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The Recognition of the Right to Cultural Identity under (and beyond) international Human Rights law

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Abstract

After summarising the range of reflections by legal scholars on Cultural Rights, this article scrutinises the principle interpretations of the right to take part in cultural life – by the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child. Due to the evolving interpretations adopted, these bodies have come to define both a right to cultural identity and a right to cultural heritage that is both nuanced and direct. Moreover, they open the door to more extensive attempts at defining customary state obligations, for instance, to respect cultural heritage as recently demonstrated by the decision of the International Criminal Court in the well-known *Prosecutor v. Ahmad Al Faqi Al Mahdi* case (2016). This article underlines the importance of this ruling in identifying the human dimension to cultural heritage. It established that the human perspective of cultural heritage is not a prerogative of human rights bodies only, but is beginning to be recognised and valued by other international agencies and organs.

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Introduction

A brief assessment of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) would show that these two treaties enshrine two different concepts of culture, and consequently of cultural rights. In the ICCPR, the only reference to cultural rights is represented by Article 27, which secures the right "to enjoy their own culture" to persons belonging to ethnic, religious and linguistic minorities.¹ This provision is based on a notion of culture which, on the one hand, supposes a broad conception of culture and on the other, makes reference to an anthropological meaning. In this regard, it is worth recalling the *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* elaborated in 1979 by Professor Francesco Capotorti, as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights – as well as the General Comment No. 23 (1994) adopted by the Human Rights Committee (HRC) on the rights of minorities. Both of these documents make reference to a broad notion of culture, encompassing not only literature, art, education, cultural heritage of minorities, but also customs, traditions and all elements «which form an integral part of their "way of life" (Capotorti, 1979:596).²

At the same time, Article 27 of the ICCPR borrows an anthropological and "identitarian" notion of culture, according to which culture provides minorities' members with values and meanings by which they build their identity. This conception

emerges firstly from the definition of "minority" proposed by Capotorti in his Study. This definition is based both on objective elements (*the minorities' numerically inferior condition, their non-dominant position and the ethnic, religious or linguistic characteristics of their members*) and on subjective elements, namely the shared sense of belonging aiming to preserve the minority's identity.³ In other words, the notion of minority in itself implies a reference to the sense of identity and belonging characterising its members. This element is even more evident as for indigenous groups.⁴ Indeed, as specified by the definition proposed in 1987 by Mr. José R. Martínez Cobo, another Special Rapporteur of the Sub-Commission, the notion of indigenous peoples differs from the general definition of minority in two aspects: first, the origin of indigenous peoples, which traces back to the pre-colonisation period; and second, the close connection existing between their cultural identity and their ancestral lands.⁵ The anthropological notion of culture adopted by Article 27 finds confirmation in General Comment No. 23 (1994); indeed, the Committee underlines that the provision's scope is to ensure the protection and development of minorities' identity.

¹ ICCPR, Article 27: «In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language».

² Emphasis added; in this regard, see also HRC 1994:7, the Committee specified that «culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples». As to this broad notion of culture, cf. also Nowak 2005: 658-659: «The term "cultural life" is to be understood in the broad sense. In addition to the customs, morals, traditions, rituals, types of housing, eating habits, etc., that are characteristic of the minority, the term covers economic activities, [...] the manufacture of objects of art, the encouragement of music, the establishment of cultural organisations, the publication of literature in the minority's language, etc.». Cf. also Thornberry 1991 and Burchill, 2009.

³ Capotorti 1979:568; according to Capotorti, the term minority identifies «A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being nationals of the State-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language». This element emerges also in the Study presented in 1985 by Jules Deschênes, another Special Rapporteur of the Sub-Commission, see Deschênes, 1985:181: «A group of citizens of a State, constituting numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law».

⁴ While the literal formulation of article 27 ICCPR makes only reference to persons belonging to minorities, the HRC has always extended its scope of application to members of indigenous groups.

⁵ Martínez Cobo 1987:379: «Indigenous communities, peoples and nations are those which, having a historical continuity with preinvasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present nondominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems».

As for the ICESCR, cultural rights are secured by Articles 13, 14, and 15. The first two articles concern the right to education and the parents' right to educate their children according to their own religious and moral convictions. Article 15 enshrines the right to (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; and (c) to benefit from the protection of the moral and material interests resulting from scientific, literary or artistic productions. The analysis of the *Travaux Préparatoires* of ICESCR, and particularly of Art. 15, para. 1(a), shows that these provisions were elaborated adopting a materialistic notion of culture. The original aim pursued by the drafters was to overcome inequality then characterising the access to cultural institutions (theatres, libraries, museum, and so on), and to guarantee everyone equal enjoyment of the highest and noblest expressions of human creativity and intellectual activities, such as philosophy, art, literature, music. While, as underlined by a commentator (Craven, 1994:162), the notions of culture and cultural life were perceived by delegates as "self-explanatory", (and they had not been debated during the discussions taking place at the General Assembly before the adoption of the ICESCR),⁶ the statements made by some delegations exemplify the materialistic approach prevailing at that time. For example, an Indian representative underlined the scope of provision corresponding to future Article 15, para. 1(a) stating that it "was to recognize the loftiest aspects of culture after defining the right to education [...and] referred to culture in its most intellectual" (General Assembly, 1957b: 18-19). Similarly, other delegates demonstrated their compliance with the right to take part in cultural life by referring to the number of scholarships offered by their country to study art, science and literature, as well as the number of libraries, theatres, cinemas and printed books.⁷

In distinction to Article 27 ICCPR, the ICESCR's provisions on cultural rights, and in particular

⁶ In this regard, see General Assembly 1957a; General Assembly 1957b; General Assembly 1957c.

⁷ cf. General Assembly 1957b: 27; General Assembly 1957a: 6.

Article 15(1)(a) on the right to take part in cultural life, were elaborated, as noted, by drawing on a materialistic notion of culture: it was conceived as including the highest and noblest manifestations of intellectual activities, and ultimately it was assimilated to a material good, while remaining lofty and noble. Strangely perhaps, the two International Covenants embraced two different notions of culture, and consequently of cultural rights – on the one hand, the right to enjoy one's own culture, recognised in relation to members of minorities and indigenous peoples, and which had an identitarian meaning and anthropological function; on the other hand, the right to take part in cultural life, to which everyone is entitled, regardless of their belonging to a minority or an indigenous groups, and which was conceived in a materialistic sense.

Over the years, legal scholars, influenced by anthropological studies, have promoted a significant reflection on notions of culture and cultural rights. They have pointed out the necessity to stress the identitarian and anthropological nature of culture in relation to everyone, and not only to persons belonging to minorities and indigenous peoples. Among these authors, it is worth recalling the reflection elaborated by the Fribourg Group, a working group composed of international experts, organised from the Interdisciplinary Institute for Ethics and Human Rights (IIEDH) of the University of Fribourg (Switzerland), and coordinated by Professor Patrice Meyer-Bisch. The Group was created in 1991 after a Conference on "Les droits culturels: une catégorie sous-développée de droits de l'homme" (Meyer-Bisch, 1993), and since its origin has worked in strong connection with the Council of Europe and UNESCO, and with the Office of the United Nations High Commissioner for Human Rights.⁸

Developing the legal and philosophical reflection on cultural rights, the Fribourg Group has elaborated an articulate theorisation which allowed it to propose, in 2007, the Fribourg Declaration on Cultural Rights. While the Declaration does not possess any legal status, it is

⁸ To examine in depth the composition and history of Fribourg Group, see Meyer-Bisch and Bidault, 2010: 141 ss.

of considerable significance. It does not define *new* cultural rights, but has gathered in a single document all the cultural rights already recognised under international human rights law, albeit "in a dispersed manner" (Declaration 2007: Preamble, IX recital). This systematisation consents to clearly identify cultural rights, precisely define their content, and ultimately encourage their full implementation. This merit has been widely recognised by human rights treaty bodies, and in particular by the Committee on Economic, Social and Cultural Rights (CESCR). As a matter of fact, the notion of culture elaborated by this organ has undergone a meaningful evolution, which has led to elaborate a new interpretation of the right to take part in cultural life. And this interpretation has been widely influenced by the Fribourg Declaration.

This article will proceed as follows. Firstly, it will summarise the reflection elaborated on by legal scholars concerning notions of culture and cultural rights, and do so by paying a great deal of attention to the proposal made by the Fribourg Group, formalised in the Fribourg Declaration on Cultural Rights. Secondly, it will analyse the evolutive interpretation elaborated by the CESCR on the right to take part in cultural life; and special attention will be given to the General Comment No. 21 (2009), in which the Committee came to embrace a broad interpretation of the right to take part in cultural life, and to recognise a right to cultural identity. Thirdly, this article delves into the protection assured by the Committee on the Rights of the Child (CRC) to the child's right to take part in cultural life, and more generally to the cultural identity of children. Finally, the article will briefly analyse the judgement rendered by the International Criminal Court in the case *Prosecutor vs. Ahmad Al Faqi Al Mahdi* on the international crime of attacking cultural heritage. The protection of cultural heritage under international law is not a topic to be discussed here; however, the *Al Mahdi* decision is of utmost importance as the Court stressed the human dimension of cultural heritage and endorsed the interpretation of cultural identity elaborated by human rights treaty bodies.

I. The Scholars' Reflection on Culture and Cultural Rights

The development of contemporary anthropology since the 1960s eventually had a significant measure of impact on international lawyers in their reflection on the notions of culture and cultural rights adopted by the two International Covenants. A survey of the legal literature would show that one of the most shared definitions is that proposed by Stavenhagen (1995) and then adopted by other notable authors (Eide, 1995; O'Keefe, 1998; Stamatopoulou, 2007; Psychogiopoulou, 2008; Yupsanis, 2012). In Stavenhagen's view, it is possible to identify different definitions of the "right to culture" depending on the specific conception of culture adopted. The analysis of international human rights law allows Stavenhagen to distinguish three different notions of culture. First, culture can be conceived as the "accumulated material heritage of humankind as a whole or of particular human groups"; according to this notion, the right to culture is the right to have access to cultural capital. Second, culture can be defined as "the process of artistic and scientific creation"; in this perspective the right to culture identifies the right to free cultural creation and the right to have access to cultural creations. Finally, the term culture can qualify "a coherent self-contained system of values and symbols that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationship in everyday life"; in this light, the right to culture must be defined as the right to maintain and develop one's own culture or, in other words, "the right to cultural identity" Stavenhagen (1995: 65-66).

As for the specific definition of cultural rights, it is worth recalling that several Authors have proposed to distinguish between a narrow and a broad notion of these rights (Symonides, 1993 and 2000; Häusermann, 1994; Eide, 1995; Donders, 2002 and 2007). According to the narrow conception, it is possible to qualify as cultural rights only the kinds of rights that include a specific and explicit reference to culture, such as the right to take part in cultural life and the right

of minorities' members to enjoy their own culture. Instead, the adoption of a broad notion of cultural rights makes it possible to include, along with these rights, all those which, while traditionally classified as civil, political, economic or social rights, have a significant "link" with culture, such as for example freedom of religion, freedom of expression, freedom of association, and right to education.⁹ While not adopting this distinction between a narrow and a broad notion of cultural rights, other authors (Prott, 1988; Symonides, 2000) have proposed a list of cultural rights which, clearly, supposes the adoption of an anthropological notion of culture, and indeed includes also the right to cultural identity.¹⁰

1.1. The notion of cultural rights proposed by the Fribourg Group

The analysis of academic studies on cultural rights cannot help but mention the pivotal contribution of the Fribourg Group which, as recalled above, came to propose the Fribourg Declaration on

⁹ This classification is proposed in particular by Donders (2007); Häusermann (1994) makes reference to right to education, freedom of expression and information, right to privacy, and freedom of religion; Symonides (1993) includes in the broad definition of cultural rights the right to education, the right to participate in scientific progress, and the right to information. While not recalling the distinction between a broad and a narrow notion of cultural rights, Eide stresses the «close link» (1995:232) existing between cultural rights identified by the provisions of the two Covenants and some other rights, such as right to education, freedom of information and expression, freedom of religion, freedom of assembly and association, and the right to property.

¹⁰ Prott (1988) defines cultural rights as including (1) the right to freedom of expression, religion and association; (2) the right to education; (3) the parents' right to choose the education to be given to their children; (4) the right to take part in cultural life; (5) the right to protect the artistic, literary and scientific work; (6) the right to develop a culture; (7) the right to respect cultural identity; (8) the minorities' right to respect for their identity, traditions, languages, and cultural heritage; (9) the people's right to their own artistic, historical and cultural wealth; (10) the people's right not to have an alien culture imposed; and (11) the right to the equal enjoyment of the common heritage of mankind. Symonides (2000), while recognising that some rights, such as freedom of religion, expression, association and assembly, play a critical role to assure cultural rights, he does not qualify them as cultural rights. According to this Author, it is possible to qualify as cultural rights: (1) the right to cultural identity; (2) the right to take part in cultural life; (3) the right to education; (4) the right to creativity and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production; (5) the right to information; (6) right to enjoy benefits of scientific progress and its applications; (7) the right to cultural heritage; and (8) the right to cultural international cooperation. As to the right to cultural identity, cf. also Riedel who refers to the individuals' right to «to define their own identity and/or to do so as part of a culture» (2010: 78).

cultural rights. To study the reflection of the Fribourg Group, it is necessary to start examining the definition of culture formalised in Article 2(a) of the Declaration, according to which the term "culture" covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and the meanings that they give to their existence and to their development.'

The relevance of this definition lies in a couple of different aspects. Firstly, it embraces a broad definition of culture, including not only material aspects, but also traditions and ways of life. Secondly, and more importantly, it lays stress on the identitarian role of culture: culture performs a pivotal role in developing individual identity as it provides individuals with a horizon of meanings, senses and values where they can find references to build and shape their identity.¹¹ This notion presumes that cultural goods cannot be reduced to their material and tangible basis; instead, as stated by the UNESCO Universal Declaration on cultural diversity (2001), they are "vectors of identity, values and meaning" (Article 8).

When a person encounters a "cultural good", he/she encounters the values and meanings expressed by it, and unavoidably takes a position in relation to these values. When they are assessed as positive values, the individual will appropriate these values as a reference point in building his/her identity. Against this background, cultural goods represent the means whereby persons constructs interpersonal relationships; indeed, when an individual recognises himself/herself in values expressed by a cultural good, he/she establishes an indirect link with persons sharing these same values, and in this way, he/she becomes part of a cultural community.¹² According to the Fribourg

¹¹ Wilhelm, 1993; Bassand, 1993; Ayton-Shenker, 1995; Meyer-Bisch and Bidault, 2010; Riedel, 2010. As underlined by Ayton-Shenker (1995): «Cultural background is one of the primary sources of identity. It is the source for a great deal of self-definition, expression, and sense of group belonging».

¹² It is important to specify that, in Meyer-Bisch's view (Meyer-Bisch and Bidault, 2010), belonging to a community does not suppose a formal membership, but it exists as soon as individuals recognise themselves in values shared by the community's members, and consequently create an indirect relationship with them.

Declaration, a cultural community is the group of persons sharing the same cultural references, and these references constitute the cultural heritage of the community.¹³ In the light of this, cultural goods and cultural heritage acquire a fundamental “human” dimension: they do not simply label a material good, but they have an identitarian value as they allow individuals to recognise themselves in values expressed by them, and to shape their identity.

It is important to refer to some specification as to the process characterising the development of individual cultural identity. This is a complicated process as it lies in the creative contribution of everyone: while, on the one hand, culture provides individuals with references allowing them to build their identity, on the other, individuals offer a fundamental contribution for the development and interpretation of culture. The individual contribution lies in two different aspects. First, when person recognise a cultural value as one of their identitarian references, this value is not accepted in an acritical and automatic manner, following standardised and predetermined standards; instead, the reference is re-interpreted and re-elaborated by others. Consequently, when the acquired reference is shared and communicated with others, it will have a different and new guise arising from the reinterpretation made by the person who, thereby, becomes creator of cultural references. Cultural goods cannot be conceived without considering the creative contribution of everyone, and ultimately their freedom and dignity.¹⁴ Second, as stressed by Sen (2006), individuals are not characterised by one single identity; instead they have multiple and interlaced identities. Individuals build their identities on different and simultaneous affiliations which, sometimes, can respond to inconsistent logics. To overcome the opposition existing between multiple cultural references, persons must reinterpret them to assure their conciliation. As underlined by Meyer-

¹³ Fribourg Declaration 2007: 2(c) : «“Cultural community” connotes a group of persons who share references that constitute a common cultural identity that they intend to preserve and develop».

¹⁴ Cf Meyer-Bisch 2008 : 4 and 19; the Author underlines that the free and creative participation of individuals «à la reconnaissance et au développement des références culturelles» represents a fundamental precondition to respect human dignity.

Bisch, contractions existing between different affiliations represent some “espaces de libertés” (2000: 271): they provide persons with rooms to freely and autonomously decide how to conciliate them. In other words, cultural references are not imperatively imposed on individuals; these latter develop and build their identities by fully expressing their freedom and autonomy. This implies that, as underlined by Donders, cultural identity is not a fixed entity “given from birth” (2001:30); instead, it corresponds to a dynamic and never-ending process of re-interpretation and re-elaboration of cultural references.¹⁵ As the appropriation of a cultural reference implies the establishment of a relation with a cultural community, it is crucial to stress that freedom and autonomy characterising the development of personal identity similarly affect the communities’ membership. Indeed, as underlined by Article 4 of the Fribourg Declaration, the adhesion to a cultural community must be absolutely free, as well as the decision to modify this choice.¹⁶ Moreover, in the light of multiple affiliations marking human identity, the belonging to a cultural community does not exclude, but is normally associated with, the adhesion to other cultural communities.

Before concluding, it is worth stressing an additional character of the notion of culture proposed by the Fribourg Declaration. As the development of individual identity implies the creative approach of everyone who gives their personal interpretation of cultural references, culture is characterised by a dynamic and evolutive nature as well. It cannot be conceived as a set of given and defined elements, but represents a *quid in fieri*, a “*moment provisoire*” (Meyer-Bisch and Bidault, 2010: 33) of a never-

¹⁵ As underlined by Donders, cultural identity «should be considered a process, instead of a creation according to a fixed scheme. Cultural identity is not a simple, uniformly consisted entity given from birth». In this sense, cf. also Meyer-Bisch and Bidault, 2010 : 34 : «L’identité est culturelle, car elle est le résultat d’un travail permanent de recherche de sens et de communication». Cf. also Wilhelm 1993 and Keller 1998.

¹⁶ Fribourg Declaration 2007: 4 : «(a) Everyone is free to choose to identify or not to identify with one or several cultural communities, regardless of frontiers, and to modify such a choice; (b) No one shall have a cultural identity imposed or be assimilated into a cultural community against one’s will.»

ending process which is open to continuous developments and evolutions.¹⁷

I.I.I. *The notion of cultural rights proposed by the Fribourg Declaration*

As individuals shape and develop their own identity from meanings and values expressed by culture, cultural rights must be defined as rights allowing persons to access to cultural references necessary to build and express their cultural identity.¹⁸ The Fribourg Declaration consists of a Preamble with 8 recitals and 12 Articles: after the firsts two Articles, defining some fundamental principles and key concepts, there is six provisions listing cultural rights (Articles 3-8) and four provisions concerning their implementation (Articles 9-12). Here it is not possible to analyse the entire content of the Declaration; however, it seems important to reflect on Article 3 concerning the right to identity and cultural heritage; it reads as follows: "Everyone, alone or in community with others, has the right:

- a. To choose and to have one's cultural identity respected, in the variety of its different means of expression. This right is exercised in the inter-connection with, in particular, the freedoms of thought, conscience, religion, opinion and expression;
- b. To know and to have one's own culture respected as well as those cultures that, in their diversity, make up the common heritage of humanity. This implies in particular the right to knowledge about human rights and fundamental freedoms, as these are values essential to this heritage;
- c. To access, notably through the enjoyment of the rights to education and information, cultural heritages that constitute the expression of different cultures as well as resources for both present and future generations.

¹⁷ Cf. Prott, 1988; Marks and Clapham, 2005; Pedrazzi, 2011.

¹⁸ Cf. Meyer-Bisch, 2008: 14; here the Author affirms that «Les droits culturels désignent les droits, libertés et responsabilités pour une personne, seule ou en commun, avec et pour autrui, de choisir et d'exprimer son identité, et d'accéder aux références culturelles, comme à autant de ressources qui sont nécessaires à son processus d'identification»; similarly cf. Meyer-Bisch and Bidault, 2010 : p. 17.

The right to choose and to have one's cultural identity respected (Article 3 (a) represents the essence itself of cultural rights: it formalises the principle underpinning the whole Declaration, and it is further specified and developed in the following provisions. They secure the right to identify or not with one or several cultural communities (Article 4), the right to access and participate freely in cultural life (Article 5), the right to education and training (Article 6), the right to communication and information (Article 7), and the right to participate in the cultural development of one's own community and cultural cooperation (Article 8).

The definition of culture provided by the Fribourg Declaration makes it possible to overcome the dualism characterising the notion of cultural rights embraced by the two International Covenants, in which the ICCPR embraces an anthropological conception, and the ICESCR a materialistic one. Starting from an anthropological and identitarian notion of culture, the Fribourg Declaration adopts a broad definition of cultural rights, which encompasses all rights allowing individuals to develop and express their own cultural identity.

II. **The evolutive interpretation elaborated by the CESCR on the right to take part in cultural life**

After the adoption of the ICESCR, the interpretation elaborated by the CESCR on the right to take part in cultural life has undergone a significant evolution. This evolution has been deeply influenced, on the one hand, by the reflection elaborated by scholars, and on the other, by the important instruments adopted by UNESCO on cultural heritage and cultural diversity. In this regard, the scholarly reflection on culture and cultural rights had influenced and, in its turn, had been influenced by the action promoted by UNESCO. Certainly, culture is at the heart of UNESCO's mission; and indeed, UNESCO had consecrated several studies on culture and cultural rights: this is illustrated by the significant International Conference on cultural rights organised in 1968. At the same time, it is important to remember that beginning with this Conference, UNESCO started to promote an

inclusive notion of culture which is understood as the way of life expressing the identity of an individual or a people (UNESCO 1970). This conception has been fully recognised by the Recommendation on participation by the people at large in cultural life and their contribution to it (1976), and then in the Mexico City Declaration on cultural policies (1982), the Universal Declaration on cultural diversity (2001) and in the Convention for the safeguarding of intangible cultural heritage (2003). This set of hard and soft law instruments, adopted by UNESCO, borrows a notion of culture which stresses both culture's dynamic character, and the role it performs to make it possible the development of individual identity.

Academic reflection and studies promoted by UNESCO have deeply influenced the interpretation elaborated by the CESCR on the right to take part in cultural life and have allowed the Committee to overcome the original notion characterised by a materialistic approach. A first stage in this evolution was represented by the reporting guidelines, adopted by the Committee in 1991, to define the elaboration of reports which states party to the ICESCR are periodically requested to submit according to Articles 16 and 17 of the Covenant. The new guidelines, replacing the preceding ones, borrowed a notion of culture which, while keeping elements of the original conception, was really more open and inclusive. On the one side, the guidelines require member states to provide information on infrastructures created to guarantee the participation to cultural life, such as museums, libraries, cinemas, theatres, and so on; on the other side, the Committee stressed the importance to promote "cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions" (CESCR 1991). This formulation is illustrative of a more inclusive notion of culture, which points out the role it plays to allow individuals to develop their own personal identity.¹⁹

Another fundamental step is identifiable in the general discussion day, organised by the CESCR in

¹⁹ In this regard see also Donders, 2002:151; as underlined by the Author, the reference to cultural identity as « a factor of mutual appreciation» expresses a notion of culture really more inclusive than a notion only including its materialist aspects.

1992, on the right to take part in cultural life. The working paper, elaborated by Mr. Samba Cor Konaté, a Committee's member, on the content of Article 15.1 (a) stressed that the tendency to reduce the notion of culture only to its "external manifestations of culture, such as libraries, museums, works of art" (CESCR 1992: para. 5) risks leading towards the adoption of a « materialist or even mercantilist» definition (CESCR 1992: para. 6). This manner of conception is not able to emphasise the deep relationship existing between culture and human dignity, and consequently the pivotal role played by culture in the human rights system. During the general discussion day, several Committee members highlighted the necessity to conceive culture as broad and comprehensive, including all human activities manifesting the way of life of a person or a group and to express their values and worldview.²⁰ Culture "mirrored and shaped" a community's life, provides individuals with a sense of belonging and defines their identity (CESCR 1992: para. 17). In the light of this, they stressed the necessity to overcome the subsidiary position recognised to cultural rights and emphasised the central role of the right to take part in cultural life in the human rights system.²¹

The meaningful evolution characterising the interpretation elaborated by the CESCR on the right to take part in cultural life emerges in a significant way from the reporting guidelines adopted in 2008 to replace the previous ones. Certainly, they keep some references to the materialistic notion of culture, requiring states to

²⁰ See in particular CESCR 1992: para. 17, the intervention of Mrs. Bonoan-Dandan; she proposed a broad notion of culture encompassing «language, non-verbal communication, oral and written literature, song, religion or belief systems which included rites and ceremonies, material culture, including methods of production or technology, livelihoods, the natural and man-made environment, food, clothing, shelter, the arts, customs and traditions consisting of practices, behaviour and institutions which reflected the norms of social order by which members of the community abided freely, plus a world view representing the totality of a person's encounter with the external forces affecting his life and that of his community. Those fundamental elements of culture distinguished man from beasts». See also the intervention of Mr. Zachariev, UNESCO's representative, who underlined the organisation's will to «to go beyond the materialistic vision of culture, to one that included every aspect of the creativity of individuals and groups, both in their style of life and in their mode of practical activity» (para. 36).

²¹ CESCR 1992: para. 52, intervention of Mr. Fofanà; he defined the right to take part in cultural life as «a central pillar of human rights».

submit information on infrastructures established to assure the access to and the participation in cultural life, and to guarantee that "access to concerts, theatre, cinema, sport events and other cultural activities is affordable for all segments of the population" (CESCR 2008a: 67 a). However, these guidelines are characterised by some really significant aspects. Different to previous ones, the 2008 guidelines not only refer to participation in cultural life, but introduce the issue of access. As it will be underlined below, the General Comment No. 21 (2009) recognised a fundamental role to "access" to cultural life and cultural heritage. In the light of this, the references made by the guidelines to access to cultural infrastructure acquire a different meaning: accessing to culture is not simply functional (understood as a mere availability of a material good); access becomes a fundamental condition to assure an effective and active participation in cultural life. Moreover, it is really meaningful that the guidelines require states to "Indicate the measures taken to protect cultural diversity, promote awareness of the cultural heritage of ethnic, religious or linguistic minorities and of indigenous communities, and create favourable conditions for them to preserve, develop, express and disseminate their identity, history, culture, language, traditions and customs" (CESCR 2009a: 68). This paragraph is important for two different references. Firstly is its reference to cultural diversity and cultural heritage, and how these reflect the influence of instruments adopted by UNESCO on these issues. The Committee recognises the essential link existing between the right to take part in cultural life (*rectius*, cultural rights), cultural diversity, and cultural heritage. In particular, this is directly relevant to the UNESCO Universal Declaration on cultural diversity, which defines the protection of cultural diversity an "ethical imperative" in guaranteeing respect for human dignity (Article 4) and where cultural rights are an essential precondition to assure the effectiveness of cultural diversity (Article 5). Secondly is its reference to identity of indigenous groups and minorities. Recalling not only the preservation of cultural identity, but also the development and expression, the guidelines overcome a "museum" notion of cultural heritage, but embrace an evolutive and dynamic notion.

II.1 *The General Comment No. 21 (2009) on the right to take part in cultural life*

In 2007, the CESCR decided to hold another general discussion day on the right to take part in cultural life. The discussion day took place in 2008 with the specific aim to reflect on notion of cultural life and on the content of the right to take part in cultural life, and to open the way for the adoption of a General Comment on this right. Undoubtedly, the General Comment No. 21 (2009) represents a real turning point: as it will be underlined below, the Comment gave an interpretation of culture and of the right to take part in cultural life which is deeply involving the whole notion of cultural rights. Not by chance, the General Comment starts with a reference to all cultural rights, the importance of which is emphasised by the Committee stating that they "are an integral part of human rights" (CESCR 2009a: 1).

II.1.1. *The anthropological notion of culture*

One of the main reasons makes it possible to qualify the General Comment as a revolutionary milestone in the interpretation of cultural rights lies in the formalisation of an anthropological and identitarian notion of culture. The concept of culture is defined in paragraph 13, according to which culture

...encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.

In elaborating this definition, the Committee exemplifies the learning over the years both by UNESCO and academic scholarship, and in particular by the Fribourg Group. Indeed, the

Committee's definition seems to completely embrace the definition of the Fribourg Declaration which, as a matter of fact, is explicitly quoted, as well as the UNESCO Universal Declaration of Cultural Diversity.²² More generally, the influence of UNESCO and Fribourg Group emerges in the overall Comment.

The definition of culture provided by the General Comment No. 21 is characterised by three significant aspects. First, it is a dynamic and evolutive notion. As clearly underlined by the Committee, culture must be conceived as "a living process" (CESCR 2009a:11)²³: it is not static and unchanging, but thanks to creative contributions of everyone, it is liable to a constant evolution and development. Second, it is a broad and omnicomprehensive definition: culture is not reduced to its materialistic or "external" aspects, but it includes "all manifestations of human existence" (CESCR 2009a: 11). Third, and most important, it is an identitarian notion which stresses the critical role played by culture to make it possible the development of personal identity. According to the definition proposed by the Committee, culture covers all activities and practices which, thanks to their capacity to express a sense and meaning, represent the references allowing individuals to shape their identity. It is just in the light of this that, throughout the Comment the term identity is always associated with the qualification cultural: between culture and identity there is such a close relation that identity cannot but have cultural origin. The deep link existing between culture and identity is underlined by the definition of culture itself, according to which culture includes all human activities allowing persons and community to "express their humanity and the meaning they give to their existence and build their world view". This aspect emerges also when the Committee, dealing with the children's right to take part in cultural life, stresses that education must ensure the "the transmission [...] of common cultural and moral values in which the individual and society find their identity" and "enable children to develop their personality and cultural identity" (CESCR 2009a: 26). In this point, education is

interpreted according to a cultural approach: it is viewed as the means permitting the transmission of cultural values which are qualified as the reference points needed by individuals to develop and build their personal identity. Consistently with this perspective, the General Comment quotes the UNESCO Universal Declaration of Cultural diversity and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, and underlines that cultural goods and services must be conceived "as vectors of identity, values and meaning" (CESCR 2009a: 49(a)).²⁴

II.I.II. *The content of the right to take part in cultural life*

To define the content of the right to take part in cultural life, it is necessary to mention two different parts of the General Comment: the section dealing with the meaning of the expression "to take part" (paragraph 15), and the section on member states' obligations stemming from the right to take part in cultural life (paragraph 49 ss.). As to the first aspect, the Committee underlined that the right to take part in cultural life includes three different "components", such as the participation in, the access to and the contribution to cultural life, and each of them "cover" several rights (CESCR 2009a: 15). The first component, namely the participation *stricto sensu*, covers two different spheres: on the one side the participation in political life and cultural activities, and on the other the choosing of one's own cultural identity, the adhesion to cultural communities and the use of one's own language. Similarly, the access concerns two different fields – on the one hand, the right to education and information whereby everyone can know their culture and cultures of others, and the right to benefit from cultural heritage, and on the other hand, the right to follow one's own way of life associated with the use of natural resources and cultural good. Finally, the contribution covers the right to be involved and to contribute to creative activities of the community, and the right to participate to the community's development

²² See in particular, CESCR 2009: 13, footnote 12.

²³ See also CESCR 2009: 12.

²⁴ See Universal Declaration of Cultural diversity, Article 8; Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Preamble XVIII recital and Article 1 (g).

and in the definition of policies impacting on cultural rights.

With regard to the section on states' obligations, it is necessary to make a few remarks on the general structure of General Comments. In his report submitted in 1987, *Right to Adequate Food as a Human Right*, the Special Rapporteur to the then UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Professor Asbjorn Eide proposed a tripartite classification of state obligations stemming from human rights, identifying the obligation to respect, to protect, and to fulfill.²⁵ The Eide's tripartite distinction was widely accepted by the CESCR beginning with the adoption of the General Comment No 12 (1999) on the right to adequate food, and it has been further developed by the Committee in its next General Comments. According to the Committee, the obligation to respect implies that states refrain from interfering with enjoyment of the right; the obligation to protect requires states to take necessary measures preventing private parties from interfering with the enjoyment of individuals' rights, and the obligation to fulfil supposes the adoption of measures aiming to assure the full realisation of the right.

Normally, the Committee, in its General Comments provides some illustrative examples in order to detail the specific content the obligations assume with regard to the specific right covered by the Comment.²⁶ Instead, General Comment No.

²⁵ ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Adequate Food as a Human Right*, Report prepared by Mr A. Eide, UN Doc. E/CN.4/Sub.2/1987/23 (1987), paras. 66 et seq.

²⁶ For example, see the General Comment n. 19 (2005), *The right to social security*: «The obligation to respect requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to social security. The obligation includes, inter alia, refraining from engaging in any practice or activity that, for example, denies or limits equal access to adequate social security» (CESCR 2005: 44). General Comment No. 24 (2017) on *State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*: «The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights. This may occur for instance when forced evictions are ordered in the context of investment projects. Indigenous peoples' cultural values and rights associated with their ancestral lands are particularly at risk». (CESCR 2017a: 12).

21 does not present such a structure, which as a matter of fact characterises all Comments both previous and following its adoption. The peculiarity of General Comment No. 21 lies in particular in paragraph 49 on states' obligation to respect, reading as follows:

The obligation to respect includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group

After this affirmation, the following subparagraphs (from (a) to (e)) enumerate some specific rights. Each of these rights is characterised by a composite content, which is further specified in the following lines of the subparagraph. In particular, the Committee identified:

- i. the right to freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected;
- ii. the right of all persons to express their cultural identity freely and to exercise their cultural practices and way of life;
- iii. the right to enjoy freedom of opinion, freedom of expression in the language or languages of their choice;
- iv. the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers of any kind;
- v. the right to enjoy the freedom to create, individually, in association with others, or within a community or group;
- vi. the right to have access to their own cultural and linguistic heritage and to that of others;
- vii. the right to be taught about one's own culture as well as those of others;
- viii. the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life;

- ix. the right to take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights.

It is important to stress the highly exceptional character of this structure. In its other General Comments, while exemplifying some measures states are requested to take in order to implement their obligation to respect, the Committee has never referred to measures necessary to guarantee rights different from the specific right dealt with in the Comment. Instead, in General Comment No. 21, the CESCR stated that the implementation of obligation to respect the right to take part in cultural life requires states to adopt measures necessary to respect some other rights, namely the rights listed above.

Also paragraph 50 on the obligation to protect is characterised by a structure different from the usual Comments' structure. On the one hand the Committee upheld the traditional definition of obligation to protect, according to which it requires states to adopt necessary measures to prevent third parties from interfering with the right. However, on the other hand, the CESCR stated that the measures states are requested to adopt are those measures necessary to protect the exercise of rights listed in paragraph 49. Along with these measures, the Comment identified some other obligations to protect which are focused on the respect and protection of cultural heritage and cultural production. Unlike the obligations to respect and protect, the obligation to fulfil keeps the traditional content characterised by the usual distinction between obligations to facilitate, promote and provide.²⁷

The exceptional and peculiar structure of paragraphs defining the content of the obligation to respect makes it possible to affirm that in the General Comment No. 21, the CESCR defined the right to take part in cultural life as a right having a broad and composite content and including some other (cultural) rights. Moreover, it is possible to find a match between rights listed in paragraph 49

(a)-(e) and rights covered by the three components, identified in paragraph 15. In other words, the rights included in the three components identified by the Committee (participation in, access to and contribution to) become object of the states' obligation to respect. As these rights are covered by some states' obligations, they are not simple components of the right to take part in cultural life but become rights which states party to the ICESCR are obliged to guarantee. It is meaningful to underline that the rights identified by the Committee correspond to a large extent to the broad notion of cultural rights proposed by scholars and formalised in the Fribourg Declaration. Not surprisingly, the first right identified by the Committee, both in paragraph 15 and in paragraph 49, is the right of everyone to freely choose their own cultural identity.

Needless to say, the General Comment No. 21 represented a meaningful revolution as regards the international protection of cultural rights. The broad and anthropological notion of culture adopted by the Committee makes it possible to qualify the right to take part in cultural life as a right having a broad and composite content including all cultural rights, as broadly understood.

II.I.III. *Subjects entitled to the right to take part in cultural life (rectius: cultural rights)*

Another fundamental aspect characterising the General Comment No. 21 and giving it a fundamental importance concerns the subjects who are entitled to enjoy the right to take part in cultural life, and more generally all cultural rights. As already underlined, according to the traditional interpretation, cultural rights have been only recognised in favour of persons belonging to minorities and indigenous groups. While paying a great deal of attention to these categories, the General Comment adopted an "individualistic" notion of culture and cultural rights.

This approach emerges first in paragraph 9, underlining that "cultural rights may be exercised *by a person* (a) as an individual, (b) in association with others, or (c) within a community or group, as such". Firstly, the Committee recognised that the right to take part in cultural life can be

²⁷ CESCR 2009:52-53-54.

exercised not only collectively, but also by individuals in themselves (a). Secondly, while these rights keep an important collective dimension, and indeed they can be exercised in association with others or within a community, cultural rights are recognised and exercised by a person. In other words, rights-holders are individual persons, not community or groups.

In this regard, it is important to recall also the definition of culture provided in paragraph 13: it is conceived as the expression of human existence through which, not only "groups of individuals and communities", but also individuals "express their humanity".²⁸ In this perspective, the Committee underlined that culture is a good to be recognised and protected in favour of individuals, too. The adoption of such an approach is extremely meaningful as it can open the way to assure an effective protection of cultural rights into modern societies. Indeed, knowledge communications and people movements are so simple and swift that cultural identity – while keeping a strong collective dimension -- is becoming a good affecting everyone who in their lifetime can experience numerous cultural influences and thus build their own identity referring to different cultures and ways of life. The protection of cultural identity is becoming urgent and overdue, in particular, for migrant workers, refugees and asylum seekers. Indeed, their cultures are not, generally, shared with the majority of the society; at the same time, they can have multiple and interlaced identities that makes it difficult to identify them into one single community of belonging (Sen 2006).

The CESCR, in the General Comment No. 21, proved to overcome the traditional tendency only recognising cultural rights in favour of persons belonging to minorities and indigenous groups also in the section E of the Comment dealing with "Persons and communities requiring special protection". In this section, the Committee made reference to minorities and indigenous groups, but also to some other vulnerable categories of

²⁸ In this regard, see also CESCR 2009:7; in this paragraph the Committee underlines that « The decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality».

persons, namely women, children, older persons, persons with disabilities, persons living in poverty, and migrants. Two specific paragraphs, albeit quite short, are dedicated to the protection of cultural identity of migrants.²⁹ A specific reference is also present in relation to obligation to facilitate which, as underlined by the Committee, includes also the adoption of measures and programmes aiming to support the preservation of migrants' culture (CESCR 2009a:52(f)).³⁰

II.II. *The right to take part in cultural life in the CESCR's Concluding Observations*

To complete the analysis of the right to take part in cultural and clarify the concrete application it can have, it can be instructive to recall the Concluding Observations adopted by the CESCR at the end of the examination of periodic reports states are requested to submit according to Articles 16 and 17 ICESCR.

Before analysing the most interesting aspects concerning the right to take part in cultural life, it is possible to make some general considerations in this regard. First, due to the cross-cutting nature of cultural rights, on several occasions the Committee refers to cultural rights not only in the specific session concerning this, but in some other points of the Concluding Observations. So, for example, it is possible to find significant references to cultural rights in sections dedicated to some specific groups of vulnerable persons (i.e. indigenous peoples, African descent, migrant workers, refugees and asylum seekers) or to some specific issues (lands, equality between women and men, poverty, non-discrimination, business and human rights) or rights (in particular the right to work, to education, to health).

Second, the analysis of Concluding Observations makes it possible to remark the tendency towards

²⁹ CESCR 2009:34-35: «34. States parties should pay particular attention to the protection of the cultural identities of migrants, as well as their language, religion and folklore, and of their right to hold cultural, artistic and intercultural events. States parties should not prevent migrants from maintaining their cultural links with their countries of origin.

35. As education is intrinsically related to culture, the Committee recommends that States parties adopt appropriate measures to enable the children of migrants to attend, on a basis of equal treatment, State-run educational institution and programmes».

³⁰ For a more comprehensive analysis of the protection of cultural identity of migrants, let me make reference to Ferri, 2017.

recognising the right to take part in cultural rights especially in favour of persons belonging to minorities and indigenous groups. On several occasions, the Committee expresses its concern about the situation of persons living in a vulnerable condition (migrant workers, refugees, asylum seekers, women ...) and requires states to adopt measures necessary to guarantee them to enjoy social and economic rights without discrimination, and in particular the right to health, to work, to adequate housing, to education, and to social security. While, as underlined above, the General Comment No. 21 marked a significant turning point from this point of view, the Concluding Observations keep – also after the General Comment’s adoption – several references to cultural rights of minorities and indigenous peoples.

The following paragraphs are focused on the main topics the Committee deals with in its Concluding Observations, and in particular in the sessions specifically devoted to the right to take part in cultural life.

Access to cultural institutions and protection of cultural heritage. Frequently, the Committee underlines the necessity to assure equal access to culture and cultural activities, and to institutions promoting culture, such as museums, cinemas, theatres, and so on.³¹ In the most recent Concluding Observations, the Committee has made significant references to cultural heritage: it has recommended states to protect and preserve *cultural heritage*, expressing its concern about the massive destruction of cultural heritage and looting of cultural goods.³² Sometimes, while more rarely, the Committee recognises the right

to access to cultural heritage as an important condition to assure the effectiveness of the right to take part in cultural life. In this regard, it is particularly illustrative to quote the Concluding Observations adopted in 2008 in relation to report submitted by Angola; the Committee asked the state to include in its following report some information on the right to take part in cultural life and on measures adopted "to implement the right of Angolan communities, including San people, to the preservation, protection and development of their cultural heritage".³³

On several occasions, the Committee has highlighted that members of minorities have *the right to express in the language of their choice*, and it has qualified this aspect as an element of the right to take part in cultural life. As highlighted by the Committee, the right to take part in cultural life implies that minorities must be allowed to use their own language not only in their private sphere, but also in public, for instance in dealings with public administration.³⁴ A special attention has been given to the use of languages at school: as underlined by the General Comment No. 21, member states must assure the right to be taught about and in one’s own language; this aspect has been frequently stressed in Concluding Observations not only in relation to the right to education and the necessity to assure its cultural adequacy, but also in specific reference to the right to take part in cultural life.³⁵

³¹ CESCR 2017b: 60; CESCR 2014a: 24; CESCR 2014b: 27; CESCR 2013a: 30; CESCR 2013b: 35; CESCR 2010a: 37; CESCR 2008b: 40; CESCR 2000: 29.

³² CESCR 2016a: 43; CESCR 2015a: 59; CESCR 2015b: 31; CESCR 2015c: 58-59; CESCR 2015d: 30; CESCR 2014c: 34; CESCR 2013c: 26; CESCR 2013d: 31. As destruction of cultural heritage see in particular and Iraq, E/C.12/IRQ/CO/4 (2015), paras. 58-59: «The Committee [...] remains concerned that such acts continue to be carried out by ISIL and affiliated armed groups on a large scale [...] The Committee recommends that the State party further strengthen its measures, including through technical cooperation with and international assistance from the United Nations Educational, Scientific and Cultural Organization and other organizations, to stop destruction and looting of sites and objects with cultural heritage significance, and take steps to bring perpetrators to justice».

³³ CESCR 2008b: 40.

³⁴ CESCR 2016b: 60; CESCR 2016c: 57; CESCR 2016d: 68; CESCR 2012a: 27.

³⁵ CESCR 2017c: 58; CESCR 2017d: 64; CESCR 2017e: 55; CESCR 2017f: 86; CESCR 2017g: 9; CESCR 2017h: 68. CESCR 2016b: 60; CESCR 2016c: 57; CESCR 2016d: 68; CESCR 2016e:56; CESCR 2016f: 63; CESCR 2016g: 74; CESCR2016h: 59; CESCR 2016i: 55; CESCR 2015b: 31; CESCR 2015e: 53; CESCR 2015f: 57; CESCR 2015g: 27 («The Committee is concerned about the limited and decreasing use of minority languages, particularly Uzbek, in education, the media and cultural life (art. 15). The Committee recommends that the State party allocate specific budgetary resources to promoting the cultural diversity of ethnic minorities, allow mother tongue education and minority language press, and enable all groups to express and develop their culture, language, traditions and customs»); CESCR 2015h: 50; CESCR 2015i: 31; CESCR 2015j: 37 («The Committee is concerned at the decreasing number of classes provided in the languages of ethnic minorities and of students attending schools where the teaching is given in the languages of ethnic minorities, owing to the insufficient number of teachers, the lack of retraining programmes for teachers and a shortage of textbooks in minority languages (art. 13). The Committee recommends that the State party

Another significant aspect recalled by the Committee concerns the *(right to) cultural identity*. On several occasions, the Committee has recommended states to take steps to allow minorities and indigenous groups to promote, develop and express their cultural identity.³⁶ The most meaningful aspect lies in the explicit references to the right to cultural identity. For instance, in the Concluding Observations adopted in 2013 with regard to report presented by Kuwait, the Committee recommended to the state to "develop a legislative framework which defines and recognizes that minorities, minority communities and groups, among others, have: (a) the right to freely choose their own cultural identity and to belong or not to a community and have their choice respected; (b) the right to conserve, promote and develop their own culture; and (c) the right to cultural diversity, traditions, customs, religion languages and other manifestations of cultural identity and membership. The Committee refers the state party to its general comment No. 21 (2009) on the right of everyone to take part in cultural life".³⁷ This is a really interesting passage as the Committee adopted the same formulation employed by the General Comment No. 21 in referring to the right to cultural identity. Another illustrative reference, underlining the deep connection existing between culture and identity,

take the necessary steps to improve education in ethnic languages, and consider adopting multilingual education programmes in the education system»); CESCR 2014b: 27 and 52; CESCR 2014c: 32; CESCR 2014d: 26; CESCR 2014e: 29; CESCR 2014f: 26; CESCR 2014g: 36 and 40; CESCR 2014h: 23; CESCR 2014i: 28; CESCR 2014j: 36; CESCR 2014k: 24; CESCR 2014l: 26; CESCR 2013a: 29; CESCR 2013e: 37; CESCR 2010b: 22; CESCR2006: 48.

³⁶ CESCR 2017e: 55 («The Committee reminds the State party of its general comment No. 21 (2009) on the right of everyone to take part in cultural life, in which it stated that education must be culturally appropriate and enable children to develop their personality and cultural identity, and to learn and understand the cultural values and practices of the communities to which they belong, as well as those of other communities and societies»); CESCR 2016h: 59; CESCR 2014b: 27; CESCR 2014h: 24; CESCR 2014j: 27; CESCR 2014k: 24.

³⁷ CESCR 2017g: 9 (« the Committee is particularly concerned about restrictions faced by Crimean Tatars and ethnic Ukrainians in exercising their economic, social and cultural rights, particularly the rights to work, to express their own identity and culture and to education in the Ukrainian language»); CESCR 2014c: 33 (here the Committee recalled «the right of everyone, alone or in association with others or as a community, to choose his or her identity, including the right to identify as belonging to an indigenous peoples»); CESCR 2014j: 36; CESCR 2013d: 30; CESCR 2013f: 21; CESCR 2012b: 27.

can be found in the Concluding Observations adopted in 2017 as for the report submitted by the Netherlands; referring to Dutch Caribbean territories, the Committee stressed the necessity to promote a culturally adequate education which "enable children to develop their personality and cultural identity" (CESCR 2017e: 55).

In relation to right to cultural identity, it is important to recall also the significant references to member states' obligations to recognise and protect traditional practices and ways of life. In this regard, it is possible to recall two important elements.

Firstly, Concluding Observations include some references to the right of minorities groups' members to have and see formally recognised in official documents their traditional names.³⁸ Secondly, on several occasions the Committee has underlined the necessity to recognise traditional means of livelihood and to assure access to ancestral lands. It has particularly stressed the double values that indigenous peoples recognise to their lands and to natural resources. On the one hand, lands and natural resources play a key role from the economic point of view, i.e. guaranteeing the necessary means of subsistence; on the other hand, the CESCR has emphasized the cultural meaning of traditional lands: indigenous groups have a spiritual and identitarian relationship with their lands represent a fundamental element of their own identity; in this perspective, ancestral lands must be recognised as "an integral part of their cultural identity (art. 15)".³⁹ Against this background, the Committee has pointed out that the right to take part in cultural life implies the protection of traditional lands and natural resources. In particular, states must recognise and assure the right of indigenous peoples to own, develop, control and use lands they have traditionally owned, occupied, or acquired, and express their free, prior and informed consensus with regard decision on their lands' use.⁴⁰

³⁸ CESCR 2017i: 75; CESCR 2016i: 55; CESCR 2015h: 50.

³⁹ CESCR 2011a: 25.

⁴⁰ CESCR 2017g: 59; CESCR 2017h: 70; CESCR 2014c: 29; CESCR 2014d: 27; CESCR 2014e: 9; CESCR 2014f: 6; CESCR 2014g: 38-39; CESCR 2014i: 29; CESCR 2012c: 33; CESCR 2012d: 11; CESCR 2012e: 29;

According to the 2008 guidelines, the Committee has often underlined that the right to take part in cultural life implies the necessity *to protect and value cultural diversity*. Generally, this aspect is referred to indigenous peoples and ethnic minorities, and like the Concluding Observations stress the necessity to “preserve, develop and disseminate their identity, culture, language, traditions and customs”.⁴¹ However, it is significant that in some recent Observations, the CESCR has highlighted the importance of cultural diversity in order to assure the respect of migrants’ cultural tradition and promote their integration. In this regard, it is particularly illustrative to cite the Concluding Observations adopted in 2017 as to the report submitted by the Republic of Korea; on this occasion, the Committee expressed its concern “about the low level of acceptance of multiculturalism among the state party’s population. While noting the measures taken to facilitate the social integration of non-nationals in the state party, the Committee is concerned at the lack of policies promoting cultural diversity that reach out to the population at large [and] recommends that the state party promote the value of cultural diversity among its population, including by countering prejudices against non-nationals” (CESCR 2017j, 65-66). Another interesting reference in this sense can be found in Concluding Observations adopted in 2015 with regard to Italy; here, the Committee recommended the state to promote its efforts to assure second-generation migrants to maintain their mother tongue and cultural traditions. (CESCR 2015f: 57).

CESCR 2011a: 25; CESCR 2011b: 34; CESCR 2009b: 27; CESCR 2009c: 35; CESCR 2009d: 33; CESCR 2009e: 36; CESCR 2008c: 20; CESCR 2008d: 34; CESCR 2008e: 15.

⁴¹ CESCR 2017b: 60; CESCR 2017d: 66; CESCR 2016f: 63; CESCR 2016h: 59; CESCR 2016j: 67 («The Committee recommends that the State party take all necessary steps to strengthen the protection of cultural rights and respect for cultural diversity by fostering an enabling environment for the efforts of Afro-descendent communities to preserve, develop, express and share their identity, history, culture, traditions and customs»); CESCR 2015a: 59; CESCR 2015b: 31; CESCR 2015g: 27; CESCR 2015h: 49; CESCR 2014e: 29; CESCR 2014j: 36; CESCR 2014l: 27; CESCR 2014m: 36; CESCR 2013b: 35; CESCR 2013g: 35; CESCR 2013h: 30; CESCR 2007: 37 («officially recognize the need to protect the cultural diversity of all minority groups residing in its territory, in accordance with the provisions of article 15 of the Covenant»).

III. The right to take part in cultural life in the Convention on the rights of the child.

As anticipated above, the interpretation elaborated by the CESCR on the right to take part in cultural life has been upheld by the CRC too. Before looking into this aspect, it is important to make some considerations on cultural rights secured by the Convention on the rights of the Child. Unlike the ICESCR, this Convention seems to pay a great deal of attention to cultural identity, beginning with the Preamble which stresses “the importance of the traditions and cultural values of each people for the protection and harmonious development of the child” (XII recital). This cultural approach finds confirmation in the Convention’s provisions which include some important references to the protection of cultural rights. In this regard, it is worth recalling Article 8 on the children’s right to preserve their identity: while the provision does not make explicit reference to cultural identity, it offers some rooms to protect it. Even more important potentialities are offered by Article 20.3, which in relation to children deprived of family environment, states the necessity to take into account their cultural background, and Article 29 including the development of cultural identity among the aims of education. Finally, it is necessary to recall Articles 30 and 31 respectively dealing with children’s rights belonging to minorities or indigenous groups, and the right to take part in cultural life.

III.I. *The children’s right to cultural identity*

As already recalled, Article 8 of the Convention of the rights of the child deals with the preservation of children’s identity. It does not include any specific reference to cultural identity, and it was elaborated according to a traditional approach which qualifies the right to identity as essentially the right to a name and nationality. However, in interpreting this provision, the Committee has sometimes qualified the identity in terms of *cultural* identity, in particular, the right to preserve identity assumes a cultural connotation with specific regard to children belonging to minorities and indigenous groups.⁴²

⁴² In this regard, see for example CRC 2011: 68, where the Committee recommended State to adopt necessary measures to ensure to

The children's right to cultural identity has been recognised in relation to cases in which they are deprived of their family environment or, in their best interest, they must be removed from it. In these cases, children are entitled to a special protection and assistance (i.e. adoption, foster placement); as provided by Article 20, "When considering [these] solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background". Recalling this provision and the right to preserve children's identity, the Committee has underlined that when it is necessary to implement special protection measures, states must adopt instruments to ensure children do not lose their cultural identity.⁴³

The importance to protect cultural identity is deeply underlined by Article 29.1(c) which, among the education aims, includes "The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or

indigenous children the «right to grow up in a safe cultural environment, maintain and develop their identity and use their own language without being disqualified and discriminated against»; see also CRC 2012c: 39-40; here the Committee recommended State to «ensure full respect for the preservation of identity for all children, and to take effective measures so as to eliminate all efforts to assimilate ethnic minority populations with the Kinh majority» (par. 40). See also CRC 2010: 83; CRC 2006c: 79; CRC 2005a: 32; CRC 2004: 73.

⁴³ With specific regard indigenous children, see CRC 2009: 48: « In States parties where indigenous children are overrepresented among children separated from their family environment, specially targeted policy measures should be developed in consultation with indigenous communities in order to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity. Specifically, if an indigenous child is placed in care outside their community, the State party should take special measures to ensure that the child can maintain his or her cultural identity»; see also CRC 2012b: 43; CRC 2012a: 37-38. As for children not necessarily belonging to indigenous groups, see CRC 2005b: 40: «Mechanisms established under national law in order to ensure alternative care for such children in accordance with article 22 of the Convention, shall also cover unaccompanied or separated children outside their country of origin. [...] When selecting from these options, the particular vulnerabilities of such a child, not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as well as the child's age and gender, should be taken into account. In particular, due regard ought to be taken of the desirability of continuity in a child's upbringing and to the ethnic, religious, cultural and linguistic background as assessed in the identification, registration and documentation process»; see also CRC 2006a: 41 and 2006b: 35.

her own". This is a really meaningful provisions underling the necessity to reach an equilibrium between the respect and promotion of children's cultural identity, and the development of their openness towards other cultures. As pointed out by the CRC in the General Comment No. 1 (2001) on the aims of education, the promotion of cultural identity is inconsistent with other education aims, and in particular with the promotion of understanding, tolerance and friendship among all peoples; instead, these two goals are perfectly coherent. Article 29.1(c) aims to reach "a balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference" (CRC 2001:4).

A great recognition of the crucial role played by cultural identity can be found in General Comment No. 14 (2013) on the principle of the best interest of the child (Article 3.1). According to the Committee, the assessment and the identification of the best interests of the child must consider several elements, namely the child's own viewpoint, the child's identity, the preservation of the family environment, the care, protection and safety of the child, the situation of vulnerability, the right to health, the right to education. With specific regard to children's identity, the CRC specified that it encompasses also their cultural identity.⁴⁴ Recalling the right to preserve one's own identity (Article 8) and the necessity to take into account the cultural background in case of measures of special protection (Article 20.3), the Committee recognised that due consideration of the best interests of children implies guaranteeing them access to the culture of their origin, and more generally, to consider the "preservation of religious and cultural values and traditions as part of the identity of the child" (CRC 2013: 57).⁴⁵ This reasoning allowed the Committee to define, while implicitly, a right to cultural identity which must be recognised in favour of all children, and not

⁴⁴ CRC 2013b: 55: «The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality. Although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities».

⁴⁵ This reference was detailed in CRC 2017a: 31.

only those belonging to minorities and indigenous groups. Indeed, it is worth stressing the great deal of attention paid by the CRC to cultural identity of migrant children. In this regard, it is important to remark that, while the principle of cultural adequacy has been mainly recalled in relation to indigenous children, the Committee has sometimes referred it also to migrant children, too. It is really meaningful the General Comment No. 22 (2017) on the general principles regarding the human rights of children in the context of international migration, and the General Comment No. 23 (2017) on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, both jointly adopted with the Committee on the protection of the rights of all migrant workers and members of their families. These Comments included several references to the importance to adopt a culturally appropriate approach, especially in relation to the right to be heard,⁴⁶ to health⁴⁷ and education.⁴⁸ Certainly, the most explicit recognition of the right to cultural identity can be found in the General Comment No. 6 (2005) on unaccompanied and separated children which, in relation to the right to education, specified that they "have the right to maintain their cultural identity and values" (CRC 2005b:42).

With specific regard to the right to take part in cultural life, it is secured by Article 31 of the Convention of the rights of the child, along with the right to rest, leisure, play, recreational activities, and the arts.⁴⁹ As the right to take part in cultural life is associated with activities characterising free time, it is possible to affirm that originally cultural life was conceived according to a materialistic conception. On the one hand, this interpretation seems to be confirmed by the General Comment No. 17 (2013), adopted by the CRC on Article 31 of the Convention; indeed, in the Comment's introduction, the Committee declared to focus on "aspects related to creative or artistic activities", and pointed out the difference existing between

this approach, and the "broader definition" adopted in relation to article 30 on the right of indigenous children to enjoy their own culture (CRC 2013a:6). However, on the other hand, in the following paragraphs the General Comment upholds the identitarian and anthropological notion of culture, elaborated by the CESCR. Indeed, the CRC explicitly "endorses" the definition adopted in the General Comment No. 21 according to which "it is through cultural life and the arts that children and their communities express their specific identity and the meaning they give to their existence and build their world view representing their encounter with external forces affecting their lives" (CRC 2013a:14 (f)).

The CRC underlined that culture plays a fundamental role as it provides children with references allowing them to discover, develop "and forge their sense of identity" (CRC 2013a:11) and their belonging. At the same time, the Comment stressed how this process is far from being passive and forced: instead, creativity and imagination of children consent them to re-interpret, re-create, transform culture, "translate and adapt its meaning through their own generational experience" (CRC 2013a:12).

As underlined above, the General Comment No. 21 underlined that the right to take part in cultural life implies the right to be taught about one's own culture as well as about culture of others. To a certain extent, the CRC further developed this reference by highlighting that the right to take part in cultural life plays a fundamental role in learning and understanding other cultures, and in developing children's openness, spirit of understanding and an appreciation of cultural diversity.⁵⁰ Like the General Comment No. 21 of the CESCR, the CRC paid a greater deal of attention – if compared to previous CRC's Comments – to children who, due to their vulnerable conditions, need a special attention; in this way, recognised that the right to take part in cultural life must be recognised not only in favour of children belonging to minorities and indigenous groups. It is worth remarking the Committee's

⁴⁶ CRC 2017a: 36.

⁴⁷ CRC 2017b: 58.

⁴⁸ *Ibi*, para. 62-62.

⁴⁹ For a specific comment on this provision, see David 2006.

⁵⁰ CRC 2017: 12; see also para. 46: here, the Committee expressed its concern about the media's trend to not reflect the diversity of culture existing within societies and to prioritize mainstream culture.

references to refugees and asylum seekers children who, as pointed out in General Comment No. 17, must face several difficulties in enjoying rights secured by Article 31 and in particular their right to take part in cultural life. As a matter of fact, often they can find difficulties in maintaining connections with their culture of origin and, at the same time, their culture is different from the culture of host country, from which thus they risk being excluded. In this perspective, the Committee underlined that member states must pay special attention to assure children to preserve and practise their traditions and cultures.

IV. The protection of cultural identity and cultural heritage beyond international human rights law: the judgement of the International Criminal Court in the *Al Mahdi* case

The interpretation elaborated by the CESCR and CRC on the right to take part in cultural life received an historical acknowledgement in the judgement delivered in 2016 by the Trial Chamber VIII of the International Criminal Court in *Prosecutor v. Ahmad Al Faqi Al Mahdi* case (International Criminal Court 2016).⁵¹ The special protection that cultural heritage requires in situations of armed conflict is a matter that has been widely recognised under international law since the Hague Convention of 1907⁵² and, more recently by the Statute of the International Criminal Tribunal for the Former Yugoslavia,⁵³ as well as the Rome Statute of the International Criminal Court.⁵⁴ In particular, Articles 8.2 (b)(ix)

and 8.2 (e)(iv) of the Rome Statute concerning crimes of war, respectively committed in international armed conflict or in conflicts not of an international character, qualifies as war crimes the "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives".

The judgement adopted by the Trial Chamber VIII of the International Criminal Court on the *Al Mahdi* case is an historical decision as it represented the first occasion on which the Court – and more generally, an international tribunal – adopted a judgment of conviction for crimes concerning the destruction of cultural heritage: indeed, *Al Mahdi* was convicted, under Article 8.2 (e) (iv) of the Rome Statute of the International Criminal Court, for the war crime of directing attack on ten religious and cultural buildings in Timbuktu (Mali). The facts occurred between June and July 2012, during the occupation of Timbuktu by the armed groups of Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM). Since April 2012 until January 2013, in the context of armed violence taking place in Mali, the control of the territory of Timbuktu was taken by Ansar Dine and the AQIM, which imposed their government on population. This government included an Islamic tribunal, an Islamic police force, a media commission, and the *Hesbah*, namely a morality brigade tasked with assuring the implementation of a fundamentalist version of Islamic Law. Mr. Ahmad Al Faqi Al Mahdi, a local Koran scholar and expert on religious matters, gave his active support to Islamic administration, and since April 2012 until September 2012 lead the *Hesbah*. As according a fundamentalist interpretation of Islamic law the construction of building over graves is prohibited, the Islamic government decided to destroy the mausoleum and cemeteries in Timbuktu. While having previously recommending not to raze the monuments, *Al Mahdi* then implemented the instructions received by supervising and actively participating

⁵¹ For a comment on this judgement see, among others, Lostal, 2017a and 2017b; Rossi, 2017; Scovazzi, 2017; Webb, 2016, Casaly, 2016.

⁵² Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land; see also the Four Geneva Conventions of 1949 (I Convention on Wounded and Sick in Armed Forces in the Field, II Convention on Wounded, Sick and Shipwrecked of Armed Forces at Sea, III Geneva Convention on Prisoners of War, and IV Convention on Civilians), and their two Additional Protocols of 1977, the Hague Convention for the protection of cultural property in the event of armed conflict (1954) and its two Protocols of 1954 and 1999.

⁵³ Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 3 (d): «seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science».

⁵⁴ In this regard see, *inter alia*, Francioni and Lenzerini, 2003; Gerstenblith, 2006 and 2009; Blake, 2011; Francioni, 2011; Frulli, 2011, Borelli and Lenzerini, 2012; Lenzerini, 2013 and 2016; Pocar,

Pedrazzi, Frulli, 2013; Vlastic and Turku 2016 and 2017; Giulini, 2017; Venturini, 2017.

in the destruction. In the light of the admission of guilt made by Al Mahdi under Article 64(8)(a) of the Rome Statute, and the evidences presented, the Chamber concluded that all the elements for the co-perpetration (Article 25(3)(a)) of a direct attack of religious and cultural objects could be established, and sentenced Al Mahdi to 9 years of imprisonment.

The Al Mahdi judgement represented the first occasion on which the ICC convicted an individual for the war crime of directing attack of cultural objects, and the first occasion that an international tribunal qualified a crime against cultural heritage as the principal charge. Indeed, in some important cases, the International Criminal Tribunal for the former Yugoslavia has convicted individuals for attacking cultural objects under Article 3 (d) of the Statute, but in conjunction with other international crimes.

IV.1. *The recognition of human dimension of cultural heritage*

The innovative character of the Al Mahdi judgement lies also in the meaningful references made by the Chamber to cultural value of destroyed monuments. Indeed, in assessing the gravity of the crime in order to determine the appropriate sentence, the Chamber paid a great deal of attention to the value of monuments and the impact their destruction had on cultural life of victims. While the Chamber remarked that crimes against property are less grave than crimes against persons, it came to recognise the significant gravity characterising the crimes for which Al Mahdi was charged. The Chamber reached this conclusion in the light of several considerations, such as the careful planning of the attack, the intensification of its impact due to the relaying provided by media, the discriminatory religious motive characterising its commission. However, the most significant part lies in the value of destroyed cultural goods. Recalling some testimonies, the Chamber underlined that the destroyed mausoleums were of highly significant for persons living in Timbuktu: they were important places of worship and pilgrimage, and their symbolic maintenance played a crucial role in the community life. In the light of this, the Court came to state that "targeted buildings were

not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu" (ICC 2016:79).⁵⁵ Moreover the Chamber distinguished between the direct victims of the crimes, namely the inhabitants of Timbuktu, and the indirect victims. As all destroyed buildings, with the exception of one mausoleum, had the status of protected UNESCO World Heritage sites, the Chamber pointed out that the attack and destruction affected also the broader population of Mali and the international community. In particular, with regard the international community, the Court underlined that, as affirmed in his testimony by Mr. Francesco Bandarin, UNESCO Assistant Director-General for Culture, the destruction of a protected site causes acute anguish for the entire international community because cultural heritage "is part of cultural life" (International Criminal Court 2016: 80).

These references were further and significantly developed in the reparation order adopted in 2017, in which the Chamber concluded that Mr Al Mahdi is liable for 2.7 million euros (International Criminal Court 2017). As the Al Mahdi's conviction concerns the destruction of cultural heritage, the Court pointed out the necessity to reflect on the importance recognised to cultural heritage by international law. In this regard, a high recognition is granted to reports submitted by some experts appointed by the Chamber to assist it in determining the reparations, and in particular to the report presented by Ms. Karima Bennoune, the UN Special Rapporteur in the field of cultural rights.⁵⁶ The Chamber totally embraced the approach, adopted by the Special Rapporteur, focused on the necessity to consider cultural heritage in "its human dimension" (ICC 2017a: 16). In the light of this, the Chamber stressed the role played by cultural heritage in protecting the identity of individuals and groups. Cultural

⁵⁵ See also para. 80: recalling the testimony of a witness, the Chamber underlined that «The witness testified that destroying the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at *breaking the soul* of the people of Timbuktu» (International Criminal Court 2016: 80, emphasis added).

⁵⁶ In these paragraphs, the Chamber referred also to the Report submitted by Professor Marina Lostal who, in her turn, made some meaningful references to the approach adopted by the UN Special Rapporteur in the field of cultural rights.

heritage is defined as “encompassing the resources enabling cultural identification and development processes of individuals and groups” (ICC 2017a: 15); it provides individuals and communities with resources allowing them to qualify themselves, define their identity and build their sense of belonging. In the light of this, the destruction of cultural heritage has not only physical consequences, but it affects in a serious manner the identity and dignity of communities and individuals. The perspective adopted by the Chamber is even more evident by reading the report submitted by the Special Rapporteur. She recalled the interpretation elaborated by the CESCR on the right to take part in cultural life, and the reports the UN Special Rapporteurs in the field of cultural rights have elaborated over the years on the protection of cultural heritage. In the light of this, she highlighted that international human rights law recognises the “right of access to and enjoyment of all forms of cultural heritage” as a right finding its legal basis in the right to take part in cultural life (ICC 2017b: 8).

Concluding Remarks

The foregoing analysis makes it possible to underline the meaningful evolution of the notion of cultural rights, and how the notion has undergone significant elaboration in interpretation in the context of human rights treaty bodies. As underlined in the Introduction, when the two International Covenants were adopted they enshrined two different notions of culture and cultural rights. In particular, the conception of culture borrowed by the ICESCR was reduced to material expressions of artistic and intellectual activities and, unlike the definition founding Article 27 ICCPR, did not recognise at culture any role in the development of personal identity.

Since the 1980's legal scholars have promoted a meaningful reflection on notions of culture. Influenced by scholarly advances in the discipline of anthropology, they underlined the importance of the identitarian role of culture in relation to everyone, and not only to members of minorities and indigenous peoples. While the latter certainly face a high risk in seeing their cultural identity

repressed, in this broader sense, cultural identity must be protected in favour of everyone.⁵⁷ The proposal formalised in the Fribourg Declaration represented a fundamental turning-point in this regard, as it overcame the dual definition of culture originally enshrined in international human rights law. Culture assumes a broad and anthropological denotation: it was recognised as including all human activities allowing persons and communities to “express their humanity and the meaning they give to their existence and build their world view” (Fribourg Declaration 2007: 2(a)). Against this background, the Declaration identified as “cultural rights” all rights that allowed individuals to develop and express their cultural identity. This elaboration, along with the UNESCO’s work, deeply influenced the interpretation elaborated in turn by human rights treaty bodies on cultural rights. This evolution has created a specific focus on the right to take part in cultural life, secured by Article 15(1)(a) ICESCR. Except for Article 27 ICCPR, Article 15(1)(a) ICESCR is the only provision including an explicit reference to culture. Consequently, the interpretation of the right to take part in cultural life has forced the CESCR to look into the legal conception of culture itself. Over the years, the Committee has recognised a necessity in overcoming a materialistic view of culture, and has progressively come to embrace the stance proposed by scholars and in particular by the Fribourg Group. This evolution culminated in the adoption of the General Comment No. 21 (2009): the formalisation of an identitarian notion of culture allowed the Committee to give a broad interpretation of the right to take part in cultural life. This right is now interpreted as a composite right including all rights allowing persons to develop and express their identity. Among the rights listed by the Committee, it is possible to distinguish three different groups of rights.

First: the rights already qualified as cultural rights, whose identitarian aspect is further emphasised by the General Comment (v. the right to enjoy the

⁵⁷ Fribourg Declaration, Preamble, 7th recital: «Observing that cultural rights have been asserted primarily in the context of the rights of minorities and indigenous peoples and that it is essential to guarantee these rights in a universal manner, notably for the most destitute».

freedom to create, individually, in association with others, or within a community or group; vii. the right to be taught about one's own culture as well as those of others; viii. the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life).

Second: the rights traditionally qualified as civil or political rights, which the General Comment reinterpreted in the light of their cultural value (iii: the right to enjoy freedom of opinion, freedom of expression in the language or languages of their choice; iv: the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers of any kind; ix: the right to take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights).

Third: this most important category is represented by the right to freely choose one's cultural identity, to belong or not to belong to a community, and have their choice respected; the right of all persons to express their cultural identity freely and to exercise their cultural practices and way of life, and the right to have access to their own cultural and linguistic heritage and to that of others. Differently to the other two groups of rights, these rights are not recognized as such by international human rights instruments, as their "content" is covered by other rights, for example the right to cultural identity is protected by "a connexion des libertés", such as freedom of thought, conscience and religion, freedom of expression, the right not to be discriminated against, and the right to respect for private life (Meyer-Bisch and Bidault, 2010: 42). However, with the General Comment No. 21, these rights acquire a new guise, and are now recognised as autonomous and self-standing rights. This is the aspect which gives a revolutionary and historical value to General Comment No. 21 (2009).

However, the notion of culture adopted in the General Comment No. 21 is not a prerogative of the CESCR. As underlined above, it was upheld by

the CRC. Unlike the CESCR, the CRC has not recognised the right to cultural identity from the right to take part in cultural life. Indeed, the references to cultural identity included in the Convention of the rights of the child facilitated the CRC in elaborating the right to cultural identity. At the same time, it must be underlined that for many years only children belonging to indigenous groups and minorities were conceived as entitled to this right; instead, more recently, the CRC has started to recognise this right in relation to every child, and in particular paying a great deal of attention to children living in the context of migration.

The analyses of the interpretation elaborated by the CESCR and CRC made it possible to underline that these bodies, while having some slight differences in their approaches, have come to recognise a right to cultural identity and a right to cultural heritage. Such a recognition is of utmost importance and can open the door towards the definition of a customary states' obligation to respect cultural heritage. In this perspective, the judgment delivered by the International Criminal Court in *Prosecutor v. Ahmad Al Faqi Al Mahdi* is particularly relevant.

The brief analysis of this judgment allowed for the assertion that the human perspective of cultural heritage is not a prerogative of human rights bodies, but it is starting to be recognised and valued by other international organs.

The *Al Mahdi* decision represented an historical turning point, not only as it the first time the International Criminal Court adopted a judgement on the destruction of cultural heritage but, more specifically, in the light of the perspective adopted by the Court with regard to this kind of crime. Cultural heritage is not perceived as a physical good belonging to the collective memory of humanity. In the judgement and even better in the reparation order, the Court made explicit that the importance inherent to this memory is represented by its human dimension and its identitarian role. The relevance of destroyed monuments in Timbuktu does not lie only in being an element of the heritage of humanity, but also in being part of heritage which makes it possible the cultural identity and development of

individuals and communities. In other words, cultural heritage is important not only as the heritage of humanity, but also – and primarily – as heritage of individuals and communities who build their identity with reference to it. This evolution has been made possible as the Court adopted the perspective, elaborated by the CESCR and the Special Rapporteur in the field of cultural rights on the notions of culture and cultural heritage and the interpretation they have elaborated on the right to take part in cultural life and, more generally, on cultural rights.

In the light of this, the *Al Mahdi* decision is extremely relevant from a double point of view. First, and more generally, it provides a good illustration of the authoritative character of the interpretative work of human rights treaty bodies and the Special Rapporteurs. While their recommendations do not have a legal binding nature, their interpretations can become a fundamental reference for the (binding) decisions of the International Criminal Court. Second, and with specific regard the topic of this paper, the *Al Mahdi* judgement represented one of the first occasions in which the anthropological and identitarian notion of culture, elaborated by the human rights treaty bodies, has been adopted and endorsed by an international court.

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