

Monitoring of cultural human rights: The Claims of Culture on Human Rights

and the Response of Cultural Human Rights

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The universality of human rights passes and is confirmed through specificities, including cultural specificities. Understanding and upholding, instead of avoiding or being scared of cultural human rights will bring us closer to the confirmation of universality.

Introduction

Speaking of cultural human rights is not the same as discussing the question of cultural relativism vs. universality or culture vs. human rights, although it is close enough that it begs the question.

Over the decades, the political reticence of states has cast a shadow on international law and practice concerning cultural human rights. Even among human rights bodies and at UNESCO the human rights aspect of culture was a taboo for a long time.

Today, it would be no exaggeration to say that, if “classical lawyers” think that human rights is a weak part of law, human rights lawyers think that cultural rights are the soft part of human rights. They could not be more mistaken. The neglect of cultural rights, by states and the legal profession as well, has hidden one of the most disgraceful and violent parts of human history, that of states knowingly and deliberately oppressing and even annihilating human groups, communities and peoples as such, in short, committing what Rafal Lemkin had originally called genocide or ethnocide. It is well known that Lemkin, the “father” of the Convention on the Prevention and Punishment of the Crime of Genocide, the creator of the word *genocide*,

¹ This essay is work in progress towards publication and is devoted to the memory of Samba Cor Konate, member of the Committee on Economic, Social and Cultural Rights who pioneered the work on cultural rights in the early 1990s (see below).

originally advocated for a concept that would clearly include both acts of physical and cultural destruction of a group. Lemkin later gave up most, not all, of the cultural aspects so he would ensure ratifications of the new treaty².

In 2003, at WISIS (the World Summit on the Information Society, that took place in Geneva) an indigenous representative from Bolivia spoke up at a parallel meeting on indigenous peoples and the information society that the Secretariat of the UN Permanent Forum on Indigenous Issues was organizing. As the participants were adopting the report, late in the evening, in the midst of the well-known tension that the adoption of a final document entails, an indigenous representative from Bolivia contested the inclusion of the word “human rights” in the document. There was a moment of confusion and because of the lateness of the hour it was not possible to debate this in any substantive way. The words “human rights” were of course included in the document eventually. It took me a long time to understand this objection of the indigenous participant. In fact, what he wanted to include was a reference broader than human rights, he wanted to refer to the holistic existence of people in harmony with nature and all living beings of the animal world and the plant world, as well as harmony with the community—the indigenous world view that in Bolivia they refer to as *vivir bien*, living well, *Allin Kawsay* (in Quechua), *Suma Qamana* (in Aymara) or being *Kamiri Capac*—a person who lives well.

This story indicates that there is something that is often missing in human rights discourse and approach. When we speak of human rights, do we take into account the indigenous cultures or the youth cultures, for example? Is the human rights edifice under International Law so fragile that we should be afraid of a dialogue across differences, cultural, political, economic and other? Is a dialogue capable to lead to a destruction of the international human rights framework, so carefully put together over the past 60 years? Are the human rights experts speaking a language of dialogue?

The political chessboard on which cultural rights are played or neglected today is complex: globalization, the North/South tensions, the culturalization of political life and rhetoric, migration and racism, cultural relativism and identity politics, peace and security, the huge economic interests invested in current international intellectual property regimes, the so-called “dialogue among civilizations” or “alliance among civilizations” at the UN, the post-September 11th era and the impact of terrorism on human rights.

² R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals of Redress*, 1944, Carnegie Endowment for International Peace, Washington. See the extraordinary treatise of Bartholome Clavero, *Genocide or Ethnocide 1933-2007: how to make, unmake, and remake law with words*, 2008, Centro di Studi per la Storia del Pensiero Giuridico Moderno, Universita di Firenze, Milano, Giuffre Editore. The author offers a compelling review of the history of the term genocide, the adoption of the Convention on the Prevention and Punishment of the Convention of Genocide, the weakening of the concept of genocide, by the legal profession as well, and the need to give full meaning to the concept and crime of genocide by advocating for people’s and peoples’ right to culture.

The culturalization of political life and rhetoric and identity politics have been on the rise within states as well as internationally. This “battle of the cultures”, as some may see it, is part of a more fundamental struggle- the struggle for the expression of identity, both personal and political. One reason for this increased assertiveness of identity is that globalization has accentuated local awareness, consciousness, sensitivity, sentiment and passion. We have seen a clear sign of this in human rights debates at the UN after the end of the Cold War. One of the challenges in contemporary law and politics is how to ensure that the politicization of culture is a positive and not a negative development and that it results in the respect and not the denial of human rights, including cultural human rights.

For six decades since the adoption of the Universal Declaration of Human Rights in 1948 cultural rights had been largely neglected. Some of the reasons include the following³:

a) The prevalent attitude among many human rights experts, including international law specialists, has been to avoid discussion of cultural rights lest the lurking issue of cultural relativism appears, implicitly or explicitly, to undermine the delicate and fragile universality concept that has painstakingly been woven over the last five decades. Therefore, many have felt it is better not to discuss cultural rights, but rather to take a low profile approach in order not to “provoke” the cultural relativists. Avoiding discussion, however, is short-sighted and does not make issues disappear.

b) Another difficulty lies in the definition of cultural rights since they are obviously tied to the concept of culture, which is fluid and changing. UNESCO’s definition of culture, which has followed the anthropological paradigm (namely culture as “a way of life”), while extremely useful within the context of UNESCO’s work, is viewed by some, especially those in the legal profession, as too vague to base actual rights and obligations on.

c) Cultural rights may even be considered by some as a “luxury”, as something that comes after “bread and water”, as an item only for societies at a certain stage of development. Nobody could deny, by looking at human history, that economic prosperity generally goes with cultural development. At the same time, culture represents the soul, the moral edifice, the self-definition and self-esteem of a person or a community without which life loses context and meaning. In that sense, cultural development is not a luxury but, one could say, a tool for obtaining “bread and water”.

d) Political difficulties at the international level are also part of the reason of silence. Governments that are members of UN bodies may not necessarily want to speak of cultural rights in their own or other states unless they are ready to also talk of cultural wrongs, i.e. those

³ See the author’s Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond, 2007, Martinus Nijhoff Publishers, Leiden/Boston, pp 4-6.

customs and prejudices that in fact violate internationally proclaimed human rights. This is an issue approached cautiously by states. For example, it took from the 1950s to the late 1970s to get UN bodies to see that female genital mutilation is not only a health issue but a human rights issue as well.

e) Even as individual rights, cultural rights can be perceived as threatening to the state or the community. One person's artistic creation outside the norm, outside the traditional culture of the community of which s/he is a member, borrowing elements of other cultures, can be seen as a threat that needs to be suppressed in various ways. New trends are often started by one person and this does not escape the traditional mainstream. Violent crimes against gay people, for example, are only one way in which gay cultures are sometimes rejected by communities.

f) One of the most significant, if not the most significant, difficulties in dealing with cultural rights is that these rights have evoked, for many governments, the scary spectrum of group identities and group rights that they fear could threaten the "nation" state and territorial integrity. The drafting history of Article 27 of the Universal Declaration of Human Rights is telling. Official state support of cultural rights has often taken the form of promoting for example seemingly innocent folklore while remaining silent or hostile to the promotion of minority languages in the education systems and the media. The other side of this coin is that governments may be wary of the threat that majorities may feel from the promotion of minority cultures which may lead to claims for collective rights. Taking a holistic approach to cultural rights, in accordance with their normative elements as they have been developed to-date, gives plenty of constructive policy responses to governments, if the political will is present.

Given the reticence of states about cultural rights, this essay will explore how the independent UN human rights monitoring bodies filled the gap of political will of states for a long time. Cultural rights made the human rights system burst at the seam. Monitoring bodies picked up the bold demand that culture poses for human rights. Through their practice, they crafted an understanding of the normative content of cultural rights and thus helped overcome the seemingly insurmountable political difficulties of states. The essay will unravel this practice and also present a critical analysis of the new developments in this area. The main perspective in this essay is an International Law perspective.

First, I will provide a historical perspective of the issue via the drafting history of Article 27 of the Universal Declaration of Human Rights and a comparison of how cultural rights have been viewed from 1945 to the time of the adoption of the UN Declaration on the Rights of Indigenous Peoples (UN-DECRIPS) in 2007-a major landmark in the area of cultural rights. Second, I will examine the practice of international human rights monitoring bodies and outline the normative elements of cultural rights, both as individual and as group rights. In this part I will also provide a critical overview of recent developments on cultural rights in the UN human

rights system. Finally, I will identify some challenges and future paths in monitoring cultural human rights today and in the future.

A. Historical perspective on cultural rights

The drafting history of Article 27 of the Universal Declaration of Human Rights

The drafting history of the Universal Declaration of Human Rights (UDHR) is revealing of the difficulties we still face today in dealing with cultural rights. It is indeed impressive that the core debate on whether, apart from individual rights, the Declaration should also recognize group rights and minority rights in particular, took place within the context of Article 27 of the Declaration dealing with cultural rights. This discussion was in turn connected with the fierce controversy, as to whether the Convention on the Prevention and Punishment of the Crime of Genocide which was being prepared simultaneously to the Universal Declaration, should also address “cultural genocide” besides “physical” or “biological” genocide⁴.

Article 27 of the Universal Declaration states:

“1. 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.

“2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

Article 27, through the inclusion of the word ‘the’ before ‘cultural life’ and ‘community’, does not present a commitment to diversity and pluralism, assuming somehow that cultural participation will take place in the ‘one’ culture of the ‘nation-state’. The question about the inclusion of rights for persons belonging to minorities did arise, as was to be expected in the very First Session of the Commission on Human Rights in 1948. In the mind of the drafters of the UDHR “protection of minorities” would normally “include both protection from discrimination and protection against assimilation” and in particular protection of ethnicity and language—since other elements of minorities were covered by other articles of the Declaration.

The text originally debated provided for the right of persons belonging to such ethnic, linguistic or religious minorities to establish and maintain schools and cultural and religious institutions and to use their own language in the press, in public assembly and before the courts and other authorities of the state. However, this text was never adopted. We see, in other words, how important states felt language was for the preservation of culture and identity and they deliberately omitted reference to it. It is dramatic to realize how these issues still remain burning rallying points and demands by indigenous peoples and minorities.

⁴ See Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting and Intent, 1999, University of Pennsylvania Press, Philadelphia, especially pp 217-222 and 269-280.

The United States led the opposition to the minority-related article, claiming that minorities were a European issue and there was no reason to reflect the matter in the Universal Declaration. Eleanor Roosevelt, the USA representative, was later supported by Latin American countries and Canada in this position, while Australia declared it had opted for the principle of assimilation of all groups as being in the best interest of all in the long run. In the other camp, in favour of minority rights, were the USSR, Yugoslavia and other Eastern European countries as well as Lebanon and India. Belgium, although hesitating occasionally, was one of the supporters. When the debate came to a crunch, the USSR, hoping to get developing countries on its side, accused the colonial powers of denying the cultural rights of the people in the colonies and engaged in Cold War rhetoric, but this strategy did not have the desired effect and the idea of an article on minorities was rejected.

The drama of the debate on cultural rights, which encompassed the debate on minority rights, had another angle as well. It was connected with the Convention on the Prevention and Punishment of the Crime of Genocide which was being drafted by the General Assembly Sixth Committee simultaneously with the Universal Declaration of Human Rights being drafted by the Third Committee. There was a proposal during the preparation of the Anti-Genocide Convention to include in the definition of genocide the intent to destroy, in whole or in part, cultural groups, alongside “national, ethnical, racial or religious” groups, in other words to include “cultural genocide” along with “physical or biological” genocide. The proposed article 3 in the Genocide Convention read as follows:

“In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief such as: 1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; 2. Destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the groups”.

The proposal on cultural genocide in the context of drafting the Genocide Convention at the Sixth Committee of the General Assembly was finally put aside.

The final wording adopted by the General Assembly for Article 27 includes the prescriptive word *the* in the phrase “the right freely to participate in *the* cultural life of *the* community”, thus giving out a signal of limitation to this freedom and an assumption of a homogenous instead of a multicultural society. Later, in 1966, the International Covenant on Economic, Social and Cultural Rights improved on the wording by recognizing, in Article 15, “the right of everyone to take part in cultural life”. The International Covenant on Civil and Political Rights adopted eight years later, in 1966, is the most broadly ratified international instrument with binding nature to recognize, in Article 27, that persons belonging to ethnic,

religious or linguistic minorities “shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.

The dramatic history of Article 27 may well explain much of the silence on cultural rights over the decades, to the extent that the original reasons for resisting them for minorities and indigenous peoples still remain. A corrective gesture was made by states when they adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities and, especially, when they adopted the UN Declaration on the Rights of Indigenous Peoples.

In today’s interconnected world of greater openness to democracy and a world, where, ethnic groups, especially indigenous peoples have built strong movements, avoiding the respect of cultural rights can only lead to frustrations in society and the instigation of conflict- in fact states have learned hard lessons and are gradually opening up.

Culture, identity and collective rights: what has changed since the adoption of the UDHR and the Convention against Genocide in 1948?

What has changed between 1948 and today, I venture say, is three-fold

- a) The Holocaust during WWII has been followed by other genocides.
- b) The end of the Cold War has seen the rise, or rather allowed the expression of identities in an unprecedented manner, thus obliging states to provide some recognition of those or else face serious political and other consequences.
- c) Globalization has triggered the urge in people to confirm their own identities.

Examples of recognition of cultural rights include the adoption by the UN of the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities, and of the UN Declaration on the Rights of Indigenous Peoples. The Declaration constitutes the boldest recognition of ethnicity in international relations today. The space for culture and identity recognized by states over time in human rights terms has been particularly dramatic in the case of indigenous peoples.

While stories of political and cultural resistance of indigenous peoples, at the local level, to colonialism, domination and exploitation abound, these did not always find resonance at the international level, in particular the United Nations, for a long time. In a post WWII era, questions of ethnicity and minorities were viewed with suspicion. It is well known for example that even the body established in 1946 for this purpose, called Sub-Commission on Prevention of

Discrimination and Protection of Minorities, was essentially prevented from doing its work on minority issues by its parent bodies, including the Commission on Human Rights and the Economic and Social Council, until after the end of the Cold War in the late 1980s/early 1990s.

There is something that clearly distinguished the minority agenda from the indigenous peoples' agenda internationally. And that has been the passing from local struggles to international ones through the creation of an international indigenous peoples' movement and its dynamic interface with the United Nations. In other words, there was never a global movement of minorities, and still there is no such movement.

On the side of states we can note a differentiation of their stand vis a vis indigenous peoples over the years. In the earlier days, in the 1970s, when the issue of gross violations of human rights was brought up in the human rights bodies, including mass killings in Guatemala, states viewed this issue mostly as a humanitarian one, one of "kindness", so to speak, to disappearing civilizations, in the process of assimilation. One could therefore see some permissiveness on the part of governments in UN processes, i.e. states allowed the birth of exceptional, unprecedented and extensive participatory procedures for indigenous peoples—which, in turn, increased the numbers of indigenous representatives at the UN as well as their overall political impact⁵. This dynamic interface of indigenous peoples' movements with the UN has brought culture to human rights.

By 1993, the relative softness on the part of states was no longer present, as the balance of power and international solidarity had changed the scenery at the UN. The indigenous movement was by then strong, and the then Draft Declaration on the Rights of Indigenous Peoples had included strong language on the right to self-determination of indigenous peoples, on cultural rights and on the right to lands, territories and resources. From the Latin American region especially, the realities of exclusion of indigenous peoples combined with their increased political awareness, were creating tense situations demanding solutions.⁶

B. The practice of international human rights monitoring bodies and the normative content of cultural human rights

Three recent important developments

I would like to say from the beginning that there have been three important developments in the last four years at the United Nations that contribute tremendously to the promotion and

⁵ Elsa Stamatopoulou, "Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples", in *The UN Declaration on the Rights of Indigenous Peoples*, 2011, Stephen Allen and Alexandra Xanthaki eds., Hart Publishing Ltd., Oxford and Portland, Oregon, p.392.

⁶ Who does not remember, for example, the appearance of the Zapatistas and the mysterious *Sub-Commandante* Marcos in Mexico, whose supreme commander was a council of indigenous elders?

protection of cultural rights, as human rights, i.e. as part of international human rights law. These three developments are:

- 1) The adoption by the UN in 2007 of the UN Declaration on the Rights of Indigenous Peoples: this is the most advanced international human rights instrument in terms of boldly recognizing cultural rights, as international legal norms, both as individual and especially as group rights.
- 2) The creation in 2009 of an Independent Expert in the area of cultural rights by the Human Rights Council of the UN.
- 3) The third development is the adoption by the Committee on Economic, Social and Cultural Rights (CESCR) of the long-awaited General Comment, i.e. authoritative interpretative comment, on Article 15(a) of the International Covenant on Economic, Social and Cultural Rights, which is about the right to participate in cultural life—the most all encompassing cultural right of all. This General Comment, adopted in January 2010 by CESCR, the expert UN body most appropriate for this issues, was indispensable for a more objective cool-minded and not so politicized understanding of cultural rights to come to the surface⁷.

Before I examine the above developments and their significance for cultural rights, I would like to refer more broadly to the work of the international human rights monitoring bodies. The human rights treaty bodies and the special rapporteurs⁸ and related mechanisms of the UN Human Rights Council are, at the global level, the *stricto sensu* human rights monitoring mechanisms. It is useful to recall that at the time that the first human rights monitoring procedures of the UN Commission on Human Rights were created in the late 1960s, it was clear in the minds of states that there was a distinction between human rights monitoring and promotion of human rights. The first was and is considered the stricter arm of the international community that aims to protect human rights from governmental actions or omissions that violate them. The second aspect of international human rights action, i.e. the promotion of human rights, was and is viewed as the softer approach, while continuing to be extremely valuable. In the last four decades, the international human rights system, especially the system developed by the United Nations, has taken on a more comprehensive approach. Today, the

⁷ See UN doc. E/C.12/GC/21.

⁸ I use the term “special rapporteur” as a blanket term to cover mandate holders under other titles, such as “independent expert” or “special representative” or, occasionally, “working group”. Although there is diplomatic nuance in using these terms, their aim is to monitor human rights and their methodologies are similar. Other intergovernmental organizations, especially the OAS and the Council of Europe have occasionally appointed similar mechanisms, but those are not as extensive or as developed as the UN’s. As of September 2011 there were 35 thematic and 8 country-specific mandates at the UN Human Rights Council. Four of the thematic mandates are and bear the title “Working Group” (on arbitrary detention, on discrimination against women in law and practice, on enforced or involuntary disappearances, on people of African descent, on transnational corporations and other business enterprises).

“naming and shaming” connected with human rights monitoring, often goes together with human rights institution building, human rights information, education and training, areas where states can seek the technical assistance of the United Nations. In addition, human rights monitoring has to be seen against the backdrop of increasing efforts of the UN system to integrate human rights in development work and humanitarian and peace operations, which in turn make monitoring relatively easier, since this can be done within an all encompassing operational framework⁹. Lastly, a new type of human rights monitoring was born through the UN Declaration on the Rights of Indigenous Peoples, which, in Article 42 states that

“The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States, shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

In a commentary on Article 42 at its eighth session in 2009, the UN Permanent Forum on Indigenous Issues decided that it would pursue monitoring of the implementation of the Declaration in ways similar to human rights treaty bodies¹⁰. Such developments demonstrate a tendency of the international human rights system towards additional or softer methods of monitoring of human rights than the *stricto sensu* international human rights monitoring mechanisms. While recognizing the value of adding a variety of tools to the international human rights system, it should be underlined clearly in an article on human rights monitoring such as this that a large number of states have, in the last ten years, attempted to weaken the international monitoring system at the UN Human Rights Council (HRC), not without success. The drastic reduction of country-specific human rights rapporteurs at the HRC is but one such proof and one could not maintain that the excessively diplomatic and government-controlled Universal Periodic Review has replaced the voices of independent country-specific rapporteurs.

In addition to their main task of monitoring the implementation of human rights by governments, monitoring mechanisms have also contributed considerably to the interpretation of international human rights instruments and the progressive development of human rights norms. This has been valuable in the case of cultural human rights, where especially human rights treaty bodies have clarified the normative content of these rights.

Almost all international human rights instruments, global and regional, are pertinent for cultural rights, the main ones being the International Covenant on Economic, Social and Cultural

⁹ See the author’s “The United Nations Permanent Forum on Indigenous Issues”, in International Human Rights Monitoring Mechanisms: Essays in Honour of Jacob Th. Moller, 2009, Martinus Nijhoff Publishers/Kluwer Law International.

¹⁰ UN doc. E/2009/43, annex.

Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, the Convention on the Rights of Persons with Disabilities and the UN Declaration on the Rights of Indigenous Peoples.

Some human rights treaty bodies have done better than others in terms of paying attention to cultural rights. The Committee on the Rights of the Child¹¹ for example adopted an important General Comment on the indigenous child, detailing the specificities of indigenous children's cultural rights¹². Several Special Rapporteurs have been especially attentive to cultural rights, including the Special Rapporteur on the rights of Indigenous Peoples, the Special Rapporteur on the right to education, and the Special Rapporteur on freedom of religion and belief. References to cultural rights in country-specific reports by Special Rapporteurs have been rare, with the exceptions of past reports on Yugoslavia, Bosnia and Herzegovina, Croatia and the Former Yugoslav Republic of Macedonia.

UNESCO approaches human rights, and cultural rights in particular with considerable political caution.” At the same time, UNESCO has truly contributed, even if many times indirectly, to the understanding of cultural rights as human rights, i.e., the rights of individuals and the rights of

¹¹ In the preamble of the Convention on the Rights of the Child, States parties take “*due account of the importance and cultural values of each people for the protection and harmonious development of the child*”. While all the rights contained in the Convention apply to all children, whether indigenous or not, the Convention on the Rights of the Child was the first core human rights treaty to include specific references to indigenous children in a number of provisions.

Article 30 of the Convention states that “*In those States in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion or to use his or her own language.*” 3.

Furthermore, article 29 of the Convention provides that “*education of the child shall be directed to the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin*”. Article 17 of the Convention also makes specific mention as States parties shall “*encourage the mass media to have particular regard for the linguistic needs of the child who belongs to a minority group or who is indigenous*”.

¹² General Comment 12, see UN doc. CRC/C/GC/11.

groups or communities within the state. UNESCO can be viewed as too prolific, producing too many international instruments too fast, without them necessarily having gone through the kind of preparation and collection of views required for a standard setting text of universal character. In addition, UNESCO's overseeing mechanisms are soft by comparison to those of the UN. UNESCO conventions have generally dealt with culture for decades without providing a human rights perspective, but rather a statist and inter-state perspective, especially in terms of trade and commercial relations. However, this trend seems to be changing and two relatively recent instruments have been especially sensitive to cultural rights as human rights: the 2001 Universal Declaration on Cultural Diversity and the 2003 UNESCO Convention on Safeguarding of Intangible Cultural Heritage. The latter is an instrument that sees the human rights element of cultural heritage referring to communities, in particular indigenous communities, and the need for their participation in actions of the state in this area.

It is worth noting that, while global legal instruments have seemed somehow reticent to fully recognize cultural rights, or the human rights aspect of culture-with some exceptions, of course, the most notable being the UN Declaration on the Rights of Indigenous Peoples-regional instruments have done so clearly and boldly: this is the case with the 1955 Council of Europe Framework Convention on the Protection of National Minorities that entered into force in 2009, the 2000 ASEAN Declaration on Cultural Heritage, the 2006 Charter for African Cultural Renaissance and the 2011 Faro Council of Europe Framework Convention on the Value of Cultural Heritage for Society.

The work of two human rights treaty monitoring bodies is most noteworthy in terms of cultural rights, namely that of the Human Rights Committee that monitors the implementation of the International Covenant on Civil and Political Rights, and of the Committee on Economic, Social and Cultural Rights. Given that it would be much beyond the purview of this essay to provide a detailed examination of the work of all human rights monitoring bodies, I will focus on the two above-mentioned treaty bodies as well as the work of the Independent Expert on Cultural Rights¹³.

The Human Rights Committee

The Committee has been most proactive in monitoring cultural rights via its work under Article 27 of the Covenant that provides that

“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 other members of their group, to

¹³ A detailed examination of the whole international monitoring system in terms of cultural rights is provided in Cultural Rights in International Law, *supra* 3.

enjoy their own culture, to profess and practice their own religion, or to use their own language”.

In 1994, the Committee adopted an important General Comment on Article 27 where the Committee underlined that the enjoyment of these rights “...does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article -- for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority”. In the case of indigenous peoples such traditional activities may include fishing or hunting and the right to live in reserves protected by law.

The Committee moreover considers that the rights stipulated in Article 27 are also to be enjoyed by non-citizens. As to the term “exist” in Article 27, the degree of permanence of a non-citizen’s stay is not relevant. Thus migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon the decision by that State party, but is to be established by objective criteria. In examining States parties reports the Committee has been thorough in its monitoring of cultural rights of minorities, in particular language rights, cultural autonomy in terms of cultural institutions as well as consultation regarding traditional means of livelihood, limits to indigenous cultures by logging, mining and delays in demarcation of traditional lands, protection of sites of religious or cultural significance and protection of cultural rights of non-citizens.

The case law of the Human Rights Committee under the Optional Protocol to the Covenant has reflected this interpretation of Article 27 and has made pronouncements including (a) use of land and resources in a way that will respect the culture of a minority or indigenous group, (b) the possible limitations of such rights of the group by other development concerns in the area, (c) the requirement of consultation by the state with the minority group concerned by a decision that may affect its use of the land and resources, and (d) on the issue of the sensitive limits between the cultural rights of a member of a group and what the group perceives as its own cultural rights.

The Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights is the main international human rights body that has cultural rights explicitly under its mandate, namely the Committee has to monitor the implementation by States Parties of article 15 of the Covenant, which establishes the right to participate in cultural life. For a long time, the Committee’s work on cultural rights could be viewed as good but limited. The reasons for this inadequate attention

could be understood by the Committee's prioritization of other rights, such as economic and social rights, which the Committee, especially since its constitution as an expert body, has proceeded to analyze and interpret as well as monitor over the years. It seems that the overall reasons mentioned earlier in this essay for the neglect of cultural rights prevailed in the Committee's practice as well. However, it is clear that the quality work of CESCR has made major contributions to cultural rights.

The Committee's first attempt to grapple with cultural rights dates back to the early 1990's. At its request a study was prepared¹⁴ in 1992 by one of its members, Samba Cor Konate of Senegal, who had a special interest in cultural rights. In the same year the Committee held a day of general discussion on the subject¹⁵. Konate was requested by the Committee to draft recommendations on the obligations of states concerning the right to participate in cultural life that the Committee would study in 1993, but the death of Konate halted this effort of the Committee for years to come. It was only in 2001 that the Committee decided to embark on the preparation of a general comment on the right to participate in cultural life and its work was successfully completed in 2010 by the adoption of a General Comment on the right to participate in cultural life, to which I return below.

The Committee has contributed to the understanding of what cultural rights are in various other ways, namely through its examination of States Parties reports and the use of the Revised Guidelines for the consideration of these reports, through its General Comments on various other articles of the Covenant and, most importantly, its General Comment on states' obligations under the Covenant, through the Limburg Principles on the implementation of the Covenant and through the Maastricht Guidelines on violations of economic, social and cultural rights. This analytical work offers a good basis for deciphering some of the normative elements of cultural rights.

The Committee has included a number of questions relevant to cultural rights in its dialogue with States parties, even if they are not systematic. Through addressing various questions to states on Article 15 of the Covenant, the Committee shows that it went through considerable normative analysis of the Article. In that process, the Committee has helped analyze what non-discrimination and also what freedom of dissemination mean in terms of cultural rights.

At its thirty-fifth session in November 2005, issued a General Comment on article 15, paragraph 1© of the Covenant, regarding the right of everyone to benefit from the protection of

¹⁴ E/C.12/1992/WP.4.

¹⁵ E/1993/22, paras 202 to 223.

the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author¹⁶.

The seminal moment of CESCR's contribution came in 2010 with the adoption of General Comment 21, i.e. an authoritative interpretative statement on Article 15, paragraph 1(a) on the right to participate in cultural life¹⁷. The main contributions of the General Comment are summarized below¹⁸:

Regarding *the understanding of "culture"*, the Committee adopted a broad and inclusive concept, encompassing all manifestations of human existence. The expression "cultural life" is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future. The Committee considers that culture, for the purpose of implementing article 15 (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.

The right to participate in cultural life being the broadest expression of cultural rights enunciated in the International Covenant on Economic, Social and Cultural Rights, the Committee has rightly underlined the *interdependence of these rights with other human rights*, including freedom of expression, freedom of religion and freedom to peaceful assembly. At the same time the Committee also stresses the significance of cultural rights in the implementation of other human rights by recalling the notion of cultural appropriateness (or cultural acceptability or adequacy), in relation in particular to the rights to food, health, water, housing and education. The way in which rights are implemented may also have an impact on cultural life and cultural diversity. There is therefore the need to take into account, as far as possible, cultural values attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed.

The Committee has struck a wise *balance between individual rights and collective or group rights*, although it uses the term "community" more comfortably rather than the former terms. Presumably the Committee used this word as less politically charged and sensitive for

¹⁶ E/C.12/GC/17 (General Comments), General Comment No. 17 (2005); also available on www.ohchr.org.

¹⁷ UN doc. E/C.12/GC/21.

¹⁸ This analysis of CESCR's General Comment 21 is expected to appear in a forthcoming UNESCO publication in 2011.

states. However, in the case of indigenous peoples the Committee has used the right terminology, i.e. “peoples”, in almost all references. The General Comment makes clear that the decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality, while recognizing that cultural rights may be exercised in association with others or within a community or group. States shall respect the right of everyone to identify or not identify themselves with one or more communities, and the right to change their choice.

On *the issue of universality vs. particularity*, the Committee recalls the well-known UN position that emerged at the 1993 World Conference on Human Rights that, while account must be taken of national and regional particularities and various historical, cultural and religious backgrounds, it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁹ Thus, no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.²⁰

The Committee carefully outlines the parameters and *limitation of the right of everyone to take part in cultural life* in the case of *conflict of rights*: limitations may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights. Such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the Covenant. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed. The Committee stresses the need to take into consideration existing international human rights standards on limitations that can or cannot be legitimately imposed on rights that are intrinsically linked to the right to take part in cultural life, such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association.

The Committee takes a broad view on *non-discrimination and equal treatment*, analyzing Article 2, paragraph 2, and Article 3 of the Covenant that prohibit any discrimination in the exercise of the right of everyone to take part in cultural life on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²¹ The Committee points out in particular, that no one shall be discriminated against because he or she chooses to belong, or not to belong, to a given cultural community or group, or to practise or not to practise a particular cultural activity. Likewise, no one shall be excluded

¹⁹ Vienna Declaration and Programme of Action, para. 5.

²⁰ Universal Declaration on Cultural Diversity, art. 4.

²¹ See General Comment No. 20 (2009).

from access to cultural practices, goods and services. The latter point is especially relevant for indigenous peoples who have often been deprived by states from accessing their sacred sites and other sites of major cultural significance for them, through, among other things, the designation of national parks as well of specific locations or monuments as cultural heritage of humanity.

The Committee affirms the obligation of states to take legislative and any other necessary steps to guarantee non-discrimination and gender equality in the enjoyment of the right of everyone to take part in cultural life.

Through its careful comments the Committee makes sure to underline that measures for equality will not result in forced assimilation. It states In particular that a first and important step towards the elimination of discrimination, whether direct or indirect, is for States to recognize the existence of diverse cultural identities of individuals and communities on their territories. Voicing a well-known human rights principle *in favour of positive measures*, the Committee reaffirms that adoption of temporary special measures with the sole purpose of achieving de facto equality does not constitute discrimination, and that taking appropriate measures to remedy structural forms of discrimination so as to ensure that the underrepresentation of persons from certain communities in public life does not adversely affect their right to take part in cultural life. Even in times of severe resource constraints, states the Committee, the most disadvantaged and marginalized individuals and groups can and indeed must be protected by the adoption of relatively low-cost targeted programmes. This view of the Committee is quite significant for indigenous peoples regarding both correcting the present situation of their cultural rights, but also mending past wrongs through specific programmes that will address their cultural rights.

On the discussion on *globalization* the Committee strikes a wise balance between the need to protect and promote the diversity of cultural expressions and for all cultures to express themselves and make themselves known and the requirement to respect human rights standards, including the right to information and expression, and to the need to protect the free flow of ideas by word and image. The measures may also aim at preventing the signs, symbols and expressions of a particular culture from being taken out of context for the sole purpose of marketing or exploitation by the mass media. This position of the Committee is especially significant for minorities, indigenous peoples, migrant workers and others.

The right to impart information and cultural exchanges at national and international level is recognized in the General Comment as part of the normative content of cultural rights. To enjoy freedom of opinion, freedom of expression in the language or languages of one's choice, and the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind. This implies the right of all persons to have access to, and to participate in, varied information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning.²² The Committee

²²

Universal Declaration on Cultural Diversity, para. 8.

rightly attributes *moral and ethical meaning to cultural expressions*, beyond only material and commercial ones, which has often been the case in a number of international debates.

Under the rubric of promoting understanding and tolerance and eliminating prejudice against other cultures, a positive contribution of the Committee is the recognition of *the obligation of the state to take appropriate measures to conduct public campaigns through the media, educational institutions and other available channels, with a view to eliminating any form of prejudice against individuals or communities, based on their cultural identity*. This is especially important regarding indigenous peoples and minority cultures as well as migrant workers.

The Committee brings out the *importance of international cooperation for development for the right to take part in cultural life*, especially as an obligation of those States that are in a position to provide assistance. This is especially significant given the considerable neglect of cultural rights within development cooperation.

Far from seeing cultural rights as a “luxury”, the General Comment underlines the importance of the fact that cultural rights must be treated with similar attention to other human rights by requiring that *States parties must take the necessary steps without delay to guarantee immediately at least the minimum content of the core obligations*. Many of these steps, such as those intended to guarantee non-discrimination de jure, do not necessarily require financial resources. While there may be other steps that require resources, these steps are nevertheless essential to ensure the implementation of that minimum content. Such steps are not static, and States parties are obliged to advance progressively towards the full realization of the rights recognized in the Covenant and, as far as the present general comment is concerned, of the right enshrined in article 15, paragraph 1 (a).

Especially positive is also the Committee’s view of the duty-bearers for the implementation of cultural rights. While compliance with the Covenant is mainly the responsibility of States parties, the Committee recognizes agency and duties for all members of civil society — individuals, groups, communities, minorities, indigenous peoples, religious bodies, private organizations, business and civil society in general — who also have responsibilities in relation to the effective implementation of the right of everyone to take part in cultural life.

Given the significance of cultural rights for the survival of indigenous peoples, it is important to turn to some challenges for the Committee’s work in the coming years.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is imbued with the affirmation of the cultural rights of indigenous peoples, as collectivities and as individuals. Cultural rights are reflected in at least 17 of the 46 articles of the Declaration. Significantly, about 15 of the 46 articles deal with governance and participation in a democratic polity, in other words they are crucial process and substantive rights via which the culture and identity of indigenous peoples will have an impact in the public sphere, in relations with the state and society at large. Article 3 of the Declaration recognizes that *indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

Although the General Comment refers to participation in general, the full understanding of cultural rights of indigenous peoples must be understood as containing self-determination as a normative element. Similarly, free, prior and informed consent (FPIC) of indigenous peoples, to which the General Comment refers, is both a procedural and a substantive right and is mentioned in articles 10, 11, 19, 28 and 29 of the UNDRIP in connection with culture and, in article 19, in connection with lands and possible relocation. Full and effective participation of indigenous peoples in matters that concern them as well the implementation of FPIC continue to be challenges as repeatedly affirmed by the UN Permanent Forum on Indigenous Issues. The Permanent Forum has adopted an understanding of the elements of FPIC, which, among other things, stresses that the state and others concerned must interface and receive the express consent from representative institutions that indigenous peoples themselves will specify and who are entitled to express consent on behalf of the affected peoples or their communities²³. *In other words, the governance institutions of indigenous peoples must be respected in consultation and decision-making processes.*

The General Comment indicates that states must allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk. In light of the extensive references to the right to self-determination, participation and governance in the UNDRIP, this reference in the General Comment appears restrictive regarding indigenous peoples. One question is, who determines that a culture is at risk? The state or the indigenous people concerned? It is obvious that indigenous peoples should participate fully and effectively through their own governance structures and authorities at all cases of decisions that concern them.

²³ E/C.19/2005/3 paragraphs 45-50. The UN Permanent Forum on Indigenous Issues adopted the elements of the common understanding of FPIC at its 2005 session.

A number of cultural rights of indigenous peoples are reflected in the UNDRIP in a more explicit or detailed manner than in the General Comment. They are the following: the right to maintain and strengthen their distinct cultural institutions, while retaining their rights to participate fully, if they so choose, in the cultural life of the state (Article 5); the collective right to live as distinct peoples (Article 7); the right not to be subjected to forced assimilation or destruction of their culture, including mechanisms of prevention and redress (Article 8); right to belong to an indigenous community or nation in accordance with the traditions and customs of the community or nation concerned (Article 9); the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies, to maintain, protect and have access to their religious and cultural sites, to use and control their ceremonial objects and to have their human remains repatriated (Article 12); the right to revitalise and transmit to future generations their histories, languages, oral traditions and philosophies, and to designate their own names for communities, places and persons; and the obligation of states to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings (Article 13); the right to establish and control their education systems and institutions providing education in their own language and in a manner appropriate to their cultural methods of learning and teaching; and the right to have access, when possible, to an education in their own culture and provided in their own language (Article 14); the right to have the dignity and diversity of their cultures reflected in all forms of education and public information (art 15); the right to their traditional medicines and to maintain their health practices (Article 24); the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts; they also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions (Article 31); the right to determine their own identity or membership in accordance with their customs and traditions (Article 33); the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures and practices and, in case they exist, juridical systems or customs in accordance with international human rights standards (Article 34).

The above mentioned cultural rights of indigenous peoples, including those earlier identified in the General Comment, have also been affirmed over the decades in the practice, case law and policies of national and international bodies. The UN Declaration on the Rights of Indigenous Peoples is the most universal, comprehensive and fundamental instrument on

indigenous peoples' rights. Its Article 42 addressed to the UN bodies and agencies is to constitute the legal basis for all activities on indigenous issues.²⁴ It would thus be expected that the Committee on Economic, Social and Cultural Rights would be guided by the detailed enumeration of indigenous peoples' cultural rights in the Declaration regarding its monitoring efforts in the future.

There has been a welcome coincidence in the adoption of the long-awaited General Comment 21 on cultural rights under the International Covenant on Economic, Social and Cultural, two years after the adoption of the UNDRIP, the richest international human rights instrument in terms of cultural rights. The UNDRIP recognizes indigenous peoples' cultural rights—namely their human right to exist as peoples and as cultures. The cultural rights of indigenous peoples constitute a major path to mending the hurt of historical injustices committed against indigenous peoples, building bridges among indigenous and non-indigenous communities and fostering inclusive, pluricultural democratic states²⁵.

The Independent Expert on cultural rights

The establishment of the Independent Expert has to be seen against the backdrop of a 2002 resolution of the UN Commission on Human Rights, the precursor of the current UN Human Rights Council. Resolution 2002/26 entitled “promotion of the enjoyment of the cultural rights of everyone and respect for different cultural identities” was the very first on cultural rights in the 50-year history of the Commission, a clear demonstration of the reticence of states on the subject. A Cuban initiative, the resolution at first reminded of negotiations on things cultural at UNESCO, the dominant element of which have been interstate commercial, trade and political relations and not the human rights of individuals and groups, with the notable exceptions mentioned above. The original Commission on Human Rights resolution, however, was enriched over the years with human rights elements and finally, resolution 10/23 of the Human Rights Council, adopted in 2009, included the establishment of an Independent Expert on cultural rights or, as the resolution stipulates, “an Independent Expert in the field of cultural rights”.

The resolution, among other things, reaffirms that cultural rights are an integral part of human rights, which are universal, indivisible, interrelated and interdependent; recognizes the

²⁴ UN Permanent Forum on Indigenous Issues, Report on its 8th session (18–29 May 2009), Economic and Social Council Official Records, Supplement No 23 (E/2009/43), Annex. See in particular paras 6–13 entitled ‘The legal character of the Declaration’. The report is available at www.un.org/indigenous. Article 42 reads as follows: “The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

²⁵ “Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples”, in *The UN Declaration on the Rights of Indigenous Peoples*, *supra* 6, p. 412.

right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications; reaffirms that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms; recalls, as expressed in the Universal Declaration on Cultural Diversity, that no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope; reaffirms that States have the responsibility to promote and protect cultural rights; recognizes that respect for the cultural diversity and cultural rights of all enhances cultural pluralism, contributing to a wider exchange of knowledge and understanding of cultural background, advancing the application and enjoyment of human rights throughout the world and fostering stable, friendly relations among peoples and nations worldwide.

According to the resolution, the mandate of the Independent Expert in the field of cultural rights”, is:

- (a) To identify best practices in the promotion and protection of cultural rights at the local, national, regional and international levels;
- (b) To identify possible obstacles to the promotion and protection of cultural rights, and to submit proposals and/or recommendations to the Council on possible actions in that regard;
- (c) To work in cooperation with States in order to foster the adoption of measures at the local, national, regional and international levels aimed at the promotion and protection of cultural rights through concrete proposals enhancing subregional, regional and international cooperation in that regard;
- (d) To study the relationship between cultural rights and cultural diversity, in close collaboration with States and other relevant actors, including in particular the United Nations Educational, Scientific and Cultural Organization, with the aim of further promoting cultural rights;
- (e) To integrate a gender and disabilities perspective into his and her work;
- (f) To work in close coordination, while avoiding unnecessary duplication, with intergovernmental and non-governmental organizations, other special procedures of the Council, the Committee on Economic, Social and Cultural Rights and the United Nations Educational, Scientific and Cultural Organization, as well as with other relevant actors representing the broadest possible range of interests and experiences, within their respective mandates, including by attending and following up on relevant international conferences and events.

It is a welcome development that the resolution uses the “classical” language of core resolutions via which the Human Rights Council establishes monitoring mandates, in other words, this is a resolution that clearly views cultural rights as part of human rights, avoiding what in the past was more a discussion of inter-state commercial relations. It should also be noted that the resolution builds on the by-now-famous consensus wording at the 1993 Vienna

World Conference on Human Rights that debated the issue of cultural relativism and concluded and established that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms. The resolution also states on this point, again resonating the Vienna consensus, that cultural diversity may not infringe upon human rights guaranteed by International Law.

Mrs Farida Shaheed of Pakistan is the first expert appointed for this mandate and has to-date reported to the HRC in 2010 and 2011. She conducts her work via thematic reports and public statements, as well as country visits and country-specific reports. She also convenes seminars and consultations on specific topics. As of October 2011, the Independent Expert has issued two thematic reports, one on the overall understanding of cultural rights and the interpretation of her mandate and one on cultural heritage.²⁶ She has also conducted three country visits and issued a report on Brazil and preliminary notes on Austria and Morocco and Western Sahara.²⁷

Among the positive elements to be noted in the Independent Expert's first two thematic reports that set the stage for her mandate, we note the following:

Cultural rights are viewed as rights in the field of culture, and culture is understood broadly as a process, product and a way of life, beyond ethnicity, language and religion; as a living process, historical, dynamic and evolving. Cultural rights also include the right to question the existing parameters of 'culture', to opt in or out of particular cultural entities, and to continuously create new culture.

The Independent Expert acknowledges both the individual and collective or group aspects of cultural rights and their significance for the expression of identity. The early dealing by the Independent Expert with this topic contributes to the much-needed demystification of group human rights in the international human rights edifice.

The Independent Expert explicitly mentions indigenous peoples and persons belonging to minorities as well as migrants as special categories to whom identity-related cultural rights apply. In particular regarding indigenous peoples, the Independent Expert recognizes that the right to land is closely connected to cultural rights.

A very important step is that in her very first report the Independent Expert lays out her preliminary views on the interaction between the principle of universality of human rights, the

²⁶ A/HRC/14/36 and A/HRC/17/38 respectively.

²⁷ On Brazil, A/HRC/17/38/Add.1; on Austria, A/HRC/17/38/Add.2.; on Morocco and Western Sahara <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11396&LangID=E>

recognition and implementation of cultural rights and the need to respect cultural diversity. She analyzes the concept of multiple identities and the permanent dynamic processes that are integral to cultural diversity; the link between cultural diversity and human rights overall; and the need to evaluate the content and implications of cultural practices. She dispels the confusion between cultural diversity and cultural relativism and points out that not all cultural practices can be protected under International Law. The Independent Expert lays out some major challenges of the judiciary, the executive and of communities in dealing with cultural practices that contravene human rights.

The Independent Expert recognizes the ideological plurality and power differentials that exist within nations, ethnic groups and cultural communities, as to the identification, development and interpretation of a “common” culture.

The Independent Expert recognizes the inter-connectedness of cultural rights with a series of other human rights, including freedom of religion and freedom of expression.

The non-discrimination principle, enshrined in a large number of international legal instruments, constitutes an important legal basis for the Independent Expert. She notes that it is generally agreed that the enjoyment of rights and freedoms on an equal footing “does not mean identical treatment in every instance”, which enables the accommodation required to respect and facilitate the expression of various cultural identities.

The Independent Expert has incorporated in her working methods the holding of consultations and seminars on the topics of the thematic reports. Two have been held until now, one on the concept of cultural rights and the other on cultural heritage. Given the novelty of the mandate and the topic, this method of work is needed and appreciated.

The Independent Expert establishes access to and enjoyments of cultural heritage as part of cultural rights. Her report identifies the normative content of this right as well as state obligations in that regard. The Independent Expert provides a human rights analysis of the complex issues involved in matters of cultural heritage, not the least of which has to do with power relations within the state and among and within groups. The well-known problem of individuals and groups, including indigenous peoples, being disconnected from their cultural heritage due to tourism and other projects is rightfully highlighted by the Independent Expert, who underlines the participation rights of indigenous peoples in matters connected to cultural heritage, namely the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage. The Independent Expert fully acknowledges the authority and legal force of the UN Declaration on the Rights of Indigenous Peoples by mentioning clearly the many elements on cultural heritage contained in the Declaration.

The Independent Expert sees access to and enjoyment of cultural heritage as interdependent concepts – one implying the other. They convey an ability to, inter alia, know, understand, enter, visit, make use of, maintain, exchange and develop cultural heritage, as well as to benefit from the cultural heritage and creations of others, without political, religious, economic or physical encumbrances. Individuals and communities cannot be seen as mere beneficiaries or users of cultural heritage. Access and enjoyment also imply contributing to the identification, interpretation and development of cultural heritage, as well as to the design and implementation of preservation/safeguard policies and programmes. Effective participation in decision-making processes relating to cultural heritage is a key element of these concepts.

At the end of her report on cultural heritage the Independent Expert makes a series of strong and concrete recommendations to states, cultural institutions, researchers and the private sector, including the tourism industry, that give concrete policy direction to all the actors that have the political will to act on this topic. These recommendations, it could be said, have a central theme, which is a perspective on cultural heritage from the angle of individuals and groups, a human angle, a human rights angle. The Independent Expert's recommendations focus substantively on the various ways in which people will participate actively and meaningfully in matters related to cultural heritage, ways in which people will be given agency and voice. The following paragraph, that addresses a major problem in the past 60 years is a good example of this:

“Concerned communities and relevant individuals should be consulted and invited to actively participate in the whole process of identification, selection, classification, interpretation, preservation/safeguard, stewardship and development of cultural heritage. No inscription on UNESCO lists relating to cultural heritage or national lists or registers should be requested or granted without the free, prior and informed consent of the concerned communities. More generally, States should seek the free, prior and informed consent of source communities before adopting measures concerning their specific cultural heritage, in particular in the case of indigenous peoples, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples”.

In addition to clarifying the normative elements of cultural rights in her thematic reports, in her first and second reports, the Independent Expert also conducts country visits. As of September 2011, she had visited Brazil, Austria and Morocco and Western Sahara. The Independent Expert has requested visits to Algeria, Ecuador, Nepal, Philippines, the Russian Federation and Vietnam.

The country visits and reports follow the standard practice of other monitoring human rights mechanisms of the Human Rights Council, namely receiving information and discussing

with government, non-governmental organizations, indigenous peoples, community representatives, the media and other civil society actors. The reports analyze the legal system of the countries, the institutional framework and state practice. Good practices and areas for improvement are identified and recommendations are addressed to government as well as communities, indigenous peoples and civil society at large. The reports and the recommendations of the Independent Expert are useful in giving concrete content, in country-specific terms, to the promotion, protection and fulfillment of cultural rights, including calling for specific plans and benchmarks. In this way cultural rights are finally given the concrete and serious consideration and profile that they had been missing for decades.

It is obvious that many challenges and areas of action for the future work of the Independent Expert on cultural rights remain and need to be addressed.

The Independent Expert has identified a number of topics to which she will devote special attention. These include the following : cultural dimensions of all human rights; the principle of non-discrimination as it applies to cultural rights; analysis of the right to rest and leisure; the analysis of the obligations of states within the framework developed by the Committee on Economic, Social and Cultural Rights, using the concepts of availability, accessibility, acceptability, adaptability and appropriateness; responsibilities of the corporate sector regarding cultural rights within the established framework of “protect, respect and remedy”²⁸. The Independent Expert has committed herself to focus special attention to the cultural rights issues of gender and women (and men), of migrants and non-nationals and persons with disabilities.

Development with culture and identity is a theme that the Independent Expert should further analyze, following a number of recent policy steps at the international level. These include the adoption of UNESCO’s Universal Declaration on Cultural Diversity, the UN Declaration on the Rights of Indigenous Peoples, the UN Development Group Guidelines on Indigenous Peoples’ Issues for UN Country Teams, as well as the pioneering work of the UN Permanent Forum on Indigenous Issues on development with culture and identity.

Given the increasing visibility of youth cultures in the national and international scene and their impact on the new social movements, it would be welcome for the Independent Expert to explore the ways in which the particular cultural expressions and overall cultural rights of youth should be protected and promoted.

The issue of popular, democratic, community, peoples’ and other participation in setting state policies affecting cultural rights is a huge vacuum that needs to be addressed. While the UN Declaration on the Rights of Indigenous Peoples for example is quite explicit on the topic in

²⁸ Report of the Special Representative of the Secretary-General on transnational corporations and other business enterprises, A/HRC/11/13.

terms of indigenous peoples' participation, a lot remains to be done to refine and understand the mechanisms to apply such participation. On the other hand, participation for other groups and for individuals is hardly something addressed by policy at the moment.

An area that has not yet been mentioned in the reports of the Independent Expert to-date is that of the promotion and protection of cultural rights within the context of peace-keeping and peace-building operations, as well as in the area of conflict prevention. Given that many of today's conflicts have been due to the rise of identities, it would be very useful if the Independent Expert could devote attention to this matter in one of her future reports. It is a good step in that direction that the Independent Expert, in her report on cultural heritage, identifies the repair and other issues related to objects of cultural heritage, as warranting the attention of peace-building efforts.

Cultural human rights and their normative content in summary

The wording of international human rights instruments in terms of cultural rights may be elliptic, non-systematic or unclear - in short, imperfect - but a careful examination of international legal texts, the jurisprudence and other case law of international bodies and international and national practice reveals the normative elements of cultural human rights²⁹.

Cultural rights include both rights of individuals and rights of groups. The right to participate in cultural life is the most comprehensive of cultural rights. It includes the right to education; the right to enjoy the benefits of scientific progress and its applications; the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which a person is the author; the freedom indispensable for scientific research and creative activity. Cultural rights also include the right to access and enjoy cultural heritage.

At the level of the individual, the right to participate in cultural life contains in summary the following normative elements:

- a) Non-discrimination and equality.
- b) Freedom from interference in the enjoyment of cultural life, and freedom to create and contribute to cultural life.
- c) Freedom to choose in which culture(s) and cultural life to participate, the freedom to manifest one's culture.

²⁹ This part is the result of comprehensive research in the work of UN human rights and other bodies. See supra 3, especially pp 245-258.

- d) Freedom of dissemination.
- e) Freedom to cooperate internationally.
- f) Right to participate in the definition, preparation and implementation of policies on culture.

In addition, various other human rights and fundamental freedoms are interdependent and interrelated vis-a- vis the right to participate in cultural life, including freedom of movement, freedom of expression, the right to education and the right to work. The full enjoyment of cultural rights depends on these other rights, but also there is a weakness in the understanding of these other rights if cultural rights are not factored in.

In the case of minorities and indigenous peoples, most cultural rights of the persons belonging to these communities are better or solely implemented within a group context, as they constitute expressions of a way of life of a culturally distinct group. Even more important, the implementation of minority and indigenous peoples' cultural rights is far from being a soft or secondary agenda or a luxury. It is in fact of great human, moral and political significance and responds to the sense of identity and some of the most profound aspirations of minority groups and indigenous peoples.

In addition to the above normative elements pertaining to the cultural rights of individuals, the cultural rights of minorities and indigenous peoples have the following characteristics and involve the following special obligations for states-I present these here in summary form:

a) The state and its agents have an obligation to respect the freedom of persons belonging to minorities and minority groups to participate in cultural life, to assert their cultural identity and to express themselves culturally in the way they choose, i.e. the authorities must not interfere with this freedom unless conditions under (b) below are present, namely conditions that represent conflict between a group and the human rights of an individual. The state, as part of the regular discharge of its police and justice functions, must also protect the right to participate in cultural life from infringement by third parties, whether they are individuals, groups, corporations, domestic or foreign. The principles of non-discrimination and equality must guide the state's actions, in accordance with Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. The state must establish laws and policies regarding non-discrimination in the enjoyment of cultural rights. Equality may not amount to forced assimilation. Special positive measures by the state to secure advancement of minorities, i.e. affirmative action, are allowed. The positive actions of the state for the fulfillment of cultural rights, i.e. in terms of the provision of resources, subsidies etc., must be guided by the principle of non-discrimination. If the state does not have adequate resources to respond to its obligation to fulfill, it should explore the possibility of international assistance.

b) International human rights norms prohibit cultural practices that contravene internationally recognized human rights. Minority and indigenous rights are part of the human rights regime. States should thus adopt preventive and corrective policies and measures and promote awareness of such problems so that practices of this kind can stop.

c) Individuals living within groups are free to participate or not to participate in the cultural practices of the group, and no negative consequences may ensue because of their choice. In other words, the cultural autonomy of the individual is guaranteed.

d) The cultural rights of minorities and indigenous peoples, both as groups and as individuals, consist of: the right to education; the right to use their language in private life and various aspects of public life, such as before judicial authorities and to identify themselves as well as place names; the right to establish their own schools; access to mother tongue education to every extent feasible; access to the means of dissemination of culture, such as the media, museums, theatres etc., on the basis of non-discrimination; the right to practice their religion; the freedom to maintain relations with their kin beyond national borders, and the right to participate in decisions affecting them through their own institutions; and the preservation of sacred sites, works of art, scientific knowledge (especially knowledge about nature), oral tradition and human remains, i.e. both the tangible and the intangible objects that comprise cultural heritage. These rights are also applicable to indigenous peoples. In the case of indigenous peoples special cultural rights also include the right to continue certain economic activities linked to the traditional use of land and natural resources.

e) Minorities and indigenous peoples have the right to pursue their cultural development through their own institutions and they have the right to participate in the definition, preparation and implementation of cultural policies that concern them. The state must consult the groups concerned via democratic and transparent processes. Moreover, indigenous peoples have the right to self-determination and can decide their own cultural development.

f) The state has an obligation to educate the larger society about cultural diversity and minority and indigenous cultures. The media and other institutions should play a special role in promoting such knowledge.

The minimum core obligations of states regarding cultural rights consist of the basic elements outlined below. The elements of the state's core obligations constitute the other side of the equation that requires human rights to be accompanied by corresponding obligations:

a) Non-discrimination in law and practice;

b) Non-interference in the freedom of cultural expression and of individuals and groups, including its dissemination within and beyond borders;

c) Protection by the state, within the purview of the regular discharge of police and justice functions, of the freedom to participate in cultural life when it is under threat by non-state actors;

d) Ensuring representative participation of society, including of minorities and indigenous peoples, in the definition, preparation and implementation of policies on culture.

e) Promoting policies of respect for cultural rights and cultural diversity within society, especially through education, formal and non-formal.

f) Taking steps to the maximum of available resources to fulfill conditions and correct circumstances that will allow the full enjoyment of cultural rights, especially those of marginalized and disadvantaged groups.

C. Challenges in monitoring cultural rights and future paths

The recent developments on cultural rights have boosted the international human rights monitoring system. From now on the challenge will be for governments, non-governmental organizations and the UN bodies to use these mechanisms actively. Governments will have to overcome a possible reticence from the relative novelty of these mechanisms and use them constructively to develop, improve and uphold public measures for cultural rights. They should report actively to the Committee on Economic, Social and Cultural Rights (CESCR) on the implementation of Article 15 and also integrate cultural rights aspects in reporting on other articles of the International Covenant on Economic, Social and Cultural Rights, as well as to other UN monitoring bodies, such as the Human Rights Committee, the Committee on the Elimination of All Forms of Racial Discrimination and the Committee on the Rights of the Child. Governments should also open their doors and invite the Independent Expert on cultural rights to visit.

Non-governmental organizations will need to become familiar with the new developments and the potential that this analytical work of the UN monitoring bodies has unleashed, and use their work and knowledge to submit information and cooperate with CESCR and the Independent Expert.

The Office of the High Commissioner for Human Rights and others could develop human rights training curricula or integrate in existing curricula the specific elements of cultural rights that provide concreteness, such that they can be pursued in public policy work, including the monitoring of their implementation.

A difficult and painful issue that can be addressed through the respect of cultural rights is that of remedying historic injustices. -Groups claim cultural rights as collective rights vis-à-vis the majority society, with corresponding obligations, both negative and positive, which are

necessary to preserve and develop the cultural integrity of the group, often in order to remedy historical injustices. Far from being a soft agenda, cultural rights have a real-world political strength. They make both moral and material claims and claims that have a reasonable chance of being satisfied. In the case of indigenous peoples, they stake out a zone in which it is possible for some quantity of power to change hands and for age-old injustices to be mended.³⁰

Human sustainable development—or, better said, well-being-- will be possible in a culturally respectful and relevant policy environment that addresses people's cultural rights. At the same time, crucial as cultural rights are in the preservation or building of peace and for development, they should not be viewed only in terms of their functionality vis a vis peace and development, but also, boldly, for their value as human rights, as part of our human dignity.

If we look back over 60 years ago when the UDHR was being drafted, and since then, when the many other human rights instruments were drafted, we see that the process of drafting constituted a dialogue among the various civilizations, religions, regions, legal and political systems that were bringing their perspectives and values and the UN was synthesizing them. Those were put in legal language by the drafters and adopted by the UN as international human rights instruments. What I am saying now is, that there is a need to return back to the world's diversity what that diversity gave us and we encapsulated in the brief, telegraphic language of the human rights instruments. We have to return back the holistic international human rights vision to humanity in a culturally specific way.

Grounding human rights in culture means listening to the local, listening to communities and peoples, dialoguing with the diversity of the world, bringing the international/universal to the local. I can think of no better way for that than by fostering the genuine participation of communities and indigenous peoples and by protecting and promoting cultural rights.

The human rights monitoring bodies have played a major role in the surfacing and validation of cultural rights so that they occupy their rightful place in the human rights system.

³⁰³⁰ Bruce Robbins and Elsa Stamatopoulou, "Reflections on Culture and Cultural Rights", in *Justice for All? The Claims of Human Rights, The South Atlantic Quarterly*, Spring/Summer 2004, Vol. 103, No 2/3, I. Balfour and E. Cadava Special Issue Editors, pp 419-431.

