

# The Safeguarding of the Intangible Cultural Heritage According to the 2003 UNESCO Convention: The Case of First Nations of Canada\*

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## **Abstract**

The paper aims at providing an overview of the rules of international law applicable to the protection of the intangible cultural heritage, as defined in the Convention for the Safeguarding of the Intangible Cultural Heritage, adopted in 2003 within the framework of the UNESCO and today in force for 174 States. The paper elaborates on the definition of the intangible cultural heritage and its main components — an element of intangible cultural heritage, a community of people and a cultural space — and makes some remarks on two questions that were deliberately left aside from the scope of the Convention, namely the rights of indigenous peoples and the relationship between the intangible cultural heritage and intellectual property rights. Consideration is finally given to the special case of the First Nations of Canada, who are the bearers of an important intangible cultural heritage.

## *French translation*

L'article vise à donner un aperçu des règles du droit international applicables à la protection du patrimoine culturel immatériel, tel que défini dans la Convention pour la Sauvegarde du Patrimoine Culturel Immatériel, adoptée en 2003 dans le cadre de l'UNESCO et aujourd'hui en vigueur pour 174 États. L'article élabore la définition du patrimoine culturel immatériel et ses composantes principales - un élément du patrimoine culturel immatériel, une communauté de personnes et un espace culturel - et fait quelques remarques sur deux questions qui ont été délibérément écartées du champ d'application de la Convention, à savoir les droits des peuples autochtones et la relation entre le patrimoine culturel immatériel et les droits de propriété intellectuelle. Enfin, l'article terminera par traiter du cas spécial des Premières Nations du Canada, qui sont les porteurs d'un important patrimoine culturel immatériel.

## *Spanish translation*

En este artículo se pretende ofrecer un panorama general de las normas del derecho internacional aplicables a la protección del patrimonio cultural inmaterial, tal y como está definido en la Convención para la Salvaguardia del Patrimonio Cultural Inmaterial, aprobada en 2003 por la Unesco y actualmente en vigor en 174 estados. Asimismo, se trata más en profundidad la definición de patrimonio cultural inmaterial y sus principales componentes —un elemento del patrimonio cultural inmaterial, una comunidad de personas y un espacio cultural— y se formulan algunas observaciones sobre dos cuestiones deliberadamente excluidas del marco de la Convención y que son los derechos de los pueblos indígenas y la relación entre el patrimonio cultural inmaterial y los derechos de propiedad intelectual. Por

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\* T. Scovazzi has written paras. 1 to 4 and L. Westra para. 5.

último, se considera el caso especial de las Primeras Naciones de Canadá, que son portadoras de un importante patrimonio cultural inmaterial.

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2. The obligations and mechanisms established by the Convention;
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## Introduction

This paper aims at providing an overview of the rules of international law applicable to the protection of the intangible cultural heritage, as defined in the Convention for the Safeguarding of the Intangible Cultural Heritage, adopted in 2003 within the framework of the UNESCO and today in force for many States. The paper elaborates on the definition of the intangible cultural heritage and its main components—a subject of particular interest for anthropologists—and makes some remarks on two questions that were deliberately left aside from the scope of the Convention, namely the rights of indigenous peoples and the relationship between the intangible cultural heritage and intellectual property rights. Consideration is finally given to the special case of the First Nations of Canada, who are the bearers of an important intangible cultural heritage.

### 1. A Heritage in Need of Safeguarding

In the first years of this century, new instruments were negotiated and adopted at the international level within the framework of United Nations Educational, Scientific and Cultural Organization (UNESCO) and have enlarged the scope of international treaty law relating to the protection of all components of the cultural heritage. One of these instruments is the Convention for the Safeguarding of the Intangible Cultural Heritage, which was adopted in Paris on 17 October 2003, entered into force on 20 April 2006 and is now (June 2017) binding on the notable number of 174 States Parties.<sup>1</sup> The Convention was negotiated to fill a gap within the UNESCO legal instruments and to put due emphasis on an aspect of cultural heritage that, although not as “tangible” as monuments, buildings or natural sites,<sup>2</sup> is equally important “as a mainspring of cultural diversity and a guarantee of sustainable development” (preamble of the Convention).<sup>3</sup>

For many countries, especially developing countries, traditional culture represents the principal form of cultural expression and is an important contribution to economic and social progress. However, it is a heritage in danger. The present trend of globalization threatens the continuation of traditional practices, also because people, in particular young people, are attracted to a unified culture, mostly based on Anglo-American models. The loss of the intangible heritage is aggravated by phenomena of neglect and intolerance, as it is recalled in the preamble of the Convention, where the Parties recognize that:

[T]he processes of globalization and social transformation, alongside the conditions they create for renewed dialogue among communities, also give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the intangible cultural

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<sup>1</sup> *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006) [The Convention]; see Janet Blake, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage*, (Leicester: Institute of Art & Law, 2006); Toshiyuki Kono, “UNESCO and Intangible Cultural Heritage from the Viewpoint of Sustainable Development” in Abdulqawi A Yusuf, ed, *Standard-Setting in UNESCO, Vol I: Normative Action in Education, Science and Culture: Essays in Commemoration of the Sixtieth Anniversary of UNESCO*, (Leiden: Martinus Nijhoff Publishers, 2007) 237; Burra Srinivas, “The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage” in James A R Nafziger & Tullio Scovazzi, eds, *Le patrimoine culturel de l’humanité – The Cultural Heritage of Mankind*, (Leiden: Martinus Nijhoff Publishers, 2008) 529; Toshiyuki Kono, ed, *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21<sup>st</sup> Century* (Leiden: Martinus Nijhoff Publishers, 2010); Tullio Scovazzi, “The Definition of Intangible Cultural Heritage” in Silvia Borelli and Federico Lenzerini, eds, *Cultural Heritage, Cultural Rights, Cultural Diversity* (Leiden: Martinus Nijhoff Publishers, 2012) 179; Lucas Lixinski, *Intangible Cultural Heritage in International Law*, (Oxford: Oxford University Press, 2013).

<sup>2</sup> The “tangible” heritage is the subject of UNESCO’s well-known 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972.

<sup>3</sup> The *Convention*, *supra* note 1, Preamble.

heritage, in particular owing to a lack of resources for safeguarding such heritage.<sup>4</sup>

The intangible cultural heritage is viewed today as a common interest of humanity that, besides its national dimension, deserves to be protected also under principles and rules of international law, as seen in Art. 19, para. 2 of the Convention:

[W]ithout prejudice to the provisions of their national legislation and customary law and practices, the States Parties recognize that the safeguarding of intangible cultural heritage is of general interest to humanity, and to that end undertake to cooperate at the bilateral, subregional, regional and international levels.<sup>5</sup>

Apart from its cultural dimension, the intangible cultural heritage also involves other fundamental values, such as the preservation of the natural environment and the respect of human rights, especially those of indigenous peoples and minority groups.

## 2. The Obligations and Mechanisms Established by the Convention

The purposes of the Convention are stated in Art. 1:

- (a) to safeguard the intangible cultural heritage;
- (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;
- (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;
- (d) to provide for international cooperation and assistance.<sup>6</sup>

The first three purposes are linked, as the intangible cultural heritage cannot be safeguarded without appreciating the communities, groups and individuals who are its performers and custodians, and without raising general awareness of its importance.

The main obligations of States Parties relate to the identification and definition of the various elements of the intangible cultural heritage present in their territory, with the participation of communities, groups and relevant non-governmental organizations;<sup>7</sup> the drawing up and updating, in a manner geared to their own situation, of one or more inventories of the intangible cultural heritage present in their territory;<sup>8</sup> the adoption of training, educational, awareness-raising and informational programmes, as well as the promotion of capacity-building activities for the safeguarding of the intangible cultural heritage.<sup>9</sup> The States Parties are bound to submit reports on the legislative, regulatory and other measures taken for the implementation of the Convention.<sup>10</sup>

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, art 19(2).

<sup>6</sup> *Ibid.*, art 1.

<sup>7</sup> *Ibid.*, art 11.

<sup>8</sup> *Ibid.*, art 12.

<sup>9</sup> *Ibid.*, art 14.

<sup>10</sup> *Ibid.*, art 29.

At the international level, the Convention provides for the establishment of a Representative List of the Intangible Cultural Heritage of Humanity, “in order to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity”,<sup>11</sup> and a List of Intangible Cultural Heritage in Need of Urgent Safeguarding.<sup>12</sup> A third list is also drawn up to include the national, sub-regional and regional programmes, projects and activities for the safeguarding of the heritage which best reflect the principles and objectives of the Convention (so-called “best practices”), taking into account the special needs of developing countries.<sup>13</sup> Besides other functions, the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (hereinafter, the Committee), which has been established by the Convention,<sup>14</sup> is in charge of examining the proposals submitted by States Parties for inscription on the lists of elements of intangible cultural heritage and best practices. In its eight years of activity (from 2008 to 2016), the Committee has inscribed 365 elements in the Representative List, 47 in the Urgent List and 17 in the Best Practices List.<sup>15</sup>

The Convention includes provisions for international co-operation and assistance and sets up a Fund for the Safeguarding of the Intangible Cultural Heritage.<sup>16</sup>

### 3. The Definition of Intangible Cultural Heritage

The definition of intangible heritage is particularly interesting, as addressed in Art. 2, para. 1, of the Convention:

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.

Accordingly, the essential components of the concept of intangible cultural heritage seem to be: A) an element of such heritage (objective component); B) a community of people (subjective or social component); and C) a cultural space (spatial component).<sup>17</sup>

#### 3.A. The Element of Intangible Cultural Heritage

Art. 2, para. 2, of the Convention provides several concrete examples of domains in which the intangible cultural heritage can be manifested:

- (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;

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<sup>11</sup> *Ibid*, art 16.

<sup>12</sup> *Ibid*, art 17.

<sup>13</sup> *Ibid*, art 18(1).

<sup>14</sup> *Ibid*, arts 5–8.

<sup>15</sup> *Ibid*, arts 16-18.

<sup>16</sup> *Ibid*, art 25.

<sup>17</sup> The *Convention*, *supra* note 1, art 2(1).

(e) traditional craftsmanship.<sup>18</sup>

The same element can belong to two or more different domains. For example, in vocal music, storytelling or sung poetry, the distinction between performing arts and oral expression becomes blurred; food practices can be listed in all the last three domains.

The negotiators of the Convention discussed whether languages could be included among the manifestations of the intangible cultural heritage. At the end, languages were included only insofar as they can be considered as “a vehicle of the intangible cultural heritage”.<sup>19</sup> The consequence seems to be that a language, such as English or Chinese, cannot be considered in itself a manifestation of the intangible cultural heritage. However, a language could qualify as such if it becomes a means for the expression of what already belongs to the domain of the intangible cultural heritage.<sup>20</sup>

The domain of social practices can include elements belonging to, *inter alia*, sports,<sup>21</sup> law,<sup>22</sup> medicine<sup>23</sup> or food.<sup>24</sup> With regard to “rituals”, during the negotiations it was generally agreed 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,<sup>25</sup> do qualify as the heritage.

Concerning the relationship with nature, intangible cultural heritage is not limited to manifestations of human creativity that reinterpret or recreate nature.<sup>26</sup> It also includes

18 Ibid, art 2(2); the external manifestation does not necessarily mean that access to the intangible cultural heritage should be open to everyone, considering that the States Parties to the Convention are, *inter alia*, bound to respect “customary practices governing access to specific aspects of such heritage,” The Convention, art 13(d)(ii).

19 The *Convention*, *supra* note 1, art 2(2)(a).

20 For example, within the element “Oral Heritage and Cultural Manifestations of the Zápara People” (Ecuador, Peru), the language expresses the extremely rich understanding of nature by the Zápara people, online: <<http://www.unesco.org/culture/ich/en/RL/oral-heritage-and-cultural-manifestations-of-the-zapara-people-00007>>; the element “Whistled Language of the Island of La Gomera (Canary Islands), the Silbo Gomero” (Spain) shows that although in itself the Spanish language does not qualify for the definition of intangible cultural heritage, the situation completely changes if Spanish is not spoken, but whistled, online: <<http://www.unesco.org/culture/ich/en/RL/whistled-language-of-the-island-of-la-gomera-canary-islands-the-silbo-gomero-00172>>.

21 For example, “Kırkpınar Oil Wrestling Festival” (Turkey), online: <<http://www.unesco.org/culture/ich/en/RL/krkpınar-oil-wrestling-festival-00386>>

22 For example, “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), online: <<http://www.unesco.org/culture/ich/en/RL/irrigators-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-00171>> and “Wayuu Normative System, applied by the Pütchipü’üi (Palabrero)” (Colombia), online: <<http://www.unesco.org/culture/ich/en/RL/wayuu-normative-system-applied-by-the-putchipui-palabrero-00435>>.

23 For example, UNESCO, “Acupuncture and Moxibustion of Traditional Chinese Medicine” (2010) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/acupuncture-and-moxibustion-of-traditional-chinese-medicine-00425>>.

24 For example, UNESCO, “Gastronomic Meal of the French” (2010) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/gastronomic-meal-of-the-french-00437>>; UNESCO, “Traditional Mexican Cuisine – Ancestral, Ongoing Community Culture, the Michoacán Paradigm” (2010) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/traditional-mexican-cuisine-ancestral-ongoing-community-culture-the-michoacan-paradigm-00400>>; and UNESCO, “Mediterranean Diet” (2013) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/mediterranean-diet-00884>>.

25 See e.g. UNESCO, “The Procession of the Holy Blood in Bruges” (2009) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/procession-of-the-holy-blood-in-bruges-00263>>; UNESCO, “Yeongsanjae” (2009) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/yeongsanjae-00186>>; UNESCO, “Mystery Play of Elche: Spain” (2008) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/mystery-play-of-elche-00018>>.

26 See e.g. UNESCO, “Dragon Boat festival: China” (2009) *Representative List of the Intangible Cultural Heritage of Humanity*, online <<https://ich.unesco.org/en/RL/dragon-boat-festival-00225>>; UNESCO, “Ritual ceremony of the Voladores: Mexico” (2009) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/ritual-ceremony-of-the-voladores-00175>>. The dragon is not an existing animal, but is created by human imagination. The *voladores* cannot fly, but they behave as if they could.

manifestations of human creativity that are based on a deep knowledge of nature and are aimed at exploiting nature for the satisfaction of concrete human needs, such as the healing arts<sup>27</sup> or wood-crafting.<sup>28</sup>

The manifestations of intangible cultural heritage also include the instruments, objects and artifacts associated therewith. These items can be either the product of a practice<sup>29</sup> or the means through which it is performed.<sup>30</sup> It is difficult to find any manifestation of intangible cultural heritage that is not associated with any objects.<sup>31</sup>

### 3.B. The Community of People

According to Art. 2, para. 1, of the Convention:

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.<sup>32</sup>

Because intangible cultural heritage is shared among a plurality of people, this type of heritage provides “a sense of identity and continuity” to a specific community of bearers or practitioners (the custodian community), who by this aspect distinguish themselves from the rest of the world.<sup>33</sup> Practices or objects that are diffused worldwide, such as the wheel, the football, the Olympic Games, hamburgers or blue jeans, are not associated with any specific community and cannot belong to the intangible cultural heritage.

Simple connoisseurs and appraisers of the heritage, including spectators at performances or buyers of products, cannot be considered as members of the custodian community. However, the great popularity of an element<sup>34</sup> does not prevent it from belonging to the intangible cultural heritage, provided that a custodian community can be identified.

<sup>27</sup> See e.g. UNESCO, “Andean cosmovision of the Kallawaya: Bolivia (Plurinational State of)” (2008) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/andean-cosmovision-of-the-kallawaya-00048>>.

<sup>28</sup> See e.g. UNESCO, “Woodcrafting knowledge of the Zafimaniry: Madagascar” (2008) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/woodcrafting-knowledge-of-the-zafimaniry-00080>>.

<sup>29</sup> See e.g. UNESCO, “Traditional Art of Azerbaijani carpet weaving in the Republic of Azerbaijan: Azerbaijan” (2010) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/traditional-art-of-azerbaijani-carpet-weaving-in-the-republic-of-azerbaijan-00389>>; “Traditional Skills of Carpet Weaving in Fars” (Iran), online: <<https://ich.unesco.org/en/RL/traditional-skills-of-carpet-weaving-in-fars-00382>> and “Indonesian Kris” (Indonesia), online: <<https://ich.unesco.org/en/RL/indonesian-kris-00112>>.

<sup>30</sup> For example, the puppets in “Opera dei Pupi, Sicilian Puppet Theatre” (Italy), online: <<https://ich.unesco.org/en/RL/opera-dei-pupi-sicilian-puppet-theatre-00011>>; the “Wayang Puppet Theatre” (Indonesia), online: <<https://ich.unesco.org/en/RL/wayang-puppet-theatre-00063>>, and the masks and drums in the “Mask Dance of the Drums from Drametse” (Bhutan), online: <<https://ich.unesco.org/en/RL/mask-dance-of-the-drums-from-drametse-00161>>.

<sup>31</sup> Instances could perhaps be the “Canto a Tenore, Sardinian Pastoral Songs” (Italy), online: <<https://ich.unesco.org/en/RL/canto-a-tenore-sardinian-pastoral-songs-00165>>; and the already quoted “Whistled Language of the Island of La Gomera (Canary Islands), the Silbo Gomero” (Spain), *supra* note 20.

<sup>32</sup> The *Convention*, *supra* note 1, art 2(1).

<sup>33</sup> *Ibid.*

<sup>34</sup> For example, “Tango” (Argentina, Uruguay); see UNESCO, “Tango” (2009) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/tango-00258>>.

A delicate question is the commercialization of the heritage. As remarked in the 2009 report of the Subsidiary Body for the Examination of Nominations to the Representative List of the Intangible Cultural Heritage of Humanity:

[T]he 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.<sup>35</sup>

The intangible cultural heritage is also voluntarily transmitted 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 sons, at work from masters to apprentices, at school from teachers to pupils. Transmission also implies the consequent recreation or reinterpretation of the heritage, which is inevitable because of its social and living character. Changes also reflect the passing of time, as it is shown by the elements in “The Traditional Manufacturing of Children’s Wooden Toys in Hrvatsko Zagorje” (Croatia), where horses and carts have been joined by cars, trucks, airplanes and trains,<sup>36</sup> and “Gule Wamkulu” in Malawi, Mozambique, Zambia, where, in a rather unexpected manner, the “dancers wear costumes and masks [...] representing [...] wild animals, spirits of the dead, slave traders, as well the honda (motorcycle) or the helicopters.”<sup>37</sup>

The concepts of recreation and reinterpretation evoke the difficult question of determining the extent to which changes in the substance of the heritage are acceptable. Natural transformation does not mean artificial alteration, even though many variations can be found between one extreme and the other. With regard to modernization, the already mentioned Subsidiary Body, referring to the ever-changing nature of intangible cultural heritage, remarked that:

[T]he **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.<sup>38</sup>

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<sup>35</sup> Subsidiary Body for the Examination of Nominations to the Representative List of the Intangible Cultural Heritage of Humanity, Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, *Report by the Rapporteur*, UNESCO, 4th Sess, UN Doc ITH/09/4.COM/CONF>209/INF.6 (2009) at para 28 [2009 Report].

<sup>36</sup> See UNESCO, “Traditional manufacturing of children’s wooden toys in Hrvatsko Zagorje” (2009) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/traditional-manufacturing-of-childrens-wooden-toys-in-hrvatsko-zagorje-00233>>.

<sup>37</sup> UNESCO, “Gule Wamkulu: Malawi, Mozambique and Zambia” (2008), *UNESCO: Representative List of the Intangible Cultural Heritage*, online: <<http://www.unesco.org/culture/ich/en/RL/gule-wamkulu-00142>>.

<sup>38</sup> 2009 Report, *supra* note 35 at para 27.

Another difficult question is the “revitalization” of intangible cultural heritage, intended as the reinvention or reactivation of social practices and representations, which are no longer in use or are falling into disuse. In fact, 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 wide variety of events, having either a natural (for example, deforestation or drought) or a social (for example, conflicts or urbanization) character. The loss may also be the consequence of the simple indifference shown by the younger generations towards the traditions of their parents and grandparents.

In Art. 2, para. 3, of the Convention, the “revitalization” of the heritage is included among the “safeguarding measures” aimed at ensuring its viability.<sup>39</sup> The very inclusion of the word “revitalization” was one of the most discussed issues during the Convention negotiations. Does this mean that a manifestation of heritage that has died can be resuscitated? Should the State provide incentives to encourage indifferent people to engage in a fading practice or should it limit itself to documenting the last manifestations of the practice for the records and the 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 there is a commercial interest in performing it for tourists? Can a tournament from the Middle Ages be revitalized through a parade of *majorettes*?

On the thorny issue of revitalization, the Subsidiary Body was unable 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.<sup>40</sup>

The social component of the intangible cultural heritage explains why the elements included in the lists established by the Convention are seen as “representative of the intangible cultural heritage of humanity” and do not need to present an “outstanding universal value,” as required for inscription on the lists drawn up under the 1972 World Heritage Convention.<sup>41</sup> In the case of intangible cultural heritage, the lists are inclusive rather than exclusive. They are drawn up “to ensure better visibility of the intangible cultural heritage and awareness of its significance,”<sup>42</sup> as opposed to establishing a hierarchy between different manifestations. Such a hierarchy would be contrary to the objectives of encouraging “dialogue which respects cultural diversity”<sup>43</sup> and of “bringing human beings closer together and ensuring exchange and understanding among them.”<sup>44</sup>

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<sup>39</sup> The *Convention*, *supra* note 1 at art 2(3).

<sup>40</sup> *Supra* note 35 at para 29.

<sup>41</sup> *Ibid* at para 1; *supra* note 2 at art 11(2).

<sup>42</sup> *Supra* note 1 at art 16(1).

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid* at Preamble.

### 3.C. The Cultural Space

The intangible cultural heritage is associated with a “cultural space” and is constantly recreated by communities and groups “in response to their environment” and to “their interaction with nature and their history”.<sup>45</sup> The heritage is strictly linked to the natural and historical context in which it is created and transmitted. A cultural space cannot be identified by lines drawn on maps, as instead it is measured in the case of the properties inscribed on the lists established under the 1972 World Heritage Convention. A cultural space must be intended more for social practices than for its geographical character, as “a physical or symbolic space in which people meet to enact, share or exchange social practices or ideas.”<sup>46</sup>

A non-Mediterranean coastal State such as Portugal can thus share the element “Mediterranean Diet”, submitted by Greece, Italy, Morocco and Spain, later joined by Croatia, Cyprus and Portugal. Even a square, such as “Cultural Space of Jemaa el-Fna Square” (Morocco), is no longer just a space delimited on the topographical map of the city of Marrakesh.<sup>47</sup> It becomes a major place of cultural exchange and a unique concentration of popular culture, where it is possible to find storytellers, poets, snake-charmers, musicians, dancers, players, bards, where a variety of services are offered, such as dental care, traditional medicine, fortune-telling, preaching, and henna tattooing, and where fruit and local food may be bought and eaten.<sup>48</sup>

It is also true that a cultural space is not an immovable location, but can be transferred elsewhere, if the custodian community of the heritage or some members of it move to another location.<sup>49</sup>

The cultural concept of space has 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, State Parties to the Convention are encouraged to jointly submit multi-national nominations to the lists when an element is found on the territory of more than one country.

### 3.D. Compatibility with Human Rights and Other Requirements

Art. 2, para. 1, adds to the definition of intangible cultural heritage a condition that, if it is not met, prevents the application of the Convention to a given element, namely that:

For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual

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<sup>45</sup> *Ibid*, art 2, para 1.

<sup>46</sup> Van Zantern, Wim ed, *Glossary: Intangible Cultural Heritage* (The Hague: Netherlands National Commission for UNESCO, 2002) at 4.

<sup>47</sup> UNESCO, “Cultural space of Jemaa el-Fna Square: Morocco” (2008), *UNESCO: Representative List of the Intangible Cultural Heritage*, online: <[www.unesco.org/culture/ich/en/RL/cultural-space-of-jemaa-el-fna-square-00014](http://www.unesco.org/culture/ich/en/RL/cultural-space-of-jemaa-el-fna-square-00014)>.

<sup>48</sup> *Ibid*.

<sup>49</sup> The element “Cultural Space and Oral Culture of the Semeiskie” (Russian Federation) involves a “confessional community” originating in the seventeenth century that “[d]uring the reign of Catherine the Great [...] had to move to the Transbaikal region in Siberia, where they still live today” (2008), *UNESCO: Representative List of the Intangible Cultural Heritage*, online: <<http://www.unesco.org/culture/ich/en/RL/cultural-space-and-oral-culture-of-the-semeiskie-00017>>.

respect among communities, groups and individuals, and of sustainable development.<sup>50</sup>

It goes without saying that practices, such as female genital mutilation, however traditional they might be, cannot be protected under the Convention.

In its 2010 meeting, the Committee discussed a question relating to compatibility with human rights. A letter was read in which a Spanish non-governmental organisation (*Grup d'Acció Valencianista*) took the position that the element “Human Towers” (Spain)<sup>51</sup> conflicted with the human rights of children, particularly their right to health, because sometimes accidents occur that can determine injuries or even loss of life for the children occupying the higher levels of the human towers. However, the letter did not prevent the inscription of the element in the Representative List.

The Committee also discussed the condition of mutual respect among communities, inviting States Parties to:

[E]nsure 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.<sup>52</sup>

War, violence and massacres are part of history of humanity and have inevitably left their traces on a number of elements of the intangible cultural heritage. For example, the stories told in the performances of the element “Opera dei Pupi, Sicilian Puppet Theatre” (Italy) go back to the Middle Ages and inevitably describe the events of the crusades in a typical Christian perspective. What is important is that this and other analogous elements are proposed today in a spirit of dialogue and respect among communities, irrespective of the passions and hatred that occurred in the past.

#### 4. Two Issues Left aside by the Convention

If the negotiations for the 2003 Convention were conducted without any serious differences of views, it was also because the two most thorny issues, namely the rights of indigenous peoples and intellectual property rights on intangible cultural heritage, were deliberately left aside.

##### 4.A. The Rights of Indigenous Peoples

Most likely as a consequence of the political sensitivity of the subject itself for certain States, the expression “indigenous communities”<sup>53</sup> appears only in the preamble of the Convention, where the General Conference of UNESCO recognizes:

<sup>50</sup> The *Convention*, *supra* note 1, art 2(1).

<sup>51</sup> “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 – is composed of young children” UNESCO ICSICH, 5th Sess, UN Doc ITH/10/5.COM/CONF.202/6 (2010) at 51.

<sup>52</sup> *Ibid* at 11.

<sup>53</sup> 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”, *supra* note 46 at 5.

[T]hat 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.<sup>54</sup>

The lack of references to indigenous people in any substantive provision is regrettable. Other treaties follow a different approach. For example, Art. 3 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions 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.”<sup>55</sup> The Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya, 2010)<sup>56</sup> recognizes the relevance of traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising from the utilization of such knowledge with the indigenous and local communities concerned.

However, there is no doubt that the Convention was also drafted with the aim of safeguarding the cultural heritage of indigenous peoples, who own a substantial part of the intangible cultural heritage of the world and face a number of threats affecting their heritage in different ways. Depending on the circumstances, these threats include globalization, deforestation, commercial exploitation by outsiders and armed conflicts. As it was also suggested during the *travaux préparatoires* for the Convention, indigenous communities can be easily included in the broader terms “communities” or “groups”, which are used in several provisions of the Convention. Indeed, a number of elements already appearing in the Representative List refer to indigenous communities.<sup>57</sup>

#### 4.B. Intellectual Property Rights on Intangible Cultural Heritage

During the negotiations for the Convention it was agreed that the elaboration of the legal tools for a better protection of intellectual property rights falls within the mandate of the World Intellectual Property Organization (WIPO). Art. 3, para. b, clearly provides that nothing in the Convention may be interpreted as:

[A]ffecting 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.<sup>58</sup>

In fact, the way in which the main intellectual property rights have been conceived and formulated in national legislation and international instruments seems to be in conflict with

<sup>54</sup> *Supra* note 1 at Preamble.

<sup>55</sup> *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, 2440 UNTS 311 art 3 at 348 (entered into force 18 March 2007).

<sup>56</sup> *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, 5 June 1992 at Preamble (entered into force 29 December 1993).

<sup>57</sup> For example, UNESCO, “Andean Cosmivision of the Kallawayaya: Bolivia” (2008) *Representative List of the Intangible Cultural Heritage*, online: <[www.unesco.org/culture/ich/en/RL/andean-cosmivision-of-the-kallawayaya-00048](http://www.unesco.org/culture/ich/en/RL/andean-cosmivision-of-the-kallawayaya-00048)>; UNESCO, “Oral and Graphic Expressions of the Wajapi: Brazil” (2008) *Representative List of the Intangible Cultural Heritage*, online: <[www.unesco.org/culture/ich/en/RL/oral-and-graphic-expressions-of-the-wajapi-00049](http://www.unesco.org/culture/ich/en/RL/oral-and-graphic-expressions-of-the-wajapi-00049)>; UNESCO, “Oral Heritage and Cultural Manifestations of the Zápara People: Ecuador and Peru” (2008) *Representative List of the Intangible Cultural Heritage*, online: <[www.unesco.org/culture/ich/en/RL/oral-heritage-and-cultural-manifestations-of-the-zapara-people-00007](http://www.unesco.org/culture/ich/en/RL/oral-heritage-and-cultural-manifestations-of-the-zapara-people-00007)>; UNESCO, “Rabinal Achi Dance Drama Tradition: Guatemala” (2008) *Representative List of the Intangible Cultural Heritage*, online: <[www.unesco.org/culture/ich/en/RL/rabinal-achi-dance-drama-tradition-00144](http://www.unesco.org/culture/ich/en/RL/rabinal-achi-dance-drama-tradition-00144)>.

<sup>58</sup> *Supra* note 1 at art 3(b).

many of the peculiarities of the intangible cultural heritage and with the needs of the communities which create and transmit such heritage, especially the indigenous communities.<sup>59</sup> For instance, the requirement of novelty cannot apply to most of the manifestations of intangible heritage that are based on the transmission of practices and knowledge from generation to generation. The granting of intellectual property rights to a specific person seems also inappropriate for cultural manifestations that are often expressed in a collective way and are considered by the practitioners themselves as belonging to a whole community. The temporary limits of the rights granted to the holder of a patent do not comply with the permanent character of a heritage that often has deep social or religious roots and is not intended to fall into the public domain after the expiration of a given time. The cost itself of obtaining a patent may discourage traditional holders of intangible cultural heritage from starting the relevant procedures.

Today the dangers to the preservation or integrity of the intangible cultural heritage are the result not only of disuse or abandonment by members of the communities concerned, but also of abuse or misuse by third parties. Intellectual property laws are mostly based on Western conceptions about protecting rights of individuals and their financial interests, rather than on the understanding of the needs of the communities concerned. Intellectual property rules put emphasis on products, rather than on practices and processes that create them. Wide scale copying for commercial gain of indigenous designs, motifs, symbols and artworks has often taken place without knowledge or permission by indigenous artists or communities. Commercialization may lead to the adaptation of traditional practices and products to fit the taste of potential consumers, be they tourists or the general public, and to the consequent alteration of such practices and products<sup>60</sup> Integrity of their creations is a major concern for indigenous artists.

As a result of granting a patent to a third party, the communities concerned with the heritage may become deprived of both their past history and present identity and can be even prevented from producing the same goods that they have been making for generations. For instance, the grant of patents to traditional medicines has caused great concern in many developing countries.<sup>61</sup> Before the granting of any intellectual property rights, prior informed consent should be acquired from the community concerned, according to procedures that are effective, culturally appropriate, transparent and flexible.<sup>62</sup> However, there is no consensus on the establishment of an obligation of disclosure which would bind the applicant for a patent or other intellectual property right to state from where he has taken the natural or genetic components of the invention he is asking to patent. This would be a strong tool to prevent the so-called bio-piracy in patenting pharmaceutical, cosmetic or other products and to ensure compliance with prior informed consent requirements.

Different remedies to the present unsatisfactory situation, such as collective trademarks granted to representative entities or specific clauses in contracts, have been

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<sup>59</sup> See Toshiyuki Kono ed, *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* (Antwerp: Intersentia Publishers, 2009).

<sup>60</sup> According to the *Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions*, adopted in 1982 by UNESCO and WIPO, there is a need for protection against “(i) use without authorization; (ii) violation of the obligation to indicate the sources of folklore expressions; (iii) misleading the public by distributing counterfeit objects as folklore creations, and (iv) the public use of distorted or mutilated folklore creations in a manner prejudicial to the cultural interests of the community concerned.”

<sup>61</sup> The patent granted in the United States for the wound-healing properties of turmeric has been finally revoked for lack of novelty, as this natural element has been used for centuries in traditional healing practices in India.

<sup>62</sup> In some cases, the determination of the persons who have the authority to grant access to traditional knowledge is far from being an easy task, due to the lack of a clear leadership structure. Pedro Alberto De Miguel Asensio, “Transnational Contracts Concerning the Commercial Exploitation of Intangible Cultural Heritage” in Scovazzi, Ubertazzi & Zagato eds, *Il Patrimonio Culturale Intangibile nelle sue Diverse Dimensioni* (Milán: Giuffrè Editore, 2012) at 13.

envisaged.<sup>63</sup> A number of countries have already independently adopted in their legislation some form of protection against the misappropriation of traditional knowledge and cultural expressions. However, no uniform regime has been so far adopted at the international level to address the problem. It is understandable that the States negotiating a Convention within the framework of UNESCO, which is not the best equipped organization to deal with intellectual property rights, were not willing to enter into such complex and sensitive questions. It is less understandable that no adequate solutions at the international level have been so far been agreed in contexts different from UNESCO.

### 5. The UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage and the First Nations of Canada

After acknowledging the shortcomings of the Convention in regard to indigenous peoples, it might help to better understand the complex situation if we consider some aspects of the legal position of the First Nations of Canada. The Convention itself states:

Recognizing that communities, in particular indigenous communities, groups and in some cases individuals, play an important role in protection, safeguarding, maintenance and recreation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity.<sup>64</sup>

In Art. 2 of the Convention, the definition of “intangible cultural heritage” includes “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts, and cultural spaces [...] that communities, groups [...] recognize as part of their cultural heritage.”<sup>65</sup> In fact, aside from ways to understand Indigenous communities embedded in a country like Canada, we can consider separate sovereignty over their lands, but, in addition, I have proposed the “cultural integrity model” as especially significant, given the most important characteristics of First Nations practices and traditions, most of which apply equally to other Indigenous groups. The “cultural integrity model” is also supported by the Organization of American States (OAS) Declaration that explicitly addresses the right to cultural integrity.<sup>66</sup>

The cultural integrity model emphasizes the value of traditional cultures in themselves, as well as for the rest of society. According to the 1992 Rio Declaration on Environment and Development, Principle 22, traditional cultures and the knowledge they possess, must be protected:

Cultural protection for indigenous peoples involves providing environmental guarantees that allow them to maintain the harmonious relationship to the earth that is central to their cultural survival.<sup>67</sup>

Hence, not only their biological integrity, but their cultural integrity as well, is entirely dependent on the protection of the ecological integrity of the areas they occupy. Any

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<sup>63</sup> See Anastasia Telesetsky, “Traditional Knowledge: Protecting Communal Rights through a Sui Generis System” in Nafziger & Scovazzi eds, *Le Patrimoine Culturel de l’Humanité* (Leiden: Martinus Nijhoff Publishers, 2008) at 310; *Ibid* at 13.

<sup>64</sup> *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, 2368 UNTS 3 at preamble (entered into force 20 April 2006).

<sup>65</sup> *Ibid* at art 2.

<sup>66</sup> S James Anaya, *Indigenous Peoples in International Law*, 2nd ed (New York: Oxford University Press, 2004).

<sup>67</sup> Cherie Metcalf, “Indigenous Rights and the Environment: Evolving International Law” (2004) 35 *Ottawa L Rev* 101 at 107.

consideration of the economic value of these areas and forests then is equally dependent on that protection.

The Biodiversity Convention, Art. 8(j),<sup>68</sup> and the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification Especially in Africa,<sup>69</sup> incorporate cultural integrity as one of the indigenous environmental rights that are protected, while the Arctic Council Declaration of 1996<sup>70</sup> ensures that “indigenous groups gained status as permanent participants in an international inter-governmental forum for addressing environmental concerns affecting them and their ancestral lands”.<sup>71</sup>

The cultural integrity model has two aspects: (1) one aspect emphasizes the environmental closeness between environment and the traditional lifestyle of indigenous peoples, that in fact defines and delimits their cultural presence as a people; and (2) the other aspect has their traditional knowledge as its focus, and especially the value of that knowledge to the global community.

Indigenous groups, hence FN’s, appear not to be valued for themselves in this aspect of the model, as much as for their instrumental value, as holders of specific, commercially valuable knowledge.<sup>72</sup> When traditional knowledge is viewed as “intellectual property”, then some may conclude with Dinah Shelton,<sup>73</sup> that the best way to protect the environmental rights of indigenous peoples is through intellectual property law. I believe that this emphasis is misplaced, as the traditional approach of indigenous peoples to the land, for instance, is one of deep kinship and respect, in which the land, the creatures it supports and all its processes are not viewed as a commodity.

Several articles of the Convention on the Rights of the Child<sup>74</sup> are far more appropriate for the protection of their cultural integrity, and the CRC is an instrument that has been ratified by almost all of the global community. Art. 30 states:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous, shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.<sup>75</sup>

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<sup>68</sup> *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 at art 8(j) (entered into force 29 December 1993) [*Biological Diversity Convention*].

<sup>69</sup> *Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, 14 October 1994, 1954 UNTS 3 (entered into force 26 December 1996) [*Desertification Convention*].

<sup>70</sup> *Declaration on the Establishment of the Arctic Council*, Canada, Denmark, Finland, Iceland, Norway, Russian Federation, Sweden, and the United States, 19 September 1996, 35 ILM 1387 [*Arctic Council Declaration*].

<sup>71</sup> *Supra* note 67 at 104.

<sup>72</sup> Michael Halewood, “Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection” (1999) 44 McGill LJ 953.

<sup>73</sup> Dinah Shelton, “Fair Play, Fair Pay: Preserving Traditional Knowledge and Biological Resources” (1995) 5:1 Yearbook Intl Environmental L 77.

<sup>74</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [CRC].

<sup>75</sup> *Ibid* at art 30.

Here the respect for cultural integrity of children is easy to adapt to indigenous teachings, especially the Seven Generations Rule.

If indigenous peoples are to survive as peoples, rather than being simply assimilated to the larger society in which they are embedded, *both* their biological integrity and their cultural integrity must be treasured: the latter, not as a commodity, but as a living tradition of great value, necessary to guarantee their survival.

The cultural heritage of First Nations figures prominently in the case law that arises from conflicts between FNs and the Canadian Federal or Provincial governments. Their bond with the land and the waters in their areas is fundamental to their tradition, so that the protection of, and the respect for the integrity of the earth is basic to their culture. As well, their traditional food is at times part of their religious ceremonies, hence protected in Canada since the Proclamation of King George:

Nations or Tribes of Indians [...] should not be molested or disturbed in the possession of such Parts of our Dominions and Territories as not having been ceded to or purchased by Us, are reserved to them [...] as their Hunting Grounds [...] We do [...] strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any lands reserved to the said Indians [...]; but that if, at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be Purchased only by Us in our Name, at some public meeting or Assembly of the said Indians.<sup>76</sup>

After the Constitution Act of 1982, specifically, after the adoption of Section 35(1) of the Act, aboriginal rights or title could not be extinguished without the consent of Aboriginal peoples,<sup>77</sup> despite ongoing settlement treaties disputes.<sup>78</sup>

Prior to European occupation, and after the Treaty of Paris (1763), which ended the war between Britain and France regarding Canada, the Aboriginal peoples did not sign treaties giving the Europeans the power to decide their fate. In fact, as noted above, the Royal Proclamation of 1763 was intended to protect the land rights of Aboriginal people in the region.

However, before the Constitution Act of 1982 proclaimed that consent was needed before native rights could be extinguished, the situation was somewhat unclear. The Crown had a “fiduciary duty”,<sup>79</sup> that limited its power regarding indigenous peoples by its obligation to observe “the principles of recognition and reconciliation”.<sup>80</sup> The Crown has the obligation to ensure that there are limits to its sovereign power, in order to protect Aboriginal peoples.<sup>81</sup> The Aboriginal peoples once had sovereignty over the lands they occupied historically and the Crown did not avail itself of the categories of *terra nullius*,

<sup>76</sup> R George, *Royal Proclamation Under the Treaty of Paris, 1768*, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1.

<sup>77</sup> Özlem Ülgen, “Aboriginal Title in Canada: Recognition and Reconciliation” (2000) 40 *Netherlands Intl L Rev* 146 at 150.

<sup>78</sup> Michael Asch & Norma Zlotkin, “Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations”, in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essay son Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) at 209-211.

<sup>79</sup> Reorganized in 1984 in *Guerin v The Queen* [1984] 2 SCR 335, 13 DLR (4th) 321.

<sup>80</sup> Asch *supra* note 78 at 151.

<sup>81</sup> *R v Sparrow* [1990] 1 SCR 1075, 70 DLR (4th) 38.

discovery or conquest, recognizing that these were organized native societies already present there.<sup>82</sup>

### 5.A Aspects of the First Nations' Intangible Cultural Heritage

In the case of Indigenous Peoples, the “creativity” that is foundational to their lifestyle has developed together with their culture, through their ceremonies, their traditional feasts and ritual meetings, all of which centre on the consumption of specific foods, such as salmon, as we saw. Because the younger generations tend toward embracing the globalized western culture of the nation within which they are embedded, or a generalized Anglo-American culture, their culture remains marginalized and depreciated, and hence is in peril, and risks disappearing altogether.

It is therefore particularly important that the international community should provide a form of protection specific to the cultural traditions of Indigenous Peoples. Elsewhere, I have argued that the protection of the “natural heritage” was central to an ecologically sound form of global governance.<sup>83</sup> Ecological integrity is also necessary (though not sufficient) for the protection of the lands from which such communities draw their nourishment, and on which they carry on their traditional ceremonies.

The Declaration of King George and its confirmation in the Canadian Constitution,<sup>84</sup> guarantee the FN's rights to “hunt and fish” in their areas. It guarantees the *size* of their reserves but, as can be expected, the Constitution says nothing about the *condition* of the area, that is, whether it is unpolluted enough to maintain wildlife within the borders. It is impossible to hunt and fish according to their tradition, if the pollution eliminates wild animals on land and fish in water.

This difficulty was not an issue at the time of King George, and it was not seriously considered at the time the Constitution was enacted. It is sad, however that it is not seriously considered even today. Hence it is particularly vital to introduce yet another legal instrument to protect not only the basic rights of Indigenous peoples, but also their culture and traditions, tied as these are to the land which they occupy. When a FN's salmon catch is protected, or when the moose they hunt is kept safe, it is more than just their food sources that are defended, it is—at the same time—their traditions, their unique cultures, hence, essentially, their survival as a people.

In the case of the FNs of Canada or the Indian tribes in North America, the “intangible cultural heritage” includes their “practices, representations, expressions, knowledge, skills” such as they pertain specifically to each group or community.<sup>85</sup> In Canada, the “intangible” is especially significant, given that there are no written histories of each group, and their culture and traditions live only in their oral history. Today oral history and oral traditions are also accepted to support aboriginal claims in a court of law,<sup>86</sup> and we will return to this topic in the next section.

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<sup>82</sup> Asch *supra* note 78 at 153.

<sup>83</sup> Laura Westra, *Ecological Integrity and Global Governance: Science, ethics and the law* (New York: Routledge, 2016) at 114-119.

<sup>84</sup> *Canada Act 1982* (UK), 1982, c 11 at art 35.

<sup>85</sup> The *Convention*, *supra* note 1 at art 2(1).

<sup>86</sup> Stuart Rush, *Aboriginal Practice Points: Oral History* (Continuing Legal Education Society of British Columbia, 2008) online: < <https://www.cle.bc.ca/PracticePoints/ABOR/Oral%20History/%20FINAL.pdf> >.

In 2009, there was a meeting at Vitré, where experts in food practices met to discuss the fact that Art. 2, para. 2, explains why “food practices”, as they include several of the elements mentioned, represent also systems of social relations and express meanings shared by the collective:

Les experts ont estimé, que, dans le cadre de la Convention, les pratiques alimentaires ont une dimension transversal 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 concentrent la nature aussi que les savoir-faire liés à l'artisanat traditionnel.<sup>87</sup>

Essentially the social practices, the rites and feast occurrences include shared food, traditional music and dance.<sup>88</sup> In addition, in 2010, the List of representative examples of the intangible cultural heritage included non-Indigenous food practices: the “*pasto gastronomico dei francesi*” (the French gastronomic meal), and the well-known “Mediterranean diet” (Italy, Greece, Morocco and Spain).<sup>89</sup> These practices founded in tradition and culture are substantive examples of the intangible cultural heritage of specific peoples. Valentina Vadi argues that the 2003 UNESCO Convention on the Safeguard of the Intangible Cultural Heritage (CSICH) represents a significant way:

[To] counter the perceived commodification of culture, i.e. its reduction to the good or merchandise to be bartered or traded. Rather, the CSICH proposes an alternative view perceiving oral traditions and express knowledge and practices concerning food, as forms of intangible cultural heritage.<sup>90</sup>

Vadi emphasizes the importance of CSICH, despite its legal importance against the WTO, which, she adds, is a “legally binding and highly effective regime which demands states to promote and facilitate free trade”.<sup>91</sup> The WTO’s rules and decisions are entirely oriented to trade, with no respect for “food, culture, or farming techniques”.<sup>92</sup>

At any rate, our discussion reaches even beyond the basic conflict between cultural heritage, traditional activities on one hand, and trade on the other, because Canadian Courts allow the confirmation of land title, using these same traditions as decisive.

However it is important to distinguish those traditional activities from the recognition that the same Indigenous communities do not have written histories or laws, although only recently their oral testimonies have been accepted as equal to written documents in Canadian courts, as we shall see below.

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<sup>87</sup> Compte rendu des journées de Vitré sur les Pratiques Alimentaires, 3 April 2009; see also Scovazzi, *supra* note 1 at 156.

<sup>88</sup> *Ibid* at 159.

<sup>89</sup> *Ibid* at 162.

<sup>90</sup> Valentina Vadi, “Food wars: Food, intangible cultural heritage and international trade” in Laura Westra, Janice Gray & Antonio D’Aloia, eds, *The Common Good and Ecological Integrity: Human Rights and the Support of Life* (Abingdon, GB: Routledge, 2016) 49 at 52.

<sup>91</sup> *Ibid*.

<sup>92</sup> *Ibid* at 56-57, see also Fiona Smith, “Indigenous Farmers’ Rights, International Agriculture Trade and the WTO” (2011) 2:2 J HR & Env 157.

### 5.B. Oral History and Tradition: Its Role in Proving Aboriginal Rights or Title

Judicial skepticism about the use of oral history has taken a turn for the better as a result of the judgment of Vickers J. in *Tsilhqot'in Nation v. British Columbia*, 2007 BC SC 1700. By this case the law on the use of oral history evidence has evolved significantly and its important role in aboriginal title litigation has been properly recognized. The decision represents the first considered and systematic application of oral history and oral tradition evidence by a trial judge in determining long-standing occupation of a definite tract of land. Relying on principles set out in a number of Supreme Court of Canada Decisions.<sup>93</sup>

The judges who supported this move toward the acceptance of oral history and testimony in general, gave “greater prominence to the function of history and the role of historians”: they emphasized the fact that even written historical records are not self-evident but require interpretation instead.<sup>94</sup> A further distinction is useful to achieve a clearer understanding of the difference between oral history and oral tradition and, most of all, to acknowledge the fact that oral history differs from one aboriginal nation to another, as there is not one format for all.<sup>95</sup>

Oral accounts given at trial also show the distinction between oral history and oral traditional evidence.<sup>96</sup> The latter is the history of a specific group, and how they came to occupy their land, how they procured their food, such as fishing stations or hunting areas, although some oral histories might be close to mythology as they describe the feasts and other events of the history of a people.<sup>97</sup> At any rate:

Aboriginal rights arise from pre-contact occupation and are reflected in the use of land or resources based on practice, custom or tradition.<sup>98</sup>

Although we have been studying primarily food and the use of natural resources, what we consider at this time is far more than simply the Indigenous ways of satisfying hunger. What is at stake may be the very “proof of Aboriginal rights”, as the Supreme Court of Canada demonstrates the vital importance of traditional practices and traditional ceremonies involving food:

The elements of proof of aboriginal rights were set out by the Supreme Court of Canada in *R. v. van der Peet* [1996] 2 S.C.R. 307, and the tests were summarized by the court in *Mitchell v. Canada* (M.N.R.), 2001, SCC 33 at para. 12: Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact.<sup>99</sup>

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<sup>93</sup> *Delgamuukw v BC* [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*]; *Mitchell v MNR*, 2001 SCC 33, 199 DLR (4th) 385; *R v Marshall*; *R v Bernard*, 2005 SCC 43, 255 DLR (4th) 1; Vicker J. adopted a constructive approach to determining admissibility (Rush, *supra* note 86 at 4).

<sup>94</sup> *Ibid* at 5.

<sup>95</sup> *Ibid* at 6.

<sup>96</sup> *Ibid*.

<sup>97</sup> *Delgamuukw*, *supra* note 92 at para 96-97.

<sup>98</sup> *R v Sappier*; *R v Gray*, 2006 SCC 54 at para 45, 274 DLR (4th) 75; Rush, *supra* note 86 at 9.

<sup>99</sup> Rush, *supra* note 86.

Thus, a specific intangible cultural practice may be believed to have been initiated before contact with white people had been established. If that traditional feast, event or other cultural practice can be established to have existed prior to contact, perhaps in a somewhat different form, it may be sufficient to convince the Superior Court that the area where it occurred belonged legitimately to the FN presently occupying the same location. Thus, at least in Canada, the oral recollection of a cultural practice, traditionally transmitted orally, may well be sufficient to decide a case involving the limited sovereignty present in today's Canadian law. The Convention for the Intangible Cultural Heritage, I believe, could and should support the many facets of Indigenous traditional culture that are not protected under major international law instruments.

At the same time, there is a reciprocal relation between this Convention and the rights of Indigenous Peoples, as it emerges in the discussion of the FNs of Canada. Thus, the latter's rights and values in turn emphasize the importance of the 2003 Convention, while they also demonstrate the need for further development and expansion of that document. Given the close relation between the principles and goals of the Convention and those of the traditions of the First Nations, it is unfortunate that Canada is not yet a party to the 2003 Convention. This is particularly regrettable because the Convention could grant a better protection for the cultural rights of the First Nations.

### **Conclusion**

It appears that the Convention for the Safeguarding of the Intangible Cultural Heritage has many merits and deserves to be ratified by the broadest number of States, including Canada. However, despite its expressed aim to safeguard the cultural heritage of humanity, the Convention does not address adequately the culture of indigenous peoples. Neither the preservation of the natural systems upon which most indigenous peoples depend, nor their specific traditions and culture are sufficiently stressed in the Convention. Yet oral history and traditions, at least in Canada, have a strong role in proving aboriginal title of First Nations. This explains why Canada not only should become a party to the Convention, but should take the Convention as an opportunity to do more than the Convention would strictly require in order to enhance the protection of the rights and traditions of its First Nations.