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**Brief contribution by Elsa Stamatopoulou<sup>1</sup> for the**  
**Consultation of experts on access to cultural heritage as a**  
**human right, organized by Ms. Farida Shaheed, Independent Expert on cultural rights**  
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***Introduction***

1. When we discuss cultural heritage in contemporary international affairs, the most common assumption is that we speak of the cultural heritage of a state, with little or no reference to the specifics of the cultures that make up such state, nor of the human rights aspects of such cultural heritage.

2. In today's world hardly any state can claim it is mono-cultural or that it does not have minorities in its territory. According to the 2004 Human Development Report of the UN Development Programme (UNDP) entitled *Cultural Liberty in Today's Diverse World*, the world's nearly 200 countries are home to some 5000 ethnic groups. More than 150 countries have significant religious or ethnic minorities. Some 370 million indigenous peoples live in more than 70 countries<sup>2</sup> representing more than 4000 languages. Out of the estimated 6000 plus languages spoken today, 90% may have become extinct or face extinction in the next 100 years (we can easily see what a great percentage indigenous languages, and therefore cultures, this may represent). At the beginning of 2003, there were 22 ethnic-based conflicts raging in the world, down from 48 in 1991. Another 76 groups were seeking greater autonomy through civil disobedience or random violence. 900 million people – or one in seven – belong to groups that experience some form of political, economic or cultural exclusion. Of these, about 518 million people face restrictions on religion, language, ceremonies and appearance. In sub-Saharan Africa, only 13% of children in primary school receive instruction in their mother tongue.

***A. Conceptual elements***

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<sup>1</sup> The author is currently with Columbia University and was, until 2010, Chief of the Secretariat of the UN Permanent Forum on Indigenous Issues, having served previously with the Office of the High Commissioner for Human Rights. This brief paper reflects, to a large extent, research and ideas developed in her book *Cultural Rights in International Law: Article 27 of the Universal declaration of Human Rights and Beyond*, 2007, Martinus Nijhoff, Leiden/Boston. The paper is also submitted as a contribution of the International Cultural Human Rights Institute.

<sup>2</sup> Note that the Secretariat of the UN Permanent Forum on Indigenous Issues now indicates 90 countries.

3. *From a human rights perspective*, cultural heritage has to be understood with the subject of human rights in mind, i.e the individual or the group, and, given the topic of cultural heritage, especially the latter.

4. At the same time a) that the state may recognize the cultural heritage of a people/community/group that lives in its territory as its own, be proud of it and wish to protect it in a national and international context, and b) the people of a state as a whole may claim their collective cultural heritage *vis a vis* external actors, such as colonial powers or conquerors and occupying powers, or private actors, such as corporations, that may be threatening cultural heritage. These are cases where the cultural heritage of a people/group/community *as a human right* coincides with the cultural heritage of a state<sup>3</sup>.

*-How to define cultural heritage? Who defines what cultural heritage is?*

5. It is useful to recall first various levels of understanding of culture that will help us in turn identify the *human rights elements of cultural heritage*. There are numerous definitions of culture. A definition or, more precisely, an understanding of culture that surfaces from the examination of literature and the work of the UN bodies and that is useful for examining cultural rights, and cultural heritage as a human right, is at three levels.

a) culture in its *material sense*, as product, as the accumulated material heritage of mankind, either as a whole or part of particular human groups, including but not limited to monuments and artifacts;

b) culture as *process* of artistic or scientific creation, i.e. the emphasis being placed on the process and on the *creator(s) of culture*; and

c) culture in its anthropological sense, i.e. *culture as a way of life* or, in UNESCO's words, the "set of distinctive spiritual, material, intellectual and emotional features of society or a social group"; it encompasses "in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs". In this system-oriented understanding of culture, the individual is seen as a product of a cultural system.

6. Some understandings given to cultural heritage from a human rights perspective include the one given in the Framework Convention of the Council of Europe which defines cultural heritage as "a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time" (art. 2 a). The stated aim of the Convention is for Parties to

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<sup>3</sup> In an interesting development that tries to bring cultural heritage closer to the concept of human rights, and cultural rights in particular, the Council of Europe adopted and opened for signature in October 2005, the Framework Convention on the Value of Cultural Heritage for Society<sup>3</sup>.

recognize that rights relating to cultural heritage are inherent in the right to participate in cultural life, as defined in the UDHR (art 1a), in other words the Convention views cultural heritage-related rights as part of cultural rights.

7. Although cultural heritage is important for all cultures, indigenous peoples have been particularly present and vocal at international debates to point to its significance for them and to underline the need for special protection. Tangible and intangible cultural heritage, which includes traditional knowledge, is viewed by indigenous peoples as an inextricable part of their identity and human dignity, as part of their cultural rights. In a study decided in 1993 by the Sub-Commission on Prevention of Discrimination and protection of Minorities, Erica-Irene Daes was mandated to expand her previous study with a view to elaborating draft principles and guidelines for the protection of indigenous peoples' heritage. The study was completed in 1995 and the draft guidelines appear in the annex as they provide a broad and comprehensive view of this area in human rights normative terms<sup>4</sup>. A definition of "indigenous heritage" is given in the UN study on the "Protection of the heritage of indigenous people"<sup>5</sup> in the draft guidelines prepared by Special Rapporteur Daes, as follows:

"11. The heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature of which has been transmitted from generation to generation, and which is regarded as pertaining to particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.

"12. The heritage of indigenous peoples includes all movable cultural property as defined by the relevant conventions of UNESCO; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance and burial; and documentation of indigenous peoples' heritage on film, photographs, videotape, or audiotape."

8. The above-mentioned definition contains elements of what today is referred to more often as traditional knowledge. Legal custom and institutions are considered part of indigenous heritage and traditional knowledge. The UN Declaration on the Rights of Indigenous Peoples contains at least 17 articles on cultural rights, including the elements mentioned in the Daes study.

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<sup>4</sup> E/CN.4/Sub.2/1994/31, Annex and subsequently revised and appearing in E/CN.4/Sub.2/1995/26.

<sup>5</sup> E/CN.4/Sub.2/1995/26, Annex, paras. 11 and 12.

9. The protection of cultural heritage has been partly analyzed through UNESCO's work from its early days. UNESCO's mandate encompasses the task of preserving and protecting cultural heritage which its Constitution proclaims as "universal". Cultural heritage represents what we have the right to inherit from our predecessors and a duty to pass on to future generations. Over decades of normative work UNESCO expanded its original understanding of cultural heritage as the traditional manifestation of a masterpiece or a monument, reflecting the continuity of a particular people, to include the notion of intangible heritage<sup>6</sup>. Intangible heritage is the issue of identifying, protecting and enhancing an exceptional heritage, threatened with disappearance, particularly in the face of the uniformity frequently brought about by globalization. In a context of essentially oral cultures where, according to the African parable, "when an old man dies, a library disappears", these notions have become crucial. UNESCO adopted the Intangible Heritage Convention in 2003 and decided to embark on the preparation of a convention on cultural diversity. Indigenous peoples were always eager to be allowed participation in the debates to ensure that the provisions of the convention also protect indigenous cultural heritage. As UNESCO does not always address the human rights aspects of cultural heritage and traditional knowledge, these need protection and promotion under the human rights legal regime as well, in ways that go beyond intellectual property regimes, copyright and trademark actions, which have economic remedies as their main focus.

- *Is access to cultural heritage a collective or an individual human right?*

10. Cultural heritage as a part of cultural human rights, is both an individual and a collective human right. These elements have been mentioned above.

- *Is there a substantive right/an entitlement to cultural heritage, or is it more an obligation/responsibility of States?*

11. In the above text, I have tried to stress the neglected human rights aspect of cultural heritage. As a substantive human right, cultural heritage carries obligations for states.

## ***B. Major challenges regarding cultural heritage from a human rights perspective***

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<sup>6</sup> UNESCO and the Cultural Heritage, UNESCO's Action, pp. 1 and 4. Fundamental normative instruments of UNESCO in this area include the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1972 World Heritage Convention and the 1995 UNDRIT Convention on Stolen or Illegally Exported Cultural Objects.

12. Key problems *from a human rights perspective* to the proclamation or recognition of a specific aspect of human culture as cultural heritage by the state or, at international level, by UNESCO, have been a) the separation of the concept of cultural heritage from its human rights aspect and b) the lack of consultation or participation on such matters by peoples/groups/communities identifying that particular manifestation of culture *as their own cultural heritage*, whether this is a geographical place that is a sacred site with spiritual or religious significance, a monument or an object or any other kind of tangible or intangible cultural heritage.

13. Such alienation of human beings- individually or as groups- that are subjects of cultural human rights from their cultural heritage undermines the deep moral aspect and significance of cultural heritage for persons and groups. This approach equates cultural heritage to only a national, i.e., state object and interest.

14. A state's cultural heritage and a specific sub-group's cultural heritage may coincide, -and there is nothing wrong with this, in fact it is laudable for a state to be proud of the cultural heritage of a specific group in its territory and espouse it as its own and protect it. However, the human rights aspect of cultural heritage requires respect and protection by the state of such cultural heritage in consultation and full and effective participation of the people/community/group concerned in all processes in this regard.

15. Unfortunately, negative examples abound, where the declaration of a specific cultural manifestation as cultural heritage has detrimental effects for the peoples/groups/communities concerned, depriving them from enjoying their human right to participate in cultural life and enjoy their culture. In various countries for example indigenous peoples are prevented from accessing monuments of their own cultural heritage to perform ceremonies, while tourists have free access to such monuments. Similarly, indigenous peoples or other communities may be removed from an area once it is proclaimed cultural heritage of the state or of humanity (by UNESCO, in cooperation with a state). It is therefore no wonder that indigenous peoples often cover with secrecy special places/objects/traditional knowledge of their cultural heritage so as to protect them from the state's claims, tourist exploitation or the exploitation by corporations.

***C. What does access as a human right mean? (physical access, economic access, access to information on cultural heritage, non discrimination in access, ...)***

16. The Committee on Economic Social and Cultural Rights adopted the highly regarded Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights and the Maastricht Principles on Violations of Economic, Social and Cultural Rights. It is recommended that the Independent Expert and Member States use these Guidelines regarding the human rights aspects of cultural heritage, including issues of access..

*- Does access also mean participation in the identification, interpretation, and preservation of cultural heritage?*

17. A fundamental element of the right to participate in cultural life in a democratic polity is the right to participate in the definition, preparation and implementation of policies on culture, including issues of cultural heritage. Thus people, especially peoples/ communities/groups whose cultural heritage is being dealt with by the state must be consulted and must effectively participate in the formulation, planning, implementation and evaluation of such policies.

The participation element in cultural policies is supported by most relevant international human rights instruments . In the case of indigenous peoples in particular, the participation aspect is part of the right of indigenous peoples to self-determination as well as their right to free, prior and informed consent. It should be understood by the state that indigenous peoples have the right to say 'no' to a proposed policy on a specific aspect of their cultural heritage.

18. Minorities and indigenous peoples have the right to pursue their cultural development through their own institutions and via those 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 through democratic and transparent processes.

*- Who are the concerned persons / communities?*

19. State authorities should hold consultations that are genuine, open and in good faith, such that any persons and communities concerned will have the opportunity to come forward and participate, so that arrangements on access, openness to tourism or other economic exploitation of cultural heritage etc can be decided in partnership among the parties. In such processes it will also be crucial to respect the cultural protocols of the peoples concerned, so that the special sites/monuments/objects/knowledge will be treated within the cultural domain where they belong.

*- Are there / should there be various degrees of a right of access?*

20. Cultural heritage as a human right means also that the subject of this right, individual, people/community/group, should have the priority in terms of access to a specific manifestation of their own cultural heritage. As mentioned above, a human rights perspective of cultural heritage requires that the cultural protocols of the specific community be respected in determining access of others.

*- What are the possible limitations to a right to cultural heritage?*

21. Such limitations derive from the responsibility to respect the cultural heritage of all groups and human beings in a society. The right to cultural heritage is also subject to those restrictions which are necessary in a democratic society for the protection of the public interest and the rights and freedoms of others —a standard provision found in human rights treaties.

***D. States' obligations in relation to a right to access cultural heritage (respect, protect, fulfill)***

22. Although the purpose of this brief paper is not to provide all the answers to the challenges around cultural heritage, I argue that a human rights approach to questions of cultural heritage is both legally and morally required. A human rights approach (a) requires particular sensitivity to and focus on vulnerability factors, namely socioeconomic, legal, institutional awareness and capacity and other conditions that render a particular population group vulnerable, including the group's cultural heritage; (b) obliges the state to devise special legislation, policies and budgets to protect and promote traditional heritage and knowledge, ensuring that the people concerned will participate fully and meaningfully in this process; (c) requires respect for the norm of non-discrimination, and (d) requires implementation of the international human rights legal instruments to which the country has subscribed, which also protect cultural rights and cultural heritage. In addition, a cultural rights approach in terms of minorities and indigenous peoples requires the state to adopt awareness-raising and educational measures vis a vis the dominant society and to inspire appreciation and respect for indigenous and minority traditional heritage and knowledge, including understanding of the special conditions required for outsiders before they attempt any commercial exploitation of cultural heritage.

***E. Specific areas of focus for the future work of the Independent Expert (thematic research)***

23. One important area to focus is the issue of cultural heritage held in museums other than those of the people/peoples/communities to whom such cultural heritage belongs and to identify the human rights aspects of this phenomenon. As a second step, such study could take stock of the practice of states in that regard in order to identify common characteristics of constructive policies.

24. Another important area that requires research is the issue of natural sites that are declared by UNESCO, in cooperation with states, as cultural heritage of humanity. This matter is of crucial significance for indigenous peoples and local communities who may live in those areas. The UN Permanent Forum on Indigenous Issues has started focusing attention on the challenges of such situations.