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Safeguarding shared Intangible Cultural Heritage: A “bridge over troubled water”?

1. Introduction

Within the wider framework of what could be characterised as the modern international cultural heritage law,¹ the field of the so-called “intangible cultural heritage” (hereinafter: ICH) gains more and more ground in the international discourse. The latter, initially described as “oral heritage” or “traditional culture and folklore”,² constitutes “the living culture of peoples”,³ while the establishment of rules for its protection followed years-long processes of the international community. During at least the last three decades, a remarkably intense law-making activity in relation to the international protection of all types of cultural heritage takes place,⁴ concerning not only the review

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¹ L. Lixinski, “Between orthodoxy and heterodoxy: the troubled relationships between heritage studies and heritage law”, *International Journal of Heritage Studies* 2015, vol. 21, no. 3, p. 204. Shaped as a distinguishable field of law during the second half of the 20th century. For a brief historical analysis of this shaping see: J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015, p. 4.

² The first international instrument that set the base for a holistic approach to the safeguarding of this part of cultural heritage was the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, adopted in Paris on 15 November 1989.

³ As aptly written by Lenzerini; F. Lenzerini, “Intangible Cultural Heritage: The Living Culture of Peoples”, *The European Journal of International Law* 2011, vol. 22, no. 1, pp. 101–120.

⁴ F. Francioni, J. Gordley, “Introduction” [in:] *Enforcing International Cultural Heritage Law*, eds. F. Francioni, J. Gordley, Oxford University Press, Oxford 2013, p. 1.

of older instruments but also the adoption of new multilateral conventions and soft-law instruments. Among them, the Convention for the Safeguarding of the Intangible Cultural Heritage (hereinafter: 2003 UNESCO Convention)⁵ “officialised” the use of this well-criticised and relatively new term⁶ for its subject matter.

ICH seems to be controversial as a regulatory object, as also other types of heritage and cultural expressions could easily be. However, ICH in particular is by its character indissolubly connected to peoples and their communities, being defined by its apparent human dimension⁷ and signalling the progressive transition from the notion of “cultural heritage of humanity” towards “cultural heritage of communities, groups and individuals”.⁸ For what is more, it has an inherent capacity and liberty to “spring up” near and/or on borders, “easily escaping the territorial jurisdiction of the State”,⁹ since there would normally be no limited habitable area on Earth from which it could possibly be excluded as happens with its bearers. As a result, the relevant regulations have to deal also with the safeguarding of transboundary ICH expressions, what we will also call “shared ICH” hereafter. This is a rather complicated area where the manifestation of the fragile – mostly political – balances and tensions among international community’s actors is favoured par excellence, something also reflected at the present UNESCO protection mechanism as well as during statutory intergovernmental meetings and other relevant forums.

This paper will examine the issue of the safeguarding of shared ICH within the 2003 UNESCO Convention’s framework. Firstly, it will make a reference to the nature, definition and characteristics of ICH that somehow define its protection’s perspectives. Secondly, it will outline the conventional safeguarding mechanism, pointing out those aspects that might *a priori*, in theory, and *a posteriori*, as reflected in State practice, favour or impede the protection of transboundary ICH manifestations in particular. Finally, it will focus on the way the existent system deals with the issue, questioning whether its evolution is needed with a view to a potentially more effective safeguarding of shared ICH.

⁵ UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, adopted in Paris by the 32nd session of the General Conference of UNESCO, signed on 17 October 2003, entered into force on 20 April 2006), with 180 States Parties (as of 27.07.2020); UNESCO-ICH, <https://ich.unesco.org/en/convention> (accessed: 14.10.2020).

⁶ R. Kurin, “Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention”, Inaugural Public Lecture, Smithsonian Institution and the University of Queensland MoU Ceremony, 23 November 2006, p. 12.

⁷ F. Francioni, “The Human Dimension of International Cultural Heritage Law: An Introduction”, *The European Journal of International Law* 2011, vol. 22, no. 1, pp. 9–16.

⁸ J. Blake, *International Cultural Heritage...*, p. 272.

⁹ L. Lixinski, *Intangible Cultural Heritage in International Law*, Oxford University Press, Oxford 2013, p. 22.

2. Dealing with shared Intangible Cultural Heritage within the 2003 UNESCO Convention

2.1. The definition and characteristics of Intangible Cultural Heritage

The 2003 UNESCO Convention in Article 2 para. 1 defines as ICH “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”. Characterised by its intergenerational transmission, constant recreation, interrelationship with the communities’ environment, nature and history, ICH provides them “with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity” (Article 2 para. 1 of the 2003 UNESCO Convention). The preservation of cultural diversity – particularly threatened due to the globalisation’s onset in contemporary world – remains a main *ratio* of protection,¹⁰ something that should always be kept in mind, especially in front of certain States’ tendency to promote the “exclusivity” or “authenticity” of ICH expressions, as noticed in their – relevant to the Convention’s implementation – practice.

It is true that a series of terminological questions arise.¹¹ However, for the needs of the present analysis, it suffices to mention the opinion highlighting the problematic nature of “intangible”¹² as qualifier in the term, which possibly leads to an also problematic use, namely the instrumentalisation of heritage in a manifold way. Despite the criticism, it was the working definition that reached general consensus and was found the most operationally useful,¹³ favouring the independence of that new notion from any material

¹⁰ Preamble, para. 3 of the 2003 UNESCO Convention faces ICH “as a mainspring of cultural diversity”.

¹¹ J. Blake, “Preliminary Study into the Advisability of Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage (‘Traditional Culture and Folklore’), presented in the UNESCO, International Round Table of experts, *ICH: Working Definitions*, Turin, Italy, 14–17 March 2001, pp. 7–12.

¹² The term “oral and intangible heritage” was firstly institutionally employed in the 1998 UNESCO Masterpieces Programme; UNESCO Brochure, *Masterpieces of the Oral and Intangible Heritage of Humanity* (Proclamations 2001, 2003 and 2005), UN Doc. CLT/CH/ITH/PROC/BR3, 2006 (hereinafter: UNESCO Masterpieces). However, even the 2003 Convention’s Entity within UNESCO’s Culture Sector has been renamed from “ICH Entity” to “Living Heritage Entity” officially since early 2019, still revealing the “uncertainty” of the term.

¹³ UNESCO, Executive Board, Report on the preliminary study on the advisability of regulating internationally, through a new standard-setting instrument, the protection of Traditional Culture and Folklore, 161st session, Paris, 28 May – 13 June 2001, p. 6.

type of heritage,¹⁴ as well as marking the initiation of a new instrument, different from the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on 16 November 1972 (hereinafter: 1972 World Heritage Convention) dedicated to the protection of “tangible” cultural and natural heritage.¹⁵

Furthermore, prominence is given to “communities, groups and individuals” – bearers of ICH – who are acknowledged as playing “an important role in the production, safeguarding, maintenance and recreation” of it (preamble, para. 7 of the UNESCO Convention 2003). Two significant parameters in comparison to the cultural heritage protection regime existent prior to the 2003 Convention should be underlined. On the one hand, the self-recognition by communities themselves of ICH as part of their heritage, contrary to the perception of the “outstanding universal value” of the world cultural and natural heritage (Article 1 of the UNESCO World Heritage Convention 1972). On the other hand, the representativeness of ICH elements, unlike the former characterisation of the “masterpieces” of cultural heritage.¹⁶ The emerging question, then, refers to the central role accorded to the communities associated with ICH¹⁷ – at least theoretically – and their participation in the safeguarding mechanism,¹⁸ as also reflected at the States Parties’ conventional obligations,¹⁹ though remaining unguaranteed while often “top-down approaches” are followed.²⁰

In parallel, the dialectical relationship between ICH and space, as happens with persons and their environment,²¹ is critical for understanding in principle what is or should

¹⁴ M. Vecco, “A definition of cultural heritage: From the tangible to the intangible”, *Journal of Cultural Heritage* 2010, vol. 11, pp. 323–324.

¹⁵ W. van Zanten, “Constructing New Terminology for Intangible Cultural Heritage”, *Museum International*, ICOM 2004, vol. 56, issue 1–2, p. 39.

¹⁶ UNESCO Masterpieces 2001, 2003, 2005.

¹⁷ J. Blake, “UNESCO’s 2003 Convention on Intangible Cultural Heritage: the implications of community involvement in ‘safeguarding’” [in:] *Intangible Heritage*, eds. L. Smith, N. Akagawa, Routledge, Abingdon, United Kingdom 2009, p. 45.

¹⁸ In the context of inscriptions on the Convention’s listing mechanisms, this is in practice “proved” through the requirement for their “*prior, free and informed consent*” (in the form of letters of consent accompanying the nomination file, as it is expressed at least until today); Operational Directives for the Implementation of the Convention for the Safeguarding of the ICH, adopted by the General Assembly of the States Parties to the Convention at its 2nd session (UNESCO Headquarters, Paris, 16–19 June 2008), as amended into their last version (2018), para. 1 (U.4.), para. 2 (R.4.), para. 7 (P.5.) (hereinafter: UNESCO, Operational Directives 2018).

¹⁹ Mostly in: Articles 11b and 15 of the UNESCO Convention 2003.

²⁰ See the most recent comment of the Evaluation Body on the issue: Intergovernmental Committee for the Safeguarding of ICH (hereinafter: IGC), Report of the Evaluation Body on its work in 2020, UN Doc. LHE/20/15.COM/8, 2020, para. 42.

²¹ Communities recreate their ICH “in response to their environment and their interaction with nature”; Article 2 para. 1 of the UNESCO Convention 2003.

be the connection between ICH and State territories. Beyond the apparent connection of all those “place-based” ICH elements and cultural spaces²² or cultural landscapes²³ associated with ICH, any other reference to place – again, at least in principle – should not be interpreted as establishing any fixed link between ICH and a delimited geographical space, but merely as highlighting the role of the social, political or natural context in the recreation of cultural practice.²⁴

As a step further, ICH’s character reveals its capacity to transcend national borders par excellence. In fact, there are ICH elements which could be described as “being present” in the territories of more than one States²⁵ or “present” wherever their people are.²⁶ Besides, “political geography” that shapes modern States does not always overlap with “cultural geography” that forms communities of specific heritage elements. This issue has some rather important dimensions in association with refugee crisis and migration,²⁷ people of diaspora,²⁸ nomadic communities and minorities present in a territory, as well as cross-border communities with common cultural characteristics.²⁹ This means that ICH cannot reasonably be defined in relation to territories, as is the case with culture itself,³⁰ despite any direct or indirect attempt on the basis of the 2003 Convention’s provisions.³¹

²² T.M. Schmitt, “The UNESCO Concept of Safeguarding ICH: Its Background and Marrakchi Roots”, *International Journal of Heritage Studies* 2008, vol. 14, no. 2, pp. 95–111.

²³ See some examples of this connection between ICH and cultural landscapes inscribed in the UNESCO World Heritage List in: G. Caballero, “Crossing Boundaries: Linking Intangible Heritage, Cultural Landscapes, and Identity”, 5 September 2017, pp. 4–10, <http://openarchive.icomos.org/id/eprint/1814> (accessed: 28.10.2020).

²⁴ C. Bortolotto, “Placing ICH, owning a tradition, affirming sovereignty: the role of spatiality in the practice of the 2003 Convention” [in:] *The Routledge Companion to Intangible Cultural Heritage*, eds. M.L. Stefano, P. Davis, Routledge, Abingdon, United Kingdom 2017, p. 48.

²⁵ C. Amescua, “Anthropology of ICH and Migration: An Uncharted Field” [in:] *Anthropological Perspectives on Intangible Cultural Heritage*, eds. L. Arizpe, C. Amescua, Springer, Cham – Heidelberg – New York 2013, pp. 103–120.

²⁶ W. Logan, “Cultural diversity, cultural heritage and human rights: towards heritage management as human rights-based cultural practice”, *International Journal of Heritage Studies* 2012, vol. 18, no. 3, p. 241.

²⁷ R. Nettleford, “Migration, Transmission and Maintenance of the Intangible Heritage”, *Museum International, ICOM* 2004, vol. 56, issue 1–2, pp. 78–83.

²⁸ J. Blake, *International Cultural Heritage Law...*, pp. 282–283.

²⁹ See the examples mentioned in: UNESCO, Intangible Heritage Beyond Borders: Safeguarding Through International Cooperation-Regional Meeting, *Background paper*, Bangkok (Thailand), 20–21 July 2010.

³⁰ M.C. Vernon, “Common Cultural Property: The Search for Rights of Protective Intervention”, *Case Western Reserve Journal of International Law* 1994, vol. 26, no. 2, p. 446.

³¹ See the criticism for “the mapping of cultures into bounded and distinct places”, which was a dominant trend at the time of the adoption of the 2003 UNESCO Convention when UNESCO was facing post-colonial developments in: C. Bortolotto, “Placing ICH, owning a tradition...”, p. 48.

2.2. The conventional safeguarding mechanism

The core notion around which the UNESCO Convention 2003 is built is that of “safeguarding”,³² which means “measures aimed at ensuring the viability” of ICH (Article 2 para. 3 of the Convention), and encompasses a wider approach to the sensitive issue of the legal protection of “a living body”,³³ with a view to ensure the circumstances and processes under which it is being created, preserved and transmitted rather than protect it against any threat, “physically” or “*in situ*”.³⁴ It, then, functions parallelly at two levels, a national and an international one.

At the national level, each State Party “shall take the necessary measures to ensure the safeguarding of the ICH present in its territory” (Article 11a of the UNESCO Convention 2003, also at Articles 12, 13, 23) and “shall endeavour” to adopt measures such as, among others: a general policy promoting the function of ICH in society, appropriate legal, technical, administrative and financial measures (Articles 13, 14 of the Convention). Special emphasis is given on the identification and definition of the various ICH elements present in its territory (Article 11b of the Convention), mainly achieved by drawing up – regularly updated and adjusted in each State’s particular circumstances – inventories (Article of 12 of the Convention). At the international level, States Parties concerned may submit their proposals for the inscription of elements and good practices to the Intergovernmental Committee for the Safeguarding of ICH (hereinafter: IGC)³⁵ which establishes, keeps up to date and publishes the “Representative List of the ICH of Humanity” (RL), the “List of ICH in Need of Urgent Safeguarding” (USL) and the “Register of Good Safeguarding Practices”³⁶ (hereinafter mentioned also as the Lists). Furthermore, States submit periodic reports on the legislative, regulatory and other measures taken for the implementation of the Convention to the IGC (Article 29 of the Convention), which in its turn submits them to the General Assembly

³² For the explicit choice of the term “safeguarding” unlike “protection” in the 2003 Convention, see: UNESCO, Meeting of the “Restricted Drafting Group”, Preparation of a preliminary draft International Convention on the ICH, Paris, 20–22 March 2002, para. 17.

³³ UNESCO Brochure, *Questions and Answers about ICH* 2009, p. 3; UNESCO-ICH, <https://ich.unesco.org/en/kit> (accessed: 30.11.2020).

³⁴ C. Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, London – New York 2010, pp. 14–18.

³⁵ Articles 5–9 of the UNESCO Convention 2003; UNESCO-ICH, <https://ich.unesco.org/en/functions-00586> (accessed: 20.10.2020).

³⁶ Articles 16–18 of the UNESCO Convention 2003; “Browse the Lists of ICH and the Register of good safeguarding practices”, UNESCO-ICH, <https://ich.unesco.org/en/lists> (accessed: 22.11.2020).

of the States Parties,³⁷ a process that somehow counterbalances the absolute absence of a compliance mechanism.³⁸

In this context, place becomes a pivotal axis for safeguarding ICH through the establishment of the prerequisite of its “presence” in a State’s territory, which has some important implications with reference to transboundary manifestations. Besides, a serious concern was raised in this regard even during the drafting period but it seems that the Convention took a clear position.³⁹ Firstly, it implies that ICH is defined on the basis of current State territories, despite the fact that no such strict geographical condition is included in its conventional definition and does not necessarily correspond to its nature as presented above. Secondly, a crucial territorial clause is enshrined in the safeguarding mechanism, reflected at all of its aspects, limiting, re-characterising, re-constructing or re-adjusting ICH elements in order to “fit them better in” the listing patterns and, thus, questioning the possibilities for an effectively holistic safeguarding. Thirdly, the listing mechanisms under the 2003 Convention eventually function as a favourable stage for ensuring the wide “approval” and application of the aforementioned territorial clause as reflected in the purely State nominations for inscription.⁴⁰

Aside from any relevant criticism on the controversial choice of Lists⁴¹ as the predominant international protection means,⁴² the credibility of the evaluation and

³⁷ Article 4 of the UNESCO Convention 2003; UNESCO-ICH, <https://ich.unesco.org/en/functions-00710> (accessed: 20.10.2020).

³⁸ P. Kuruk, “Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention For the Safeguarding of ICH”, *Macquarie Journal of International and Comparative Environmental Law* 2004, vol. 1, p. 133.

³⁹ “It was suggested that the idea of ‘present’ is important as providing the necessary temporal element that characterises ICH as evolving and migratory. A further suggestion was a formulation such as ‘with links with the population situated on the territory’. [An alternative proposal not supported was ‘practised by its citizens’]. (...) Although the issue of transboundary ICH was raised, it was felt that any reference to extra-territoriality of State jurisdiction should be avoided” in: UNESCO, First meeting of the select drafting group of a preliminary international convention on ICH. Final Report, Paris, 20–22 March 2002, Discussion of Unit 8 – Article 4, p. 7.

⁴⁰ In practical terms, a section titled “geographical location and range of the element” is enshrined in the nomination forms: UNESCO-ICH, <https://ich.unesco.org/en/forms> (accessed: 23.11.2020).

⁴¹ UNESCO, 2nd Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention for the Safeguarding of ICH, *Position des Etats Membres eu egard au principe de liste(s) du patrimoine culturel immaterial – 7 Octobre 2002*, Paris, 24 February – 1 March 2003.

⁴² Their establishment was inspired by the 1972 UNESCO World Heritage Convention which initiated the World Heritage List (Article 11) and came as a natural continuity of the 1998 Proclamation of “Masterpieces” since the elements then inscribed were directly incorporated in the Representative List of the ICH of Humanity according to the 2003 Convention (Article 31);

inscription procedure itself⁴³ or any other deficiencies regarding their character and function,⁴⁴ one should highlight the way Lists could be easily used by States for other purposes, even contrary to the Convention's spirit, especially on the ground of this territorial clause. While some form of hierarchy, elitism and fragmentation among ICH elements (whether or not included in the Lists) is inevitable – “lists itemise culture” as it was aptly written⁴⁵ – and while representativeness and equality among them is questioned, there is a tendency to promote inscribed objects as “national products” in the international market.⁴⁶

In particular, various elements are either directly presented as exclusively “national” or their “national character” is stated even in their definition and title.⁴⁷ In other cases, States use the Lists “as a race or contest, seeking to have elements inscribed before other States manage to do so”,⁴⁸ in order to somehow get a patent or copyright on elements present only in a certain State's territory, unique and having a sole “country of origin”.⁴⁹ Within this framework, the principle of representativeness could lead to some

N. Aikawa-Faure, “From the Proclamation of Masterpieces to the Convention for the Safeguarding of ICH” [in:] *Intangible Heritage...*, pp. 13–14.

⁴³ R. Smeets, H. Deacon, “The examination of nomination files under the UNESCO Convention for the Safeguarding of the ICH” [in:] *The Routledge Companion...*, pp. 32–33.

⁴⁴ A global reflection process at the level of the IGC on the nature and purposes of the listing mechanisms is ongoing officially since 2018. The current Covid-19 pandemic did not allow this to proceed significantly since the announced category VI expert meeting which was going to take place in March and then in September 2020 at UNESCO was postponed for 2021, along with the meeting of the Open-ended intergovernmental working group; UNESCO-ICH, <https://ich.unesco.org/en/expert-meeting-on-listing-01112> (accessed: 29.11.2020); see the progress done until today in: UNESCO-ICH, <https://ich.unesco.org/en/global-reflection-on-the-listing-mechanisms-01164> (accessed: 30.11.2020).

⁴⁵ V.T. Hafstein, “Intangible heritage as a list: from masterpieces to representation” [in:] *Intangible Heritage...*, p. 105.

⁴⁶ J. Blake, *International Cultural Heritage Law...*, p. 244.

⁴⁷ E.g., elements inscribed on the RL: “Albanian folk iso-polyphony” (2008), “Palestinian Hikaye” (2008), “Georgian polyphonic singing” (2008), “Fado, urban popular song of Portugal” (2011), “Ethiopian epiphany” (2019), “Traditional Turkish archery” (2019); Armenia's nomination's title of “Lavash, the preparation, meaning and appearance of traditional Armenian bread as an expression of culture” was changed as “in Armenia” after reactions by Azerbaijan and Iran and finally inscribed in 2014, while also as “Flatbread making and sharing culture Lavash, Katyrma, Jupka, Yufka” by Azerbaijan, Iran, Kazakhstan, Kyrgyzstan, Turkey in 2016.

⁴⁸ IGC, Evaluation of nominations for inscription in 2011 on the List of ICH in Need of Urgent Safeguarding, UN Doc. ITH/11/6.COM/CONF.206/8 Add., 2011, para. 26

⁴⁹ See such an analysis on the basis of the inscription of “Karagöz” by Turkey on the RL in 2009 and its “conflict” with Greece for the shadow theatre of “Karagiozis” in: B. Aykan, “‘Patenting’ Karagöz: UNESCO, nationalism and multinational intangible heritage”, *International Journal of Heritage Studies* 2015, vol. 21, no. 10, p. 949.

“conflicting” inscriptions of the same elements by different States claiming “ownership” over them.⁵⁰ This issue has already been discussed at the stage of files’ evaluation. For example, the Consultative Body decided not to present to the IGC two nominations on the grounds that “they were identical to one another” during the 2011 cycle and noted that “the communities concerned were overlapping”,⁵¹ while the Evaluation Body recently stated in a paragraph titled “shared heritage” that “as the Body recognizes the right of every State Party to nominate an element within its territory even if it is practised elsewhere, it was not influenced in its evaluations by the existence of similar elements”, and encouraged States to work together towards “the possibility of extended nominations”.⁵² Consequently, a grey zone is in any case created with reference to transnational/transboundary ICH elements.

2.3. The parameter of transboundary Intangible Cultural Heritage manifestations

In principle, States Parties “undertake to cooperate at the bilateral, subregional, regional and international levels” (article 19 of the UNESCO Convention 2003) and are encouraged to develop joint initiatives “particularly concerning elements of ICH they have in common” (UNESCO, Operational Directives 2018, para. 86). Besides, States recognise that ICH safeguarding “is of general interest to humanity” (Article 19 para. 2 of the UNESCO Convention 2003), while declaring “aware of the universal will and the common concern to safeguard” it (preamble, para. 6 of the UNESCO Convention 2003), something consistent with the characterisation of cultural diversity as “common heritage of humanity” by the subsequent the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted in Paris on 20 October 2005 (preamble, para. 2). For what is more, UNESCO system has from its first steps included a provision for submission of “multi-national nominations” for inscription of elements “found on the territory of more than one State Party” on the two Lists and of “subregional or regional programmes, projects and activities as well

⁵⁰ E.g., the inscription of the same type of ‘Mongolian traditional art of Khöömei throat singing’ on the RL by China in 2009 and Mongolia in 2010, of the same traditional horse-riding game as “Chovqan a traditional Karabakh horse-riding game in the Republic of Azerbaijan” by Azerbaijan in 2013 on the USL and as “Chogān a horse-riding game accompanied by music and storytelling” by Iran in 2017 on the RL, as well as of the same festival as “Gangneung Danoje festival” by the Republic of Korea in 2008 (originally proclaimed in 2005) and as “Dragon Boat festival” by China in 2009 on the RL.

⁵¹ IGC, Report of the Consultative Body on its work in 2011, UN Doc. ITH/11/6.COM/CONF.206/7, 2011, para. 16.

⁵² IGC, Report of the Evaluation Body on its work in 2019, UN Doc. LHE/19/14.COM/10, 2019, para. 34.

as those undertaken jointly by States Parties in geographically discontinuous areas” on the Register.⁵³ A “mechanism to encourage multinational files” by publicly declaring – on a voluntary basis – the intention for a future nomination has also been initiated without countable success, since it has been used only eight times and with no concrete outcomes until today.⁵⁴

However, it is normal that the preparation of a multinational proposal is absolutely dependent on the consent of the concerned States. As a result, nothing could be done if one of them does not want to move on to it, does not have the sufficient resources to do so, has not ratified the Convention or has rival relations with the other one(s). Furthermore, this complex process discloses its own narrow limits for an effective safeguarding of shared ICH, while some important issues on the matter are underlined even in the latest report of the Evaluation Body.⁵⁵ So, for the first years a reluctance has been noted, corresponding to the tendency of submission of one-State nominations in a States Parties’ attempt to present “their own” ICH. Yet, States reflexes prove to be faster than the ability of the system to adapt to this tendency and we have already today reached a point where a worrying trend to “fabricate” multinational nominations out of combined individual ones and with no real underlying cooperation is noted,⁵⁶ following the priority accorded to multinational files to be treated per cycle by the IGC.⁵⁷

⁵³ UNESCO, Operational Directives 2018, paras. 13, 14; The extension of an existent inscription is also encouraged in paras. 16–19, while the initial provision referred only to the Lists and not the Register: UNESCO, Operational Directives 2008, paras. 3, 20. The issue of simplifying the procedure for the extension of multinational nominations to new States Parties, having its origins in the 14th session of the IGC, has already attracted States’ interest in the context of the ongoing global reflection on the listing mechanisms; IGC, *Decision 14.COM 14*, 2019, para. 13; IGC, Item 4 of the Provisional Agenda: Towards a reformed listing system, UN Doc. LHE/21/16.COM WG/3, 2021, p. 9, para. 21.

⁵⁴ UNESCO-ICH, <https://ich.unesco.org/en/mechanism-to-encourage-multinational-files-00560> (accessed: 26.11.2020); Established as an on-line resource following the: IGC, *Decision 7.COM 14*, 2012, para. 4.

⁵⁵ IGC, Report of the Evaluation Body on its work in 2020, UN Doc. LHE/20/15.COM/8, 2020, para. 40

⁵⁶ *Ibid.*, para. 40 (iii).

⁵⁷ A ceiling to the maximum number of files examined per cycle was proposed for the first time; see: IGC, *Decision 6.COM 15*, 2011 and finally endorsed in: UNESCO, General Assembly of the States Parties to the 2003 Convention, Resolution 4.GA 5, 2012. The ceiling is accompanied by priorities, one of which is the multinational nominations; see: UNESCO, Operational Directives 2018, para. 34(ii). The trend is measurable in the fact that the multinational files examined this year have impressively increased: 2017 – 4, 2018 – 7, 2019 – 5, 2020 – 16. For the 2021 cycle, 16 multinationals files could be examined (including backlog files) but only 5 will be treated after application of the ceiling and priorities rules.

It is noteworthy, though, that UNESCO explicitly recognises the problem around “shared ICH”⁵⁸ and, at a declaratory level, the existence of communities “having an open character, not necessarily linked to specific territories”.⁵⁹ An attempt was also made to approach the issue during a regional consultation meeting of government representatives and experts,⁶⁰ which, despite concluding on some critical comments on “diffuse heritage and communities”, ends up with attributing the non-correspondence of States Parties towards the international cooperation clause to questions of willingness and politics, again with no practical proposal. Nevertheless, the concern on managing those cases is apparent and characterised by ambiguity. At the same time that the IGC encourages nominations on “elements shared by different communities”,⁶¹ it reminds States of the “sensitivities” and the “necessity to take care when elaborating” multinational nominations, as well as their “sovereign right to nominate elements found on their territory, regardless of the fact that they may also exist elsewhere”,⁶² while the Subsidiary Body invites them “to demonstrate their concern for and responsibility towards ICH and its safeguarding that goes beyond national borders”.⁶³

However, States Parties’ and the IGC’s dominant conception of the relation between respect for sovereignty and safeguarding of shared ICH is still very narrow and could be briefly described in the following statements. On the one hand, “although nominations are to be elaborated with the widest possible participation of the community (...) concerned, each State’s respect for the sovereignty of its neighbours constrains it from involving community members living outside of its own territory”.⁶⁴ On the other, “nominations to the RL should concentrate on the situation of the element within the territory(ies) of the submitting State(s), while acknowledging the existence of same or similar elements outside its(their) territory(ies), and submitting States should not refer

⁵⁸ “Examples of ICH shared across international borders are plentiful. (...) When safeguarding an element is at stake, better results will be achieved with the full participation of the whole community, regardless of its geographic location”; IGC, Mechanism for sharing information to encourage multinational nominations, UN Doc. ITH/12/7.COM/14, 2012, paras. 1–3.

⁵⁹ UNESCO Brochure, *Implementing the Convention for the Safeguarding of the ICH*, 2009, p. 8; UNESCO-ICH, <https://ich.unesco.org/en/kit> (accessed: 30.11.2020).

⁶⁰ UNESCO, *Intangible Heritage Beyond Borders...*

⁶¹ IGC, *Decision 9.COM 10*, 2014, para. 5.

⁶² UNESCO, *Aide-mémoire for completing a nomination to the RL of the ICH of Humanity for 2016 and later nominations*, 2015, p. 20, para. 45, available at: <https://ich.unesco.org/en/forms> (accessed: 29.11.2020).

⁶³ IGC, *Report of the Subsidiary Body on its work in 2014 and examination of nominations for inscription on the RL of the ICH of Humanity*, UN Doc. ITH/14/9.COM/10 Add.3, 2014, para. 33.

⁶⁴ IGC, Mechanism for sharing information to encourage multinational nominations, UN Doc. ITH/12/7.COM/14, 2012, para. 2.

to the viability of such ICH outside of their territories or characterize the safeguarding efforts of other States”.⁶⁵

Finally, it is notable that these positions are linked to the proposals towards the two Lists and not the Register, for which another grey zone is created. Thus, in the case of a programme, project or activity carried out for the safeguarding of a shared heritage manifestation and/or in the context of a cross-border community but not by State actors or actors that could cooperate with both or all the States concerned, it does not seem feasible that it could ever be nominated under the current system. However, the requirement for a preexistent inscription of the ICH element concerned on the National Inventory of the submitting State, as applies for the two Lists, is not in effect for nominations to the Register, something that could facilitate a wider approach to the issue of shared ICH safeguarded by a certain programme, project or activity constituting a good practice.⁶⁶

3. Conclusions

The present analysis ran through the safeguarding mechanism established under the 2003 UNESCO Convention, focusing on the case of shared ICH. By examining the existent legal framework, an important inherent contradiction is revealed. At the same time that the Convention underlines ICH's strong links with its people, it tries to establish solid links with State territories, something that results in limiting the object of protection in a way incompatible with its admittedly cross-border character and “excluding” several manifestations from this framework's patterns. Despite any theoretical recognition of the issue's complexity, no practical tool has yet been adopted beyond the encouragement and growing tendency for the submission of multinational nominations to the Convention's Lists, a process which manifests its shortcomings too.

By arguing solely in favour of international cooperation – which usually happens to serve as panacea – seems insufficient and hasn't led to effective safeguarding at least until today, partially because it is exactly the lack of State cooperation that creates the

⁶⁵ IGC, *Decision 6.COM 13*, 2011, para. 11; see also an analysis questioning the lawfulness of the IGC's decisions on this territorial condition, which however concludes in favor of it, in: B. Ubertazzi, “The Territorial Condition for the Inscription of Elements on the UNESCO Lists of ICH” [in:] *Between Imagined Communities and Communities of Practice*, eds. N. Adell, R.F. Bendix et al., series: Göttingen Studies in Cultural Property, vol. 8, Universitätsverlag Göttingen 2015, pp. 111–119.

⁶⁶ It is notable that only one multinational nomination has ever been inscribed on the Register (2009): “Safeguarding ICH of Aymara communities in Bolivia, Chile and Peru” by those three States.

deficiencies. In fact, UNESCO's system for the safeguarding of ICH, in trying to compromise a community-oriented approach with a State-centred one, has vested States Parties with "powers" they would be really reluctant to "share" with the actual beneficiaries of the whole safeguarding mechanism, namely the people connected to their ICH or – in order to use the 2003 Convention's wording – ICH communities, groups and individuals.

In order, thus, to deal with ICH beyond borders, the overcoming of the constraints of a mechanism defined by strong sovereignty-based arrangements⁶⁷ is needed. In this regard, concerning, indicatively, the listing mechanisms in the context of the ongoing global reflection for their reform, a new provision that would address some of the gaps mentioned earlier could be adopted. Namely, the possibility of communities to submit their own nominations for ICH elements' inscriptions on the two Lists and good practices' inscriptions on the Register, on the basis of proved special links to certain ICH manifestations and involvement in a certain good safeguarding practice, independently of the State to the jurisdiction of which they are subject or the prerequisite of ICH presence in a given territory. Although this would need to conquer a series of obstacles, such as the definition⁶⁸ of the "ICH community",⁶⁹ which would be reflected also at the national level in the inscriptions on National Inventories, it would probably lead to a more effective safeguarding of shared ICH which cannot "fit in" the territorial condition and find its place in the Lists until today. At the end of the day, the proposals would be subject to the same evaluation process and the IGC would still reserve the power of the final decisions.

However, even if this step – or others that could be proposed in this direction – seems to be premature for the actual period of the Convention's life, it is not unrealistic. On the contrary, it is inspired by the discussion around the possible establishment of a right to ICH, which gains more and more ground in the international discourse. On

⁶⁷ L. Lixinski et al., "Identity beyond Borders: International Cultural Heritage Law and the Temple of Preah Vihear Dispute", *ILSA Quarterly* 2011, vol. 20, issue 1, p. 37; see also: F. Francioni, "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity", *Michigan Journal of International Law* 2004, vol. 25, p. 1210.

⁶⁸ See a comparative analysis on the "heritage community" of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society signed in Faro on 27 October 2005 (hereinafter: the Faro Convention) and the "communities, groups and individuals" of the ICH Convention in: L. Zagato, "The Notion of 'Heritage Community' in the Council of Europe's Faro Convention. Its Impact on the European Legal Framework" [in:] *Between Imagined Communities...*, pp. 153–160.

⁶⁹ UNESCO Convention 2003 does not contain a definition of "community". We interestingly find the definition of "heritage community" for the first time in a relevant regional instrument in Article 2 paras. 1–2 of the Faro Convention.

the one hand, the latest developments in the field of human rights law⁷⁰ towards the expansive progressive interpretation of cultural rights – especially the right to participate in cultural life⁷¹ – so as to contain in its scope the right of access to and enjoyment of cultural heritage should be taken into consideration. On the other, this debate is somehow “transplanted” at the UNESCO level with the adoption of the Ethical Principles for ICH Safeguarding, among which Principle 2 declares: “the right of communities, groups and individuals to continue the practices, representations, expressions, knowledge and skills necessary to ensure the viability of the ICH”.⁷² Although they constitute a soft-law, thus non-binding, instrument and function merely as a code of conduct, their adoption reveals the existence of a dynamic tendency of inter-State discussion towards the recognition of a right to ICH.

Besides, the ICH international protection field remains new and evolving, thus a dynamic one, with all the instability as well as creativity when it comes to legal proposals that this evokes. Its current phase of evolution, following a consistent – more than decennial – application of the 2003 Convention after its entry into force in 2006, reveals still a process of transformation where maybe a re-orientation and re-position of the crucial questions at stake, rather than absolute answers to the already apparent deficiencies, would prove more effective. ICH intrinsically raises the question of limits,⁷³ either if that means the limits between different areas of law and the figurative frontiers raised between all actors involved in its safeguarding or the real inter-State borders. Safeguarding ICH seems challenging, insofar as the demand for a more active involvement of ICH bearers in the implementation of the system intensifies. The tensions manifested among States as also among communities within and beyond the same State, in the context of rather politicised debates especially in decision-making processes, are evident, while aspects of the existing regulation serve their maintenance instead of elimination. This

⁷⁰ Human Rights Council, Agenda item 3-Report of the independent expert in the field of cultural rights, Farida Shaheed, 17th Session, 21 March 2011, paras. 77–79 and Resolution 33/20: Agenda item 3-Cultural rights and the protection of cultural heritage, 33rd Session, 27 September 2016, preamble: paras. 4–5 and 1; Committee on Economic Social and Cultural Rights, General comment No. 21: Right of everyone to take part in cultural life, 43rd Session, 21 December 2009, paras. 11, 13, 16, 49, 50; Nonetheless, the Committee has never proceeded with adopting views in a case examining art. 15 para. 1a and as a result no practical example of the application of this interpretation exists so far.

⁷¹ Article 27 para. 1 of the Universal Declaration of Human Rights, adopted in Paris on 10 December 1948; Article 15 para. 1 of the International Covenant on Economic, Social and Cultural Rights, signed in New York on 16 December 1966.

⁷² IGC, *Decision 10.COM 15.a*, 2015, Annex.

⁷³ P. Dube, “The Beauty of the Living”, *Museum International*, ICOM 2004, vol. 56, issue 1–2, p. 123.

happens when States Parties “take advantage of” a mechanism that in practice prioritises their own interests over communities’ ones while perpetuating the Convention’s grey zones and the absence of specific legal guarantees.

In an imagined picture inspired by the famous album by Simon and Garfunkel, safeguarding shared ICH could be described as a “bridge over troubled water”. In an attempt to visualise ICH world map, if States’ relations provoke the “troubled waters” and ICH itself is the flowing water that connects cultures and peoples, the international regime for its safeguarding should be functioning as “a bridge” above any kind of borders rather than the foundations for the construction of more artificial “intangible walls” in a field where they were never supposed to exist.

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Summary

Safeguarding shared Intangible Cultural Heritage: A “bridge over troubled water”?

The paper examines the issue of the safeguarding of shared Intangible Cultural Heritage (ICH), namely transboundary manifestations that cannot be defined on the basis of their “presence” in a given territory, within the 2003 UNESCO Convention. Firstly, it refers to the characteristics of ICH somehow defining its protection’s perspectives. Secondly, it outlines the conventional mechanism, pointing out those aspects that might *a priori* in theory and *a posteriori* reflected in State practice favour or impede the protection of shared heritage in particular. Finally, it focuses on how the existent system deals with the issue, questioning whether its evolution is needed with a view to a potentially more effective safeguarding. In an attempt to visualise ICH world map, if States’

relations provoke the “troubled waters” and ICH itself is the flowing water that connects cultures and peoples, the international regime for its safeguarding should be functioning as “a bridge” above any kind of borders rather than the foundations for the construction of “intangible walls”.

Keywords: Intangible Cultural Heritage, international law of culture, safeguarding, shared cultural heritage, transboundary cultural heritage manifestations, UNESCO 2003 Convention

Streszczenie

Ochrona wspólnego niematerialnego dziedzictwa kultury: „most nad wzburzoną wodą”?

Tematem artykułu jest ochrona wspólnego niematerialnego dziedzictwa ludzkości, ściślej – transgranicznych przejawów tego dziedzictwa, czyli takich, których nie sposób ująć jako „znajdujące się” na danym terytorium w rozumieniu konwencji UNESCO z 2003 r. Autorka przedstawia definicję tego dziedzictwa oraz omawia sposoby jego ochrony, następnie opisuje mechanizm konwencji UNESCO z 2003 r., ze szczególnym uwzględnieniem zagadnień, które *a priori* lub w praktyce państw członkowskich mogą mieć znaczenie dla dziedzictwa wspólnego, wreszcie – ocenia efektywność systemu, a zwłaszcza to, czy potrzebne są zmiany. Obrazowo ujmując, jeżeli dziedzictwo niematerialne jest jak rzeka łącząca ludy i kultury, i jeżeli relacje między państwami mogą wywołać stan wzburzenia wód, to system ochrony wspólnego niematerialnego dziedzictwa mógłby zadziałać jak most przeciwdziałający traktowaniu dziedzictwa jako pretekstu do tworzenia barier.

Słowa kluczowe: niematerialne dziedzictwo kultury, międzynarodowe prawo kultury, ochrona, wspólne dziedzictwo kultury, transgraniczne przejawy dziedzictwa kultury, konwencja UNESCO z 2003 r.