⁴ remarked in its 2009 report:

While reaffirming that religion was crucial to the identity and life of communities, the Body held that religion as such fell outside the scope of the Convention. Nevertheless elements concerning cultural practices and expressions drawn from religion could be taken into account under the Convention. By the same token, a distinction was made between canonical or orthodox practices, deemed to fall outside the scope of the Convention, and popular religious customs, which could be considered intangible heritage.³⁵

There are several instances of religious rituals in the Representative List. Besides the traditional processions, such as *The Procession of the Holy Blood in Bruges* (Belgium),³⁶ ceremonies, such as *Yeongsanjae* (Republic of Korea),³⁷ or sacred musical dramas, such as the *Mystery Play of Elche* (Spain),³⁸ particularly interesting from a social perspective are the cases where a religious component serves the purpose of concealing another aspect that could not be freely manifested. This happens in the cases of the *Carnival of Oruro* (Bolivia) and of the *Mbende Jerusarema Dance* (Zimbabwe):

³² In this sense see also Maffei, chapter 4 in this volume.

³³ In this list only the entry of olive oil seems sufficiently specific.

³⁴ Hereinafter: the Subsidiary Body.

³⁵ UNESCO doc. ITH/09/4.COM/CONF.209/INF.6, 26 August 2009, p. 6.

³⁶ *Representative List 2009* (above n. 16), Element No. 4.

³⁷ *Ibid.*, Element No. 68.

³⁸ *Representative List 2008* (above n. 12), Element No. 77.

The town of Oruro, situated at an altitude of 3,700 metres in the mountains of western Bolivia and once a pre-Columbian ceremonial site, was an important mining area in the nineteenth and twentieth centuries. Resettled by the Spanish in 1606, it continued to be a sacred site for the Uru people, who would often travel long distances to perform their rituals, especially for the principal Ito festival. The Spanish banned these ceremonies in the seventeenth century, but they continued under the guise of Christian liturgy: the Andean gods were concealed behind Christian icons and the Andean divinities became the Saints. The Ito festival was transformed into a Christian ritual [...].³⁹

Under the influence of Christian missionaries, who strongly disapproved of this sexually explicit dance, the dance's name was changed to *Jerusarema*, deriving from the Shona adaptation of the name of the city of Jerusalem, to endow it with a religious connotation.⁴⁰

2.4. *Knowledge and Practices Concerning Nature and the Universe*

As regards the relationship with nature, the intangible cultural heritage is not limited to manifestations of human creativity that reinterpret or recreate nature, such as in the elements *Dragon Boats Festival* (China)⁴¹ or *Ritual Ceremony of the Voladores* (Mexico).⁴² It also includes manifestations of human creativity that are based on a deep knowledge of nature and are aimed at exploiting it for the satisfaction of concrete human needs. For instance, in the case of the *Andean Cosmivision of the Kallawaya* (Bolivia), the healing art

[...] derives from a deep understanding of animal, mineral and botanical pharmacopoeia and a body of ritual knowledge intimately linked to religious beliefs. The exclusively male itinerant healers treat patients using medical and pharmaceutical knowledge that revolves around a complex system of transmission and apprenticeship in which the journey plays an essential role. By travelling through widely varying ecosystems, Kallawaya healers expand their knowledge of medicinal plants. With some 980 species, their botanical pharmacopoeia rates as one of the richest in the world.⁴³

In the case of the *Woodcrafting Knowledge of the Zafimaniry* (Madagascar),

[...] for generations, Zafimaniry foresters, carpenters and craftworkers have developed a body of practical knowledge and skills revolving around wood. [...] The Zafimaniry use twenty different endemic species of tree, each adapted to a specific type of construction or decorative function.⁴⁴

³⁹ *Ibid.*, Element No. 11.

⁴⁰ *Ibid.*, Element No. 90.

⁴¹ *Representative List 2009* (above n. 16), Element No. 12. The dragon is not an existing animal, but is created by human imagination.

⁴² *Ibid.*, Element No. 62. The *voladores* cannot fly, but they behave as if they could.

⁴³ *Representative List 2008* (above n. 12), Element No. 12.

⁴⁴ *Ibid.*, Element No. 52.

2.5. *Traditional Craftsmanship*

There are so many manifestations of traditional craftsmanship in the Convention Lists that there is little need to provide many examples here. For example, the *Watertight-Bulkhead Technology of Chinese Junks* (China), inscribed in the Safeguarding List and developed in South China's Fujian Province

[...] permits the construction of ocean-going vessels with watertight compartments. If one or two cabins are accidentally damaged in the course of navigation, seawater will not flood the other cabins and the vessel will remain afloat. The junks are made mainly of camphor, pine and fir timber, and assembled through use of traditional carpenters' tools. They are built by applying the key technologies of rabbet-jointing planks together and caulking the seams between the planks with ramie, lime and tung oil. The construction is directed by a master craftsman who oversees a large number of craftsmen, working in close coordination.⁴⁵

2.6. *The Associated Instruments, Objects or Artifacts*

As pointed out in Article 2(1), the manifestations of intangible cultural heritage also include "the instruments, objects, artefacts" associated therewith. These things can be either the product of a manifestation, such as the carpets in the *Traditional Art of Azerbaijani Carpet Weaving in the Republic of Azerbaijan* (Azerbaijan)⁴⁶ and the *Traditional Skills of Carpet Weaving in Fars* (Iran)⁴⁷ or the daggers in the *Indonesian Kris* (Indonesia),⁴⁸ or the means through which it is performed, such as the puppets in *Opera dei Pupi, Sicilian Puppet Theatre* (Italy)⁴⁹ and the *Wayang Puppet Theatre* (Indonesia)⁵⁰ or the masks and drums in the case of the *Mask Dance of the Drums from Drametse* (Bhutan).⁵¹ It is difficult to find any manifestation of intangible cultural heritage that is not associated with any objects.⁵²

3. The Community of People

The intangible cultural heritage is recognized as such by "communities, groups and, in some cases, individuals" (Article 2(1)). This means that the heritage must not only be manifested, but also shared with, someone else. The social component of the intangible

⁴⁵ UNESCO doc. ITH/10/5.COM/CONF.202/Decisions (above n. 20), p. 5.

⁴⁶ *Ibid.*, p. 11.

⁴⁷ *Ibid.*, p. 28.

⁴⁸ *Representative List 2008* (above n. 12), Element No. 40.

⁴⁹ *Ibid.*, Element No. 42.

⁵⁰ *Ibid.*, Element No. 39.

⁵¹ *Ibid.*, Element No. 10.

⁵² Instances could perhaps be the "Canto a Tenore, Sardinian Pastoral Songs" (Italy) (see *ibid.*, Element No. 43) and the already quoted (above n. 16) "Whistled Language of the Island of La Gomera (Canary Islands), the Silbo Gomero".

cultural heritage marks a clear-cut distinction between this form of cultural heritage and the tangible cultural heritage, as defined in the Convention concerning the Protection of the World Cultural and Natural Heritage, where this component is lacking or is much less important.⁵³

This social component explains why the elements included in the lists established by the ICH Convention are seen as “representative of the intangible cultural heritage of humanity”⁵⁴ and do not need to present an “outstanding universal value”, as required for inscription on the lists drawn up under the World Heritage Convention.⁵⁵ In the case of the intangible cultural heritage, the lists are inclusive, and not exclusive. They are drawn “to ensure better visibility of the intangible cultural heritage and awareness of its significance” (Article 16(1)), and not to establish any hierarchy between different manifestations of it. Such a hierarchy would be contrary to the objectives of encouraging “dialogue which respects cultural diversity” (Article 16(1)) and of “bringing human beings closer together and ensuring exchange and understanding among them” (preamble).

The ICH Convention recalls communities and groups in a number of provisions, for example in Article 1(b), in Article 11(b),⁵⁶ in Article 14(a)(ii), and in Article 15 (where individuals are also mentioned).⁵⁷ There is so little difference between a “community” and a “group” that the two words can be considered as synonymous.⁵⁸ The Operational Directives for the Implementation of the Convention require, as criteria for inscription on either List, that “safeguarding measures are elaborated that may enable the community, group or, if applicable, individuals concerned to continue the practice and transmission of the element” and that “the element has been nominated following the widest possible participation of the community, group or, if applicable, individuals concerned and with their free, prior and informed consent” (directives 1 and 2).

⁵³ See Convention concerning the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972; 1037 UNTS 151) (World Heritage Convention), referring to monuments, groups of buildings and sites, as regards the cultural heritage (Article 1), and natural features, geological and physiographical formations and natural sites, as regards the natural heritage (Article 2).

⁵⁴ This is explicitly provided in Article 16 ICH Convention, but is also implied in Article 17, relating to the Safeguarding List.

⁵⁵ Namely the World Heritage List and the List of World Heritage in Danger.

⁵⁶ “Each State Party shall: [...] among the safeguarding measures referred to in Article 2, paragraph 3, identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations”.

⁵⁷ “Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management”.

⁵⁸ A community has been defined as “people who share a self-ascribed sense of connectedness. This may be manifested, for example, in a feeling of identity in a common behaviour, as well as in activities and territory. Individuals can belong to more than one community” (*Glossary* (above n. 3), p. 4).

It is regrettable that, probably as a consequence of the political sensitivity of the subject itself for certain States, indigenous communities⁵⁹ are mentioned only in the preamble of the ICH Convention,⁶⁰ where the General Conference of UNESCO recognizes that

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

In fact the ICH Convention was drafted also with the aim of safeguarding the cultural heritage of indigenous peoples, who own a very important part of the intangible cultural heritage of the world and have to face a number of threats affecting it in different ways, such as – depending on the circumstances – globalization, deforestation, commercial exploitation by strangers⁶¹ or armed conflicts. However, as was also remarked during the *travaux préparatoires* of the Convention, there is no doubt that indigenous communities are included in the broader term “communities”. A number of elements already appearing in the Representative List refer to indigenous communities, such as the *Andean Cosmovision of the Kallawayá* (Bolivia),⁶² the *Oral and Graphic Expressions of the Wajapi* (Brazil),⁶³ the *Oral Heritage and Cultural Manifestations of the Zápara People* (Ecuador and Peru)⁶⁴ and the *Rabinal Achí Dance Drama Tradition* (Guatemala).⁶⁵

⁵⁹ An indigenous community has been defined as “a community whose members consider themselves to have originated in a certain territory. This does not exclude the existence of more than one indigenous community in the same territory” (*ibid.*, p. 5).

⁶⁰ Minorities are not mentioned either. On the contrary, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 20 October 2005; 2440 UNTS 311) clearly provides that “the protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of, and respect of, all cultures, including the cultures of people belonging to minorities and indigenous peoples” (Article 3).

⁶¹ The recent Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya, 2010) recognizes the relevance of traditional knowledge associated with genetic resources and aims at ensuring the sharing in an equitable and fair way of the benefits arising from the utilization of such resources with the indigenous and local communities concerned.

⁶² Quoted above n. 43.

⁶³ *Representative List 2008* (above n. 12), Element No. 13.

⁶⁴ Quoted above n. 15.

⁶⁵ “The impact of armed conflict especially in the *departamentos* of Rabinal and K’iche has almost led to the disappearance of this dance” (*Representative List 2008* (above n. 12), Element No. 34). In fact, as found by the Inter-American Court of Human Rights in the decisions No. 105 of 29 April 2004 (merit) and No. 116 of 19 November 2004 (reparations) in the case *Masacre de Plan de Sánchez v. Guatemala*, “the Guatemalan Army, based on the ‘Doctrine of National Security,’ identified the members of the Mayan indigenous people as ‘domestic enemies,’ as they deemed that they were or could be the social base for the guerrilla forces. These people suffered massacres and ‘scorched earth operations’ that involved complete destruction of their communities, houses, livestock, harvests, and other means of survival, their culture, the use of their own cultural symbols, their social, economic, and political

In light of the first sentence of Article 2(1), single individuals who do not constitute a community or a group, for example because they are located in different parts of one or more States, can also share the same intangible cultural heritage, although only “in some cases”.⁶⁶ The word individual is used in the plural, probably to imply that there is always a need to have a plurality of persons involved. An instance of individuals who barely constitute a community is perhaps the element *Falconry, a Living Human Heritage* (United Arab Emirates, Belgium, Czech Republic, France, Republic of Korea, Mongolia, Morocco, Qatar, Saudi Arabia, Spain, Syria):

While falconers come from different backgrounds, they share common values, traditions and practices, such as the methods of training and caring for birds, the equipment used and the bonding between falconer and the bird, which are similar throughout the world.⁶⁷

3.1. *The Identification of a Community*

Being shared among a plurality of people, the intangible cultural heritage provides “a sense of identity” (Article 2(1)) to a specific community of bearers or practitioners⁶⁸ (the custodian community) who for this reason distinguish themselves from the rest of the world.⁶⁹ Practices or objects that are diffused worldwide, such as the use of the wheel, football, hamburgers or blue jeans, cannot identify any specific community and do not belong to the intangible cultural heritage.

Bearers and practitioners of the heritage may play different roles. For instance, *Tango* (Argentina, Uruguay)

[...] is practised in the traditional dance halls of Buenos Aires and Montevideo, spreading the spirit of its community across the globe even as it adapts to new environments and changing times. That community today includes musicians, professional and amateur dancers,

institutions, their cultural and religious values and practices” (para. 42.7 of decision No 105). “With the death of the women and elders, oral transmitters of the Maya-Achí culture, their knowledge could not be transmitted to the new generations and, today, this has produced a cultural vacuum. The orphans did not receive the traditional education handed down from their ancestors. In turn, the militarization and repression to which the survivors of the massacre were subjected, particularly the young men, has caused them to lose their faith in the traditions and knowledge of their forefathers. The victims could not freely perform the ceremonies and rites of their Mayan culture, because the military authorities controlled all their activities” (paras 49.12 and 49.13 of decision No. 116).

⁶⁶ However, the Convention does not specify in which cases the individuals could share the same intangible heritage and the second sentence of Article 2(1) forgets individuals by referring only to “communities and groups”.

⁶⁷ UNESCO doc. ITH/10/5.COM/CONF.202/Decisions (above n. 20), p. 49.

⁶⁸ The practitioner has been defined as “a member of a community who actively reproduces, transmits, transforms, creates and forms culture in and for the community by performing and otherwise maintaining social practices based on specialised knowledge and skills” (*Glossary* (above n. 3), p. 5).

⁶⁹ For more elaboration on this point, see Urbinati, chapter 11 in this volume.

choreographers, composers, songwriters, teachers of the art and the national living treasures who embody the culture of tango.⁷⁰

Simple connoisseurs and appraisers of the heritage, including spectators of performances or buyers of products, cannot be considered as members of the custodian community. But the great popularity of a manifestation does not exclude the fact that it belongs to the intangible cultural heritage, as remarked by the Subsidiary Body:

[...] the members of the Subsidiary Body considered that an element's great popularity, even internationally, did not mean that it was of less significance to the community to which it belonged. The Subsidiary Body held that the inscription of an element that was already well-known could help to increase the visibility of intangible cultural heritage in general, which should remain the principal objective of inscription.⁷¹

Something similar can be said about the question of commercialization:

The commercialization of an intangible heritage element and its consequences on the viability of the element were addressed. In that regard, too, the members of the Subsidiary Body were of the view that commercialization was not *a priori* a disqualifying factor, highlighting the vital role of the intangible cultural heritage as a factor of economic development in some communities. They did, however, point out that excessive commercialization could distort traditional cultural customs or expressions. It was therefore necessary to ensure that such processes remained under the control of the communities concerned and not of private companies.⁷²

As regards the delicate question of the commercial use of some elements included in the Representative List, in 2010 the Committee invited the States Parties "to take all necessary measures in order to avoid any commercial misappropriation of inscribed elements, in particular of generic elements covering several domains, through the use of the Convention's emblem for purposes of commercial instrumentalization and branding".⁷³

3.2. *The Transmission of Heritage*

The intangible cultural heritage also provides "a sense of [...] continuity" (Article 2(1)), second sentence) to a specific community, as it is voluntarily transmitted without interruption

⁷⁰ *Representative List 2009* (above n. 16), Element No. 1.

⁷¹ UNESCO doc. ITH/09/4.COM/CONF.209/INF.6 (above n. 35), p. 7.

⁷² *Ibid.*, p. 6.

⁷³ Decision 5.COM 6 in UNESCO doc. ITH/10/5.COM/CONF.202/Decisions (above n. 20), p. 9. The Convention does not enter into the question of intellectual property rights on the intangible cultural heritage: "Nothing in this Convention may be interpreted as: [...] (b) affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties" (Article 3(b)). See T. Kono (ed.), *Intangible Cultural Heritage and Intellectual Property* (Intersentia, 2009).

from bearers to recipients. A mere exhibition of a certain skill, without any desire to transmit it, cannot qualify for intangible cultural heritage. Transmission can take place in several forms: in families from parents to children, at work from masters to apprentices, at school from teachers to pupils.

Transmission is stressed in many elements inscribed in the Lists. For example, in the case of the *Craftsmanship of Alençon Needle Lace-Making* (France):

Each Alençon lace-maker knows how to complete all the stages of the process – knowledge that can only be transmitted through a practical apprenticeship. To fully master Alençon needle lace-making requires seven to ten years of training. The learning method relies on a close relationship between the specialized lace-maker and the apprentice, and is exclusively based on oral transmission and practical teaching.⁷⁴

The practice of transmission itself has been inscribed in the Representative List in the case of *Compagnonnage, Network for On-the-job Transmission of Knowledge and Identities* (France):

The French Compagnonnage system is a unique way of conveying knowledge and know-how linked to the trades that work with stone, wood, metal, leather, textiles and food. [...] Those aged 16 years or over who wish to learn and/or develop their skills in a given profession can apply to join a Compagnonnage community. Training lasts on average five years, during which apprentices regularly move from town to town, both in France and internationally, to discover types of knowledge and ways of passing them on.⁷⁵

3.3. *The Recreation of Heritage*

As it is transmitted from generation to generation, the intangible cultural heritage is “constantly recreated by communities and groups in response to their environment, their interaction with nature and their history” (Article 2(1)). The concepts of recreation or reinterpretation imply that changes occur with the passing of time, as is inevitable due to the living character of the heritage.

Changes are evident in many among the elements inscribed in the Lists. For example, the *Oral and Graphic Expressions of the Wajapi* (Brazil) is the heritage of a community that has a long history of using vegetable dyes to adorn bodies and objects with geometric motifs:

This coded repertory of traditional knowledge is perpetually evolving as indigenous artists are constantly reconfiguring the motifs and inventing new patterns.⁷⁶

⁷⁴ UNESCO doc. ITH/10/5.COM/CONF.202/Decisions (above n. 20), p. 21.

⁷⁵ *Ibid.*, p. 20.

⁷⁶ *Representative List 2008* (above n. 12), Element No. 13.

In the case of the *Aalst carnival* (Belgium):

[...] in addition to the carefully-prepared floats of official entrants, informal groups join the festivities to offer mocking interpretations of local and world events of the past year. The 600-year-old ritual, drawing up to 100,000 spectators, is a collective effort of all social classes and a symbol of the town's identity in the region. Constantly recreated by new generations, the ancient carnival's collective laughter and slightly subversive atmosphere celebrate the unity of Aalst.⁷⁷

Changes follow evolution of times also in the cases of *The Traditional Manufacturing of Children's Wooden Toys in Hrvatsko Zagorje* (Croatia) and the *Gule Wamkulu* (Malawi, Mozambique, Zambia), where, in a rather unexpected way, wild animals, slave traders and motorcycles dance together today:

They have also evolved with the times and, in addition to the traditional shapes such as horses and carts, new ones representing cars, trucks, airplanes and trains have appeared, reflecting the world surrounding modern-day children.⁷⁸

[...] the Nyau dancers wear costumes and masks made of wood and straw, representing a great variety of characters, such as wild animals, spirits of the dead, slave traders as well as more recent figures such as the honda or the helicopter.⁷⁹

The concepts of recreation and reinterpretation entail the difficult question of determining to what extent changes in the quality of the heritage are acceptable. Natural transformation does not mean artificial alteration, even though many variations can be found in the space between one extreme and the other. As regards modernization, the Subsidiary Body, moving from the ever-changing nature of intangible cultural heritage, remarked that

[...] the modernization of production methods, mechanization and electrification would not be regarded as *a priori* disqualifying an element of intangible cultural heritage, particularly as regards craft practices, as long as the requirements were met that emphasis remained on the human factor of the element and that mechanization duly respected the aspirations of the communities concerned. The Subsidiary Body considered, however, that the degree of mechanization in the production of the element must be appraised case by case when the files were being examined.⁸⁰

Another difficult question relates to the "revitalization" of the intangible cultural heritage, intended as:

⁷⁷ UNESCO doc. ITH/10/5.COM/CONF.202/Decisions (above n. 20), p. 11.

⁷⁸ *Representative List 2009* (above n. 16), Element No. 35.

⁷⁹ *Representative List 2008* (above n. 12), Element No. 54.

⁸⁰ UNESCO doc. ITH/09/4.COM/CONF.209/INF.6 (above n. 35), p. 6.

[If referring to practices developed by the cultural community] reactivating or reinventing social practices and representations, which are no longer in use or falling in disuse.

[If referring to heritage policies] the encouragement and support of a local community, developed with the agreement of that same community, in the reactivation of social practices and representations, which are no longer in use or falling in disuse.⁸¹

The problems posed by revitalization are due to the fact that the intangible cultural heritage is subject not only to transformation, but also to death, like every social manifestation. The definitive loss of the heritage can be the consequence of a great variety of events, of either a natural (for example, deforestation or drought) or a social (for example, conflicts or urbanization) character. It may also be due to the simple indifference shown by the young generations towards the traditions of their parents and grandparents. Article 2(3) of the Convention includes among the “safeguarding measures” aimed at ensuring the viability of the intangible cultural heritage also the “revitalization” of it. In fact, the inclusion of the word “revitalization” was the most discussed issue during the negotiations for the Convention. Does it mean that a manifestation of heritage that has died can be resuscitated? Should the State provide incentives to lead unwilling people to engage in a fading practice or should it limit itself to documenting the last manifestations of it for the records and archives? Is it in conformity with the spirit of the Convention that someone takes the initiative to restore a practice that is no longer in use because it can be of commercial interest to perform it for tourists or to sell the relevant products to visitors? Can a tournament of the Middle Ages be revitalized through a parade of *majorettes*?

On the thorny issue of revitalization the Subsidiary Body was not able to take a clear-cut position:

The issue of revitalization was also discussed. The Subsidiary Body spoke out in favour of elements that, despite being threatened, played a key role in a community’s collective memory. Even if they were not in regular use, they could be revitalized and could once more fulfil socio-cultural functions. A lapsed element that had subsequently been revitalized could also be included in that category. Nevertheless, some members of the Body pointed out that the main purpose of the Convention was to safeguard living intangible cultural heritage, and emphasized the need to avoid trying to revive historical practices that no longer had a social function in contemporary society.⁸²

The question of revitalization can be raised, for instance, in the case of the *Mevlevi Sema Ceremony* (Turkey), which is based on the whirling dances performed by the members of the Mevlevi ascetic Sufi order, founded in 1273 in Konya:

⁸¹ *Glossary* (above n. 3), p. 6.

⁸² UNESCO doc. ITH/09/4.COM/CONF.209/INF.6 (above n. 35), p. 6.

Dancers used to receive 1,001 days of reclusive training within the mevlevi-houses (mevlevihane), where they learned about ethics, codes of behaviour and beliefs by practising prayer, religious music, poetry and dance. After this training, they remained members of the order but returned to their work and families. As a result of secularization policies, all mevlevihane were closed in 1925. The Turkish government began to allow performances again, though only in public, in the 1950s, restrictions were eased in the 1990s. Some private groups are re-establishing the original spiritual and intimate character of the Sema ceremony. However, over the thirty years the tradition was practised clandestinely, transmission focused rather on music and songs than on spiritual and religious traditions, which has deprived performances of part of their religious significance. Consequently, many Sema ceremonies are no longer performed in their traditional context but for tourist audiences, and have been shortened and simplified to meet commercial requirements.⁸³

4. The Cultural Space

The intangible cultural heritage is associated with a “cultural space”⁸⁴ and is constantly recreated by communities and groups “in response to their environment” and “their interaction with nature and their history”.⁸⁵ The heritage is closely tied to the natural and historical environment in which it is created and transmitted.

A space intended in a cultural sense cannot be identified by lines drawn on maps, as is required for the properties inscribed on the lists established under the World Heritage Convention.⁸⁶ A cultural space must be intended according to its social character as “a physical or symbolic space in which people meet to enact, share or exchange social practices or ideas”.⁸⁷

Even a square, such as in the case of the *Cultural Space of Jemaa el-Fna Square* (Morocco), is no longer a space delimited on the topographical map of the city of Marrakesh. It has become a major place of cultural exchange and a unique concentration of popular traditions:

⁸³ *Representative List 2008* (above n. 12), Element No. 81.

⁸⁴ ICH Convention, Article 2(1). See Scovazzi T., *Le concept d'espace dans trois conventions UNESCO sur la protection du patrimoine culturel*, in *L'Observateur des Nations Unies*, 2009, p. 7.

⁸⁵ ICH Convention, Article 2(1).

⁸⁶ According to para. 132 of the Operational Guidelines for the Implementation of the World Heritage Convention, “for a nomination to be considered as ‘complete’, the following requirements are to be met: 1. Identification of the Property. The boundaries of the property being proposed shall be clearly defined, unambiguously distinguishing between the nominated property and any buffer zone (when present) [...]. Maps shall be sufficiently detailed to determine precisely which area of land and/or water is nominated. Officially up-to-date published topographic maps of the State Party annotated to show the property boundaries shall be provided if available. A nomination shall be considered ‘incomplete’ if it does not include clearly defined boundaries.”

⁸⁷ *Glossary* (above n. 3), p. 4.

Located at the entrance of the Medina, this triangular square, which is surrounded by restaurants, stands and public buildings, provides everyday commercial activities and various forms of entertainment. It is a meeting point for both the local population and people from elsewhere. All through the day, and well into the night, a variety of services are offered, such as dental care, traditional medicine, fortune-telling, preaching, and henna tattooing; water-carrying, fruit and traditional food may be bought. In addition, one can enjoy many performances by storytellers, poets, snake-charmers, Berber musicians (mazighen), Gnaoua dancers and senthir (hajouj) players. The oral expressions would be continually renewed by bards (imayazen), who used to travel through Berber territories. They continue to combine speech and gesture to teach, entertain and charm the audience. Adapting their art to contemporary contexts, they now improvise on an outline of an ancient text, making their recital accessible to a wider audience.⁸⁸

A cultural space is not an immovable property, but can be transferred elsewhere if the custodian community of the heritage or some members of it move to another location. In the case of the *Cultural Space and Oral Culture of the Semeiskie* (Russian Federation), the Semeiskie communities are

[...] formed by a group of so-called “Old Believers”, a confessional community originating from the time of the Instigation of the Russian Orthodox Church in the seventeenth century. Their history is marked by repression and exile. During the reign of Catherine the Great, believers in the “old system” from various regions of Russia had to move to the Transbaikal region in Siberia, where they still live today. In this remote area, they have preserved elements of their respective culture, forming a distinct group identity.⁸⁹

The cultural concept of space has very little to do with the legal concept of territory over which a State exercises its sovereignty. As a number of elements inscribed in the Representative List show, the same intangible cultural heritage can belong to the territory of two or more States, if it has a transboundary or even transcontinental character. To avoid the risk of fragmentation of the same heritage, paragraph 13 of the Operational Directives encourages States Parties to jointly submit multi-national nominations to the Lists when an element is found on the territory of more than one of them.

5. Aspects Not Related to the Definition

Besides providing the three essential components of the definition of intangible cultural heritage, Article 2(1) of the ICH Convention also deals with other aspects which, while very important for the purposes of the Convention, do not properly belong to the domain of a definition. The promotion of “respect for cultural diversity and human creativity”,

⁸⁸ *Representative List 2008* (above n. 12), Element No. 60.

⁸⁹ *Ibid.*, Element No. 73.

mentioned in Article 2(1), is more a consequence of being intangible cultural heritage than a condition for being it. As it is formulated, the third sentence of Article 2(1) relates to three conditions that prevent the application of the ICH Convention and has little to do with the definition of intangible cultural heritage. In fact, the sentence implies that manifestations that are not compatible with existing international human rights instruments or with the requirements of mutual respect among communities, groups and individuals and of sustainable development could in principle also belong to the domain of intangible cultural heritage. However, the scope of application of the Convention does not cover such manifestations, with all the relevant consequences (for example, States Parties are not bound to safeguard them, they cannot be inscribed on the Lists, etc.).

The 2010 meeting of the Committee, where questions related to human rights⁹⁰ and mutual respect among communities⁹¹ were evoked, shows how interesting any future developments in the application of the three conditions may be. But each of them deserves to be defined and analyzed by itself and not as part of a broader concept of intangible cultural heritage.

6. Conclusions

The ICH Convention was negotiated and adopted to fill a gap within the UNESCO regime of cultural heritage protection and to give due recognition to an aspect of cultural heritage which, although not tangible in the same way as monuments, buildings or sites, is equally important “as a mainspring of cultural diversity and a guarantee of sustainable

⁹⁰ It happened in the case of *Human Towers* (Spain): “The human towers are formed by *castellers* standing on the shoulders of one another in a succession of stages (between six and ten). Each level of the *tronc*, the name given to the second level upwards, generally comprises two to five heavier built men supporting younger, lighter-weight boys or girls. The *pom de dalt* – the three uppermost levels of the tower – comprises young children” (UNESCO doc. ITH/10/5.COM/CONF.202/Decisions (above n. 20), p. 44). At the 2010 meeting of the Committee a letter was read where the Grup d’Acció Valencianista argued that this performance is against the rights of the children, in particular their right to health: “[...] los ‘Castellers’ son torres humanas que simbolizan edificios o ‘castells’. Esta forma de festividad tradicional en Cataluña sufrió el pasado 23 de julio de 2006 un duro golpe, Mariona Galindo una niña catalana de 12 años falleció por traumatismo craneo encefálico al caerse de un castell de nueve pisos, en una exhibición durante la fiesta mayor de Mataró. La niña, que participaba en los castillos en la posición de ‘dosos’, en el antepenúltimo piso de la torre, se lesionó la espalda al caer al vacío cuando el grupo estaba a punto de coronar la construcción. No fue la primera víctima infantil de esta peligrosa tradición, ya en 1983, otro niño falleció cuando cayó al suelo en Barbera del Vallés”.

⁹¹ As stated in Decision 5.COM 6 (UNESCO doc. ITH/10/5.COM/CONF.202/Decisions (above n. 20), p. 10), the Committee invited States Parties to “ensure that, in case of proposals of elements containing references to war or conflict or specific historical events, the nomination file should be elaborated with utmost care, in order to avoid provoking misunderstanding among communities in any way, with a view to encouraging dialogue and mutual respect among communities, groups and individuals”.

development” (preamble of the Convention). This heritage is often endangered by the processes of globalization and social transformation, which in turn can give rise to neglect or intolerance.

The negotiations for the Convention were conducted in a spirit of cooperation and without any particularly serious obstacles. This was also because the two thorniest issues, namely the question of indigenous peoples’ rights and that of intellectual property rights over elements of the intangible cultural heritage, were deliberately left aside.

Definitions are difficult in any legal text.⁹² Rather than a definition, the Convention provides a description of the essential components contained within the concept of intangible cultural heritage. While giving general guidance, this description is flexible enough to serve as a starting point for future practice to be developed by the Committee when deciding on the inscriptions on the Lists.

⁹² “Omnis definitio in iure civili periculosa est” (Digest of the Roman emperor Justinian, book 50, title 17, fragment 202).