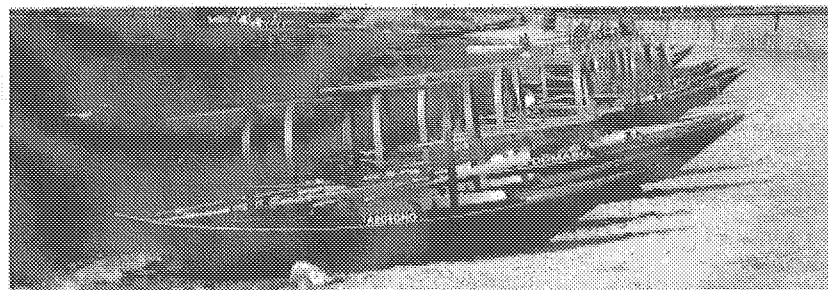


# IL PATRIMONIO CULTURALE INTANGIBILE NELLE SUE DIVERSE DIMENSIONI

a cura di

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*Lauso Zagato*

## INTANGIBLE CULTURAL HERITAGE AND HUMAN RIGHTS

SUMMARY: I. The Hendiadys and Its Limitations. — II. A Qualified Individual Human Right. — III. A Collective Right: The Right to Identity/Safeguard of Cultural Heritage.

### I. *The Hendiadys and Its Limitations.*

1. The hendiadys “intangible cultural heritage and human rights” is very limited, and therefore not convincing. The hendiadys has a literal basis in the 2003 Convention on the safeguarding of intangible cultural heritage (1): Art. 2, para. 1, states that “For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals”.

In doing so, the Convention certainly seems to qualify the relationship between intangible cultural expressions and international law of human rights as a relationship between compatibility and exclusion: the condition of the protection afforded to each expression of the first is the compatibility with all the instruments of the second (2).

(1) *Convention on the Safeguarding of the Intangible Cultural Heritage*, adopted by the UNESCO General Conference, 32<sup>nd</sup> Session, Paris, 17 October, 2003. Entry into force on 20 April 2006, in accordance with Article 34.

(2) According to relevant doctrine “requirement of mutual respect among communities” etc. is a vague formula “open to various readings”; more than a requirement it would mean “an aim of promoting these positive types of ICH”. See BLAKE, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage*, Leicester, 2006.

The definition is even more limited than that contained in the 2005 Convention on the protection of cultural diversity (3). In fact, in the latter, the relationship between the instruments is formally two-way: on the one hand (art. 2, para. 1), the respect for human rights is also the limit of the application of the Convention since “cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed”.

On the other hand particularly in point 4 of the preamble it is clearly indicated that “the importance of cultural diversity for the full realization of human rights and fundamental freedoms [is] proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments”.

The protection of cultural diversity is, therefore, an indispensable tool for the full realization of fundamental human rights (4); but such an explicit statement is absent in the 2003 Convention.

The existing instruments on human rights to which the 2003 UNESCO Convention makes reference (Preamble, point 1) are: the Universal Declaration of Human Rights (5) which states in Art. 27 “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”; the International Covenant on Civil and Political Rights (6), in which Art. 27 states “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

(3) *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted by the UNESCO General Conference, 33<sup>rd</sup> Session, Paris, 20 October 2005. Entry into force on 18 March 2007, in accordance with article 29.

(4) See PINESCHI, *Convenzione sulla diversità culturale e diritto internazionale dei diritti umani*, in ZAGATO (ed.), *Le identità culturali nei recenti strumenti UNESCO*, Padova, 2008, pp. 159-190. See also CORNU, *La Convention pour la protection et la promotion de la diversité des expressions culturelles*, in *Journal du droit international*, 2006, pp. 929-993.

(5) *Universal Declaration on Human Rights*, N.Y., 10 December 1948.

(6) *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratifications and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. Entry into force on 23 March 1976, in accordance with Article 4.

practice their own religion, or to use their own language” and the International Covenant on Economic, Social and Cultural Rights (7).

Art. 15, para. 1, of the latter Covenant states that “The States Parties to the present Covenant recognize the right of everyone: *a*) to take part in cultural life; *b*) to enjoy the benefits of scientific progress and its applications; *c*) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.

A wide range of instruments of *soft* and *hard* law for the protection of human rights operating at a general (or sectoral), regional, and universal level is still of relevance: to some of these instruments an explicit reference will be made below.

2. The condition of compatibility with human rights and the ensuing imposition of cultural “mutual respect” between different communities and groups established by Art. 2, para. 1, of the Convention — of which the inadequacy has been advanced — appears, however, appropriate at a preliminary examination. Indeed, several cultural expressions and traditions of particular communities and groups have proved offensive *per se* to other communities, adversely affecting the human rights of other groups and individuals. Let’s think to the procession of *orange* in the Catholics’ settlements in Northern Ireland and, generally speaking, to the discriminatory practices towards minority groups, or to the caste systems, not to mention the discriminating rites and traditions on the basis of gender, known to reach sexual mutilation or self-mutilation.

Also the UNESCO Program on the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity (8), which preceded the 2003 Convention, is not exempt from criticism. In the

(7) *International Covenant on Social, Economic and Cultural Rights*, adopted and opened for signature, ratification and accession by the General Assembly Resolution 2200 A (XXI) of 16 December 1966. Entry into force on 3 January 1976, in accordance with Article 27.

(8) *Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity*, decided by the XXVIII General Conference of the UNESCO (October 1997). For critical appraisals: KIRSHENBLATT-GIMBLETT, *Intangible Heritage as Meta-cultural Productions*, in *Museum International*, 2004, pp. 52-65; MURPHY, *Immaterial Civilization!*, in *Atlantic Monthly*, 2001, pp. 20-22; ZAGATO, *La Convenzione, sulla protezione del patrimonio culturale intangibile*, in ZAGATO (ed.), *Le identità culturali*, cit., pp. 27-70, at 51-52.

absence of a measure such as that at stake, the medieval European cultural expressions featured by explicit manifestations of anti-Semitism have been awarded the title of masterpieces (9).

There is a question of whether the condition laid down in Art. 2, para. 1, is sufficient, or is it too general and, therefore, less solid than it seems at first sight. To continue with the example of gender, only certain practices of female genital cutting in the European regional legal space (10) are explicitly considered detrimental to human rights. Much more complicated is the situation regarding traditions related to religious practices and the segregation of the sexes (11). However, no proper consideration can be put here on the role of Intangible Cultural Heritage in the controversies over religious symbols (12).

Again, what exactly does the reference to existing instruments of protection of human rights mean? *Quid* of animal rights? The associations supporting the fox hunting in the UK (or pigeon shooting in Italy, not to mention the controversial yet recently abolished bullfighting in Catalonia) could find these cultural traditions protected under the Conventions of 2003 and 2005, and thus arguments in favour of their positions once the respective States shall be party of the Conventions. In short, there is the risk that the safeguarding of the intangible cultural heritage and the protection of cultural diversity would operate in grey areas left uncovered by the existing instruments of international human rights law. Some practices, while not violating an international obligation, however touch extended sensitivities.

The same 1994 French law on *Métiers d'Art* is often cited as the first legal instrument through which a European country has transposed into national legal systems the spirit of the laws of Japan and

(9) These masterpieces have been absorbed in the *Representative List of the Intangible Cultural Heritage of Humanity* (art. 16 et seq.), under art. 31 of the Convention; it can be seriously doubted that it will happen again, in the light of the provision stating the respect of human rights.

(10) See European Court on Human Rights decisions: 1 July 2003, *Abraham Lunguli v. Sweden*, 33692/02 (in *Infonote* n. 55, on-line at [www.echr.coe.int](http://www.echr.coe.int)); 8 March 2007, *Collins e Akaziebie v. Sweden*, n. 23944/05, in *Infonote* n. 95, at [www.echr.coe.int](http://www.echr.coe.int).

(11) On this topic see ZAGATO, *Il volto conteso: velo islamico e diritto internazionale dei diritti umani*, in *Diritto, Immigrazione e cittadinanza*, 2007, 64-87.

(12) On this subject see MARIOTTI, in this book.

Korea on the protection of living masterpieces (the bearers of traditional knowledge of particular value) (13). However, it sets a precedent not exactly reassuring. One of the first masters of art proclaimed was Christian Bonnet, of the Maison Bonnet, who was engaged for generations in the creation of works by carving tortoise shells. Not only were the friends of the animals very puzzled, but the proclamation had also created problems relating to the fear of circumventing the ban on trade in endangered wildlife species (14).

These cases might justify the criticism authoritatively levelled at the Convention by the Director of the Smithsonian Institute (15) according to whom some aspects of the Convention would be conditioned by an "idealistic approach," as it considers the different cultural traditions of groups and communities as a positive expression of freedom, opposed by forces of injustice and tyranny. On the contrary, these traditions, in some minority measure but not insignificantly would include bullying, discrimination, violence against other human beings and living creatures in general.

3. Staying on the limits of the Convention, the primacy recognized by it (see Art. 3) to other instruments may adversely affect the condition of compatibility with human rights, especially when rights of indigenous communities are at stake.

(13) See the project presented by Korea to the UNESCO Executive Committee on 30 June 1993, in consideration of which the Committee launched the Program "Establishing of a Living Cultural Property (Living Human Treasures)", UNESCO 142 EX/18, §12 (5). The first national legal systems to establish the protection of bearers of traditional knowledge of special value have been the Japanese (1954), the Korean (1964), and the Philippines (1972). See: GARCES CANG, *Cultural Heritage and Its Stakeholders: The Case of Japan*, in *International Journal of Cultural Property*, 2007, pp. 45-55; JONGSUNG, *Korean Cultural Property Protection Law with Regard to Korean Intangible Heritage*, in *Museum International*, 2004, pp. 180-188; KONO, in this book.

(14) *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, Washington D.C. 3 March 1973. On the subject see MAFFEI, *Il potenziale conflitto tra tutela della diversità culturale e tutela delle specie e degli animali*, in *Rivista giuridica dell'ambiente*, 2008, pp. 193-241.

(15) KURIN, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: a Critical Appraisal*, in *Museum International*, 2004, pp. 66-77, at 70: "the Convention's standard is quite idealistic, seeing culture as generally hopeful and positive, born not of historical struggle and conflict".

We will further discuss the complex relationship between intangible heritage, human rights and the protection of intellectual property. Meanwhile, the provisions of Art. 3.a) states, "Nothing in this Convention may be interpreted as altering the status or diminishing the level of protection under the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage of World Heritage properties with which an item of the intangible cultural heritage is directly associated" (16). In other words, in the case of coexistence of both profiles of protection (sites used by community for rituals and expressions of their culture), the first profile always prevails.

The consequences of a one-way relationship, such as in the case of forced relocation of the San (Bushmen) from the Central Kalahari Reserve, Botswana, are enlightening. The reserve was listed as natural heritage of mankind, precisely on the basis of the 1972 Convention, and the deportation — which of course involves the deprivation for the San of their ritual, magic sites, and of their traditional houses — was justified by the government of that State with the need to comply with its obligations set forth in the 1972 Convention.

In practice, the recognized primacy would imply the possibility of sacrificing the protection of heritage and of cultural identity of indigenous peoples in the name of luxury tourism projects, and this, it seems, without even having the State responsible for a wrongful act. In this way, *inter alia*, a light of ambiguity on the same system of the Lists of the Convention is thrown (17).

But is it really true that the rights of communities and groups within their own cultural expressions may be affected so easily? It's time to bring the terrain of the inquiry beyond the narrow limits of the hendiadys given by the text of Art. 2.

## II. A Qualified Individual Human Right.

4. The question to which an answer is due reads as follows: are the expressions of intangible cultural heritage safeguarded by the Convention only conditioned and limited externally by the system of

(16) *Convention Concerning the Protection of the World Cultural and Natural Heritage*, adopted by the UNESCO General Conference, 17<sup>th</sup> Session, Paris, 16 November 1972. Entry into force on 17 December 1975, in accordance with Article 33.

(17) See MAZZA, *La protezione dei popoli indigeni nei paesi di common law*, Padova, 2004, p. 55.

human rights protection (18), or rather do they have a deep impact on the system, interacting with it and ultimately helping it to change? According to the writer the 2003 Convention plays an essential role in upgrading and redesigning thoroughly the extent of the cultural right under Art. 15, para. 1, of the Covenant on Economic, Social and Cultural Rights: it is surely part of the human rights system (yet understood in an individualistic sense), and it specifically belongs to the second generation of rights (19).

Some immediate instruments — instruments which are clearly affected by the long wave of the Convention — following the Convention contribute to this renewed individual dimension of the cultural right. The reference, in addition to the 2005 UNESCO Convention, is to the 2007 Declaration of the UNGA on the Rights of Indigenous Peoples (20), on the one hand, and to the Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) of Council of Europe, on the other hand (21).

In the past, indigenous communities have been subjected to campaigns of marginalization of their needs, to contempt and to forced assimilation, to cultural genocide, or even to extermination (22). Over the recent decades the need to recognize not only the identity's rights of persons belonging to these communities, but also the need for an enhanced protection of those rights more than the ones generally enjoyed by minorities has been established (23).

(18) The reference is so far to individual human rights; see *sub* III for collective rights.

(19) MARCHESI, *Diritti umani e Nazioni Unite*, Milano, 2007, at 30.

(20) *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the UN General assembly on 27 September 2007 (A/61/L.67). The Project had been adopted on 29 June 2006, at the first session of the new body created on 3 April 2006 (Ris. 60/251, UN. Doc. A/Res/60/251); before, see *Draft United Nations Declaration on the Rights of Indigenous Peoples*, Report of the Working Group on Indigenous Peoples, adopted by the Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, 45 Session, 26 August 1994, in *International Legal Materials*, 1995, p. 5451. The first comments are of ERRICO, *La Dichiarazione delle Nazioni Unite sui diritti dei popoli indigeni*, in *Diritti umani e diritto internazionale*, 2007, pp. 167 et seq., and ZAMBRANO, *La Dichiarazione delle Nazioni sui diritti dei popoli indigeni*, in *La Comunità internazionale*, 2009, pp. 55-80.

(21) Adopted in Faro on 27 October 2005, ETS n. 199.

(22) See para. 12 (and note 57).

(23) See Daes Report of 1996; also *Working Paper on the Relationship and Distinction between the Rights of the Persons Belonging to Minorities and Those of Indi-*

This development marked a clear repudiation of the brutal assimilation logic that characterized, for example, the ILO Convention n. 107, of June 26<sup>th</sup>, 1957 (24), properly substituted by the following Convention n. 169 (25). The last Convention, however, limited to set forth a general obligation on States to make room for cultural autonomy of indigenous peoples, without establishing any positive obligation on the matter.

It is not the case to discuss here whether or not a customary rule which requires the entitlement of indigenous peoples to qualified individual human rights (26) is already established. This expression refers to those human rights which, while structurally individual, inevitably bear a collective value also: in primis the right of non-discrimination founded on Art. 27 of the Covenant on Civil and Political Rights which, according to the doctrine, already covers the principle of non-assimilation (prohibition of negative discrimination) (27).

The 2007 Declaration of the Rights of Indigenous Peoples contributes, in each case, to better define those qualified individual rights: Arts. 8 and 9 stipulate the right of individuals not to be subjected to forced assimilation and, respectively, the right of individuals to the recognition of their wish to belong to a community. Art. 14, para. 3, on its part, poses the fundamental right of indigenous children to access to their own culture and to the use of their language.

5. The Faro Convention entered into force on June 1<sup>st</sup>, 2011, after having barely achieved the minimum number of ratifications re-

*genous Peoples*, UN Doc. E/CN.4/Sub.2/2000/10. The distinction, it should be noted, is inextricably linked to the specificity of the right to separation, thus a collective right, which is a right of indigenous peoples. See ZAGATO, *La protezione dell'identità culturale dei popoli indigeni come oggetto di una norma di diritto internazionale generale?*, *Thule*, 2011 (forthcoming); ZAGATO, *Tutela dell'identità e del patrimonio culturale dei popoli indigeni. Sviluppi recenti nel diritto internazionale*, in CIMINELLI (ed.), *La negoziazione delle appartenenze*, Milano, 2006, pp. 35-65.

(24) ILO Convention n. 107 *Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries*, 26 June 1957, [www.ilo.org/ilolex/english/convdisp2.htm](http://www.ilo.org/ilolex/english/convdisp2.htm).

(25) ILO Convention n. 169 *Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, *ivi*.

(26) On this issue, ZAGATO, *La protezione dell'identità culturale dei popoli indigeni*, *cit.*

(27) See para. 12.

quired. Those ratifications do not include those of the main European countries. Indeed, most countries of Western Europe had not even signed, at the time, the instrument in question (28).

It is also true that the definition of *cultural heritage* provided by the Convention at issue (art. 2 lett. *b*) is an attempt, perhaps not quite successful, to achieve a unitary concept, applicable to both the tangible cultural heritage and the intangible one. In the end, it proves to be correct, in part, the widespread prejudice that sees in the Convention an instrument too ambitious for the member countries of the Council of Europe, almost all being East European and Balkan countries, that drafted (and wanted) the Convention.

The fact remains that the Convention is the first instrument to explicitly mark the entrance of the *cultural heritage* in the sphere of individual rights. The recognition to individuals of the right "to engage with the cultural heritage of their choice", while respecting the rights of others (paragraph 4 of the preamble), is particularly significant. The rights provided by the Convention are understood as an aspect of the right to participate in cultural life that is enshrined in the Universal Declaration and in the Covenant on Economic, Social and Cultural Rights. Consistently, Art. 4, para. 1 of the Faro Convention establishes the right of everyone to benefit from the cultural heritage (and to contribute to its enrichment).

Regarding the importance of the States which have promoted and implemented the Convention, the reverse consideration can be made: due to the particular hardships experienced in the '90s, Eastern European States (or a part among them) may well be today at the forefront in understanding the value of cultural heritage for society. In this light, even the few ratifications become significant.

6. In literature, the more detailed definition of cultural rights is the one provided by the Group of Freiburg in 1998 (29). This definition's initial value does not try to include different types of rights as expressions of cultural rights, though they are related in some way.

(28) Currently, the States that ratified are: Bosnia, Croatia, Georgia, Latvia, Luxembourg, Macedonia, Moldova, Montenegro, Norway, Portugal, Serbia and Slovenia. The States that signed but not ratified are: Albania, Armenia, Bulgaria, San Marino and Ukraine.

(29) *Les droits culturels. Projet de déclaration*, Meyer-Bisch (ed.), UNESCO, Paris/Fribourg, 1998.

For example, the freedom of thought and religion set forth in Art. 18 of the Covenant on Civil and Political Rights and Art. 10 of the ECHR expresses that these rights have a certain cultural dimension, but they cannot be defined as cultural rights; otherwise the notion would extend dramatically.

According to the Freiburg Group the cultural right has some distinct elements: the right to identity and to cultural heritage; right to identification with the cultural community of belonging; right to participation in cultural life, education and training, information; and the right to participation in the cultural and cooperation policies (30).

Some of these rights are at the core of the traditional cultural right. In particular, the right to participation in cultural life and the right to education. The first one has to be understood as a right of access to culture, which places upon States a general obligation to facilitate such participation. The right to education, has been the subject few years ago of extensive analysis by the Committee on Economic, Social and Cultural Rights (31).

But the first two profiles identified by the Group of Freiburg have direct relevance, and provide support for the investigation so far developed. The 2003 Convention — together with the tools and doctrinal documents that accompany it — plays an essential role in specifying and redesigning the extent of the individual right under Art. 15 of the Covenant on Economic, Social and Cultural Rights.

The Convention, in short, makes an *unicum* with it, beyond the will of its own editors.

7. The extension of the concept of cultural right under Art. 15, para. 1.a), of the Covenant on Economic, Social and Cultural Rights

(30) The Declaration has been touched up (but not substantially modified) in 2007, in the light of the two UNESCO Conventions of 2003 and 2005, of the Faro Convention and of the Declaration on the Rights of Indigenous Peoples, [www.unifr.ch/iieds](http://www.unifr.ch/iieds).

(31) According to *General Comment* n. 13 of 1999, the right to education can be divided into four profiles: the refusal to deny anyone the right to education (education must be accessible by all); the right of everyone, including where appropriate the adults, to basic education (with the obligation of States to prevent the interference by third parties in the enjoyment of that right); the free choice of content of education, by individuals and families; the freedom of minorities to be educated in their own language, also outside the school's system (in other words, the only obligation of the State is that of not interfering).

(the right of everyone to take part in cultural life), on the basis of a tool (or a set of instruments) adopted decades later, corresponds to the criterion called “systemic integration”, established in Art. 31, para. 3.c), of the Vienna Convention on the Law of Treaties, that codifies a rule of general international law (32).

A few years ago, the *ad hoc* Criminal Tribunal for former Yugoslavia used (33) the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict (in particular its definitory content) as a rule of interpretation of the (poor) concepts established by Article 3.d) of its Statute — “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and work of art and science”. These concepts have been quite literally taken by Art. 27 of the Regulation annexed to the IX Hague Convention (34). The Tribunal properly reached that conclusion even though the 1954 Convention was not one of the instruments that it was called upon to ap-

(32) According to this rule, in the interpretation of any treaty consideration has to be put on “any relevant rules of international law applicable in the relations between the parties”. See MCLACHLAN, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, in *International and Comparative Law Quarterly*, 2005, pp. 279 et seq., and FRENCH, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, in *International and Comparative Law Quarterly*, 2006, pp. 281 et seq. As an interesting recent case — *Rantsev v. Cyprus and Russia* (<http://hudoc.echr.coe.int/hudoc/default.asp> — on the application of the rule by CEDU, see ANNONI, *La tratta di donne e bambini nella recente giurisprudenza della Corte europea dei diritti dell'uomo*, in DEP, *Deportate Esuli Profughe, Rivista telematica*, 2011, pp. 87-97, at [www.unive.it/dep](http://www.unive.it/dep).

(33) 26 February 2001, *The Prosecutor v. Kordic and Cekez*, Case N.IT-95-14/2-T. See SCHAIRES, *The Intersection of Human Rights and Cultural Property Issues under International Law*, in *Italian Yearbook of International Law*, 2001, pp. 59-99, pp. 75-78 and ZAGATO, *La protezione dei beni culturali in caso di conflitto armato all'alba del secondo Protocollo 1999*, Torino, 2007, pp. 172 et seq.

(34) Regulation Annex to the Convention (IV) Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907, art. 27. “In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes”. See FRIEDMAN (ed.), *The Law of War. A Documentary History*, vol. I, New York, 1972, p. 204 et seq. and SCHINDLER, TOMAN (eds.), *The Laws of Armed Conflicts: A Collection of Conventions*, III ed., Dordrecht, 1988. See also ALDRICHT, CHINKIN (eds.), *Symposium: The Hague Peace Conferences*, in *American Journal of International Law*, 2000, pp. 1-91.

ply. Then it is decisive the fact that the Committee on Economic, Social and Cultural Rights, in its recent General Comment n. 21 on the right of everyone to take part in cultural life (35), has successfully defined the “normative content” of Art. 15, para. 1.a), based on a series of later texts, recently adopted. The texts are those referred to in the preceding pages, in particular the 2005 Convention, the UN Declaration on Indigenous Peoples, the Declaration of the Group of Freeburg and, eventually, the ILO Convention n. 169. In addition, consideration has to be put on regional instruments such as the *Framework Convention for the Protection of National Minorities* (36), and on acts of *soft law*, in particular the UN *Declaration on the Right to Development* (37) and the UNESCO *Declaration on Cultural Diversity* (38). The Faro Convention at that time is not yet in force and is not mentioned by the Commentary. Also any reference to the 2003 Convention is lacking.

Since we cannot doubt this as a deliberate exclusion, and not an oversight, we must dwell on that document in order to check whether the reasoning carried out so far and its logic could be jeopardized by the choice made by the Committee in its General Comment.

8. In accordance to the General Comment n. 21, the notion of “intangible cultural heritage” would seem not to exist; in its place the phrase (para. 16) “intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history as well as values, which make up identity and contribute to the cultural diversity of individuals and communities” (39) appears. The very expression “cul-

(35) Committee on Economic, Social and Cultural Rights, Forty-third session, 2-20 November 2009, *General Comment No. 21, Right of Everyone to Take Part in Cultural Life (art. 15 para. 1 a), of the International Covenant on Economic, Social and Cultural Rights*, 21 December 2009.

(36) *Framework Convention for the Protection of National Minorities*, Strasbourg 1 December 1995, ETS n. 157.

(37) GA Resolution 41/128, 4 December 1986, *Declaration on the Right to Development*, A/RES/41/128.

(38) UNESCO Universal Declaration on Cultural Diversity, Paris, 2 November 2001. See LENZERINI, *Riflessioni sul valore della diversità culturale nel diritto internazionale*, in *La Comunità internazionale*, 2001, pp. 671-684 and PINESCHI, *op. cit.*, *passim*.

(39) And at para. 70: “State parties should [...] adopt policies, programmes and proactive measures that also promote effective access by all to intangible cultural goods (such as language, knowledge and traditions)”.



tural heritage" is reserved for the cultural rights of indigenous peoples, while for the remainder of the comment the term heritage concerns tangible heritage goods, or more often is part of the hendiadys "culture and heritage". Consistently, the notion of "safeguarding" is absent from the text of the Comment n. 21.

The individual right to take part in cultural life requires the States to comply with the obligations to respect, to protect, to fulfil (III B, para. 48). The realization of the right to participate in cultural life also requires (II B, para. 16) the availability of cultural goods and services for the enjoyment of each person, their accessibility, the acceptability and adoptability of national laws, policies and strategies relating to cultural rights, in addition to the "appropriateness". The latter obligation is expressed, inter alia, in providing programs "aimed at preserving and restoring cultural heritage".

The picture is thus clear. The questions unresolved remain why, primarily, the Committee has decided to exclude the 2003 Convention from the range of instruments called for the purpose of qualifying the content of Art. 15, para. 1.a), as it would impose a sort of ... *damnatio memoriae* and, secondly, what could possibly be the consequences of this choice as to the ongoing analysis.

Focusing on the first issue — Part II F of the Comment — dedicated to "Cultural Diversity and the Right to Take Part in Cultural Life", it shows all too clearly why it was decided to privilege the 2005 Convention. Para. 43 of the General Comment n. 21, recalling point 18 of the 2005 Convention reads as follows: "States parties should [...] bear in mind that cultural activities, goods and services have economic and cultural dimensions, conveying identity, values and meanings. They must not be treated as having solely a commercial value".

This emphasis on economic aspects related to the activities and to cultural heritage pervades the General Comment n. 21, together with a reference to the rights of authors in the sense referred to in para. 1. c) of Art. 15. In fact, in Comment n. 21 the reference to Comment n. 17 (40) is constant in an effort to ensure consistency between the two interpretative instruments.

(40) Committee on Economic, Social and Cultural Rights, Thirty-fifth session, Geneva, 7-25 November 2005, E/C.12/GC/17 General Comment No. 17 (2005), *The Right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is*

Maybe, reasons of continuity with Comment n. 17 have made the text of the 2005 Convention more "palatable" to the Committee than the 2003 text. This may be explained by the ongoing hot debate in doctrine on the scope of Art. 15, para. 1.c), of the Covenant, that is the possibility or not to qualify intellectual property rights as a human right. The 2003 Convention, at Art. 3 b) provides that "Nothing in this Convention may be interpreted as: [...] b) affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties".

There is no doubt that in this way one of the limitations of the 2003 Convention is outlined and the same is for the limitation already underlined in the Blake report from which it drew inspiration (41); on such limit the doctrine did not fail to draw attention (42).

the author (art. 15 para 1.c) of the International Covenant on Economic, Social and Cultural Rights.

(41) BLAKE, *Developing a New Standard-setting Instrument for the safeguarding of Intangible Cultural Heritage. Elements for Consideration*, UNESCO, Paris, 2001.

(42) See SCOVAZZI, *La notion de patrimoine culturel de l'humanité dans les instruments internationaux*, in SCOVAZZI, NAFZIGER (eds.), *Le patrimoine culturel de l'humanité*, Leiden/Boston, 2007, *passim*; SCOVAZZI, *La Convention pour la sauvegarde du patrimoine culturel immatériel*, in VUKAS, ŠOŠIĆ (eds.), *International Law. New Actors, New Concepts - Continuing Dilemmas; Liber amicorum Bozidar Bakotić*, 2010, pp. 301-317. On the relationship between intangible cultural heritage and intellectual property rights see MASKUS, REICHMAN (eds.) *International Public Goods and Transfer of Technology*, New York, 2005; VON LEWINSKI, *Traditional Knowledge and Folklore - A New Topic in the International Arena*, in UBERTAZZI L.C. (ed.), *TV, Internet e new trend di diritti d'autore e connessi*, Milano, 2003, pp. 45-62; WENDLAND, *Intangible Heritage and Intellectual Property: Challenges and Future Prospects*, in *Museum International*, 2004, pp. 97-107. Among Italian authors see: MANSANI, *La tutela delle espressioni del folklore*, in *Annali italiani del diritto d'autore, della cultura e dello spettacolo*, 2005, pp. 305-350. Regarding specifically the traditional knowledge of indigenous people, in addition to the authors now quoted see: WENDLAND, *Intellectual Property and the Protection of Cultural Expressions: the Work of the World Intellectual Property Organization*, in GROSHIELDS, BRINKHOF (eds.), *Intellectual Property Law. Articles on Cultural Expressions and Indigenous Knowledge*, Antwerp, 2002, pp. 102-138; ZAGATO, *Appunti su traditional knowledge dei popoli indigeni e diritti di proprietà intellettuale*, in CIMINELLI (ed.), *La negoziazione delle appartenenze*, Milano, 2006, pp. 81-103; ZAGATO, *La protezione dell'identità culturale dei popoli indigeni*, cit., Attention has to be put on the WIPO's work, through ARIPO (African Regional Organization on Intellectual Property), on the *Protocol on the Safeguarding of*

9. That said, and noted that in relation to cultural rights, unresolved nodes of the relationship between intangible cultural heritage and intellectual property rights (as well as between human rights and intellectual property rights in general) may begin to emerge (43), the General Comment n. 21 includes all the situations mentioned in Art. 2 of the 2003 Convention. So the absence of an explicit reference to the craftsmanship does not create problems, since the knowledge and expertise are however mentioned in the Convention. Conversely, the particular amplitude given to the right to linguistic diversity qualified as a human right is perfectly understandable: that right in the Comment does not meet the limits placed by Art. 2, para. 2.a), of the 2003 Convention.

The exclusion from General Comment n. 21 of the terms “safeguarding” and “intangible cultural heritage” produces some definitional confusion that runs through the text, making it less easy to be used. It does not mean, however, to exclude the “safeguarding of the intangible cultural heritage” from the “normative content” of Art. 15, para. 1.a). It is not a coincidence that the right of everyone to take part in cultural life includes, among the necessary conditions, the “appropriateness”, making it reference “to the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples”.

Again, (see General Comment n. 21, para. 13), the Committee performs a torrential definition of culture that encompasses, however, the object of the 2003 Convention: “The Committee considers that

culture, for the purpose of implementing Article 15, para. 1.a), 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. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities”.

Above all, the General Comment makes constant reference to the obligations of States relating to groups, communities and individuals, a feature completely absent from the 2005 Convention. On the other hand, the Comment is explicit in highlighting the centrality of the right to cultural identity (44). Independent of the intentions of the Committee, the object of the Convention is therefore in the (individual) reinforced human right of Art. 15, para. 1.a), of the Covenant on Economic, Social and Cultural Rights.

In conclusion, the safeguarding of the intangible cultural heritage qualifies as a crucial element of the redefinition of the cultural right — intended primarily as a right to cultural identity — which for too long has been considered the least relevant among individual human rights of second generation. The cultural right usually played a mere frill role to the more significant economic and social rights.

All this is behind us, definitely. Cinderella does not live here anymore.

(44) The right to cultural identity, in turn, has interesting antecedents — in addition to Art. 27 of the *Covenant on Civil and Political Rights* — in the 1978 UNESCO *Declaration on Race and Racial Prejudice*, and in the Recommendation following the World Conference on Cultural Policies held in Mexico City in 1982. This identified the need for Member States to undertake to preserve the cultural identity of all Member States, regions and peoples and to oppose to any discrimination against the cultural identities of other countries, regions, nations. The same countries were also required to cooperate in the development of cultural identity through appropriate means. It should also be mentioned (again) art. 29 of the *Convention on the Rights of the Child*, which invokes the respect “of his or her own cultural identity, language and values”.

*Traditional Knowledge* adopted at the beginning of 2010 in Namibia (a Swakopmund) and aimed at entering into force after the sixth ratification.

(43) See DESANTES, in this book. On the general topic of the relationship between international trade and culture from different points of view, see BURRI-NE-NOVA, *Trade and Culture in International law: Paths to (Re)conciliation*, in *Journal of World Trade*, 2010, pp. 49-80; LUCAS, *Culture et développement durable*, Paper presented at the Forum *Ready to Change?*, Ljubljana, 2-4 December 2010, [www.cultura21.net](http://www.cultura21.net). On the relationship between human rights and intellectual property see CULLET, *Human Rights and Intellectual Property Protection*, in *Human Rights Quarterly*, 2007, pp. 403-440. As to the EU Charter of Fundamental Rights: GEIGER, *Intellectual Property Shall be Protected? - Article 17 (2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope*, in *European Intellectual Property Review*, 2009, pp. 113-17.

### III. *A Collective Right: The Right to Identity/Safeguard of Cultural Heritage.*

10. The right to identity, understood as identification with the community or cultural group to which individuals belong, introduces the discourse on the collective dimension of cultural rights.

The complex relationship between individual and collective human rights has been deepened in international law especially with regard to the relationship between self-determination of peoples (art. 1 common to the two Covenants) and individual rights of persons belonging to minorities established by Art. 27 of the Covenant on Civil and Political Rights (right of persons belonging to ethnic, religious minorities or linguistic minorities to enjoy their own culture, in community with the other members of their group).

Worthy of consent is the doctrine (45) according to which the right to (internal) self-determination cannot coincide with the sum of individual civil and political rights of the members of the group, that is with the right to democracy generally understood as a government that respects the free will of the people. Art. 1 common to the two Covenants places on each State Party an obligation to protect the specific identity of the peoples who live within its territory: these are the classic cases of minorities (in Northern Ireland, Quebec, the Basque Country, in the new EU member states of Eastern Europe) as well as of indigenous peoples or, more generally, of non-State communities.

Since it cannot be reduced to the sum of human rights of individuals that make up the respective groups, the right to internal self-determination establishes a collective right to identity. Through an interesting evolutionary interpretation, set forth in the General Comment on Art. 27 of the Covenant on Civil and Political Rights, the Committee of Civil and Political Rights noted (46) that the protection

(45) PALMISANO, *L'autodeterminazione interna nel sistema dei Patti sui diritti dell'uomo*, in *Rivista di diritto internazionale*, 1996, pp. 365-413, at 388.

(46) *Committee on Human Rights*, fiftieth session (1994), General Comment n. 23, 8 April 1994, CCPR/C/21/Rev.1/Add.5, *Article 27: Rights of Minorities*. Despite the different nature of the rights protected by art. 27 rather than those protected by art. 1, the Committee states: "Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States

provided for in Art. 27 concerns the survival of groups as such, and should therefore not be confused with other "personal rights" conferred by the Government.

11. Bringing the focus back on cultural rights, in the 90s, the World Commission on Culture and Development had come to the conclusion that "cultural freedom, unlike the other freedoms, is a collective freedom" (47). In 1989, the OSCE prepared a document which committed states parties to the Vienna Conference to create conditions that guarantee the promotion of ethnic, religious, linguistic and cultural diversity (48). Of relevance are also the 1992 *European Charter for Regional and Minority Languages* (49) and the

may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group". The General Comment concludes: "The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end".

(47) *Our Creative Diversity*, Report of the World Commission on Culture and Development, Paris, 1996, p. 16: "Cultural freedom, unlike individual freedom, is a collective freedom. It refers to the right of a group of people to follow a way of life of its choice. Cultural freedom guarantees freedom as a whole. It protects not only the group but also the rights of every individual within it. Cultural freedom, by protecting alternative ways of living, encourages experimentation, diversity, imagination and creativity. Cultural freedom leaves us free to meet one of the most basic needs, the need to define our own basic needs".

(48) Follow-up to the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, held on the basis of the Final Act relating to the follow-up to the Conference, Vienna 1989, *Co-operation and Exchanges in the Field of the Culture*, para. 59: "They will ensure that persons belonging to national minorities or regional cultures on their territories can maintain and develop their own culture in all its aspects, including language, literature and religion; and that they can preserve their cultural and historical monuments and objects".

(49) *European Charter for Regional or Minority Languages*, Strasbourg, 5 November 1992, entered into force on March 1<sup>st</sup>, 1998 (ETS n. 148). See KOVACS, *La protection des langues des minorités ou la nouvelle approche de la protection des minorités?*, in *Revue générale de droit international public*, 1994, pp. 411-418.

Council of Europe *Framework Convention for the Protection of National Minorities* (1995) (50).

In the context of the dramatic events of the early '90s, the collective profiles of cultural rights carry tragic significance. Not surprisingly, the first articulated description of the renewed importance of the right to cultural identity emerges, *a contrariis* (in relation to the destruction of cultural heritage during armed conflicts of the '90s) in the document drafted by a group of international experts convened in Stockholm, at the initiative of the Swedish government in the summer of 1994.

The deliberate destruction of cultural heritage during the latest armed conflicts, regardless of them having an international character, is said by these experts to be part of a strategy of control that simultaneously makes use of tools such as systematic torture, ethnic rape, expulsion and physical extermination. In particular "the destruction of historic records, monuments and memories serves the purpose of suppressing all that bears witness that the threatened people were ever living in the area" (51).

This leads to a brutal first conclusion: only by referring to cultural heritage (tangible and intangible) as interconnected with the cultural identity of peoples, the sequence of behaviours which characterize the vast majority of armed conflicts in the last years can be explained.

At this "strong" interpretation of facts, one can oppose the expansion, in the last fifteen years, of a trend concerning interdisciplinary studies focused on the central role of bio-cultural/bio-linguistic

(50) *Framework Convention for the Protection of National Minorities*, Strasbourg, 1 February 1994, entered into force on February 1<sup>st</sup>, 1998 ETS n. 157. See: ERRICO, *Protezione delle minoranze nazionali e sistema di controllo della Convenzione Quadro del Consiglio d'Europa del 1945*, in *Diritti umani e diritto internazionale*, 2007, pp. 442-447; also MALINVERNI, *La Convention-cadre du Conseil de l'Europe pour la protection des minorités nationales*, in *Revue Suisse de droit international et de droit européen*, 1995, pp. 521-546.

(51) *Resolution on Information of an Instrument for Protection against War damages to the Cultural Heritage*, adopted at the Meeting convened by the Swedish Central Board of National Antiquities, Swedish National Commission for UNESCO e ICOMOS Sweden, Stockholm, 10 June 1994, [www.UNESCO.org/culture/laws/sweden/btmoeng/page1.shtml](http://www.UNESCO.org/culture/laws/sweden/btmoeng/page1.shtml). See ZAGATO, *La protezione dei beni culturali in caso di conflitto armato*, cit., p. 239 et seq.

diversity in today's development of human societies (52). The doctrine here mentioned interprets the concept of bio-cultural diversity as a development compared with the conception of bio-politics that characterized the '80s and '90s and tries to advance the knowledge of the fundamental profiles of the new scientific approach.

12. The necessarily collective profile of the right at issue is therefore largely confirmed (53).

The object of protection is precisely the preservation of cultural heritage of identity as a collective good of humanity to be enjoyed by present and future generations of that group and (then) by humanity itself (54). In other words, the obligation for States Parties to the Convention is to enable communities and groups (minority, indigenous, local, or simply electives) to live and perpetuate their intangible heritage.

It is (55), therefore, a partially negative obligation: it means the prohibition of persecution of the cultural (56) group or community

(52) See MAFFI, *Linguistic, Cultural and Biological Diversity*, in *Annual Review of Anthropology*, 2005, pp. 599-617; the paper is debated in ZAGATO, *Il ruolo della lingua nella costruzione (mantenimento e sviluppo) delle identità culturali. Riflessioni alla luce dei nuovi strumenti UNESCO*, in CERMEL (ed.), *Le minoranze etnico-linguistiche in Europa*, Padova, 2008, 229-254. See also PETRILLO, in this book.

(53) SALERNO, *Diritto internazionale. Principi e norme*, Padova, 2008, pp. 66-67 (see also next footnote). Also: CERA, *La protezione del patrimonio culturale: tra sovranità dello Stato e diritti umani*, in *Diritti dell'uomo*, 2007, pp. 23-27; DE VARENNE, *Language, Minorities and Human Rights*, The Hague, 1996; ZAGATO, *La Convenzione sulla protezione*, cit., p. 66; ZAGATO, *Il ruolo della lingua*, cit., *passim*; ZIEGLER, *Patrimonio culturale e diritti umani*, in Alberico Gentili, *La salvaguardia dei beni culturali nel diritto internazionale*, Milano, 2008, 511-543.

(54) SALERNO, *La dimensione collettiva e le forme di autogoverno nella tutela internazionale delle minoranze*, in CERMEL (ed.), *Le minoranze*, cit., pp. 207-227, p. 212. The author's opinion has to be agreed upon also on the aspect related to the idea that the multiculturalism (but better would it be to speak of "intercultural approach") is now a value *per se* of the international legal system.

(55) On this point, the *General Comment n. 21* correctly emphasizes (para. 6) that Art. 15, para. 1, lett. a) of the Covenant requests States "both abstention i.e. non interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access and preservation of cultural goods)".

(56) This is another important case of *acquis* offered by the ICTY and then reproduced by Art. 7 of the Statute of the International Criminal Court: see ZAGATO, *La protezione dei beni culturali*, cit., pp. 188-191 (see next footnote).

but also the need to treat as cultural genocide any practice of forced assimilation (57). For the other part it is a positive obligation: the promotion of conditions that best provide communities and groups as such to better uphold their own culture and to develop their cultural self-determination.

The safeguarding of the intangible cultural heritage, with its explicit reference to groups and communities as well as to individuals, is thus traversed by an irrepressible tension between the individual and collective dimension of the cultural right (58).

Consequently, in guaranteeing that both the international and domestic legal system shall ensure the free exercise of this right, it requires reconciliation with the protection and respect for other human rights, both individual and collective (59). We must not forget how groups and communities can transform themselves into centres of

(57) See SALERNO, *op. cit.*, p. 214. On the return of the concept of cultural genocide in international law, especially in light of the recent case-law of the Inter-American Court of Human Rights, on its autonomy from the definition of genocide under the 1948 Convention, and on the relation to the concept of "cultural persecution" (see *supra*, previous footnote), ZAGATO, *The (Birth, Fall and) Return of Cultural Genocide in International Law: Introductory Remarks*, at [www.genocidi.it](http://www.genocidi.it) (opened March 2011). On the case-law of the Inter-American Court of Human Rights see: Inter-American Court of Human Rights, 29 April 2004 (fond) and 17 June 2005 (reparations), *Massacre de Plan de Sanchez v. Guatemala*, 29 April 2004, Series C, n. 105 and 116 (2004); 17 June 2005, *Comunidad Indígena Yakey Axa v. Paraguay*, (Ser. C), n. 142 (2005); 15 June 2005, *Comunidad Moiwana v. Suriname*, Series C n. 124. (2005). See SCOVAZZI, *La notion de*, *cit.*, pp. 161-166.

(58) Seminar organized by the Office of the High Commissioner on Human Rights, Geneva, 1-2 February 2010, *Implementing Cultural Rights. Nature, Issues at Stake and Challenges*. Ivi the talk of M. Kenneth Deer, from the World Indigenous Association, titled "The Complexities in Practical Terms: Cultural Practices contrary to Human Rights, Possible Limitations to Cultural Rights, and Tensions around Who Decides Culture and Rights", Working Document n. 2 / rev. The author asks himself (p. 4): "Thus, the basic question is: how can the collective dimension of cultural rights be framed to become acceptable to the international community? How can individual rights and cultural rights nurture each other instead of excluding each other? How can they be balanced in a way that a totalitarian abuse of collective rights against individual freedom is overruled?"

(59) See BARBERA, *Articolo 2*, in BRANCA (ed.), *Commentario della Costituzione italiana. Principi fondamentali*, Bologna, 1975; pp. 50-199; see also GIAMPIERETTI, *La salvaguardia del patrimonio culturale italiano tra identità e diversità*, in ZAGATO, VECCO (eds.), *Le culture dell'Europa, l'Europa della cultura*, Milano, 2011 (forthcoming).

power, capable of exercising forms of oppression on individuals (even those belonging to the same community) and other groups no less intense than the oppressive manifestations emanating from the State's authorities.

In these terms we return, without fear of contradiction, to the hendiadys mentioned in the text of the Convention and which marked the starting point of this analysis, but with the awareness, in fact, of being in the presence of an unavoidable tension that can only be governed.