

The Recognition of the Right to Cultural Identity

Some Prospects to Reinforce Migrants' Protection

Marcella Ferri
(Università degli Studi di Bergamo, Italia)

Abstract This article aims to study the protection assured to cultural identity of migrant people under international human rights law. The analysis stresses the relevant prospects opened in the light of interpretation elaborated by the Committee on Economic, Social and Cultural Rights on the right to take part in cultural life. In the recent years, the Committee has come to conceive the right of cultural identity as a right which, while keeping a collective dimension, must be recognised to every single individual; this interpretation opens the way to overcome the traditional interpretation protecting cultural identity only in favour of persons belonging to national minorities, and indigenous peoples.

Summary 1 Introduction. – 2 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: some Important Prospects versus Several Limits. – 3 The Right to Enjoy One's Culture Recognised by the International Covenant on Civil and Political Rights and Its Collective Dimension. – 4 The Right to Take in Part in Cultural Life Recognised by the International Covenant on Economic, Social and Cultural Rights: Its Origins and Recent Evolution. – 5 Conclusions.

Keywords Cultural identity. Migrants' rights. Right to take part in cultural life.

1 Introduction

Within our societies, characterised by a growing cultural pluralism, the issue of cultural identity is increasingly discussed. The concept of cultural identity is closely linked with the notion of culture which seems to be greatly complicated.

Since the '80s legal scholars, influenced by anthropological studies, have developed a deep reflexion about the notion of culture, underlining the different meanings it can assume.

In particular - widely summarizing this debate¹ - it is possible to identify two main concepts: on the one hand, a narrow and materialistic definition

1 Several authors elaborated different definitions of culture, see in particular Prott 1988, 94-95; Symonides 1993, 50-51; Eide 1995, 230; Stavenhagen 1995, 65; O'Keefe 1998, 905; Stamatopoulou 2007, 108-109; International Commission of Jurists 2008, para. 6; Psychogiopoulou 2008, 223.

of culture which indicates the most elevated expressions of human creativity and intellectual activities; on the other hand, a broad and anthropological notion according to which culture is:

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. (Stavenhagen 1995, 66)

This latter definition allows us to underline that culture plays a fundamental role allowing everyone to define and express their own identity.² In this framework the protection of cultural identity represents a critical condition, an authentic *pierre angulaire* (Borghi, Meyer-Bisch 2001), to assure the human dignity of everyone.

The international human rights law has traditionally been tending to protect the cultural identity only in favour of indigenous people and the so-called national minorities. Surely persons belonging to these groups live the high risk to be discriminated on the ground of cultural origin; however, we have to recognise that nowadays cultural identity has to be protected in favour of everyone.

Knowledge communications and people movements are so simple and swift that cultural identity - while keeping a strong collective dimension - is becoming a good affecting every single individual, who can build their own identity making reference 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.³ 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; Métraux 2013, 23⁴). This framework shows the individual and personal nature of cultural identity.

This article aims to analyse whether and to what extent the international

2 Wilhelm 1993, 222; Ayton-Shenker 1995; Keller 1998, 36; Donders 2002, 30; Meyer-Bisch, Bidault 2010, 34; Reidel 2010, 68; Pedrazzi 2011, 17.

3 According to the IOM the term 'migration' means "The movement of a person or a group of persons, either across an international border, or within a State [...]; it includes migration of refugees, displaced persons, economic migrants, and persons moving for other purposes, including family reunification" (cf. <http://www.iom.int/key-migration-terms>). Consequently we will use the expression 'migrant people' or 'migrants' in order to indicate overall, migrant workers (or economic migrants), refugees and asylum seekers.

4 The Author underlines that migrant must: "tisser appartenance à la culture d'origine et appartenance à la culture d'accueil pour progressivement se construire une identité nourrie d'appartenances plurielles".

human rights law assures protection to the right to cultural identity of migrants. We will examine the most relevant international human rights Treaties dealing with this issue: the ICRMW, the ICCPR and the ICESCR. Our brief analysis is based on the interpretation elaborated by the Committees set out by these Treaties to monitor their implementation by States Parties.⁵

2 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: some Important Prospects *versus* Several Limits

We have to immediately recall that the ICRMW, adopted by the UN on 18 December 1990,⁶ was not ratified by the majority of migrant-receiving States; consequently it is not binding on the States where the protection of migrants' rights is more relevant.⁷

Another important specification is about the Convention's field of application *ratione personae*: it concerns only migrant workers and members of their families; in the light of this, it cannot guarantee any protection to some migrants, as refugees and asylum seekers, for whom the protection of cultural identity arises in an urgent and, sometimes, dramatic manner.

As underlined by the Preamble, the ICRMW aims to define a framework of 'basic norms' as regards the treatment assured by States to migrant workers and the members of their families.

The Convention is characterised by a complex structure: besides the Preamble, it is composed of 93 Articles divided into 9 Parties. The most significant aspect of the Convention lies in the fact that it establishes a set of rights recognised to all migrant workers regardless of the regular nature of their presence inside the State's territory (Part III); in addition to these rights, the Convention provides some additional rights concerning only migrant workers who are in a regular situation (Part IV).

The Part VII of the Convention set out the CMW. The CMW, composed of independent experts, is tasked with monitoring the implementation of the Convention by the States Parties.

This body exercises its monitoring function by examining the periodic States Reports, the inter-state complaints and the individual complaints. The Committee's competence to receive and consider the complaints re-

5 These Committees are: the HRC, the CESCR and the CMW.

6 For a comment about the ICRMW see *inter alia* Nafziger, Bartel 1991; Lyon 2009; de Guchteneire, Pecoud, Cholewinski 2009.

7 The Convention entered into force on 1 July 2003. To this day the ICRMW was ratified by 51 States, among which there is no European Union Country.

quires that at least 10 States make a specific declaration recognising these competences. To this day only 2 States (El Salvador and Guatemala) have made the declaration concerning the inter-state communications and 4 States (El Salvador, Guatemala, Mexico and Uruguay) have recognised the Committee's competence with regard to the individual communications. Consequently the individual complaint mechanism has not yet entered into force and this circumstance limits in a significant way the functionality of the Committee.

The Committee held its first session in 2004 and since then its work has been quite lacking and it has dealt basically with the examination of States' Reports. The Committee has adopted only few General Comments, and in particular the General Comment 1 (2011) on migrant domestic workers⁸ and the General Comment 2 (2013) on the rights of migrant workers in an irregular situation and members of their families.⁹

The lacking work of the Committee makes difficult to analyse the interpretation elaborated about the norms of the ICRMW. However this Convention represents a fundamental reference as regards the protection of cultural identity of migrant people: indeed the analysis of its norms allows us to identify several provisions concerning cultural rights and in particular the right to cultural identity.¹⁰

We can recall Article 31 providing that States Parties must ensure "respect for the cultural identity of migrant workers and members of their families".

This provision suffers some limits for two reasons. Firstly the provision makes only reference to a State obligation to respect and does not impose an obligation to promote; secondly, the norm leaves States a wide margin of appreciation as, in the second paragraph, provides that they "may take appropriate measures to assist and encourage efforts in this respect".

⁸ CMW, General comment 1 (2011) on migrant domestic workers, UN Doc. CMW/C/GC/1 (2011).

⁹ CMW, General comment 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, UN Doc. CMW/C/GC/2 (2013). In November 2017, the CMW and the Committee on the Rights of the Child adopted the Joint general comment no. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and no. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration (UN Doc. CMW/C/GC/3-CRC/C/GC/22), and the Joint general comment no. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and no. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (UN Doc. CMW/C/GC/4-CRC/C/GC/23). The present publication was closed before their adoption.

¹⁰ As regards cultural rights of migrant workers see Nafziger, Bartel 1991, 792; Agbetse 2005.

In spite of these formulations, it is meaningful that the General Comment 2 has explicitly referred to “the right to respect for their cultural identity”¹¹ underlining that the cultural identity is recognised by the Convention as the object of a specific right.

Surely art. 31 is extremely meaningful as cultural identity is recognised to all migrant workers, including those in irregular situations.

For many years the right to cultural identity and, more in general, cultural rights have been qualified as rights of minor importance, a kind of “luxury” (UNDP 2004, 38),¹² which can be postponed after the achievement of some more ‘urgent’ rights as the right to health, food, water and so on. The fundamental relevance of the ICRMW lies in the fact that it overturns this logic: indeed the Convention includes the respect for cultural identity into the core of fundamental rights (right to life, to health, freedom of movement...) to be recognised to all human beings, regardless of their regular presence in the State’s territory.

The importance of cultural identity for migrant workers is also underlined by art. 17 providing some fundamental guarantees for migrant workers and members of their families who are deprived of their liberty. According to this provision they have to be treated “with respect for the inherent dignity of the human person and for their cultural identity”.¹³ In the light of this formulation, cultural identity is compared to human dignity and it represents an essential criterion which the treatment of migrant workers deprived of their liberty have to comply with.

The Convention recognises also some other important cultural rights of migrant workers, and in particular the right to employ a language they understand in communications with juridical authority in case of arrest, procedures against them or expulsions (arts. 16(5) and 18(3)(a)).

With specific regard to migrant workers in regular situations, the Convention secures also the right to participate to political life, the access to and the participation in cultural life and the right to education. Concerning education, States must promote the integration of children of migrant workers in the local school system by teaching the local language; at the same time they must promote the teaching of their mother tongue and culture and, to this end, can provide specific “schemes of education” in

11 CMW, General Comment 2 (2013), para. 6. As underlined by the Committee, this right is “Convention-specific”.

12 The Report highlights that the role played by culture and cultural liberties in order to assure human development has been hardly recognised and these difficulties can be linked with some misconceptions and in particular the perception “that ensuring cultural liberty is a luxury: it would be nice, but the costs are just too high”.

13 In the light of this, the General Comment 2 (2013), points out that States parties must provide personnel employed in detention centres with training in, *inter alia*, cultural sensitivity (para. 39).

mother tongue (art. 45).

It is extremely significant to recall also art. 34 making reference to the obligation of migrant workers to respect the cultural identity of the inhabitants of States where they live.

This provision is relevant from a double point of view. Firstly it expresses the attention paid by the Convention to cultural identity: this is indeed recognised as a good to be protected in favour of everyone. The importance of cultural identity emerges in a significant way as art. 34 compares the obligation to respect cultural identity with the obligation to comply with the laws and regulations of the destination State.

Secondly, this provision is symptomatic of the notion of integration to which the Convention refers. The integration is conceived as a complex and bidirectional process involving on equal terms both migrants and people living into States of arrival. The Convention does not aim at realising the assimilation of migrant workers nor their ghettoization by the creation of divided ethnical communities. On the contrary an effective and actual integration requires, on the one hand, the respect of cultural identity of migrant workers and, on the other, their positive participation in the societies of arrival. This participation needs the respect of cultural identity of the inhabitants of destination States - as the compliance with their laws -; this *ratio* emerges also in art. 45 where the Convention underlines the importance to promote the integration of children of migrant workers in the local school system by teaching the local language.

The importance to know the culture and the law of the destination State is underlined also in the General Comment 1 (2011); in the Committee's view the vulnerability of migrant domestic workers originates from several aspects, including the "unfamiliarity with the culture and national labour and migration laws".¹⁴ In the following paragraphs, concerning the pre-departure training and awareness-raising programmes, which States parties must develop, the Committee recalls programmes dealing with the law and the culture of the State of arrival (programmes "know your obligations").¹⁵

Unfortunately, the attention paid by the Convention to the cultural identity of migrant people is not reflected in the practice of the CMW - even if is still at a very early stage.

As we have already highlighted, the CMW has adopted only two General Comments; the General Comment 2 on the rights of migrant workers in an irregular situation includes some brief - although significant - references to the cultural identity of migrant workers.

Firstly, as regards the right to health and, in particular, the health care

14 CMW, General Comment 1 (2011), para. 7.

15 CMW, General Comment 1 (2011), para. 30 (b).

for migrant workers, the Committee affirms that States parties must provide the medical personnel “with culturally sensitive training”.¹⁶

A second, greatly meaningful, reference is about the right to education. Although the States obligation to promote the teaching of the mother tongue and culture is secured by the Convention with regard to the children of migrant workers in a regular situation (art. 45(3)), the Committee recalls art. 31, recognising the right to respect for cultural identity of all migrant workers and art. 29(1)(c), of the Convention on the Rights of the Child, according to which the education must promote the respect of children’s cultural identity. These provisions allow the Committee to affirm that when States parties provide children in regular situations with teaching of their mother tongue, they must ensure the same even to children of migrant workers in an irregular situation having the same mother tongue.¹⁷

The analysis of Concluding Observations adopted by the CMW as regards the periodic reports submitted by States Parties to the Convention does not allow us to find significant references to cultural identity; the only references concern the cases where the Committee underlines that States must facilitate the cultural reintegration of migrant workers deciding to return to their State of origin.¹⁸

3 The Right to Enjoy One’s Culture Recognised by the International Covenant on Civil and Political Rights and Its Collective Dimension

As regards the ICCPR, we can recall art. 27 recognising to persons belonging to ethnic, religious or linguistic minorities the right “to enjoy their own culture”.

According to the traditional definition of minority, proposed by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his renowned study about minorities (Capotorti 1977, para. 568),¹⁹ the notion of minor-

16 CMW, General Comment 2 (2013), para. 73.

17 CMW, General Comment 2 (2013), para. 78.

18 See for example CMW Concluding Observations Guinea, CMW/C/GIN/CO/1 (2015), para. 49.

19 See Capotorti 1977, para. 568 where the Special Rapporteur specifies that the term minority indicates: “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”.

ity is applicable only to minority groups having the nationality of the State where they exist.

Actually, a grammatical and systematic interpretation of art. 27 ICCPR allows us to apply this norm also to minorities composed of non-citizens (Nowak 2005, 645).

This thesis was confirmed by the HRC in the General Comment 23 (1994) on the rights of minorities; in the Committee's view, the formulation of art. 27 and the state obligations deriving from art. 2(1) ICCPR imply that the rights secured to members of minorities by the Covenant must be recognised also to aliens.²⁰

Despite this affirmation of the Committee, some scholars question the possibility to apply art. 27 ICCPR to the so called 'new minorities' (Thornberry 1991, 164 ff.).²¹

Indeed, the question is far from being resolved as the practice of the Committee does not allow us to clarify this issue.

The Committee's views applying art. 27, concern communications submitted against States of which the authors of the communications are nationals. Similarly, the analysis of Concluding Observations does not permit to reach a clear solution. Indeed, in some cases the Committee has clearly affirmed the possibility to apply to aliens the rights guaranteed by art. 27;²² in others it seems to exclude this solution.²³

Even supposing that the right to enjoy one's culture can be recognised

20 HRC, General Comment 23 (1994), *The rights of minorities*, UN Doc. CCPR/C/21/Rev.1/Add.5 (1994), para. 5.1.

21 Thornberry states that non-nationals "do not have the 'identity' rights proclaimed by art. 27" (171). In this regard see also Medda-Windischer 2010, 68 ff.; the Author recalls the UN DRPNERM (1992) and the FCPNM (1995) and underlines that the new minorities are generally excluded from the field of application of international instruments securing minority rights.

22 See for example, HRC, Kuwait, CCPR/C/KWT/CO/2 (2011), para. 31, where the Committee is concerned about "the lack of protection of foreign nationals who belong to ethnic, religious or linguistic minorities living in the State party". See also Republic of San Marino, CCPR/C/SMR/CO/2 (2008), para. 16; Syrian Arab Republic, CCPR/CO/84/SYR (2005), para. 19; Japan, CCPR/C/79/Add.102 (1998), para. 13.

23 In this regard, it is extremely meaningful to recall HRC, Concluding Observations Latvia, CCPR/C/LVA/CO/3 (2014), para. 7; on this occasion, the Committee affirms to be concerned at the effects produced by the State language policy on the effectiveness of some Covenant's norms - including art. 27 - and recommends "to ensure the full enjoyment of the rights in the Covenant by 'non-citizen' residents and members of linguistic minorities". The explicit reference to non-citizen, besides persons belonging to linguistic minorities, allow us to affirm that in the Committee's view the concept of minority includes only nationals. See also HRC, Concluding Observations Hong Kong-China, CCPR/C/CHN-HKG/CO/3 (2013), para. 22 and Check Republic, CCPR/C/CZE/CO/2 (2007), para. 18; in these cases the Committee recognises to aliens some cultural rights, and especially linguistic rights, not making reference to art. 27, but to other provisions and in particular the principle of non-discrimination.

also to migrants, this provision suffers another important restriction.

Although the norm makes reference to single persons belonging to minorities as the subjects of the rights and so it recognises cultural rights in favour of individuals, this provision is characterized by a significant collective dimension. This element emerges firstly from its literal formulation and, in particular, from the specification “in community with the other members of their group”.

This reference, introduced in order to “maintain the idea of group” (Capotorti 1977, para. 171), allows us to identify the main *ratio* of this provision in the protection of the minority as a whole.²⁴

This aspect can be supported recalling the General Comment 23 (1994) where the HRC identifies the provision’s objective in ensuring the survival and the development of the “identity of the minorities concerned”.²⁵ In this perspective the rights secured by art. 27 “must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant”;²⁶ in other words the rights assured by art. 27 represent extra protection, recognised to persons belonging to minorities in addition to rights guaranteed to them as single individuals.

This framework finds a significant confirmation in the Committee’s practice concerning the limitations applicable to rights secured by this norm.

According to the traditional criteria of limitations clause, the Committee has stated that the rights of persons belonging to minorities can be legitimately limited in the presence of “a reasonable and objective justification”. In particular - and this is the most interesting aspect for our analysis - in the case *Sandra Lovelace v. Canada*, the HRC identified this justification in the necessity to protect and maintain the identity of the minority.²⁷

This principle has been further developed in the case *Kitok v. Sweden*.²⁸ The author of the communication was a Swedish citizen belonging to the Sami minority which claimed a violation of his right to enjoy his culture due to his exclusion from the Sami community and the consequent de-

24 See Nowak 2005, 656-7; recalling the expression “individually or in community”, characterising art. 18 ICCPR, the Author underlines that “Rather, members of minorities are guaranteed the rights listed in art. 27 only “in community with the other members of their group”. This means that individual enjoyment of a minority culture, individual protection to the religion of a minority and the individual use of a minority language are not protected”. See also Wolfrum 1999, 371; Yupsanis 2013, 362, Pentassuglia 2004, 50 and 106 ff.; according to Pentassuglia: “il semble incontestable que l’art. 27 est conçu pour protéger un intérêt collectif” (50).

25 HRC, General Comment 23 (1994), para. 9.

26 HRC, General Comment 23 (1994), para. 1.

27 HRC, *Sandra Lovelace v. Canada*, communication 24/1977, CCPR/C/13/D/24/1977 (1981), paras. 16-17.

28 HRC, *Ivan Kitok v. Sweden*, communication 197/1985, CCPR/C/33/D/197/1985 (1988).

nial of his rights to reindeer breeding. Indeed, according to the Reindeer Husbandry Act, Sami members who had engaged in any other profession for a period of three years, would have lost the Sami membership and the rights connected to this status.

Adhering to the Government's thesis, the Committee underlined that the restriction of reindeer breeding number, pursued by the Reindeer Husbandry Act, has some economic and ecological reasons and, in particular, aims to preserve the existence of the Sami minority.

Taking into account these objectives, the Committee resolved the conflict between the interest of a single person belonging to a minority and the necessity to protect the minority as a whole, giving priority to this latter exigency. Recalling the Lovelace case, the Committee upheld the principle whereby "a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole".²⁹

The analysis of this quasi-jurisprudence confirms that the *ratio* of art. 27 lies in the protection of minority as a whole: in this framework, this provision cannot be able to promote culture as a good to be ascribed to every single individual.

4 The Right to Take in Part in Cultural Life Recognised by the International Covenant on Economic, Social and Cultural Rights: Its Origins and Recent Evolution

Being the most important human rights treaty concerning cultural rights, the ICESCR includes some provisions which prove to be really useful for our analysis: in particular we have to focus on the right to take part to cultural life recognised by art. 15(1)(a) of the Covenant.

As the analysis of the *Travaux Préparatoires* shows, this norm was elaborated making reference to a materialistic and narrow notion of culture: it was interpreted as including the most noble manifestations of human creativity and intellectual activities (art, philosophy, music, literature). In the drafters' view, it was urgent to ensure access to culture for all, overcoming the elitist idea that culture would have been only a privilege for the upper classes. This exigency led to conceive culture as a material good which States must guarantee to everyone access; consequently, the right to take part in cultural life had been interpreted as the right to access to

29 HRC, *Ivan Kitok v. Sweden*, communication 197/1985, CCPR/C/33/D/197/1985 (1988), para. 9.8.

museums, theatres, libraries and so on.³⁰

Differently to art. 27 ICCPR, which recalls an identitarian and anthropological notion of culture, the provisions of ICESCR and in particular art. 15(1)(a), were based on a materialistic and narrow sense of culture. The notion of culture adopted by this latter norm proves the tendency of international law to protect the right to cultural identity merely in favour of persons belonging to indigenous people and to the so called “national minorities”.

The materialistic conception of culture is not mistaken in itself but, unlike the anthropological one, is not able to underline the strict relationship existing between culture and personal identity.

As we have underlined in the Introduction, a significant debate has been promoted by legal scholars about the concept of culture. Within this debate they had underlined that culture provides individuals with a “horizon of meanings” where they can find references allowing them to build their identity; according to this conception, culture plays a fundamental role in order to allow everyone to define and to express their identity, regardless of the eventual belonging to a minority or an indigenous group (Ayton-Shenker 1995; Donders 2002; Meyer-Bisch, Bidault 2010; Reidel 2010).

In this framework, some scholars had stressed that besides a ‘narrow’ definition of cultural rights, including only rights with an explicit reference to culture - as rights secured by arts. 27 ICCPR and 15(1)(a) ICESCR - it is possible to identify a ‘broad’ notion of cultural rights which involves all rights having a strict and close link with culture and personal identity (Eide 1995, 232; Symonides 2000, 52; Donders 2007, 235; Meyer-Bisch, Bidault 2010).³¹ In this view

cultural rights protect the rights for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, their world view and the meanings they give

30 In this regard it is significant to recall the declaration made by some delegations’ representatives during the Travaux Préparatoires: really meaningful the statement of the Indian representative according to which this provision “referred to culture in its most intellectual and organized aspects” and it would be designed “to recognize the loftiest aspects of culture”; cf. General Assembly, “General Assembly Official Records, 12th session, 3rd Committee, 796th meeting”, paras. 18-19.

31 Some Authors has proposed a list of cultural rights, conceived in a broad sense; see Prott 1988, 96; Symonides 2000, 189. In this regard it is particularly meaningful the Fribourg Declaration on Cultural Rights proposed by the Fribourg Group; the Declaration makes reference to the rights to cultural identity and cultural heritage, to reference to cultural communities, to access to and participation in cultural life, to education and training, to information and communication and to cultural cooperation; cf. <https://www.unifr.ch/iiedh/assets/files/Declarations/declaration-eng4.pdf> (2017-12-15); Meyer-Bisch, Bidault 2010). As specific regards, the right to cultural identity see also Zagato 2012, 45; Symonides 2000, 189; Reidel 2010, 78.

to their existence and their development through, inter alia, values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life.³²

This academic debate is closely connected with the reflexion promoted by the UNESCO about culture and cultural rights.

Since the 50s, the UNESCO has elaborated a concept of culture which refers to traditions, systems of values, meanings and ways of life and underlines the link existing between culture and identity of peoples and individuals. This notion is at the heart of several soft and hard law instruments promoted by the UNESCO in order to increase the protection of CH and cultural diversity.³³ In this respect a significant milestone is represented by the 2001 UNESCO Declaration highlighting that cultural goods are “vectors of identity, values and meaning” (art. 8).

This reflexion has been greatly influencing the interpretation elaborated by the CESCR about the right to take part in cultural life. The interpretation of this right has been undergoing a meaningful evolution allowing the CESCR to overcome the materialistic and narrow notion of culture which, as we have underlined, had characterized the elaboration of this provision during the *Travaux Préparatoires*.

Since the General Discussion Day on the right to take part in cultural life, organised in 1992, the Committee’s members stressed the importance to overcome the “materialist or even mercantilist”³⁴ definition of culture recognised by the two International Covenants and to elaborate a notion of culture able to encompass all human activities characterising the way of life of a person or a group giving them a “sense of identity”.³⁵

The important development in the interpretation of this right emerges from the Concluding Observations. Since the 2000s the Committee has been adopting a broad conception of the right to take part in cultural life recalling the right to use one’s language, the right to CH, the right to worship places, the land rights and the right to cultural identity.³⁶

32 Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, UN Doc. A/HRC/14/36 (2010), para. 9; the Special Rapporteur proposed this definition and explicitly recalled the definition of cultural rights elaborated by the Fribourg Grou

33 See *inter alia* Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It (1976), Declaration concerning the Intentional Destruction of Cultural Heritage (2003), Convention for the Safeguarding of the Intangible Cultural Heritage (2003).

34 CESCR, “General discussion on the right to take part in cultural life as recognized in art. 15 of the Covenant”, UN Doc. E/C.12/1992/SR.17 (1992), para. 6.

35 UN Doc. E/C.12/1992/SR.17 (1992), para. 17.

36 In this regard see in particular CESCR, Concluding Observations Vietnam, E/C.12/VNM/CO/2-4 (2014), para. 33; on this occasion the Committee, referring to members of

Within this evolution a fundamental milestone is represented by the General Comment 21 on the right to take part in cultural life, adopted by the CESCR in 2009.³⁷ In particular its relevance lies in two aspects.

Firstly the definition of culture formalized by the Committee: it made reference to a broad and anthropological notion stating that culture includes all manifestations of human activities allowing individuals to express and build their identity.³⁸ On this occasion the Committee emphasized the individual dimension of culture: while maintaining a strong collective dimension, it is a good that everyone - and not only persons belonging to indigenous groups or national minorities - should be entitled to enjoy.

Secondly, on this occasion, the content of the right to take part in cultural life was interpreted in a real broad manner. The Committee affirmed that the state obligation to respect “includes the adoption of specific measures aimed at achieving respect for the right of everyone” and, following this affirmation, it recalled all rights allowing people to choose, define and express their cultural identity. The Committee referred to all cultural rights falling into the broad notion elaborated by scholars and made a specific reference to the right to cultural identity.³⁹

The recognition of the right to cultural identity opens some important prospects to protect migrant people. This emerges also from the General Comment 21 (2009), where the Committee underlined that the protection of migrants’ cultural identity requires a special attention which cannot be assimilated to the protection of minorities and indigenous peoples.

5 Conclusions

This brief analysis allows us to show that the protection assured by the international human rights law to cultural identity of migrants is now still lacking but, in the future, it could have some important development

indigenous people, recommended to respect “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 people”. In a similar way, see People’s Republic of China, E/C.12/CHN/CO/2 (2014), para. 36; Denmark E/C.12/DNK/CO/5 (2013), para. 21; Kuwait, E/C.12/KWT/CO/2 (2013), para. 30.

37 CESCR, General Comment 21 (2009) “Right of everyone to take part in cultural life”, UN Doc. E/C.12/GC/21 (2009).

38 UN Doc. E/C.12/GC/21 (2009), paras. 11 and 13: culture includes “all manifestations of human existence [...] 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”.

39 UN Doc. E/C.12/GC/21 (2009), para. 49: the right to cultural identity is defined as “the right [...] To freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected”.

prospects.

As the ICMWR deals specifically with the migrant workers' rights, at first sight it could appear to be the most important treaty with regard to this issue. Indeed, the Convention devote a great deal of attention to the protection of cultural rights and its provisions confirm the urgent necessity to protect and promote the cultural identity of migrant workers; in particular comparing the cultural identity to human dignity, the Convention recognises its critical nature.

However, the ICMWR suffers several limits concerning its field of applications. On the one hand, it concerns only a specific category of migrants, namely the migrant workers (and the members of their family); on the other hand, it has not been ratified by States of destination, where the protection of cultural identity is becoming more and more essential and urgent.

Similarly, the ICCPR and in particular the right to enjoy one's culture (art. 27), did not turn out to be useful. Even assuming that this norm can be applied to aliens - an issue moreover not undisputed -, its main *ratio* is to promote the survival and the development of the minority as a whole. Consequently, this provision is not adequate to assure an effective protection to cultural identity as we conceive it as a personal good to be recognised in favour of single individuals.

On the contrary the right to take part in cultural life, secured by art. 15(1)(a) ICESCR, offers some relevant prospects as regards the protection of migrants' cultural identity. As we have briefly described, the interpretation elaborated by the CESCR on this right is undergoing a meaningful evolution; within this evolution the Committee has achieved the elaboration of the right to cultural identity as a human right to be recognised in favour of everyone, regardless of his or her belonging to indigenous people or national minority.

The identification of this right opens some fundamental prospects to protect cultural identity of migrant people; for example, this right could assure the presence of intercultural mediators at schools, in hospitals and in some public authorities, the possibility to receive an education on one's language and culture, the use of traditional names and traditional dresses, the celebration of religious and cultural festivities and so on.

It is extremely meaningful to underline that the 'identitarian' notion of culture, formalized by the CESCR in the General Comment 21, was recalled with identical terms by the Committee on the Right of the Child in the General Comment no. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts.⁴⁰

⁴⁰ See in particular Committee on the Right of the Child, General Comment no. 17 (2013) "on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts", UN Doc. CRC/C/GC/17 (2013), para. 14, lett. f).

This circumstance proves that the international human rights law has started to recognise the fundamental role played by culture in relation to the individual identity: indeed it is at the heart of human dignity. As culture provides individuals with values and references allowing them to build and express their identity, not to respect someone's cultural identity means forcing them to be different from who they actually are and how they perceive themselves: in other words, to breach their human dignity.⁴¹

The implementation of the right to cultural identity can significantly reinforce the protection assured to migrants who, also from this point of view, can experience a condition of high vulnerability.⁴²

Bibliography

- Agbetse, Yao (2005). *Droits culturels et travailleurs migrants*. Document de Synthèse 5. Fribourg: Institut Interdisciplinaire d'Éthique et de Droits de l'homme. URL <https://www.unifr.ch/iiedh/assets/files/DS/DS5-dc-travailleurs-migrants.pdf> (2017-12-15).
- Ayton-Shenker, Diana (1995). *The Challenge of Human Rights and Cultural Diversity*. New York: United Nations Department of Public Information. DPI/1627/HR.
- Borghi, Marco; Meyer-Bisch, Patrice (éds.) (2001). *La pierre angulaire. Le "flou crucial" des droits culturels*. Editions Fribourg: Universitaires Fribourg.
- Capotorti, Francesco (1977). *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*. UN Doc. E/CN.4/Sub.2/384/Rev.1.
- de Guchteneire, Paul; Pecoud, Antoine; Cholewinski, Ryszard (ed.) (2009). *Migration and Human Rights: the United Nations Convention on Migrant Workers' Rights*. Cambridge; Paris: UNESCO Publishing, Cambridge University Press.
- Donders, Yvonne (2002). *Towards a Right to Cultural Identity?* Antwerp; Oxford; New York: Intersentia; Hart.
- Donders, Yvonne (2007). "The Legal Framework of the Right to Take Part in Cultural Life". Donders, Yvonne; Volodin, Vladimir (eds.), *Human Rights in Education, Science and Culture: Legal Developments and Challenges*. Paris: UNESCO, Ashgate, 231-271.

41 Taylor 1992, 30: "There is a certain way of being human that is my way. I am called upon to live my life in this way, and not in imitation of anyone else's life. But this notion gives a new importance to being true to myself".

42 After the entry into force of the Optional Protocol to the ICESCR, in 2013, individuals are entitled to submit an application to the CESCR alleging a violation of the rights set forth in the Covenant; this could reinforce the concrete implementation of the right to cultural identity.

- Eide, Asbjørn (1995). "Cultural Rights as Individual Human Rights". Eide, Asbjørn; Krause, Katarina; Rosas, Allan (eds.), *Economic, Social and Cultural Rights. A textbook*. Leiden; Boston: Martinus Nijhoff Publishers, 229-240.
- International Commission of Jurists (2008). *Right to take part in cultural life (article 15(1)(a) of the Covenant)*. Submission of the International Commission of Jurists for the Day of Discussion on the right to participate in cultural rights convened by the Committee on Economic, Social and Cultural Rights, 9 May 2008. Background paper. UN Doc. E/C.12/40/7. URL <http://ohchr.org/Documents/HRBodies/CESCR/Discussions/May2008/InternationalCommissionJurists.pdf> (2017-12-15).
- Keller, Perry (1998). "Re-thinking Ethnic and Cultural Rights in Europe", *Oxford Journal of Legal Studies*, 18(1), 29-59.
- Lyon, Beth (2009). "The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the Brown Collar Migration Paradigm". *New York University Journal of International Law and Politics*, 42(2), 389-458.
- Medda-Windischer, Roberta (2010). *Nuove minoranze. Immigrazione tra diversità culturale e coesione sociale*. Padova: CEDAM.
- Métraux, Jean-Claude (2013). *La migration comme métaphore*. Paris: La Dispute.
- Meyer-Bisch, Patrice; Bidault, Mylène (2010). *Déclarer les droits culturels: Commentaire de la Déclaration de Fribourg*. Zürich, Bruxelles: Schulthess, Bruylant.
- Nafziger, James; Bartel, Barry (1991). "The Migrant Workers Convention: Its Place in Human Rights Law". *International Migration Review*, 25(4), 771-799.
- Nowak, Manfred (2005). *U.N. Covenant on Civil and Political Rights: CCPR commentary*. Kehl am Rhein: Engel.
- O'Keefe, Roger (1998). "The 'Right to take part in cultural life' under Article 15 of the ICESCR". *International and Comparative Law Quarterly*, 47(4), 904-923.
- Pedrazzi, Marco (2011). "La tutela della diversità culturale nel diritto internazionale". Zagato, Lauso; Vecco, Marilena (a cura di), *Le culture dell'Europa, l'Europa della cultura*. Milano: FrancoAngeli, 15-35.
- Pentassuglia, Gaetano (2004). *Minorités en droit International*. Strasbourg: Les Éditions du Conseil de l'Europe.
- Prott, Lyndel V. (1988). "Cultural Rights as Peoples' Rights in International Law". Crawford, James (ed.), *The Rights of Peoples*. Oxford: Clarendon Press, 93-106.
- Psychogiopoulou, Evangelia (2008). "Accessing Culture at the EU Level: An Indirect Contribution to Cultural Rights Protection?". Francioni, Francesco; Scheinin, Martin (eds.), *Cultural Human Rights*. Leiden, Boston: Martinus Nijhoff Publishers, 223-245.

- Reidel, Laura (2010). "What are Cultural Rights? Protecting Groups with Individual Rights". *Journal of Human Rights*, 9(1), 65-80.
- Sen, Amartya (2006). *Identity and Violence: the Illusion of Destiny*. New-York-London: W.W. Norton & Company.
- Stamatopoulou, Elsa (2007). *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond*. Leiden, Boston: Martinus Nijhoff Publishers.
- Stavenhagen, Rodolfo (1995). "Cultural Rights and Universal Human Rights". Eide, Asbjørn; Krause, Katarina; Rosas, Allan (eds.), *Economic, Social and Cultural Rights. A textbook*. Leiden, Boston: Martinus Nijhoff Publishers, 63-77.
- Symonides, Janusz (1993). "The History of the Paradox of Cultural Rights and the State of the Discussion within Unesco". Meyer-Bisch, Patrice (éd.), *Les droits culturels. Une catégorie sous-développée de droits de l'homme. Actes du VIIIe colloque interdisciplinaire sur les droits de l'homme*. Fribourg: Éditions Universitaires Fribourg, 47-72.
- Symonides, Janusz (2000). "Cultural Rights". Symonides, Janusz (ed.), *Human Rights: Concept and Standards*. Paris: UNESCO Publishing, 175-227.
- Taylor, Charles (1992). *The Politics of Recognition*. Princeton: Princeton University Press.
- Thornberry, Patrick (1991). *International Law and the Rights of Minorities*. Oxford: Clarendon Press.
- UNDP (2004). *Human Development Report 2004. Cultural Liberty in Today's Diverse World*. New York: United Nations Development Programme.
- Wilhelm, Marianne (1993). "L'étendue des droits à l'identité à la lumière des droits autochtones". Meyer-Bisch, Patrice (éd.), *Les droits culturels. Une catégorie sous-développée de droits de l'homme. Actes du VIIIe colloque interdisciplinaire sur les droits de l'homme*. Fribourg: Editions Universitaires Fribourg, 221-244.
- Wolfrum, Rudiger (1999). "The Protection of Indigenous Peoples in International Law". *Heidelberg Journal of International Law (ZaöRV)*, 59, 369-382.
- Yupsanis, Athanasios (2012). "The Meaning of 'Culture' in Article 15 (1) (a) of the ICESCR. Positive Aspects of CESCR's General Comment No. 21 for the Safeguarding of Minority Cultures". *German Yearbook of International Law*, 55, 345-383.
- Yupsanis, Athanasios (2013). "Article 27 of the ICCPR Revisited. The Right to Culture as a Normative Source for Minority/Indigenous Participatory Claims in the Case Law of the Human Rights Committee". *Hague Yearbook of International Law*, 26, 359-410.
- Zagato, Lauso (2012). "Intangible Cultural Heritage and Human Rights". Scovazzi, Tullio; Ubertazzi, Benedetta; Zagato, Lauso (a cura di), *Il patrimonio culturale intangibile nelle sue diverse dimensioni*. Milano: Giuffrè, 29-50.

