

## Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples

Elsa Stamatopoulou

*Dear Teacher,*

*I am worried about my child being in your class. You see, my daughter is a person of culture ... In numerous ways, she is like any young girl sitting in your classroom, yet, art, spirit, and culture are inextricably intertwined. She very naturally blends these aspects in her heritage. She has several dolls that reflect her darker skin, eyes and hair. Her pretend play includes making a sweat lodge, singing songs, saying prayers, dressing up the dolls in hand-crafted regalia, and having a feast, complete with miniature foods. How will these natural connections be continued? When she collects gifts from nature, she offers tobacco to the Earth Mother. How will she reconcile this practice when signs in your school say, 'No tobacco products'. Will she still have her cultural voice when she leaves your classroom?*

Excerpt from a letter sent by Claudia Fox Tree to her daughter's teacher<sup>1</sup>

### Introduction

Few would doubt, by listening to indigenous people's presentations at the UN since the 1980s, that indigenous peoples' human rights concerns were about both their cultural and

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<sup>1</sup> [nativeamericanresources.blogspot.com/2007/08/letter-to-my-childrens-teacher.html](http://nativeamericanresources.blogspot.com/2007/08/letter-to-my-childrens-teacher.html).

physical survival as peoples, those two aspects also being inextricably linked to the right to self-determination and the right to lands, territories and natural resources. Since the early days of the UN Working Group on Indigenous Populations (WGIP) through to today's sessions of the UN Permanent Forum on Indigenous Issues (UNPFII), indigenous leaders have spent a considerable amount of time explaining to the world the specificities of their cultures, including their legal systems, customs, languages, spirituality, world views, concepts of economic, social, cultural and political development, traditional knowledge systems and other aspects of their ways of life that form the basis of their collective sense of who they are and what their vision is for the future. Year in and year out, during the drafting of the UN Declaration on the Rights of Indigenous Peoples ('the Declaration'), indigenous Elders and other indigenous representatives from all parts of the world spared no effort in describing, for example, the special spiritual, moral and material relationship of indigenous peoples to their ancestral land, the concept of community ownership of the land, and various traditional systems of governance. It has also been a common occurrence at UN meetings that indigenous languages are spoken by the leaders at the beginning of their speeches to mark the significance of language to identity and that, following indigenous cultural protocol, recognition of the indigenous peoples of the land where the meeting is held is expressed.<sup>2</sup> Indigenous peoples have also come to the UN wearing traditional costume, exhibiting their art and sharing music,

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<sup>2</sup> The annual sessions of the PFII in New York, for example, are always opened by the spiritual chief of the Onondaga Nation, who speaks in the Onondaga language, with interpretation provided in the six official UN languages.

dance, stories, film and other aspects of their traditional and contemporary cultural expressions.

At the same time, indigenous peoples have brought to the UN numerous allegations of systemic discrimination and systematic violations of their cultural rights, including the non-recognition and even suppression of indigenous languages, the prohibition of access to their spiritual and religious sites, the banning of their traditional cultural expressions in public, the marginalisation they face when wearing their traditional clothes, the economic exclusion they suffer because they are culturally distinct, the lack of access to traditional occupations for subsistence, such as hunting and fishing, the lack of access to the country's education system, curricula and mass media that would both allow indigenous persons to benefit from mainstream education and make indigenous cultures known to the rest of the population, the pillaging of their cultural heritage, both tangible and intangible, the patenting of their traditional knowledge without their free, prior and informed consent, and the marginalisation and suffocation of their traditional systems of governance and law. Indigenous voices at the UN debates on the Declaration clearly articulated that the suppression of identity and culture is a denial of human dignity that must be addressed within the human rights framework.

It is therefore understandable that the Declaration is imbued with an 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 and the word 'identity' is mentioned in Article 2 (the right to be free from any discrimination based on indigenous origin or identity) and Article 33 (the right of indigenous peoples to determine their own identity or membership in accordance with their customs and traditions). The word

‘culture’ or ‘cultural’ is mentioned no fewer than eight times in the preamble and 16 times in the articles of the declaration (Articles 3, 5, 7, 11, 12, 14, 15, 16, 31, 32, 36). Significantly, around 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.

In this essay I will first provide a brief historical perspective on the path towards recognition of the cultural rights of indigenous peoples and will outline what these rights are in light of international instruments, including the Declaration, and the case law and practice of international bodies. I will then go on to discuss the significance and role of cultural rights protection and promotion in mending historical injustices.<sup>3</sup>

## Historical Perspective

The recognition of indigenous peoples’ cultural human rights in the Declaration and its significance in international law, policy and relations can be better understood by examining the interface of identity, culture and diversity in the UN era.

### The Drafting History of Article 27 of the Universal Declaration of Human Rights

States’ resistance to the recognition of cultural rights predates the emergence of indigenous peoples’ rights on the UN’s agenda. One of the most significant difficulties in

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<sup>3</sup> This essay draws in part on E Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Leiden, Martinus Nijhoff, 2007).

dealing with cultural rights is that these rights have evoked, for various governments, a scary spectrum of group identities and group rights that they feared could threaten the ‘nation’ state and territorial integrity. The drafting history of Article 27 of the Universal Declaration of Human Rights (UDHR) is telling. Article 27 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 of minorities did arise, as was to be expected, in the very first session of the Commission on Human Rights in 1948. In the minds 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’ protection were covered by other articles of the Declaration.<sup>4</sup>

The text originally debated provided for the right of persons belonging to 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

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<sup>4</sup> J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia, University of Pennsylvania Press, 1999) 270.

before the courts and other authorities of the state. However, this language was never adopted. It is overwhelming to realise that these cultural rights have remained burning demands and rallying points for indigenous peoples and minorities to date.

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 (Anti-Genocide Convention) that was being drafted by the UN General Assembly's Sixth Committee simultaneously with the Universal Declaration of Human Rights, then in preparation by the Third Committee. There was a proposal during the drafting of the Anti-Genocide Convention to include, in the definition of genocide, the intent to destroy, in whole or in part, cultural groups, as well as '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 Anti-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.<sup>5</sup>

The proposal on cultural genocide in the context of the Anti-Genocide Convention at the Sixth Committee of the UN General Assembly was finally put aside, and, as mentioned

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<sup>5</sup> *ibid*, 371, fn 45.

above, the Universal Declaration of Human Rights did not include reference to minority rights either.<sup>6</sup>

The tumultuous 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 for many states. But in today's interconnected world of greater expectations for democracy and rising cultural identities, avoiding the subject of respect for cultural rights can only lead to frustrations in society and the instigation of conflict. In fact, states have learnt hard lessons and are gradually opening up to cultural rights recognition and implementation.

### How States' Positions Changed over Time and Why

In the case of indigenous peoples, the change in the positions of states over time has been dramatic. While stories of political and cultural resistance of indigenous peoples to colonialism, domination and exploitation at the local level abound, these did not always find resonance at the international level, in particular at the United Nations. After the WWII era, questions of ethnicity and minorities were viewed with suspicion, and even the UN expert body established in 1946 for this purpose, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, was essentially prevented for

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<sup>6</sup> It is interesting to note that the United States presented the sole strong opposition to the minority-related article, claiming that minorities were a European issue and there was no reason to reflect the matter in the UDHR. The USA was subsequently joined by Canada and Latin American countries, while Australia declared that it had opted for the principle of assimilation. One wonders whether the colonial histories of mass extermination and oppression by those countries of their indigenous peoples may have had a bearing on the positions taken by them at the UN in 1948.

years from adequately doing its work on minority issues by its parent bodies, including the Commission on Human Rights, until after the end of the Cold War, in the later 1980s and early 1990s.

However, in addition to historical reasons—at state and regional levels—that are beyond the purview of this essay, there is something else that clearly distinguished the UN minority-related agenda from the UN indigenous peoples-related agenda. And this distinguishing factor has been the transformation of local struggles into international ones, through the creation of an international indigenous peoples' movement and its dynamic interface with the United Nations.<sup>7</sup> There has never been such an international movement on the part of minorities.

From the side of states, we note a differentiation of their positions vis-a-vis indigenous peoples over the years. In the earlier days, in the 1970s, when gross violations of human rights were brought up in the UN human rights bodies, including mass killings in Guatemala, states viewed the issue of indigenous peoples mostly as a humanitarian one, one of 'kindness' so to speak, to disappearing civilisations in the final process of assimilation. One could therefore observe some degree of permissiveness on the part of states in UN processes; that is, states allowed the birth of exceptional, unprecedented and extensive participatory procedures for indigenous peoples, which, in turn, increased the number of indigenous representatives at the UN as well as their overall political impact. In recent years, political changes sweeping through Latin America, from Mexico, with

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<sup>7</sup> For an account of this, see E Stamatopoulou, 'Indigenous Peoples and the UN: Human Rights as a Developing Dynamic' (1994) 16 *Human Rights Quarterly* 58–81.



the Zapatista movement,<sup>8</sup> to Guatemala, with the peace accords, to Bolivia with an indigenous Aymara President, have brought indigenous peoples to the fore. The final years of negotiations on the UN Declaration on the Rights of Indigenous Peoples reflected this new reality and thus, the recognition of cultural rights in international human rights law has now surfaced, both in terms of individual cultural rights and in terms of group cultural rights.

### Cultural Rights of Indigenous Peoples

The Declaration refers explicitly to collective rights as well as to rights of individuals. At least 17 of the 46 articles are about cultural rights; in fact, one can find the cultural rights angle in each article of the Declaration: the right of indigenous peoples and individuals to be free from any kind of discrimination, in particular that based on indigenous origin or identity (Article 2); the right to self-determination, by virtue of which indigenous peoples should freely determine their political status and freely pursue their economic, social and cultural development (Article 3); 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); the 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 practise and revitalise their

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<sup>8</sup> The world can still recall the declarations of the mysterious *Sub-Commandante* Marcos, whose supreme leader was no other than a council of indigenous Elders.

cultural traditions and customs and to receive redress for cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent (Article 11); 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 (Article 15); the right to establish their own media in their own languages and have equal access to all forms of non-indigenous media (Article 16); 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 right of indigenous peoples divided by borders to maintain and develop contacts, relations and cooperation across borders (Article 36).

Comparing the above-mentioned cultural rights to those that the advocates of minorities wanted to include in the UDHR and the Convention on the Prevention and Punishment of the Crime of Genocide, we note that the Declaration has indeed covered what some were hoping to include in 1948, and has even gone beyond that. Part of the reason for this is that international human rights law has been dynamic and developing over the decades through standard-setting and international practice. Another factor is, as mentioned above, a certain political ‘permissiveness’ on the part of states, namely that states were willing to allow for the recognition of ‘harmless’ cultural rights for what they saw at that time, some 40 years ago, as dying cultures or disappearing civilisations in the final stages of assimilation. Finally, another important factor is the birth and dynamism of the international indigenous peoples’ movement that has eloquently claimed cultural human rights. The elements of the cultural rights of indigenous peoples, even if not always explicit, have been captured in the texts of human rights instruments preceding the Declaration, as well as in the case law and practice of international human rights treaty bodies and other international bodies. It should be pointed out that, before the adoption of

the Declaration in 2007, international human rights bodies covered indigenous peoples' cultural rights by using, in some cases, the analogy to minority rights, as can be seen through an examination of the practice and case law of those bodies.

There are no formal international definitions of the terms 'minorities' and 'indigenous peoples' and these categories overlap in international practice, especially in terms of the need to establish non-discrimination towards them. However, there is an accepted distinction between these two terms, although it is not always clearly articulated. Indigenous peoples, to use one distinction, are in some cases majorities, as in Guatemala and Bolivia, or are majorities in the areas which they have traditionally inhabited. Indigenous peoples have a special spiritual relation to the land which is linked to both their physical and cultural survival as indigenous.<sup>9</sup> International Labour Organization Convention 169 on Indigenous and Tribal Peoples, in Article 1, states the following in lieu of a definition:

This Convention applies to:

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<sup>9</sup> The distinction between indigenous peoples and minorities has been affirmed on various occasions at the international level. Among them is a paper prepared in 1985 by Judge Jules Dechenes, Canadian Expert of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (see E/CN.4/Sub.2/1985/31). This was also the case at a 1989 UN seminar on the effects of racism and racial discrimination on the social and economic relations between indigenous peoples and states (E/CN.4/1989/22, para 40). On 24 October 1991, United Nations Day, the Home Rule Parliament of Greenland, which is the most advanced indigenous autonomous regime globally, adopted a resolution reiterating the distinction between indigenous peoples and minorities (quoted in 'Status and Rights of the James Bay Crees in the context of Quebec's Secession from Canada', submission to the Commission on Human Rights, February 1992, 63).

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present day boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

The Declaration thus does not contain any new cultural human rights, but restates, in one systematic text, human rights contained in previously adopted international instruments and confirmed through the case law of international bodies. Some of these provisions and cases will be mentioned below, as the brevity of this essay does not allow an exhaustive review.<sup>10</sup>

The texts of international legal instruments provide various elements of recognition of the individual and collective aspects of cultural rights, including those of indigenous peoples. Article 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR) provides for the right of persons belonging to ethnic, linguistic or religious minorities ‘in community with the other members of their group’ to enjoy their own culture, to profess and practise their own religion, and to use their own language.

Other international instruments are also vocal about the cultural rights of minorities and indigenous peoples. The 1990 Copenhagen Document of the Conference on the Human

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<sup>10</sup> For a comprehensive account of existing instruments and case law, see Stamatopoulou (n 3) 4.

Dimension of the CSCE (Conference for Security and Co-operation in Europe, later renamed OSCE), in paragraph 32, provides a series of rights including that persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts of assimilation against their will. This concept is also included and developed in the 1995 Framework Convention for the Protection of National Minorities adopted by the Council of Europe, where nine articles refer to the cultural rights of persons belonging to minorities, namely Articles 4, 5, 6, 9–12, 14 and 17. The 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities similarly states that ‘persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination’. The 1989 Convention on the Rights of the Child, in Article 30, similarly recognises 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 practise his or her own religion, or to use his or her own language’.

The 1966 UNESCO Declaration of the Principles of International Cultural Cooperation states in Article 1 that each culture has dignity and value which must be respected and preserved, that every people has the right and duty to develop its culture and that, in their rich variety and diversity, and in the reciprocal influence they exert on one another, all cultures form part of the common heritage belonging to all mankind. In 2001, UNESCO

adopted an extraordinary instrument, the Universal Declaration on Cultural Diversity.

Article 2 states:

In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.

Article 4 of the Declaration, entitled ‘Human Rights as Guarantees of Cultural Diversity’, states:

The defense of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

The African Charter on Human and Peoples’ Rights has set out guidelines requiring states to take specific measures for the promotion of cultural identity and the awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and indigenous sectors of the population.<sup>11</sup> ILO Convention 169 on Indigenous and Tribal Peoples (Article 2) spells out the duty of states to promote ‘the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions’.

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<sup>11</sup> African Commission on Human Rights, ‘General Guidelines regarding the Form and Contents of Reports to be submitted by States Members regarding the meaning, scope and weight of “the rights of peoples” recognized by Articles 17(2), 19 to 20 of the Charter’, 1990, pp 417–18.

## Human Rights Committee

In 1994, the Human Rights Committee enriched the understanding of the cultural rights of minorities and indigenous peoples by adopting an important General Comment on Article 27 of the ICCPR.<sup>12</sup> The Committee underlines 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’.<sup>13</sup> In the case of indigenous peoples such traditional activities may include fishing or hunting and the right to live in reserves protected by law. In examining states parties’ reports the Committee has been thorough in its monitoring of cultural rights of minorities, in particular linguistic rights,<sup>14</sup> cultural autonomy in terms of cultural institutions, as well as consultation regarding traditional means of livelihood,<sup>15</sup> threats to indigenous cultures from logging, mining and delays in demarcation of traditional lands,<sup>16</sup> and protection of sites of religious or cultural significance.<sup>17</sup>

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<sup>12</sup> General Comment No 23, CCPR/C/21/Rev.1/Add.5.

<sup>13</sup> Para 3.2.

<sup>14</sup> eg A/56/40, para 79(5), where the Committee welcomes Uzbekistan’s language policy whereby education at all levels is offered in 10 languages, including the languages of the minority groups.

<sup>15</sup> eg A/55/40, para 75, where the Committee notes positively the transfer of certain cultural institutions to the Saami in Norway as well as full consultation with the Saami in matters affecting their traditional means of livelihood.

<sup>16</sup> eg A/55/40, para 379 regarding Guyana.

<sup>17</sup> eg A/55/40, para 510 regarding Australia.



The case law of the Human Rights Committee under the Optional Protocol to the Covenant has reflected the above-mentioned interpretation of Article 27 and has made pronouncements regarding (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) 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. Some of the important cases of the Committee in this regard include *Mahuika et al v New Zealand*,<sup>18</sup> *Ominayak v Canada*,<sup>19</sup> the *Lansman et al v Finland* cases of 1994<sup>20</sup> and 1996,<sup>21</sup> *Francis Hopu and Tepoaitu Bessert v France*,<sup>22</sup> *Lovelace v Canada*,<sup>23</sup> and *Kitok v Sweden*.<sup>24</sup>

The Committee has been analytical and creative in protecting indigenous peoples' cultural rights, and a case in point is *Francis Hopu and Tepoaitu Bessert v France*. Long before the adoption of the Declaration and its recognition, as part of cultural rights,<sup>25</sup> of

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<sup>18</sup> A/56/40, Volume I, Annex X, A (Communication No 547/1993).

<sup>19</sup> CCPR/C/60/D/549/1993/Rev. 1, Communication No. 549/1993.

<sup>20</sup> CCPR/C/52/D/511/1992, Case No 511/1992.

<sup>21</sup> CCPR/C/58/D/671/1995, Case No 671/1995.

<sup>22</sup> CCPR/C/60/D/549/1993/Rev.1, Communication No 549/1993.

<sup>23</sup> A/36/40, Annex 7(G) (1998).

<sup>24</sup> A/43/40, Annex 7(G) (1988).

<sup>25</sup> NB Rossoff, 'Integrating Native Views into Museum Procedures' in L Peers and AK Brown (eds), *Museum and Source Communities: A Routledge Reader* (London, Routledge, 2003) 72–79. For the cultural significance of the return of human remains, see also E Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Baltimore, Johns Hopkins University Press, 2000) 187–201. In my work at the United Nations, indigenous peoples' representatives have told me painful stories of indigenous

the right to the repatriation of human remains with the corresponding obligation of states to enable this through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned (Article 12), the Committee eloquently described the parameters of indigenous identity. The Committee was dealing with a complaint against the planned destruction of a burial site of an indigenous community in Polynesia. The Committee observed that the objectives of the Covenant require that the term ‘family’ be given a broad interpretation so as to include all those comprising the family as understood in the society in question (Polynesians in Tahiti, French Polynesia). The Committee accepted the applicants’ claim that their ancestors are an essential element of their identity and play an important role in family life and thus burial grounds play an important role in the authors’ history, culture and life. It concluded that the construction of a hotel complex on a burial site constituted a violation of the right to family and privacy, in violation of Articles 17, paragraph 1, and 23, paragraph 1. The Committee did not invoke Article 27 in this case, since France has made a reservation declining to accept the applicability of Article 27 to France. In individual opinions, several members of the Committee regretted that they could not apply Article 27, which is clearly relevant in this case in terms of the need for the state to respect the cultural values of the community.

Considerable progress has been made in state practice on the subject of repatriation of human remains to indigenous peoples. Since 2003, in the United States alone, more than

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communities forcibly uprooted who had to carry with them the remains of their ancestors to the place they were relocated. In one case, the same indigenous community was forcibly removed twice and had to twice unbury and rebury the human remains of their ancestors, who were part of the community’s identity, spirituality, history and culture.

2,000 culturally sensitive items—including human remains and affiliated funerary objects—have been returned to their descendants and places of origin, in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA).

### Organization of American States

The Organization of American States has also upheld the norm of the survival of indigenous peoples as distinct cultures.<sup>26</sup> In the case concerning the indigenous peoples of Nicaragua, the Inter-American Commission on Human Rights cited Nicaragua's obligations under Article 27 of the ICCPR and found that the special protections accorded to the indigenous peoples for the preservation of their cultural identity should extend to the aspects linked to livelihood, which includes, among other things, their relation to their ancestral and communal lands.<sup>27</sup> In the case of the Yanomami of Brazil, the Commission again invoked Article 27, stating that 'international law at its present state recognizes ... the right of ethnic groups to special protection of their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity'.<sup>28</sup>

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<sup>26</sup> The discussion of OAS is based on SJ Anaya, *Indigenous Peoples in International Law*, 2nd edn (Oxford University Press, 2004) 101.

<sup>27</sup> OAS Doc OEA/Ser.L/V/II.62, doc 10 rev 3 (1983); OAS Doc OEA/Ser.L/V/II.62, doc 26(1984) (Case No 7964 (*Nicaragua*)), quoted in Anaya, *ibid*.

<sup>28</sup> Case No 761 (Brazil), Inter-American Commission Res No 12/85 (5 March 1985); Annual Report of the Inter-American Commission on Human Rights, 1984–1985, OAS Doc OEA/Ser.L/V/II.66, doc 10, rev 1, at 24, 31 (1985), quoted in Anaya (n 26) 261.

In the groundbreaking 2001 decision of *Awas Tingni v Nicaragua*,<sup>29</sup> the Inter-American Court of Human Rights recognised that the relation of indigenous peoples with their lands is the basis of their cultural and spiritual life as well as their economic survival. The Court declared that for indigenous peoples, their land base is indispensable for the preservation of their cultural heritage and its transmission to future generations; thus the state has an obligation to establish laws and other mechanisms for the demarcation and issuance of property titles to the community members in accordance with the community's customary law, values and customs.<sup>30</sup>

### Practice of International Human Rights Treaty Bodies in Examining State Reports

In addition to its case law, the Human Rights Committee has been thorough in its monitoring of cultural rights of minority and indigenous groups. The Committee has paid

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<sup>29</sup> *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Series C No 79) [2001] IACHR 9 (31 August 2001). Para 149 reads: 'Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.'

<sup>30</sup> The link between culture and traditional use of land and natural resources is also evident in many efforts at the national level. An eloquent account of the case of the Kalash people of Pakistan is given in S Hussain and S Zaman, 'Land, Culture and Identity: The Case of the Kalasha' in V Tauli-Corpuz and J Carino (eds), *Reclaiming Balance: Indigenous Peoples, Conflict Resolution and Sustainable Development* (Bagu City, Tebtebba Foundation, 2002) 267–91.

particular attention to linguistic rights,<sup>31</sup> cultural autonomy in terms of cultural institutions as well as consultation regarding traditional means of livelihood,<sup>32</sup> the obligation of the state to provide protection from threats to indigenous cultures by logging, mining and demarcation of indigenous lands,<sup>33</sup> and protection of sites of religious or cultural significance.<sup>34</sup>

The Committee on Economic, Social and Cultural Rights has shown interest, among other areas, in the lack of opportunities for education of minorities in their own languages,<sup>35</sup> non-discrimination in national legal frameworks,<sup>36</sup> and the need for steps to be taken to safeguard the cultural identity and heritage of ethnic groups.<sup>37</sup>

The Committee on the Elimination of Racial Discrimination has systematically focused on linguistic rights of minorities, indigenous peoples and migrants in education as well as in the media.<sup>38</sup> It has also paid attention to the following other aspects of cultural rights

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<sup>31</sup> eg A/56/40, para 79(5), where the Committee welcomes Uzbekistan's language policy whereby education at all levels is offered in 10 languages, including the languages of the minority groups.

<sup>32</sup> eg A/55/40, para 75, where the Committee notes positively the transfer of certain cultural institutions to the Saami in Norway as well as full consultation with the Saami in matters affecting their traditional livelihood.

<sup>33</sup> eg A/55/40, para 379 regarding Guyana.

<sup>34</sup> eg A/55/40, para 510 regarding Australia.

<sup>35</sup> eg E/2000/22, para 231 regarding Bulgaria.

<sup>36</sup> eg E/1998/22, para 79 regarding Zimbabwe.

<sup>37</sup> eg E/1997/22, para 209 regarding Guinea.

<sup>38</sup> eg A/44/18, para 51 regarding France, para 64 regarding Mexico, para 89 regarding Venezuela, para 113 regarding Poland, para 145 regarding Norway, para 193 regarding Niger; A/48/18, para 75 regarding Algeria, para 116 regarding Sudan, para 185 regarding Poland, para 519 regarding Yugoslavia and para 523 regarding Bulgaria.

related to groups: use of minority languages in administration<sup>39</sup> and health services,<sup>40</sup> measures for regaining linguistic and cultural identity,<sup>41</sup> preservation of cultural identity of minorities,<sup>42</sup> policies to ensure that tribal people live according to their original customs,<sup>43</sup> prevention of the illegal export of indigenous art,<sup>44</sup> promotion of multicultural training for teachers,<sup>45</sup> enactment of legal provisions to preserve the existence, culture and traditions of minorities,<sup>46</sup> teaching the history of different ethnic groups and cultures at schools,<sup>47</sup> concern over budget cuts in mother tongue education,<sup>48</sup> concern over assimilation,<sup>49</sup> concern over different levels of protection for different groups,<sup>50</sup> ensuring the participation of indigenous people in decisions affecting lands, culture and traditions,<sup>51</sup> concern over the lack of statistical and qualitative data on the demographic composition of the population,<sup>52</sup> cultural autonomy,<sup>53</sup> and regional cultural development.<sup>54</sup>

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<sup>39</sup> eg A/45/18, para 133 regarding Czechoslovakia.

<sup>40</sup> eg A/46/18, para 234 regarding Australia.

<sup>41</sup> eg A/51/18, para 111 regarding Hungary.

<sup>42</sup> eg A/48/18 para 113 regarding Poland.

<sup>43</sup> eg A/45/18, para 73 regarding Bangladesh.

<sup>44</sup> eg A/45/18, para 246 regarding New Zealand.

<sup>45</sup> eg A/45/18, para 273 regarding the Byelorussian SSR.

<sup>46</sup> eg A/46/18, para 68 regarding the Ukrainian SSR.

<sup>47</sup> eg A/46/18, para 101 regarding Burundi.

<sup>48</sup> eg A/46/18, para 214 regarding Sweden.

<sup>49</sup> eg A/46/18, para 136 regarding Ecuador.

<sup>50</sup> eg A/48/18, para 431 regarding Germany.

<sup>51</sup> eg A/50/18, paras 490–92 regarding El Salvador.

<sup>52</sup> eg A/51/18, para 43 regarding Colombia.

<sup>53</sup> eg A/51/18, para 111 regarding Hungary.

<sup>54</sup> eg A/53/18, para 405 regarding Morocco.

In conclusion, human rights treaty bodies have shown a keen interest in the cultural rights of groups through case law and through the specific questions they have raised in examining state party reports on the implementation of the human rights treaties, and in this way they have helped to clarify the concept of cultural rights. The elements that the treaty bodies have focused most closely on are language rights, cultural participation and cultural autonomy, education of the broader society about the cultures of minorities and indigenous peoples, protection of minority cultural heritage, and protection of certain economic activities of indigenous groups closely linked to their cultural preservation and development. Other normative elements of cultural rights regarding groups emerge from the overall letter and spirit of human rights instruments and work of the treaty bodies on other aspects of human rights, such as the right to choose which culture or cultures to participate in.

The area of indigenous cultural heritage and traditional knowledge and its protection and development, according to the traditional owners' protocols and wishes, is a rich and complex field that the brevity of this essay does not permit me to go into. Suffice it to say that close to 15 intergovernmental entities deal with traditional knowledge issues, from both a normative and a commercial perspective, demonstrating the huge trade and economic interests of states and the private sector. The Declaration on the Rights of Indigenous Peoples clearly highlights the human rights norms that must inform the actions of the state as well as the private sector.<sup>55</sup>

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<sup>55</sup> For a discussion of indigenous cultural heritage and traditional knowledge, see amongst others F Lenzerini, 'Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of their Traditional Knowledge' in F Francioni and M Scheinin (eds), *Cultural Human Rights* (Leiden, Martinus

## The Borders between Individual and Group Cultural Rights

The Declaration outlines the borders between individual and group cultural rights by clearly placing its norms within the overall normative framework of internationally recognised human rights. Article 34 states that

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, traditions, procedures and practices and, in the case where they exist, juridical systems or customs, *in accordance with internationally recognized human rights standards*.<sup>56</sup>

Article 46 of the Declaration states:

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

This means that an indigenous people or community must respect the human rights of individuals within it. In addition, a group cannot oblige an individual within it to exercise his/her rights as an indigenous person; in other words a group cannot impose indigeneity

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Nijhoff, 2008) 119–51. See also Stamatopoulou (n 3) 207–25; and E-I Daes, *Protection of the Heritage of Indigenous Peoples: Final Report of the Special Rapporteur*, E/CN.4/Sub.2/1995/26.

<sup>56</sup> Emphasis added.



on an individual. This is a matter of choice. The duties that an indigenous community would require of its members must comply with international human rights standards. It is well known that indigenous leaders who participated in the negotiations at the United Nations during the drafting of the Declaration over the years were well aware of and agreed to this principle early on.

International bodies, through their case law, have also been at pains to delineate the borders between the individual and the group in the case of cultural rights. One such border between the individual and the group is that an individual within an indigenous people is free to exercise or not to exercise her/his rights as an indigenous person—in other words, the cultural autonomy of the individual is recognised. The indigenous group/community/collectivity must respect the internationally recognised human rights of its members or other persons or groups in its midst.

Human rights treaty bodies have considered on a case-by-case basis the permissible limitations of individual cultural rights when they conflict with imputed rights of the collectivity. Under general human rights principles, such limitations would need to be duly justified and remain in force for the duration strictly necessary. Limitations on the individual's cultural rights vis-a-vis the group may be imposed only when the survival and welfare of the group are threatened and only for as long as the situation of threat persists.

### Information and educating the Wider Society

The state should take measures to inform and educate the wider society about indigenous peoples. This particular obligation has been underlined by various UN bodies,

including the UN Permanent Forum on Indigenous Issues and the Special Rapporteur on the human rights and fundamental freedoms of indigenous people.<sup>57</sup> The obligation to inform and to educate has emerged from the assumption that non-discrimination policies must be supported by a participatory and informed civil society. The role of the media has been repeatedly stressed in terms of combating racism and discrimination vis-a-vis indigenous peoples and minorities. Indigenous communities should have access to mainstream media and the media should refrain from exploiting or sensationalising their heritage. Policies should encourage the presentation of indigenous cultures in mainstream media and the world of the arts. School curricula and textbooks should teach understanding and respect for the heritage of indigenous peoples.<sup>58</sup> In order to spread this concept to the wider society, policies should, for example, support the translation of literature from indigenous languages into the majority languages.

Multiculturalism does not entail the coexistence of various cultures as separate entities that happen to exist and develop independently within the state; neither does international law.<sup>59</sup> The interaction in a state between indigenous and non-indigenous populations, particularly in terms of educating and informing the latter about indigenous histories and

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<sup>57</sup> See respectively A/60/270 containing the plan of action of the Second International Decade of the World's Indigenous People, and E/2005/43, paras 47, 48, 50 and 52.

<sup>58</sup> E/CN.4/1998/6/Add, paras 50 and 52: 'Journalists should respect the privacy of indigenous peoples in particular concerning traditional religions, cultural and ceremonial activities, and refrain from exploiting and sensationalizing indigenous peoples' heritage ... Educators should ensure that school curricula and textbooks teach understanding and respect for indigenous peoples' heritage and history and recognize the contribution of indigenous peoples to creativity and cultural diversity.'

<sup>59</sup> A Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge, Cambridge University Press, 2007) 22.

cultures, should not be a cloak that hides assimilationist strategies; it should form part of a genuine effort to create not just tolerance, but an appreciation of indigenous peoples' cultures and to strengthen human solidarity.

### Obligations of the State

The state and its agents have an obligation to respect the freedom of indigenous persons and indigenous peoples to participate freely in cultural life, to assert their cultural identity, and to express themselves culturally in the way they choose. In other words, the authorities must not interfere with this freedom unless certain circumstances, mentioned below, are present. 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 or corporations, domestic or foreign. Indigenous peoples' rights form part of the human rights regime and, given the prohibition by human rights law of practices that contravene internationally recognised human rights, states should promote awareness of such problems and adopt preventive and corrective policies conducive to the elimination of such practices. Obviously, for such measures to have an effect, they have to be designed with the full and effective participation of indigenous peoples and be culturally sensitive, following the standards of the UN Declaration on the Rights of Indigenous Peoples. Particularly relevant to this issue are Article 3 on self-determination, including cultural development, Article 33 on the right to determine one's own identity, and Articles 34 and 46 mentioned above in the discussion of the borders between individual and group cultural rights.

The principles of non-discrimination and equality must guide the state's actions, in its

obligations regarding the cultural rights of indigenous peoples. The state must establish laws and policies regarding non-discrimination in the enjoyment of cultural rights. Equality, however, may not amount to forced assimilation. The right to non-discrimination has evolved to entail not only the principle that equal cases be treated equally, but also that different cases be treated differently.<sup>60</sup>

Every state faces limitations of financial resources in the fulfillment of human rights however, this is not an excuse for the state's inaction in this area. This is equally true when it comes to the state's obligations regarding cultural rights. The state has the obligation to take steps, to the maximum of available resources, to fulfil conditions and correct circumstances that will allow the full enjoyment of cultural rights. The state is permitted to take special positive measures, that is, affirmative action measures, to secure the advancement of indigenous peoples. Such positive actions for the fulfilment of cultural rights, 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, it should explore the possibility of international assistance and cooperation. The concept of positive measures is well enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination and other human rights instruments. Defining the parameters of the obligation to fulfil is no easy matter. For example, Article 1, paragraph 4 of the International Convention on the Elimination of All Forms of Racial Discrimination speaks of 'special measures for the *sole* purpose of

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<sup>60</sup> M Ahren, 'Protecting Peoples' Cultural Rights: A Question of Properly Understanding the Notion of States and Nations?' in Francioni and Scheinin (n 55) 115. Ahren's essay provides an overview and analysis of legal doctrine regarding the right to self-determination underpinning the cultural rights of indigenous peoples, in their collective aspect.

securing *adequate* advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals *equal* enjoyment of human rights and fundamental freedoms'.<sup>61</sup> ~~It is clear that~~ In other words, the parameters of positive measures are defined in terms both of duration-i.e. they should last up to the moment of achieving equality and end after that point in time- and should also be of a special nature to address a disadvantage of a specific group-i.e. they should not be general, but tailored to the circumstances of a specific group, and, in the case of indigenous peoples, should be the result of effective consultations with them and their free, prior and informed consent.

Article 2 of the Declaration states that indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any discrimination, in particular discrimination based on their indigenous rights or identity. Article 8 explicitly provides for the right of indigenous peoples and individuals not to be subjected to forced assimilation or destruction of their culture, and stipulates a list of state obligations for the prevention and redress of violations of this right. Article 9 prohibits any discrimination that may arise in terms of the exercise by indigenous peoples or individuals of their right to belong to an indigenous community or nation, in accordance with the tradition or custom of the community or nation concerned. In many articles the Declaration includes the obligation of the state to take effective measures to remedy and redress situations where indigenous peoples' rights have been negatively affected, such as for forced assimilation and destruction of culture (Article 8) and for violations of cultural,

**Comment [RM1]:** This sentence doesn't make sense, and a word is missing at the end (NB 'both' doesn't work in this sentence – the whole sentence needs rephrasing)

**Comment [f2]:** Still needs rephrasing  
Suggestion: In other words, the parameters of positive measures are defined in terms both of duration and of nature: they should last up to the moment of achieving equality and end after that point in time and they should not be general, but tailored to the circumstances of a specific group, and, in the case of indigenous peoples, should be the result of effective consultations with them and their free, prior and informed consent. YES, I AGREE, THANK YOU, ELSA

<sup>61</sup> Emphasis added.

intellectual and spiritual property (Article 11(2)); furthermore, the state must ensure through the provision of interpretation or other appropriate means that indigenous peoples can understand and be understood in political, legal and administrative proceedings (Article 13(2)). Also explicit in terms of targeted measures as part of the obligations of the state are Articles 20(2) (indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress) and 32(3) (the state shall provide effective mechanisms for just and fair redress for the development or use of indigenous peoples' lands, territories and other resources, and appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impact). The Declaration explicitly connects indigenous peoples to international development cooperation and the corresponding obligations of the states in which indigenous peoples live as well as of bilateral or multilateral donors. Indigenous peoples have the right to access financial and technical assistance from states and through international cooperation, for the enjoyment of the rights contained in the Declaration (Article 39). The organs and specialised agencies of the UN system and other intergovernmental organisations are to contribute to the full realisation of the provisions of the Declaration through the mobilisation, inter alia, of financial cooperation and technical assistance (Article 41). The state should also respect special cultural rights of indigenous peoples related to the continuation of certain economic activities linked to the traditional use of land and natural resources, such as hunting and fishing. The Declaration recognises the right of indigenous peoples to self-determination and that 'by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development' (Article 3). The recognition of the right to self-determination and the

breadth of its application, as well as the recognition of the right to lands, territories and natural resources, constitute the main pillars of the Declaration that underpin most other rights recognised in the Declaration, including cultural rights. However, the concept of recognising the right of indigenous peoples to continue to pursue specific traditional economic activities linked to their cultures is not new and in fact predates the adoption of the Declaration. There is rich case law of the Human Rights Committee under the Optional Protocol to the ICCPR<sup>62</sup> as well as the General Comment adopted by the Committee on Article 27 of the Covenant dealing with minorities<sup>63</sup> mentioned above. . Similarly, the famous Inter-American Court of Human Rights case of *Awas Tingni*, also mentioned above,<sup>64</sup> links the cultural rights of indigenous peoples with the right to continue to pursue certain traditional economic occupations linked to land and natural resources.

States should create the conditions of respect for indigenous peoples' right to pursue their cultural development through their own institutions, through which indigenous peoples will participate in the definition, preparation and implementation of cultural policies that concern them. The state must consult indigenous peoples concerned via democratic and transparent processes, respecting indigenous governance structures. The Declaration places major emphasis on promoting indigenous peoples' full and effective participation in all matters that concern them, as well as their right to remain distinct and to pursue

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<sup>62</sup> See eg *Mahuika et al v New Zealand* (n 18); *Länsman et al v Finland* (nn 20 and 21); *Kitok v Sweden* (n 24).

<sup>63</sup> General Comment No 23, CCPR/C/21/Rev.1/Add.5.

<sup>64</sup> See text at n 29.

their own visions of economic and social development. Starting with the recognition of the right of indigenous peoples to self-determination, 15 of the 46 articles of the Declaration are about indigenous peoples' participation, through their governance structures, in all decisions that will affect their lives. This of course includes decisions affecting the protection and development of their cultures.

## Conclusion

The UN Declaration on the Rights of Indigenous Peoples is a major instrument through which humanity will protect and promote the survival and well-being of indigenous peoples and the cultural diversity of the world. The Declaration also constitutes the boldest recognition of ethnicity in international law and international relations, through the angle of human rights.

A difficult and painful issue that can be addressed through the respecting cultural rights on the part of the state is that of remedying historic injustices. Groups claim cultural rights as collective rights vis-a-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.<sup>65</sup> The fact of past injustice does not necessarily lead to an automatic legal obligation to remedy all those injustices, but it is clear that the state and society have to find mechanisms to deal with such injustices.

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<sup>65</sup> Anaya (n 26) 102 finds that in the case of indigenous peoples the norm of cultural integrity has developed remedial aspects in light of their historical and continuing vulnerability.



Since every society is unique in its history, culture and political circumstances, there do not seem to exist easy or homogenous answers to such questions. Key, however, is whether or not the descendants of groups to whom historic injustices were done continue to suffer discrimination, marginalisation and disempowerment at the hands of the dominant society-which is represented by the state. International legal thinking has contributed to solutions by addressing the concept of continuing violations of human rights, that is, injustice that stems from far back but the effects of which still continue in the present, by promoting positive measures to deal with past discrimination, by developing concepts of truth commissions and transitional justice, and, of course, by establishing imprescriptibility for crimes against humanity and gross and systematic violations of human rights and humanitarian law. The International Law Commission has defined ‘continuing act’ as a single act extending over a period of time and of a lasting nature; an act which proceeds unchanged over a given period of time: in other words an act which, after its first occurrence, continues to exist as such and not merely in its effects and consequences.<sup>66</sup> The Human Rights Committee has defined a continuing violation as an affirmation, after the entry into force of the Optional Protocol to the ICCPR, by act or by clear implication, of the previous violations of the state party.<sup>67</sup> At the national level, truth commissions and formal apology have been ways of dealing with past injustices and human rights violations.<sup>68</sup>

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<sup>66</sup> Report of the ILC on its 28th session, A/31/10, 3 May–23 July 1976, para 21, Official Records of the General Assembly, 31st session, Supplement No 10.

<sup>67</sup> *Simunek v Czech Republic*, Case No 516/1992, para 6.4, 54th session.

<sup>68</sup> The United States, for example, adopted the Apology Bill (Public Law 103-150, signed by President Bill Clinton) on 28 November 1993, to acknowledge the 100th anniversary of the 17 January 1893 overthrow of

Attention by the state to cultural rights through laws, policies and budgets, can have real moral and practical effects in society. It can ~~help~~ strengthen public action policies for the ~~respect of relating to~~ for the respect for the identity of indigenous peoples and their communities, and even mend historic injustices meted out to these communities by the majority population, as well as build positive inter-cultural relations. Since cultural rights impact so deeply on identities, even symbolic acts can have a significant impact in society and set the stage for more positive changes, changes that go beyond symbolism and moral aspects of policy to material demands that some cultural rights entail, such as language rights or the continuation of a number of traditional occupations linked to land and natural resources.

The three UN mechanisms specific to indigenous peoples, namely the Permanent Forum on Indigenous Issues, the Special Rapporteur on the human rights and fundamental freedoms of indigenous people and the Expert Mechanism on Indigenous Peoples'

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the Kingdom of Hawai'i, and to offer an apology to Native Hawaiians on behalf of the United States. The preamble to the Bill states, inter alia, that the long-range economic and social changes in Hawai'i over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Hawaiian people and that the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions. Section I states, inter alia, that the United States Congress acknowledges the historical significance of the illegal overthrow of the Kingdom of Hawai'i which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people; apologises to Native Hawaiians on behalf of the people of the United States, and expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai'i, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people. Although the road to such reconciliation seems still to be a long one, some useful steps have been taken, such as the establishment of the Office of Hawaiian Affairs (publication of Hawaiian Affairs, Apology Bill; see also [www.oha.org](http://www.oha.org)). In 2008, both Australia and Canada issued apologies to generations of indigenous peoples who had suffered harm in boarding schools established by those states.

**Comment [RM3]:** Please rephrase this sentence – expand on the first few words. Otherwise it's a bit brief/slangy and sticks out a little

**Comment [f4]:** I don't think this makes sense. Suggestion: 'It can enhance public respect for the identity of indigenous peoples and their communities, and even motivate action to mend.....' YES, I AGREE, THANK YOU, ELSA

Rights, should continue and strengthen the integration of indigenous peoples' cultural rights in their respective work—in fact, they should lead in this field.

A welcome development in this area has been the adoption, in 2009, by the Committee on Economic, Social and Cultural Rights of its General Comment on Article 15, paragraph 1 (a) on the right of everyone to participate in cultural life, which also refers to the cultural rights of indigenous peoples.<sup>69</sup>

In this era where colonialism and crimes against humanity are outlawed and respect for human rights is the prevalent moral paradigm, it cannot be permissible to extinguish cultural groups, whether this happens through physical extermination, systematic oppression and discrimination, expropriation, forced removal or forced assimilation. Given the link between peace and human rights, the UN human rights Special Rapporteurs and treaty bodies could become 'peace ambassadors' for cultural rights and show how cultural rights policies could prevent or respond to various conflicts affecting indigenous peoples and dominant societies.

In the discussions on development at the UN, indigenous peoples put forward their paradigms of development that are often quite different from the current dominant paradigm, and correspond to various indigenous world views and cultures. Concepts such as well-being and self-determined development are preferred by indigenous peoples<sup>70</sup> and the UNPFII devoted the special theme of its 9th session in 2010 to 'indigenous peoples'

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<sup>69</sup> E/C.12/GC/21

<sup>70</sup> *Vivir bien* is what the Bolivian indigenous peoples use (in their languages of course). Victoria Tauli-Corpuz, Chairperson of the PFII, often uses the term 'self-determined development'.

development, with culture and identity: articles 3 and 23 of the United Nations Declaration on the Rights of Indigenous Peoples'.<sup>71</sup> Whether states and the international community pursue the Millennium Development Goals or the overall international development goals or the human rights-based approach to development that is now followed by the UN as a methodology, they must take into account the cultural rights of indigenous peoples, including the use of culturally sensitive indicators,<sup>72</sup> implement genuine and effective processes of participation of indigenous peoples through their governance structures, and conduct cultural impact assessments before projects and programmes are decided.

A great gap that remains to be filled is that between the needs of indigenous communities for funding to support cultural projects, such as community museums, and the availability of resources for such projects. It is time for funders to realise that cultural projects of this kind are far from a luxury. They can contribute immensely to the morale and overall economic and social well-being of indigenous peoples and their communities, especially for groups long marginalised and discriminated against. UN country teams (UNCTs) should advocate and support programmes aimed at enhancing the availability of ethnically disaggregated accurate and reliable data. While assessing the situations of indigenous peoples, UNCTs should take into consideration their special social, cultural,

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<sup>71</sup> E/2010/43, paragraphs 4 to 35.

<sup>72</sup> The UNPFII and its secretariat have led, in cooperation with indigenous organisations and other UN agencies, various efforts aimed at creating culturally sensitive indicators of well-being, poverty and sustainability of indigenous peoples. A global synthesis report on 'Indicators of Well-being, Poverty and Sustainability Relevant to Indigenous Peoples' was presented by Victoria Tauli-Corpuz to the 7th (2008) session of the PFII, Doc E/C.19/2008/9; see [www.un.org/esa/socdev/unpfii](http://www.un.org/esa/socdev/unpfii).

political and historical contexts along with statistical data. UNCTs should support and/or undertake programmes aimed at capacity building of their own staff and of indigenous peoples so as to enable them to participate and contribute in programme formulation and to take ownership of programme implementation.<sup>73</sup>

The adoption of the UN Declaration on the Rights of Indigenous Peoples, with its historic, moral, political and legal implications, has already unleashed a tremendous potential for change in terms of states accepting and celebrating diversity. For example, in 2007 Bolivia adopted the Declaration as a law of the country and, in 2008, Guatemala and Ecuador approved legislative reforms recognising the existence of indigenous peoples and the nature of the states as pluricultural. In the case of Ecuador, the new constitution also recognised Quechua and Shuar as official languages, in addition to Spanish. Also in 2008, Australia and Canada issued apologies to indigenous peoples, while Japan recognised the Ainu as the indigenous peoples of the country. The optimism that the Declaration inspires is about humanity preserving its cultural diversity, where indigenous peoples will play a central role as the custodians of living and dynamic cultures.<sup>74</sup>

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<sup>73</sup> A major development in 2008 was the adoption by the UN Development Group (UNDG is a UN executive committee bringing together all the UN system organisations, funds and programmes working on development) of the UNDG Guidelines on Indigenous Peoples' Issues for UN country teams. The Guidelines aim at implementing the Declaration on the Rights of Indigenous Peoples and a human rights-based approach that is culturally sensitive. Capacity-building of UN staff in the field is part of the Action Plan to roll out these Guidelines. For the text of the Guidelines, see [www.un.org/esa/socdev/unpfii](http://www.un.org/esa/socdev/unpfii). A Resource Kit on Indigenous Peoples' Issues has also been produced by the Secretariat of the PFII to facilitate programme officers (the Resource Kit is also accessible through the abovementioned website).

<sup>74</sup> For a discussion of the impact of indigenous cultural perspectives on the Declaration see E-I Daes,

The ultimate test of the Declaration's impact will obviously be proven in practice, in terms of how states and indigenous peoples as well as the UN system and the rest of the international community use and implement it. But to those who say that the Declaration is difficult to implement because 'it is just a Declaration and not a treaty' or 'because it goes too far in the rights it proclaims' I would say this: The manner in which the Declaration was adopted by the United Nations gives it a different status from that of other international declarations. Essentially, the Declaration was the result of negotiations between indigenous peoples and states under the mediation of the United Nations. The length of the negotiations, more than 20 years, the tremendous diplomatic efforts of states and indigenous peoples to reach agreement and the goal of consensus that underpinned the negotiations until the very last minute illustrate the special status of this Declaration—which provides checks and balances for the possibility of implementation at the national level. The human rights contained in the Declaration are not new, but are established in other pre-existing sources of international law, whether normative instruments, jurisprudence, international practice and custom or reputable academic writings. The Declaration sets high standards and has an ambitious vision in terms of what justice is in today's world—and so do the other international human rights instruments. The high standards of the Universal Declaration of Human Rights, of the International Convention on the Elimination of All Forms of Racial Discrimination, of the two International Covenants and of other instruments are not arguments for devaluing them; rather they galvanise the efforts of civil society, states, the intergovernmental

system and others to strive towards the implementation of those standards. And the same, we expect, will be the case with the Declaration.

As the UN Permanent Forum on Indigenous Issues states in its General Comment on Article 42 of the Declaration, the purpose of the Declaration is to constitute the legal basis for all activities on indigenous issues. The Declaration is the most universal, comprehensive and fundamental instrument on indigenous peoples' rights.<sup>75</sup>

What the member states of the UN did not achieve in 1948, while preparing the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide, they were able to accomplish in 2007, by adopting the UN Declaration on the Rights of Indigenous Peoples and boldly recognising 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 states.

**Comment [f5]:** Happy with pluricultural rather than multicultural? YES, THE TERMS HAVE DEVELOPED, SO, IN THIS CASE, WE USE PLURICULTURAL ELSA

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<sup>75</sup> 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](http://www.un.org/indigenous).