

TABLE OF CONTENTS

Page	
	INTRODUCTION page 9
	<i>Scope and approach</i>
	<i>Why have cultural rights been neglected?</i>
	<i>Why are cultural rights important today?</i>
	I. LEGAL HISTORY AND CONTEMPORARY
	CONTEXT
	...page 16
	A. The drafting history of Article 27 of the Universal Declaration of Human Rights and of Article 15 of the International Covenant on Economic, Social and Cultural Rights page 16
	<i>Article 27 of the Universal Declaration of Human Rights</i>
	<i>Article 15 of the International Covenant on Economic, Social and Cultural Rights</i>
	B. Culture, cultural relativism, identity politics page 21
	C. The World Conference Against Racism, Racial Discrimination, Xenophobia and related Intolerance page 29
	D. Dialogue Among Civilizations page 33
	II. THE RIGHT TO PARTICIPATE IN CULTURAL LIFE IN INTERNATIONAL INSTRUMENTS AND PRACTICE
page 36
	A. International instrumentspage 36
	1. <i>Universal Declaration of Human Rights</i>
	2. <i>International Covenant on Economic, Social and Cultural Rights</i>
	3. <i>International Covenant on Civil and Political Rights</i>
	4. <i>International Convention on the Elimination of All Forms of Racial Discrimination</i>
	5. <i>Convention on the Elimination of All Forms of Discrimination against Women</i>
	6. <i>Convention on the Rights of the Child</i>
	7. <i>Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities</i>

8. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

9. *Other instruments*

B. Role of the United Nations human rights treaty bodies with respect to the right to participate in cultural life.....page 43

- 1. *Committee on Economic, Social and Cultural Rights***
- 2. *Human Rights Committee***
- 3. *Committee on the Elimination of Racial Discrimination***
- 4. *Committee on the Elimination of Discrimination against Women***
- 5. *Committee on the Rights of the Child***

C. Role of United Nations bodies other than the human rights treaty bodies...page 51

- 1. *Commission on Human Rights and extra-conventional mechanisms***
- 2. *Sub-Commission on the Promotion and Protection of Human Rights***
- 3. *United Nations Permanent Forum on Indigenous Issues***
- 4. *General Assembly***
- 5. *Security Council***

D. Role of the Office of the High Commissioner for Human Rights.....page 63

E. Role of the United Nations Education, Scientific and Cultural Organization (UNESCO)

page 65

F. Cultural rights and United Nations operations.....page 71

- 1. *Development and cultural rights***
- 2. *Peace operations and cultural rights***

**III. WHAT ARE CULTURAL RIGHTS?
NORMATIVE CONTENT OF THE RIGHT TO PARTICIPATE IN CULTURAL LIFE.....p**

age 88

A. The context and concept of culture.....page 88

B. The fundamental nature of cultural rights: not every rite is a right.....page 92

C. The elements of the right to participate in cultural life.....page 94

- 1. Non-discrimination and equality*
- 2. Freedom from interference with the enjoyment of cultural life
Freedom to create and contribute to culture.*
- 3. Freedom to choose in which culture(s) and cultural life to Participate*
- 4. Freedom of dissemination*
- 5. Freedom to cooperate internationally*
- 6. Right to participate in the definition, preparation and implementation of policies on culture*
- 7. Other elements connected to the right to participate in cultural life*

D. State obligations and violations.....page 119
The minimum core obligations of the state

E. Monitoring cultural rights: indicators and benchmarks.....page 126

F. Justiciable aspects of cultural rights.....page 128

IV SPECIAL GROUPS.....page 130

A. Indigenous Peoples and Minorities: what are their cultural rights?.....page 130

- 1. Some preliminary considerations*
- 2. Special characteristics of cultural rights pertaining to indigenous peoples and minorities*
- 3. Existing and developing international instruments*
- 4. International jurisprudence and other case law (Permanent Court of International Justice, Human Rights Committee, Inter-American*

Court of Human Rights): non-discrimination; participation through own institutions; language rights; right of indigenous peoples to continue certain economic activities linked to the traditional use of land and natural resources; competing rights

5. Practice of international human rights treaty bodies in examining state reports

6. The right to choose in which culture(s) to participate

7. Language rights

8. Freedom of religion

9. Education of the larger society

10. Contact with kin beyond borders

11. Cultural rights, self-determination and autonomy

12. Cultural heritage and traditional knowledge

13. Positive state measures

B. Other Groups

.....page 181

1. Women

2. Children, youth

3. Persons with disabilities

4. Migrant workers, refugees, non-citizens

5. The poor

CONCLUSIONS AND RECOMMENDATIONSpage
192

APPENDICES

Appendix 1

UNESCO Universal Declaration on Cultural Diversity.....page
202

Appendix 2

The Limbourg Principles on the Implementation of Economic, Social and Cultural Rights and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (E/C.12/2000/13).

.....page
209

Appendix 3

Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples

elaborated by Erica-Irene Daes, Special Rapporteur of the UN Sub-Commission on
Prevention of Discrimination and Protection of
Minorities.....page 237

Appendix 4

Overview of select national constitutions.....page 245

Africa (Kenya, Tunisia)

Americas (Guatemala, Guyana)

Asia (Bangladesh, Philippines)

Europe (Bulgaria, Ukraine)

SELECTED BIBLIOGRAPHY

INDEX

INTRODUCTION

Little attention has been paid to cultural rights by the UN human rights bodies and other UN bodies, funds and programmes, with the exception of UNESCO, which includes the promotion and protection of culture in its mission and which has made an important contribution in this area¹. UNESCO has worked to define cultural rights in terms of the rights of creators and transmitters of culture, the rights of the people at large to contribute to and participate in cultural life, and the right of peoples to cultural identity².

Although human rights literature often includes the word *cultural* in the established phrase *economic, social and cultural rights*, it most often does so without addressing cultural rights at all. Recently it seems that even the pious inclusion of the term *cultural* has started to drop off. Yet there has been no explanation of why these rights have been neglected or why more attention should be paid, apart from the reason that, after all, cultural rights are part of the human rights proclaimed in international instruments, and especially in the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights and they therefore need to be taken seriously by all actors concerned, particularly by states and the intergovernmental system.

Some recent writings have contributed to the legal analysis of cultural rights. Others are silent on them.³ The Committee on Economic, Social and Cultural Rights is the principal human rights body that should be dealing with cultural rights, since it monitors the implementation of the International Covenant on Economic, Social and Cultural Rights⁴, has made some good efforts in the last ten years, within the context of its overall priorities, but has not yet been able to exercise the leadership warranted by its

¹ For an extensive review of UNESCO's role, see Kishore Singh, "UNESCO and Cultural Rights", *Cultural Rights and Wrongs*, Halina Niec ed., UNESCO Publishing/Institute of Art and Law, 1998, pp 146-160; also an earlier article by Stephen Marks, "UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture, and Communication", *Texas International Law Journal*, 1977, vol.13, No.1, pp 35-67.

² S. Marks, *ibid.*, p. 50.

³ This is the case, for example in the recent book of Mary Ann Glendon who discusses cultural relativism, but not cultural rights in *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, 2001, Random House, New York.

⁴ The international and regional human rights instruments quoted in this book are reproduced in *Human Rights: A Compilation of International Instruments*, Volume I (Part I and Part II) and Volume II, United Nations Publication, Sales No. E.97.XIV.1 and E.02.XIV.4.

mandate. Other treaty bodies, especially the Human Rights Committee, have approached the issue from the point of view of cultural rights pertaining to minorities and indigenous peoples. A critical review of the treaty bodies' work will follow.

In 2002, the Commission on Human Rights adopted by consensus its first ever resolution on the subject, entitled "Promotion of the enjoyment of the cultural rights of everyone and respect for different cultural identities", possibly opening up the way for more attention to cultural rights⁵.

The aim of this book is twofold. First, I will explore the concept of cultural rights, by reviewing international and national legal instruments, international practice, and especially the role of UN bodies and entities in the promotion and implementation of these rights. Second, I wish to demonstrate that cultural rights are of profound moral, political and economic significance to individuals and groups and that they are concepts on the basis of which moral and material claims can be made and solutions given to long-term problems in societies, thus addressing past injustices and contributing to human development in peace. I will also draw some conclusions and make recommendations on how international organizations, especially the United Nations, can strengthen their role in promoting and protecting cultural rights and *be visible doing so*. I will situate this primarily legal analysis within the political context of current international debates on cultural relativism, racism, dialogue among civilizations and the post-11 September era.

Scope and approach

Five human rights are understood as cultural rights under international law:

1. The right to education;
2. The right to participate in cultural life;
3. The right to enjoy the benefits of scientific progress and its applications;
4. The right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the person is the author, and
5. The freedom for scientific research and creative activity⁶.

⁵ Resolution 2002/26, report of the 2002 session of the UN Commission on Human Rights, E/2002/23-E/CN.4/2002/200.

⁶ The latter freedom is also closely linked with the right to education and the right to participate in cultural life. Although I will discuss the concept of cultural rights in some detail below, I want to point out from the beginning that the Committee on Economic, Social and Cultural Rights as well as UNESCO consider the right to education as a major cultural right and have analyzed it and are actively promoting it. The right to education is also a social and an economic right and is also, in many ways, a civil and a political right (General Comment No.11 (1999) by the Committee on article 14 of the International Covenant on Economic, Social and Cultural Rights regarding plans of action for primary education, E/2000/22, Annex IV). The UN system's development efforts indeed focus considerably on helping to implement the right to education.

Considerable analytical work has already been done on the right to education, the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author—generally referred to as intellectual property rights-- and the other cultural rights mentioned above except the right to participate in cultural life. For this reason this book will focus on this least explored of cultural rights, namely the right to participate in cultural life enshrined in article 27 of the Universal Declaration of Human Rights and Article 15 1 a of the International Covenant on Economic, Social and Cultural Rights. I will only deal with the other cultural rights to the extent necessary in the discussion of the right to participate in cultural life. I occasionally use the term “cultural rights” for convenience instead of the longer “right to participate in cultural life”.

The introduction to this book addresses the questions why cultural rights have been neglected by the intergovernmental machinery, academia and others and the reasons for the importance of cultural rights today. Chapter I discusses the legal history and contemporary context of cultural rights, with special reference to the drafting history of the Universal Declaration and the International Covenant on Economic, Social and Cultural Rights, the debates on cultural relativism, racism, “the dialogue among civilizations” and terrorism. Chapter II is a critical overview of the right to participate in cultural life as it is reflected in international human rights instruments and the practice of UN bodies, agencies and other entities, including field operations in the areas of development and peace. The work of the Committee on Economic, Social and Cultural Rights since its first session and the work of other human rights treaty bodies and of the Commission on Human Rights since 1990 are reviewed in detail. Chapter III is a legal analysis of the normative content of the right to participate in cultural life, including the context of culture and the elements of the right. This Chapter also analyzes state obligations and defines the minimum core obligations of the state, provides an overview of the challenges of monitoring cultural rights and explores the justiciable aspects of the right to participate in cultural life. Chapter IV is devoted to special groups. The first part deals with indigenous peoples and minorities and their right to participate in cultural life and is a lengthy analysis due to the particular significance and challenges faced in this area by persons belonging to indigenous peoples and minorities. The Chapter the discusses this right as it applies to women, children and youth, persons with disabilities, migrant workers, refugees and non-citizens as well as the poor. At the end of the book, in the final chapter, I draw a number of conclusions and include a set of recommendations addressed to international organizations, especially the UN system, and others on how to begin a policy shift to strengthen attention to cultural rights.

Why have cultural rights been neglected?

The prevalent attitude among many human rights experts, including international law specialists, is to avoid discussion of cultural rights lest the lurking issue of cultural relativism appears, implicitly or explicitly, to undermine the delicate and fragile universality concept that has been painstakingly woven over the last five decades.

Therefore, many feel it is better not to talk about cultural rights, but rather to take a low profile approach in order not to “provoke” the cultural relativists. It is generally easier for human rights jurists to put the issue aside and only invoke the legal principle of pacta sunt servanda, in other words demand of governments to implement cultural rights as part of international agreements and expect good monitoring and promotion of same by international bodies. But this formalistic approach is not enough either to dissipate cultural relativism or to promote implementation of cultural rights, which instead must be taken seriously and be discussed and analyzed as fully as the other human rights categories.

Another difficulty lies in the definition of cultural rights, since they are obviously tied to the concept of culture, which is fluid and changing. UNESCO’s definition of culture, which has followed the anthropological paradigm (namely culture as “a way of life”), while extremely useful within the context of UNESCO’s work, is too vague to base actual rights and obligations on⁷. Moreover, anything called a “human right” should not be frivolous, but of obvious fundamental value. The challenge of grappling with the definition of cultural rights has partially prevented promotion of these rights.

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

Political difficulties at the international level are also part of the reason of silence. In an international diplomatic context, governments that are members of UN bodies may not necessarily want to speak of cultural rights in their own or other states unless they are ready to also talk of cultural wrongs, i.e., those customs and prejudices that in fact violate human rights. This is an issue approached cautiously by states. For example, it took from the 1950s to the late 1970s to get UN bodies to see that female genital mutilation is not only a health issue but a human rights issue as well.

One of the most significant difficulties in dealing with cultural rights is that these rights have evoked, for some governments, the scary spectrum of group identities and group rights that they fear could threaten the “nation” state and territorial integrity. The drafting history of Article 27 of the Universal Declaration of Human Rights is telling (see Chapter II below). Official state support of cultural rights has often taken the form of promoting, for example, seemingly innocent folklore while remaining silent or hostile to the promotion of minority languages in the education systems and the media. The other

⁷ UNESCO defines culture as 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”, see UNESCO Universal Declaration on Cultural Diversity, Records of the General Conference, Paris, 15 October to 3 November 2001.

side of this coin is that governments may be wary of the threat that majorities may feel from the promotion of minority cultures which may lead to claims for collective rights. Governments, however, if they have the political will, can find plenty of constructive policy responses, in a holistic approach to cultural rights, which this books advocates.

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

Drawbacks within the international system, as will be demonstrated below, have also been responsible for the neglect of cultural rights. For example within the UN system, the Committee on Economic, Social and Cultural Rights and UNESCO have unfortunately not yet forged the substantive link they were expected to create by the drafters of the International Covenant on Economic, Social and Cultural Rights. This lack of institutional links has impoverished both bodies and has certainly impoverished cultural rights⁸.

Why are cultural rights important today?

For many policy makers globalization and free markets, economic restructuring, economic crises and extreme poverty, the fight against HIV/AIDS and now terrorism seem to have placed cultural policies and cultural rights on the back burner. This is at a time of the most unprecedented mass movement of migrants and refugees around the globe which, together with new technologies and communications, bring cultures in contact at a speed that is tremendously challenging for people and societies to absorb without profound ramifications, sometimes in the form of racism, xenophobia and intolerance, limitations to human rights and outright conflict. These tensions have been exacerbated after the tragic events of September 11th 2001. From the varied reactions that followed September 11th in developing and developed countries it became clear that, despite all else that unites a "globalized" world, in reality there is in many senses a communication dead end at the level of the masses, one that is not only sustained by the poverty divide, but also often fueled by religious fundamentalism and exploited by political opportunism. In this dangerous crossroads respect for cultural freedom, identities and pluralism within a context of a democratic polity is more urgent than ever. To recognize cultural rights as legal rights is a bold statement and key to state action⁹.

⁸ Paul Hunt, "Reflections on International Human Rights Law and Cultural Rights" in *Culture, Rights and Human Rights*, *supra*. 7, p.28.

⁹ Elsa Stamatopoulou, "Protection of National Minorities and Kin-states: an International Perspective", in *The Protection of National Minorities by their Kin State*, European Commission for Democracy through Law (Science and Technique of Democracy, No. 32), Council of Europe Publishing, 2002, p. 90.

Responsible public policies for cultural development and for the protection of cultural rights must now be reclaimed. The World Conference Against Racism, Racial Discrimination, Xenophobia and related Intolerance that took place in Durban, South Africa, in 2001 gave a new impetus to the challenges of diversity of our time. The anti-racism agenda has become even more important after September 11th, especially as it provides a balance to the anti-terrorism agenda and is forward-looking and long-term. It is clear that now more than before the international community and especially the UN need to promote respect for cultural pluralism. Cultural rights are an indispensable component of policies of tolerance, diversity and pluralism. What is more, the UN, as the global forum for its multiethnic and multicultural constituency, must show leadership in the international arena advocating respect for cultural rights as human rights. Such leadership should also be visible, not only because it is very much needed to lift this issue out of oblivion, but also because it can represent a moral voice that will call for concrete respect – the kind that human rights provide- for humanity’s cultures and counter-balance the generalized vilification of some.

There is another reason for paying attention to cultural rights today, and this is the “culturalization” of political life and rhetoric¹⁰. Identity politics have been on the rise within states as well as internationally. This emerging” battle of the cultures” is part of a more fundamental struggle- the struggle for identity, both personal and political¹¹. One reason for this increased assertiveness of identity is that globalization has accentuated local awareness, consciousness, sensitivity, sentiment and passion¹². We have seen a very clear sign of this at human rights debates at the UN after the end of the Cold War, especially in the form of cultural relativism. I will address the issue of cultural relativism below in order to clarify to what extent it touches upon the concept of cultural rights and

¹⁰ Terry Eagleton speaks of the issue in The Idea of Culture, 2000, Blackwell Publishing, Oxford. In Eagleton’s words “... it is political interests which usually govern cultural ones, and in doing so define a particular version of humanity”, p.7; “... culture wars which matter concern such questions as ethnic cleansing, not the relative merits of Racine and soap opera”, p. 51.

¹¹ Margaret Wilson, “Cultural Rights: Definitions and contexts” in Culture, Rights and Cultural Rights: Perspectives from the South Pacific, The proceedings of a colloquium organized by the UNESCO Office for Pacific Member States and the Center for New Zealand Jurisprudence(School of Law, University of Waikato, New Zealand), October 1998; Margaret Wilson and Paul Hunt eds. , 2000, Huia Publishers, Wellington, p.14.

¹² G. Picco, A.K.Aboulmagd, L.Arizpe, H.Ashrawi, R.Cardoso, J.Delors, L.Gelb, N.Gordimer, Prince El Hassan bin Talal, S.Kapitza, H.Kawai, T.Koh, H.Kung, G.Machel, A.Sen, S.Jian, D.Spring, T.Weiming, R.von Weizsacker, J.Zarif, Crossing the Divide: Dialogue among Civilizations, 2001, School of Diplomacy and International Relations, Seton Hall University, South Orange (report of the Special Representative of the Secretary-General on Dialogue among Civilizations and the Group of Eminent Persons selected by the UN Secretary-General).

to what extent it is irrelevant to cultural rights. This analysis will contribute to disentangling the valid from the invalid arguments that see culture only as an obstacle in implementing human rights. One of the challenges in contemporary law and politics is how to ensure that the politicization of culture is a positive and not a negative development¹³ and that it results in the respect and not the denial of human rights.

Respect for and promotion of cultural rights is also closely linked to peace in many parts of the world when it comes to minorities and indigenous peoples. From the Basques of Spain and the Russians of the Baltic Republics to the Kurds of Turkey and the indigenous peoples of Ecuador, defending cultural uniqueness is a profound demand and political rallying point. How can we forget the Albanians' demands of many years for education in their own language in Kosovo and in the Former Yugoslav Republic of Macedonia before conflict broke out in the 1990s? While a serious public policy response to demands for cultural rights may not be the full response to all the issues raised by groups in struggle, such response will go a long way towards solving long-standing disputes that have often led to numerous conflicts around the world.

¹³ Ibid., p.22.

The Universal Declaration of Human Rights

Volume 2

Series Editor: Professor Hurst Hannum

Human rights law has developed from the modest "common standard of achievement for all peoples and all nations," proclaimed by the Universal Declaration of Human Rights in 1948, to a complex and rich substantive tapestry of international and national law. The provisions of the Universal Declaration have been codified and interpreted by a growing number of international bodies, most significantly by the committees created to oversee the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, each of which has over 140 state parties. In addition, the Declaration has served as a model for national constitutions and statutes, many specifically designed to reflect the Declaration's provisions.

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Cultural Rights in International Law

Article 27 of the Universal Declaration of Human Rights and Beyond

By

Elsa Stamatopoulou

Foreword by

Mary Robinson

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CHAPTER ONE

LEGAL HISTORY AND CONTEMPORARY CONTEXT

A. *The Drafting History of Article 27 of the Universal Declaration of Human Rights and of Article 15 of the International Covenant on Economic, Social and Cultural Rights*

Article 27 of the Universal Declaration of Human Rights

The drafting history of the Universal Declaration of Human Rights reveals the difficulties in dealing with cultural rights. UNESCO had proposed the first draft of Article 27. It is indeed impressive that the core debate on whether, apart from individual rights, the Declaration should also recognize group rights and minority rights in particular, took place within the context of article 27 of the Declaration dealing with cultural rights. This discussion was in turn connected with the fierce controversy as to whether the Convention on the Prevention and Punishment of the Crime of Genocide which was being prepared simultaneously to the Universal Declaration, should also address “cultural” genocide besides physical or biological genocide. This parallel and connected history of the two first United Nations human rights instruments is related with extraordinary insight by Johannes Morsink, whose account is the main source for this sub-section.¹

Article 27 of the Universal Declaration states:

- “1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- “2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

¹ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, Philadelphia, 1999, especially pp. 217–222 and 269–280.

The very first draft of paragraph 1 of the article is credited to John Humphrey, the first Director of the Human Rights Division of the United Nations Secretariat, and the first draft of paragraph 2 credited to René Cassin, the famous jurist and representative of France at the UN Commission on Human Rights. The word “freely” in paragraph 1 was added by the Peruvian delegation, while it was the Chinese delegation that included the idea of sharing in scientific advancement, which was viewed not as property of the few but as the heritage of mankind.

The second paragraph of Article 27 became the focus of a controversy about international copyright law on which no consensus existed at the time. The controversy was about some states, including the United States, the United Kingdom and India, viewing international copyright as a form of private property protection, and others, including France, Chile and Mexico, seeing in addition an author’s or an artist’s “moral rights” over the use of his or her work, the latter right remaining or lingering even after the legal rights of commercialization have expired. Thus for the first group of states there was no room for intellectual property/copyright as a human right in the Universal Declaration except in the sense of the right to property, while for the second group of states there was. After long debates at the level both of the Commission on Human Rights and of the General Assembly, Article 27 was enriched by paragraph 2.²

Yet Article 27 does not present a commitment to the respect of diversity and pluralism, assuming somehow that cultural participation will take place in the “one” culture of the “nation-state”. The question about the inclusion of rights for persons belonging to minorities did arise, as was to be expected in the very First Session of the Commission on Human Rights when it established the Sub-Commission on Prevention of Discrimination and Protection of Minorities. In his report on the issue at the Sub-Commission, Humphrey pointed out that the expression “protection of minorities” would normally “include both protection from discrimination and protection against assimilation”. In his definition of “minorities”, Humphrey referred to “groups within a country that differ from the dominant group in their culture,

² The human rights angle of this right has also prevailed in the General Comment of the Committee on Economic, Social and Cultural Rights on article 15, paragraph 1© adopted in 2005 (E/C.12/GC/17 (General Comment), which I discuss in subsequent chapters.

religion or language, and which usually desire to maintain and foster their cultural, linguistic and religious identity”. Given the fact that both the anti-discrimination Article 2 and Article 18 on freedom of religion covered the rights of persons belonging to religious minorities, Humphrey pointed out that the real interest of including an article on minorities would be the other two elements, namely ethnicity and language. Although the draft article also included reference to persons belonging to *religious* minorities, in Morsink’s view, it was ethnicity and language that caused the drafters of the Universal Declaration to reject an article on minorities.³

The text on minorities that was debated at the Sub-Commission read as follows: “In states inhabited by a substantial number of persons of a race, language, or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right, as far as compatible with public order and security to establish and maintain schools and cultural and religious institutions and to use their own language in the press, in public assembly and before the courts and other authorities of the state”.

The United States presented the sole strong opposition to the minority-related article, arguing that its ideas were covered by other articles, including the anti-discrimination Article 2 and by Article 27 on the right to participate in the cultural life of the community. During the drafting debate at the Third Committee of the General Assembly in 1947 the US delegation, headed by Eleanor Roosevelt, claimed that minorities were a European issue and there was no reason to reflect the matter in the Universal Declaration. Roosevelt was supported by Latin American countries and Canada in this position, while Australia declared it had opted for the principle of assimilation of all groups as being in the best interest of all in the long run. In the other camp, in favour of minority rights, were the USSR, Yugoslavia and other Eastern European countries as well as Lebanon and India. Belgium, although hesitating occasionally, also was one of the supporters. Three proposals on minority rights were submitted at the General Assembly Third Committee. When the debate came to a crunch, the USSR, hoping to get developing countries on its side, accused the colonial powers of denying the cultural rights of the people in the colonies and engaged

³ *Supra* 1, p. 270.

in Cold War rhetoric, but this strategy did not have the desired effect and the idea of an article on minorities was rejected.⁴

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

In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief such as: 1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; 2. Destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the groups.⁵

The supporters of such a concept argued that a group could be suppressed by extinguishing their specific traits, as well as their physical destruction, although the argument that finally prevailed was that such provision was inescapably too vague and would invite the risk of political interference in the domestic affairs of states, and that the protection of minorities' culture should be the responsibility of other international bodies. Since then other opinions have argued that cultural ethnocide

⁴ In one of the statements, the USSR delegation said that "...the individual's right to his own language and culture was one of the most important human rights" and that "...it was impossible to ignore the fact that...Australia had carried out a policy of forceful elimination of its aboriginal groups and that the North American Indian had almost ceased to exist in the United States". He went on to say that "...in colonial territories too there were no signs that indigenous culture was being developed and encouraged...Ninety percent of the people in the British colonies were illiterate, for the development of culture and the colonial yoke were mutually exclusive". (Quoted by Morsink, *supra* 13, p. 277.

⁵ Quoted by Morsink, *supra* 1, page 371, footnote 45.

and ecocide are crimes against humanity rather than genocide.⁶ Ben Whitaker, the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his study on genocide, concluded in 1985 that further consideration should be given to this question, including if there is no consensus, the possibility of formulating an optional protocol to the Genocide Convention.

The proposal on cultural genocide in the context of drafting the Genocide Convention at the Sixth Committee of the General Assembly was finally put aside with the argument that the issue of cultural groups would be dealt with by the Third Committee in the Universal Declaration of Human Rights. Denmark followed up on a promissory note made at the Sixth Committee and proposed a text on minorities in the Third Committee that would ensure the right to establish minority schools and receive training in the language of choice. It was turned down as well. In his account of the drafting process of Article 27 and the related debate on minority rights, Morsink demonstrates that, if it had not been for a series of tactical mistakes and facts of coincidence in the debate, minority rights would have been included in the Universal Declaration. As he sees it, the votes in favour were there.

The final wording adopted by the General Assembly for Article 27 includes the prescriptive word *the* in the phrase "the right freely to participate in *the* cultural life of *the* community", thus giving out a signal of limitation to this freedom and an assumption of a homogenous instead of a multicultural society. The International Covenant on Civil and Political Rights adopted eight years later, in 1966, is the most broadly ratified international instrument with binding nature to recognize, in Article 27, that persons belonging to ethnic, religious or linguistic minorities "shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

⁶ Ben Whitaker, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, E/CN.4/1985/6/Corr.1, paragraphs 32-33. "Ecocide" is defined in the Whitaker study as "adverse alterations, often irreparable, to the environment—for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest—which threaten the existence of entire populations, whether deliberately or with criminal negligence". The UN Study on Indigenous Populations (E/CN.4/Sub.2/1983) emphasized the need for special urgent attention to "cases of physical destruction of indigenous communities (genocide) or destruction of indigenous cultures (ethnocide)".

Morsink's view on Article 27 of the Universal Declaration of Human Rights, however, and the possibility of adding minority rights could be seen as too optimistic given that it took the United Nations until 1992 to adopt the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities, not to speak about the draft Declaration on the Rights of Indigenous Peoples which is still under preparation after more than twenty years of drafting. In any case, it is obvious today that cultural rights, which explicitly started as individual rights in the Universal Declaration of Human Rights, have traveled through time to acquire elements of group rights (see below Chapter VII on indigenous peoples and minorities).

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. But in today's interconnected world of greater openness to democracy, avoiding the respect for cultural rights can only lead to frustrations in society and the instigation of conflict.

Article 15 of the International Covenant on Economic, Social and Cultural Rights

The drafting of Article 15 of the International Covenant on Economic, Social and Cultural Rights was done with remarkably little debate by comparison to that of Article 27 of the Universal Declaration of Human Rights. Article 15 reads:

- “1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
- “2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
- “3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
- “4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in scientific and cultural fields.”

Not facing any particular controversy, paragraphs 1(a), 1(b), and paragraphs 2 and 3 were adopted by the UN Commission on Human Rights as early as 1952.⁷ A proposal at the Third Committee of the General Assembly in paragraph 1(a) to include some notion of restriction, as in the phrase of the Universal Declaration of Human Rights “*the* cultural life of *the* community”, that everyone has the right to participate in the cultural life “of the communities to which he belongs” was rejected. In the final wording the Committee recognized the “right of everyone to take part in cultural life”.

The core of paragraph 2 on the steps to be taken for the realization of the rights in paragraph 1 was adopted with virtually no comment made on its content: “The steps to be taken . . . to achieve the full realization of these rights shall include those necessary for the conservation, the development and the diffusion of science and culture”. There was considerable debate, however, about whether or not certain goals of scientific and cultural development should be set out within the provision. It was proposed, for example, that states should undertake to ensure the development of science and culture in the interests of progress and democracy, and of ensuring peace and cooperation among nations. But finally the view prevailed that a statement of aims might provide states with a pretext for abusive control of science and culture, so the amendment was rejected.

Paragraph 3—“The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity”—was proposed on the basis that the concept of freedom for scientific research and creative activity was not covered by the previous provisions of Article 15. Proposals suggested the inclusion of certain objectives for scientific research and creative activity. A Greek amendment suggested that states should give particular encouragement to such creative activity as tends to the healthy development of the human personality. Finally, as in the case of paragraph 2, these amendments were rejected as giving the potential for discrimination on the part of the state. Certain states found the term “indispensable” as too restrictive in the above-mentioned phrase “respect the freedom indispensable

⁷ I base the text on the drafting of Article 15 on Matthew Craven's “The Right to Culture in the International Covenant on Economic, Social and Cultural Rights”, *Cultural Rights and Cultural Policies in a Changing Europe—The Right to Participate in Cultural Life*, Report of the European Roundtable, Helsinki, 30 April–2 May 1993, pp. 142–152.

from the non-discrimination aspect, one could imagine many examples of justiciable cases, such as the prohibition of hunting certain animals or birds for use in traditional ceremonies, the prohibition of speaking a minority or indigenous language in public schools or the teaching of such language in private schools, the lack of state sanctions for acts of harassment by non-state actors towards certain cultural or religious manifestations, the deliberate institutional exclusion by the state of meaningful minority or indigenous representation in cultural policies affecting those communities, the destruction or other measures leading to the inaccessibility of sacred sites and other significant cultural sites of an indigenous or minority community, the prevention of certain traditional economic activities indispensable for the continuation of an indigenous culture, the inclusion of discriminatory and prejudicial language about minority cultures in school curricula and public documents or discourse, the prohibition of participation in or relation with cultural and scientific actors beyond national borders, the persecution of individuals for bearing visible signs of their culture, including the way they dress, or the suppression of works of art that are viewed as going astray from the mainstream.

These examples show how close to reality are situations that can give rise to court cases on cultural rights and are meant to deflate the sense of exceptionality around the idea of justiciability in this area. They also demonstrate the moral, political, social and economic stakes around cultural rights. Some cases of this type have been raised in national courts and the increasing multiculturalism in today's societies together with an increasing awareness of cultural rights may lead to further probing of judicial systems.

CHAPTER FOUR

SPECIAL GROUPS

A. *Indigenous Peoples and Minorities: What Are Their Cultural Rights?*

1. *Some Preliminary Considerations*

The crisis affecting the world's diverse cultures and languages is, according to some estimates, far greater than the biodiversity crisis. Around 90% of the 6000+ currently spoken languages (and the cultures expressed by them) may have become extinct or face extinction in the next 100 years.¹ The Minorities at Risk data set, a research project including issues related to cultural exclusion, has reviewed the situation of minority groups worldwide and estimates that about 900 million people belong to groups that are subject to some form of exclusion not faced by other groups in the state—around one in every seven people around the world.² Yet, the subject of the cultural rights of minorities and indigenous peoples is full of controversy in political and legal theory. For many it is the basis for arguing in favour of group or collective rights, an idea that others resist. The drafting history of Article 27 of the Universal Declaration that I have summarized in Chapter One A bears testimony to this controversy.

The purpose of this preliminary note to the chapter on indigenous peoples and minorities is not to do the work of philosophers or political theorists, but to give a brief account of questions that form a large part of the underlying tensions that travel across disciplines and that are actually, whether consciously or unconsciously, in the minds of real people living their lives as well as in the minds of policy-makers. After

¹ Gonzalo Oviedo, Aimee Gonzalez and Luisa Maffi, "The Importance of and Ways to Conserve and Protect Traditional Ecological Knowledge", paper presented at the UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, 30 Oct. to 1 Nov. 2000, p. 6, quoted in Carlos M. Correa, *Traditional Knowledge and Intellectual Property: A Discussion Paper*, commissioned by the Quaker United Nations Office, 2001.

² Quoted in the UNDP *Human Development Report: Cultural Liberty in Today's Diverse World*, 2004, UNDP Publication, p. 6.

this preliminary note I will proceed to the task of reviewing international law and practice on the matter.

The first basic question is what the interest of society is in protecting the integrity of cultural groups as such, i.e. providing rights beyond the protection of the individual. National, ethnic, religious and linguistic minorities and indigenous peoples are the history-based groups that this discourse is mainly about, although there are numerous other groups rendered vulnerable by society (e.g. persons with disabilities, gay people, homeless people, the extremely poor, just to mention a few) and who are not covered by the mainstream discourse on minorities. Almost everybody would agree that culture gives the context for people to make value judgments and choices about their lives and that we all need this context. Culture in this sense is seen by some as *the* specific culture to which a particular individual is supposed to *belong*, this belonging to a specific group being fundamental and linked to self-respect. According to this theory, society recognizes the value of cultural membership to *the* specific group, say the ethnic group, of a person's origin, as a primary good, closely linked to self-respect, that needs to be protected.³ Therefore, the idea is that the group needs to be protected so that the individual human being can partake in this secure culture. The protective good is *the* secure cultural context of choice within which a person exercises her moral powers. This theory presupposes that each one of us fits neatly within, say, an ethnic community and that each community is surrounded by distinct borders which need protection.

Not everybody sees cultural membership in such clear, neat terms. A person, say, that grew up in a rural minority community, received education in a metropolis in her country, joined a feminist, human rights or other association, was not necessarily popular in her community of birth, migrated afterwards to another country or city and works in a language different from her mother tongue lives simultaneously within various cultural contexts. This story could be true for various members of this person's rural minority, or even for the majority of that rural community that now has very few members remaining in the countryside. This example, all too common in today's world of massive migration, reminds us graphically of an attribute of cultures since time immemorial: in most parts of the world—with the exception

³ Will Kymlicka, *Liberalism, Community and Culture*, Clarendon Press, Oxford, "The Value of Cultural Membership", pp. 162–181.

of a few areas that developed in isolation for long periods—people, groups, nations, countries have been in contact, either peacefully through economic and other relations or through war and domination. Thus cultures have been and are in constant contact with each other, influencing each other, integrating elements of each other, disagreeing with each other, occasionally absorbing or assimilating each other. We are not the self-made atoms of liberal fantasy, certainly, but neither are we exclusively products or artifacts of single national or ethnic communities. No *one* of these entities give full shape and meaning to our life.⁴ Drawing borders around each group culture in order to protect it can be like drawing lines in sand. Linked to the difficulties on the above-mentioned question is the controversy over resources: once we accept that there is a group right to *its* culture, should the rest of the society have the positive obligation to provide resources to preserve a cultural context of a minority group which may not even be so easy to define or may not be so essential for many of those currently or formerly associated with the group? For example, while no one would dispute the freedom of a very small group of people to be the few remaining believers of a religion, is there a social interest in providing resources to preserve such religion at any cost? In case of conflict over resources, what are the limits between what is owed to a minority group and other economic development interests of society?

The second major question is the position of the individual within a cultural group. Groups often want to use the sense of group rights to rule over and force their will upon individuals. The fact that Salman Rushdie was sentenced to death for apostasy for writing *The Satanic Verses* is a sobering reminder of what it really may mean to insist that people must keep faith with their roots.⁵ What are the limits between recognizing cultural rights as collective rights and respecting and protecting the autonomy of the individual, her decision to take risks that may go against a sense of cultural purity? And since groups and individuals sometimes threaten each other, if we advocate a balance between individual and collective rights, what could be the compelling

⁴ Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative", *University of Michigan Journal of Law Reform*, Vol. 25 (1992), pp. 103, 105.

⁵ *Idem*, pp. 99 and 109. Waldron also quotes extensively a passage of Rushdie's essay *In Good Faith*, in which Rushdie defends his book: "*Melange*, hotchpotch, a bit of this and a bit of that is *how newness enters the world*. It is the great possibility that mass migration gives the world, and I have tried to embrace it. *The Satanic Verses* is for change-by-fusion, change-by-conjoining. It is a love-song to our mongrel selves..."

reasons that would place limitations on the rights of the individual in favour of the cultural group or limitations on the group in favour of the individual?

The third issue has to do with remedying historic injustices. Groups claim cultural rights as collective rights *vis-à-vis* the majority society, with corresponding obligations, both negative and positive, which are necessary to preserve and develop the cultural integrity of the group, often in order to remedy historical injustices.⁶ 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. In common criminal or civil cases, modern national legal systems normally provide for a statute of limitations, for example twenty years, so that beyond that time behaviour that the law considers illegal will not hover in perpetuity as an unsolved matter in society and so that the disturbance of the social fabric created by illegality will be laid to rest. It is known that in various parts of the world, age-old traditions that survive modern legal systems can perpetuate family *vendettas* for decades, not allowing society to “forget” or “forgive” a crime, even if it has been dealt with by the official legal system. It is also known that some traditional legal systems place strong emphasis on reconciliation and resocialization so that the social fabric will be mended sooner rather than later.⁷ However, when it comes to historic injustice *vis-à-vis* a group that continues to suffer discrimination and disempowerment by the dominant society, the issue of dealing with such historical injustice gets even more complex and its solution becomes even more significant. Questions arise as to what can constitute fair moral, symbolic or material remedies that will restore

⁶ Anaya 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. S. James Anaya, *Indigenous Peoples in International Law*, 1996, Oxford University Press, New York/Oxford, p. 102.

⁷ A good example is cited by the Special Rapporteur on human rights and fundamental freedoms of indigenous people regarding Greenland Home Rule (E/CN.4/2004, para 55). In Greenland the justice system, although based on the Danish system and administered by the Danish authorities, is responsive to the standards and values of Greenlandic society and traditional Inuit legal practice and customary law, with extensive lay participation. The judicial system differs significantly from the Danish system to which it is attached. Citizens are called to act as district judges, lay judges and defense counsel while local police handle the prosecuting function. In 1994, the Justice Review Commission recommended, *inter alia*, that local judges must have knowledge of the local community and its cultural values, and language skills in Greenlandic.

social justice for the victimized group; how far back in history should a state go to deal with historic injustices; how to deal with the competing rights and needs of other populations, majority and minority, who did not commit these injustices in the past, but are descendants of those who did, and their demands on public resources; how can a “well-meaning state” deal justly with the welfare of its total population; and how can a state take action and what action should it take in various public areas simultaneously so that the effect will be harmonious and peaceful relations among various ethnic, racial, religious and linguistic communities and the dominant society.

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 injustice was done continue or not to suffer discrimination, marginalization and disempowerment by the dominant society. International legal thinking has contributed to solutions by addressing the concept of continuing violations of human rights, i.e. 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 addressed the definition of “continuing act” as one which is 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 it occurs continues to exist as such and not merely in its effects and consequences.⁸ The Human Rights Committee has defined a continuing violation as an affirmation, after the entry into force of the Optional Protocol to the International Covenant on Civil and Political Rights, by act or by clear implication, of the previous violations of the State party.⁹ At the national level, truth commissions and formal apology have been ways of dealing with past injustices and human rights violations.¹⁰

⁸ Report of the ILC, 1976, p. 220.

⁹ *Simunek vs. Czech Republic*, Case No. 516/1992; para. 6.4, fifty-fourth session.

¹⁰ The truth commissions established in Chile after the fall of Pinochet and in South Africa after the end of apartheid are the well-known examples, with varying degrees of success.

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 the Kingdom of Hawai'i, and to offer an apology to Native Hawaiians on behalf of the United States.¹¹ The preamble of 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; apologizes 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 long, some useful steps have been taken, such as the establishment of the Office of Hawaiian Affairs.

At the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance the issue of reparations occupied center stage at the negotiations, sparking controversy, but the conference process was clearly not the forum to set any international standards in this area, especially as no global comparative study had taken place at the time that would provide insight as to where the various legal systems are on this point and how to draw consensus for international standards in this area. Yet the Conference addressed cultural rights eloquently, even if not always naming them as such, within the context of the policies it advocated on indigenous peoples, minorities, Afro descendants, migrants and Roma/Sinti/Travelers.¹²

¹¹ See publication of Hawaiian Affairs, *Apology Bill*, also www.OHA.org.

¹² See detailed account of the conference outcome in Chapter One C above; the full text of the outcome appears in A/CONF.189/12.

A lot of attention is being paid by the UN human rights system to righting the wrongs of the past and certainly the increasing discussions at the Commission on Human Rights on impunity, transitional justice and truth and reconciliation commissions bear witness to this. The Commission on Human Rights at its sixty-first session in 2005, for example, welcomed the Set of Principles for the protection and promotion of human rights through action to combat impunity developed by its independent expert on this subject and encouraged the development of effective measures to combat impunity, including efforts to strengthen domestic capacity and the design of judicial mechanisms and truth and reconciliation commissions of inquiry.¹³

In this era where colonialism and crimes against humanity are outlawed and respect for human rights seems to be a prevalent moral paradigm, it cannot be permissible to extinguish cultural groups via killings, systematic oppression and discrimination, expropriations, forced removal or forced assimilation. The need to address historic injustices looms high on the moral and material agendas of today's societies and I maintain that respect, protection and fulfillment of cultural rights provide a significant response to such historic injustices.

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. While rights of cultural integrity outside the specific context of indigenous peoples have been associated with "minority rights", indigenous rights advocates have frequently rejected calling indigenous groups "minorities" in their attempts to establish indigenous peoples within a separate regime with greater legal entitlements.¹⁴ However, there is an accepted distinction between these two terms, although 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 both to their

¹³ Commission on Human Rights resolution 2005/81 in E/2003/23 (Part I).

¹⁴ James Anaya, "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State" in *Defending Diversity: Case Studies*, Chandra Roy ed., The Sámi Council, Swedish Section, 2004, pp. 9-10.

physical and to their cultural survival as indigenous.¹⁵ International Labour Organisation Convention No. 169 on Indigenous and Tribal Peoples, in Article 1, states the following *in lieu* of definition:

This Convention applies to:

- (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 human rights of minorities have been recognized more explicitly by existing global international instruments than indigenous rights have, while indigenous rights were still being debated in 2006 at the Human Rights Council under the draft United Nations Declaration on the Rights of Indigenous Peoples. At its first session in June 2006 the Council adopted the Declaration and recommended its final adoption by the General Assembly.¹⁶ The rights formulated in this Declaration are more extensive than those recognized for minorities in the existing international instruments. Another draft on indigenous rights is under preparation by the Organization of American States. The only specialized international treaty on indigenous rights is the International

¹⁵ 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 the 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 National 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, p. 63).

¹⁶ Human Rights Council resolution 2006/2 of 29 June 2006, see website of the Office of the High Commissioner for Human Rights, www.ohchr.org.

Labour Organisation Indigenous and Tribal Peoples Convention (No. 169), but it has been ratified by few states, eighteen as of July 2006, and its purpose is not to cover the overall international legal framework of indigenous rights that the UN declaration can cover. Thus various norms of international law regarding indigenous rights are currently still in the making. International bodies have covered this *lacuna* until now regarding indigenous rights by using the analogy to minority rights, as can be seen through the examination of the practice and case law of human rights bodies examined below. I have therefore placed the discussion of minorities and indigenous peoples in the same chapter to cover what is common to both as far as cultural rights are concerned, while making distinct references to one or the other separately when necessary.

2. *Special Characteristics of Cultural Rights Pertaining to Minorities and Indigenous Peoples*

I will argue below that there are special characteristics of cultural rights pertaining to minorities and indigenous peoples, in addition to the general characteristics pertaining to the cultural rights of individuals described in Chapter Three above. In summary, these special characteristics include the following elements:

- (a) The state and its agents have an obligation to respect the freedom of persons belonging to minorities and minority groups to freely participate in cultural life, to assert their cultural identity and to express themselves culturally in the way they choose, i.e. the authorities must not interfere with this freedom unless conditions under (b) below are present. 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. The principles of non-discrimination and equality must guide the state's actions, in accordance with Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. The state must establish laws and policies regarding non-discrimination in the enjoyment of cultural rights. Equality may not amount to forced assimilation. Special positive measures by the state to secure advancement of minorities, i.e. affirmative action, are allowed. The positive actions of the state for the fulfillment of cultural rights, i.e.

- in terms of the provision of resources, subsidies etc., will be guided by the principle of non-discrimination. If the state does not have adequate resources to respond to its obligation to fulfill, it should explore the possibility of international assistance.
- (b) International norms prohibit cultural practices that contravene internationally recognized human rights. Minority and indigenous rights are part of the human rights regime. States should thus adopt preventive and corrective policies and promote awareness of such problems so that such practices stop.
 - (c) Individuals living within groups are free to participate or not to participate in the cultural practices of the group and no negative consequences may ensue because of their choice. In other words, the cultural autonomy of the individual is guaranteed.
 - (d) The cultural rights of minorities and indigenous peoples consist of: the right to education; the right to use their language in private life and various aspects of public life, such as before judicial authorities and to identify themselves as well as place names; the right to establish their own schools; access to mother tongue education to every extent feasible; access to the means of dissemination of culture, such as the media, museums, theatres etc., on the basis of non-discrimination; the right to practice their religion; the freedom to maintain relations with their kin beyond national borders, and the right to participate in decisions affecting them through their own institutions; and the preservation of sacred sites, works of art, scientific knowledge (especially knowledge about nature), oral tradition and human remains, i.e. both the tangible and the intangible objects that comprise indigenous cultural heritage. In the case of indigenous peoples, special cultural rights also include the right to continue certain economic activities linked to the traditional use of land and natural resources.
 - (e) Minorities and indigenous peoples have the right to pursue their cultural development through their own institutions and, through 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 via democratic and transparent processes.
 - (f) The education of the larger society about cultural diversity and minority and indigenous cultures must be pursued by the state. The media and other institutions should play a special role in promoting such knowledge.
 - (g) Although cultural rights have not always been called collective rights in international instruments, it is logically and morally impossible not

- to recognize the collective elements of cultural rights, when speaking of minorities or indigenous peoples. International instruments recognize that individuals belonging to national, ethnic, religious or linguistic minorities and indigenous peoples will enjoy their cultural rights, not only individually, but also as collectivities in community with other members of their group.
- (h) International law is unclear about 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 of the individual's cultural rights vis-à-vis the group could be imposed only when the survival and welfare of the group are threatened and only for as long as the situation of threat persists. Any pronouncement as to when a person's cultural rights may be limited for the sake of the cultural rights of the group would require a case-by-case analysis.

I will analyze the above-mentioned points by reviewing international and regional standards, the practice of international and regional bodies and the jurisprudence of the Permanent Court of International Justice, the Inter-American Court of Human Rights, and the case law of the Human Rights Committee.

3. *Existing and Developing International Standards*

International legal instruments in force systematically recognize the rights of *persons* belonging to national, ethnic, religious or linguistic minorities, not the rights of minorities. At the same time, it is clear that it would make little sense for an indigenous or minority person to exercise his/her cultural rights, e.g. speak his/her language on his/her own. The group context is an indispensable or a facilitating factor for the exercise of cultural rights by persons belonging to minorities and indigenous peoples. The texts of international legal instruments provide elements of recognition of the collective aspect of cultural rights. Article 27 of the 1966 International Covenant on Civil and Political Rights 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 practice their own religion, or 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 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 to 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 recognizes that "(I)n those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language".

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. 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.¹⁷ ILO Indigenous and Tribal Peoples Convention (No. 169, Article 2), spells out the duty of states to promote "the full

¹⁷ African Commission of 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. 417-418.

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". The above-mentioned instruments thus accept that cultural rights, although they are attributed to individuals, they are implemented more meaningfully within a group context.

The draft UN Declaration on the Rights of Indigenous Peoples does refer explicitly to collective rights as well as to rights of individuals.¹⁸

Seventeen of the forty-six articles are about cultural rights: the right of indigenous peoples and individuals to be free from any kind of discrimination, in particular that based on indigenous origin or identity (art. 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 (art. 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 (art. 5); the collective right to live as distinct peoples (art. 7); the right not to be subjected to forced assimilation or destruction of their culture (art. 8); the right to belong to an indigenous community or nation in accordance with the traditions and customs of the community or nation concerned (art. 9); the right to practice and revitalize their cultural traditions and customs and to receive redress for cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent (art. 11); the right to manifest, practice, 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 (art. 12); the right to revitalize and transmit to future generations their histories, languages, oral traditions, 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 (art. 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

¹⁸ Human Rights Council resolution 2006/2 of 29 June 2006, see website of the Office of the High Commissioner for Human Rights, www.ohchr.org.

(art. 14); the right to have the dignity and diversity of their cultures reflected in all forms of education and public information (art. 15); the right to establish their own media in their own languages and have equal access to all forms of non-indigenous media (art. 16); the right to their traditional medicines and to maintain their health practices (art. 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 their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions (art. 31); the right to determine their own identity or membership in accordance with their customs and traditions (art. 33); the right to their distinctive customs, spirituality, traditions, procedures and practices and, in case they exist, juridical systems or customs in accordance with international human rights standards (art. 34); the right of indigenous peoples divided by borders to maintain and develop contacts, relations and cooperation across borders (art. 36).

4. *International Jurisprudence and Other Case Law (Permanent Court of International Justice, Human Rights Committee, Organization of American States): Non-Discrimination; Participation Through Own Institutions; Language Rights; Right of Indigenous Peoples to Continue Certain Economic Activities Linked to the Traditional Use of Land and Natural Resources; Competing Rights*

Permanent Court of International Justice

International jurisprudence of the Permanent Court of International Justice, as early as 1935, in the Court's advisory opinion on *Minority Schools in Albania*, explained minority rights provisions in the European treaties as deriving from equality precepts. According to the Court, this meant that nationals belonging to racial, religious or linguistic minorities should be placed in every respect on a footing of perfect equality with other nationals of the state and that the state should ensure for minority elements suitable means for the preservation of their national characteristics. There would be no equality between a majority and a minority if the latter were deprived of its own institutions, and were

consequently compelled to renounce that which constitutes the very essence of its being a minority.¹⁹ In this opinion, we find elements for positive obligations of the state to *ensure* suitable means for the preservation of national characteristics, as well as the element of participation of a minority in decision-making via its own institutions.

In the *Minority Schools in Albania* case²⁰ the central issue was whether the Greek minority had the right to establish schools teaching the Greek language, even though private school education at the primary level was abolished for all Albanians by constitutional amendment. In the 1920's there were in southern Albania a number of Greek minority schools, all maintained by the state out of the funds of the Ministry of Education. Albanian communities, including the Orthodox community, had the right to establish schools of various grades teaching the language of the people over whom their religious heads had rights of jurisdiction. In a process of secularization of education, in 1933, the Albanian Assembly modified articles 206 and 207 of the Constitution of 1928 to read as follows:

The instruction and education of Albanian subjects are reserved to the State and will be given in State schools. Primary education is compulsory for all Albanian nationals and will be given free of charge. Private schools of all categories at present in operation will be closed.

The Court considered the case in light of the Albanian Declaration made before the Council of the League of Nations on October 2nd, 1921, article 5 of which read as follows:

Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

The position of the Albanian Government was that the above-mentioned Declaration imposed no other obligation upon it, in educational matters, than to grant to its nationals belonging to racial, religious or linguistic minorities a right equal to that possessed by other Albanian nationals; once the latter had ceased to be entitled to have private schools, the

¹⁹ Permanent Court of International Justice, Advisory Opinion of April 6th, 1935.

²⁰ Advisory Opinion of April 6th, 1935.

former could not claim to have them either. According to the Greek Government, the purpose of the above-mentioned Declaration was to ensure full and effective liberty in matters of education; the application of the same regime to a majority and a minority, whose needs are quite different, would only create an apparent equality, whereas the Albanian Declaration, consistently with ordinary minority law, was designed to ensure a genuine and effective equality, not merely a formal equality. The Greek Government also pointed out that the Declaration had to be construed in the light of the historical and social conditions of Albania, in particular to the fact that the rights of the minorities had been long in existence in the Near East, where they were known by the name of community rights; the continuation of the religious and educational autonomy enjoyed by the Greek communities in Albania was a point of the Declaration.

In its opinion the Court addressed the issue of equality, the issue of minority institutions, the issue of mother-tongue education and the issue of resources for such education. The Court pointed out that the idea underlying the treaties for the protection of minorities was to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority and satisfying the ensuing special needs. In order to attain this objective two things were regarded as particularly necessary, namely to ensure that nationals belonging to minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State, and to ensure for the minority elements suitable means for the preservation of their racial particularities, their traditions and their national characteristics. The Court also said that there would be no true equality if a minority were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.

The Court stressed that equality must be both in law and in fact, an effective and genuine equality. The abolition of minority institutions would destroy this equality of treatment, for its effect would be to deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the state.

On resources, the Court quoted article 6 of the Declaration:

Provision will be made in the public educational system in towns and districts in which are resident a considerable proportion of Albanian nationals whose mother-tongue is not the official language, for adequate facilities for ensuring that in the primary schools instruction shall be given to the children of such nationals through the medium of their own language, it being understood that this provision does not prevent teaching of the official language being made obligatory in the said schools.

In towns and districts where there is a considerable proportion of Albanian nationals belonging to racial, religious or linguistic minorities, these minorities will be assured an equitable share in the enjoyment and application of sums which may be provided out of public funds under the State, municipal or other budgets, for educational, religious or charitable purposes.

In quoting the above provision, the Court pointed out that State education so far as it is intended for members of the minorities, will be something additional to private education, and is not meant to take the place of private education. This particular pronouncement of the Court referring to resources for mother-tongue education is a particularly important one for the minorities regime. Finally, the Court found that the Declaration of October 2nd 1921 ensured for Albanian nationals belonging to racial, linguistic or religious minorities the right to maintain, manage and control charitable, religious and social institutions, schools and other educational establishments. This historic case sheds light on elements of cultural rights of minorities that are as valid today as they were in the 1930s.

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 International Covenant on Civil and Political Rights.²¹ Article 27 provides that “[I]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the rights, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”. 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

²¹ General Comment No. 23, CCPR/C/21/Rcv.1/Add.5.

with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority". In the case of indigenous peoples such traditional activities may include fishing or hunting and the right to live in reserves protected by law. The Committee moreover considers that the rights stipulated in Article 27 are also to be enjoyed by non-citizens. As to the term "exist" in Article 27, the degree of permanence of a non-citizen's stay is not relevant. Thus migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights.²² The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon the decision by that State party, but is to be established by objective criteria. In examining States parties reports the Committee has been thorough in its monitoring of cultural rights of minorities, in particular linguistic rights,²³ cultural autonomy in terms of cultural institutions as well as consultation regarding traditional means of livelihood²⁴ threats to indigenous cultures by logging, mining and delays in demarcation of traditional lands,²⁵ protection of sites of religious or cultural significance²⁶ and protection of cultural rights of non-citizens.²⁷

The case law of the Human Rights Committee under the Optional Protocol to the Covenant has reflected this interpretation of Article 27 and has made pronouncements regarding (a) use of land and resources in a way that will respect the culture of a minority or indigenous group,

²² Hurst Hannum points out that this interpretation of the term "minorities" by the Committee does not appear to be a persuasive interpretation of Article 27, as is attested by the legislative history of the International Covenant on Civil and Political Rights, other UN documents and literature ("New Minority Rights for the Twenty-First Century", in *The Universal Declaration of Human Rights: Fifty Years and Beyond*, Danieli/Stamatopoulou/Dias (eds.), 1998, Baywood Publishing Company, Amityville/New York, p. 169). I agree that it is important to keep the term "minority" for "separate, distinct groups, well-defined and long-established on the territory of a state" as was underlined in a paper on Article 27 prepared by the Secretary-General in 1955. International human rights instruments adopted well after the Covenant defined migrant workers and non-citizens as distinct from minorities.

²³ For example A/56/40, para. 79(5) where the Committee welcomes Uzbekistan's language policy whereby education at all levels is offered in ten languages, including the languages of the minority groups.

²⁴ For example A/55/40, para. 75, where the Committee notes positively the transfer of certain cultural institutions to the Sami in Norway as well as the full consultation with the Sami in matters affecting their traditional means of livelihood.

²⁵ For example A/55/40, para. 379 regarding Guyana.

²⁶ For example A/55/40, para. 510 regarding Australia.

²⁷ For example A/55/40, para. 155 regarding the Korean minority in Japan.

(b) the possible limitations of such rights of the group by other development concerns in the area, (c) the requirement of consultation by the state with the minority group concerned by a decision that may affect its use of the land and resources, and (d) on the issue of the sensitive limits between the cultural rights of a member of a group and what the group perceives as its own cultural rights. I discuss some of these cases below.

The case *Mahuika et al. v. New Zealand* is an eloquent example.²⁸ The Committee accepted that the use and control of fisheries was an essential element of the culture of the minority to which the complainants belonged and it recalled that economic activities might come under the protection of Article 27, if they are an essential element of the culture. In a similar case, *Ominayak v. Canada*, the Committee considered Article 27 to extend to economic and social activities on which the Lubicon Lake Band of the Crees relied.²⁹ The Committee found illegal the granting of leases for oil and gas exploration and for timber development in the indigenous land, since the survival of the indigenous band as a distinct cultural community was closely connected to the sustenance that it derived from the land.

Yet the Committee grappled with the conflict between the overall development needs of the state and the need for indigenous people and groups to maintain and develop their culture via use of land and natural resources. In the *Lansman et al v. Finland* case of 1994³⁰ the Committee expressed understanding for the state's wish to encourage economic development and stated that "... measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a violation of Article 27". In another case regarding Finland decided in 1996, *Lansman et al. v. Finland*,³¹ the Committee repeated and refined its view stating that "... measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under Article 27... The Committee deems it important to point out that the State party must bear in mind when taking steps affecting Article 27, that though different activities in themselves may not constitute a violation of this Article, such activities, taken together,

²⁸ A/56/40, Volume I, Annex X, A (Communication No. 1547/1993).

²⁹ A/45/40, Annex 9(A) (1990).

³⁰ CCPR/C/52/D/511/1992, Case No. 511/1992.

³¹ CCPR/C/58/D/671/1995, Case No. 671/1995.

may erode the rights of Sami people to enjoy their own culture". In the same case, the Committee examined carefully whether the traditional Herdsmen's Committee that represented the Saami of the area was consulted and found that this was the case and that that body did not react negatively to the plans for logging in part of the area where the Saami were pursuing reindeer husbandry.

Another important case is Francis Hopu and Tepoaitu Bessert v. France³² where the Committee observed that the objectives of the Covenant require that the terms "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 the burial site constitutes 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.

The Committee has also recognized that an indigenous individual's cultural rights (at least some of them, especially language rights) need membership within a group in order to be enjoyed. In the case of Lovelace v. Canada the Committee held that Canada's Indian Act denying Indian status and benefits to an indigenous woman marrying a non-indigenous man amounted to a violation of Article 27 because her right to access her native culture and tongue could only be found within the Tobique Reserve where her community exists.³³ In another case, Kitok v. Sweden, the Committee has given priority to the cultural survival of an indigenous group, the Saami, via traditional economic activity as compared to an individual's right to conduct such economic activity.³⁴ The Committee recognized reindeer herding as essential to

³² CCPR/C/60/D/549/1993/Rev.1, Communication No. 549/1993.

³³ A/36/40, Annex 7(G) (1998).

³⁴ A/43/40, Annex 7(G) (1988).

Saami culture and found that Kitok, who had lost his membership in the Saami community and had been denied readmission by the village, did not have his rights under Article 27 violated. The legislation that restricted Kitok's participation in Saami cultural life via reindeer herding was justified as a means of ensuring the viability and welfare of the Saami as a whole. In the case *Toala et al. v. New Zealand*, the Committee held that, where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority group as a whole, the Committee may consider whether the limitation at issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected.³⁵

The Committee's jurisprudence leads to the conclusion that limitations on the cultural rights of an individual may be permissible when there is a danger to the survival and welfare of a minority or an indigenous people. In the cases discussed above, Lovelace's participation in the cultural life of her community would presumably not threaten the community's survival and welfare, while Kitok's participation via economic activity would,³⁶ the underlying logic being that allowing Kitok to practice reindeer husbandry could create a precedent risking the viability and welfare of the Saami as a group.

Organization of American States

The Organization of American States has also upheld the norm of the survival of indigenous peoples as distinct cultures.³⁷ 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 International Covenant on Civil and Political Rights and found the special protections accorded to the indigenous peoples for the preservation of their cultural identity should extend to the aspects linked to productive organization, which includes, among other things,

³⁵ A/56/40, Vol. I, para. 165.

³⁶ It is interesting to note that after the Lovelace case, Canada revised the law found illegal by the Committee and this resulted in protest by the indigenous community mainly based on concerns over the economic consequences of belonging to the tribe.

³⁷ The discussion of OAS is based on Anaya, *Indigenous Peoples in International Law*, 2nd edition, 2004, Oxford University Press, New York/Oxford, P. 101.

the issue of ancestral and communal lands.³⁸ 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."³⁹ As Anaya points out, it is interesting that the Commission invoked Article 27, although Brazil was not a party to the Covenant, thus indicating the norm's possible character as customary international law.

In a groundbreaking 2001 decision, the Inter-American Court of Human Rights, in *Awas Tingni Mayagna (Sumo) Communities v. Nicaragua*,⁴⁰ recognized the fundamental relation of indigenous communities with their lands which is also the basis of their cultures, their spiritual life and 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 customary law, values and customs.⁴¹

³⁸ 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 by Anaya.

³⁹ Case No. 761 (Brazil), Inter-Am. Commission Res. No. 12/85 (March 5, 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 by Anaya.

⁴⁰ Decision of 31 August 2001, Case No. 79, OAS website, www.OAS.org, paras. 138, and 149. 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".

⁴¹ 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 by Sehr Hussain and Saima Zaman in "Land, Culture and Identity: The Case of the Kalasha", in *Reclaiming Balance: Indigenous Peoples, Conflict Resolution and Sustainable Development*, V. Tauli-Corpuz and J. Carino (eds), Tebtebba Foundation (Indigenous Peoples' International Centre for Policy Research and Education), Baguì City, 2002, pp. 267-291.

5. Practice of International Human Rights Treaty Bodies in Examining State Reports

Apart from 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 particular attention to language rights,⁴² cultural autonomy in terms of cultural institutions as well as consultation regarding traditional means of livelihood,⁴³ the obligation for the state to provide protection from threats to indigenous cultures by logging, mining and demarcation of indigenous lands,⁴⁴ protection of sites of religious or cultural significance⁴⁵ and protection of cultural rights of non-citizens and immigrant communities.⁴⁶

The Committee on Economic, Social and Cultural Rights has shown interest in the lack of opportunities for education of minorities in their own languages,⁴⁷ non-discrimination in national legal frameworks,⁴⁸ and the need for steps to safeguard the cultural identity and heritage of ethnic groups.⁴⁹

The Committee on the Elimination of Racial Discrimination has systematically focused on language rights of minorities, indigenous peoples and migrants in education as well as in the media.⁵⁰ The Committee has also paid attention to the following other aspects of cultural rights related to groups: use of minority languages in administration⁵¹ and health services,⁵² measures for regaining linguistic and cultural identity,⁵³

⁴² For example A/56/40, para. 79(5) where the Committee welcomes Uzbekistan's language policy whereby education at all levels is offered in ten languages, including the languages of the minority groups.

⁴³ For example A/55/40, para. 75 where the Committee notes positively the transfer of certain cultural institutions to the Sami in Norway as well as the full consultation with the Sami in matters affecting their traditional livelihood.

⁴⁴ For example A/55/40, para. 379 regarding Guyana.

⁴⁵ For example A/55/40, para. 510 regarding Australia.

⁴⁶ For example A/55/40, para. 155 regarding the Korean minority in Japan; A/49/40, regarding migrants in Slovenia.

⁴⁷ For example E/2000/22, para. 231 regarding Bulgaria.

⁴⁸ For example E/1998/22, para. 79 regarding Zimbabwe.

⁴⁹ For example E/1997/22, para. 209 regarding Guinea.

⁵⁰ For example 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.

⁵¹ For example A/45/18, para. 133 regarding Czechoslovakia.

⁵² For example A/46/18, para. 234 regarding Australia.

⁵³ For example A/51/18, para. 111 regarding Hungary.

preservation of cultural identity of minorities,⁵⁴ policies to ensure that tribal people live according to their original customs,⁵⁵ prevention of the illegal export of indigenous art,⁵⁶ promotion of multicultural training for teachers,⁵⁷ enactment of legal provisions to preserve the existence, culture and traditions of minorities,⁵⁸ teaching the history of different ethnic groups and cultures at schools,⁵⁹ concern over budget cuts in mother tongue education,⁶⁰ concern over assimilation,⁶¹ concern over different levels of protection to different groups,⁶² ensuring the participation of indigenous people in decisions affecting lands, culture, traditions,⁶³ concern over the lack of statistical and qualitative data on the demographic composition of the population,⁶⁴ cultural autonomy⁶⁵ and regional cultural development.⁶⁶

In conclusion, human rights treaty bodies have shown a keen interest in 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, having thus helped clarify the concept of cultural rights. The elements that the treaty bodies have focused on mostly 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, as for example, the right to choose in which culture or cultures to participate.

In conclusion, the human rights treaty bodies, in interpreting the application of the treaties regarding cultural rights, are recognizing as

⁵⁴ For example A/48/18, para. 113 regarding Poland.

⁵⁵ For example A/45/18, para. 73 regarding Bangladesh.

⁵⁶ For example A/45/18, para. 246 regarding New Zealand.

⁵⁷ For example A/45/18, para. 273 regarding the Byelorussian SSR.

⁵⁸ For example A/46/18, para. 68 regarding the Ukrainian SSR.

⁵⁹ For example A/46/18, para. 101 regarding Burundi.

⁶⁰ For example A/46/18, para. 214 regarding Sweden.

⁶¹ For example A/46/18, para. 136 regarding Ecuador.

⁶² For example A/48/18, para. 431 regarding Germany.

⁶³ For example A/50/18, para. 490-492 regarding El Salvador.

⁶⁴ For example A/51/18, para. 43 regarding Colombia.

⁶⁵ For example A/51/18, para. 111 regarding Hungary.

⁶⁶ For example A/53/18, para. 405 regarding Morocco.

elements of these rights the fundamental principle of non-discrimination in the enjoyment of cultural rights, language rights in education, administration, health services and the media, access to the media for the dissemination of culture, inter-cultural education, the obligation of the state to protect the cultural rights of minorities and indigenous peoples and to protect the traditional lands and natural resources of the latter, effective consultation regarding cultural matters and cultural autonomy in terms of cultural institutions. Together with the refinement of these elements by the case law of the Human Rights Committee, the human rights treaty bodies have contributed significantly to the clarification and promotion of the cultural rights of minorities and indigenous peoples.

6. *The Right to Choose in Which Culture(s) to Participate*

We have seen from case law analyzed above that international bodies have taken pains to delineate the borders between the individual and the group in the case of cultural rights. Another border between the individual and the group is that an individual within a minority or an indigenous people is free to exercise or not to exercise her/his rights as minority or indigenous person, i.e. the cultural autonomy of the individual is recognized. The minority or indigenous group must respect the internationally recognized rights of its members. According to the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (CSCE), paragraph 38, "... States, in their efforts to protect and promote rights of persons belonging to national minorities, will fully respect their undertakings under existing human rights conventions and other relevant international instruments...". Paragraph 32 states that "to belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice" and "no disadvantage may arise for a person belonging to a national minority on account of the exercise or non-exercise of any such rights".⁶⁷ A similar provision is included in Article 3 of the Declaration on the Rights of Persons Belonging to National or Ethnic,

⁶⁷ For the Copenhagen Document, adopted in 1990, see www.osce.org; it is also printed as an annex in W. Kemp ed., *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities*, 2001, Kluwer Law International, The Hague/London/Boston.

Religious and Linguistic Minorities. The Declaration also provides, in Article 4, that the expression by minorities of their special characteristics is limited when "...specific practices are in violation of national law and contrary to international standards".

The draft United Nations Declaration on the Rights of Indigenous Peoples indirectly recognizes the same principle by stating, in Article 34, that "(I)ndigenous 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*" [emphasis added].⁶⁸ Article 46 of the Declaration also clearly underlines the human rights framework in the exercise of collective rights, by stipulating that "[i]n the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected" and that the provisions of the 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 a group cannot oblige an individual within it to exercise his/her rights *as an indigenous person*, a group cannot impose indigeneity 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.

As the UNDP 2004 Human Development Report points out, it is particularly important not to fall into the confusion of taking unexamined traditionalism to be part of the exercise of cultural liberty and also not to see the expansion of multiculturalism as an end in itself—an end that could yield a situation in which the freedom of individual members of the community, female members for example, are severely violated.⁶⁹

⁶⁸ Human Rights Council resolution 2006/2 adopted on 29 June 2006. It is expected that the Declaration will be adopted by the General Assembly by the end of the 61st session of the General Assembly.

⁶⁹ *Human Development Report: Cultural Liberty in Today's Diverse World*, 2004, UNDP publication, pp. 24–25.

7. Language Rights

Because language is so central to our social being, it is subject to all sorts of domination, restriction and narrowing.⁷⁰ Political power wars, in times of conquest and occupation or times of peace have been fought over and through language regulation. Among the most significant features of the cultural rights of indigenous peoples and minorities are those linked with language. Language can provide an essential cultural distinctiveness to any people. It is not only a medium of communication, but also a crucial element in the structuring of thought processes and in providing meaning to the natural and social environment of any person.⁷¹ If a person's individual right to her language is to be respected, the collective or public use of minority or indigenous languages is crucial, especially in schools, but also in the media, the courts and the administration. There is no more powerful means of "encouraging" individuals to assimilate to a dominant culture than having the economic, social and political returns stacked against their mother tongue.⁷²

Indigenous peoples and minorities are still victims of assimilationist policies that often lead to the disappearance of languages and cultures. Such policies have sometimes been considered as a form of ethnocide.⁷³ In some countries indigenous and minority languages have been recognized as national languages, in others they are only tolerated. The Committee on Economic, Social and Cultural Rights has stated that the specific legal obligations of states regarding the right to education include taking positive measures to ensure that education is culturally

⁷⁰ Tony Crowley, *Wars of Words: The Politics of Language in Ireland 1537–2004*, Oxford University Press, 2005, p. 205. Crowley's excellent book is the first comprehensive survey of the politics of language in Ireland during the colonial and post-colonial periods.

⁷¹ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, E/CN.4/2002/97, para. 59.

⁷² UNDP *Human Development Report: Cultural Liberty in Today's Diverse World*, 2004, UNDP publication, p. 33.

⁷³ *Supra* 71, footnote 26. Stavenhagen gives the following definition of "ethnocide": "Ethnocide is a process of cultural change and destruction as a result of specific policies that undermine a cultural community's ability for self-preservation". Since ethnocide is viewed by many as a serious violation of human rights, reminding of "genocide", it would be important to keep a similar rigor in the definition of ethnocide. In the Genocide Convention, intent is a crucial element of the definition of genocide, while intent is not included in Stavenhagen's definition of ethnocide, which may be overly broad.

appropriate for minorities and indigenous peoples, and of good quality for all.⁷⁴ The balance between the legitimate need of the state for some degree of linguistic uniformity and the need of minorities for the practical and/or symbolic recognition of their languages may not be easy to determine, but good faith efforts to arrive at such a balance are essential to maintain intra-state harmony.⁷⁵ In some cases, special legislation recognizing indigenous languages has laid the foundation for enhanced inter-cultural understanding. In Mexico, for example, Congress adopted in 2003 the General Act on the Linguistic Rights of Indigenous Peoples and the National Institute of Indigenous Languages was established.⁷⁶

Education in the mother tongue is one of the most desired aspects of this right, but its implementation encounters difficulties—in addition to lack of political will—regarding commitment of resources and specialized teacher training. The international human rights instruments clearly recognize language rights and international human rights procedures pay special attention to them, including the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. At the same time the recognition of language rights is limited, although a tendency can be seen in the views expressed by international human rights bodies that the tendency is to expand them, especially in primary education. In terms of education in the mother tongue, the state's obligations are to facilitate access and opportunity to such education⁷⁷ and to involve the full participation of the groups concerned in the decisions and policies affecting language and education in the mother tongue. Draft instruments on indigenous rights go far beyond this in providing for control of education programmes by the indigenous communities.⁷⁸ The Special Rapporteur on the right

⁷⁴ General Comment No. 13 on the right to education, Article 13 of the Covenant, E/2000/22, para. 50.

⁷⁵ See generally Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, 1990, University of Pennsylvania Press, Philadelphia.

⁷⁶ Report of the Special Rapporteur on the human rights and fundamental freedoms of indigenous people regarding his visit to Mexico, E/CN.4/2004/80/Add.2, para. 13.

⁷⁷ For example, Article 45 of the Convention on the Rights of Migrant Workers and Members of Their Families, paragraph 34 of the Copenhagen Document, Article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Stronger language is included in terms of obligations on the Draft Declaration on the Rights of Indigenous Peoples, Article 15.

⁷⁸ For example, paragraph 30 of the Draft Principles and Guidelines for the Protec-

tion of the Heritage of Indigenous Peoples (see Appendix Three), states that "Governments should provide indigenous communities with financial and institutional support for the control of local education through community-managed programmes, and with use of traditional pedagogy and languages".

to education has pointed out that the right to be educated in one's mother tongue has been on the international human rights agenda since the 1950s, but controversies intensified in the 1990s; the financial implications of multilingualism have further exacerbated the existing controversies and demands that minority schools be made "free", i.e. state-financed, are often made but seldom granted.⁷⁹

The tumultuous drafting history of Article 27 of the Universal Declaration of Human Rights and the related history of the non-inclusion of cultural rights for minorities in the Universal Declaration of Human Rights summarized in Chapter One above, remind us of both their historic significance for those groups and their sensitivity for states. During the preparation of the Convention on the Prevention and Punishment of the Crime of Genocide, there are drafts indicating a relationship between genocide and cultural rights of minorities. In draft article 1 prepared by the Secretariat "cultural genocide" was defined as follows:

Destroying the specific characteristics of the group by (a) forced transfer of children to another human group; or (b) forced and systematic exile of individuals representing the culture of a group; or (c) prohibition of the use of the national language, even in private intercourse; or (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersal of documents and objects of historical, artistic or religious value and of objects used in religious worship.⁸⁰

Thus language was viewed as an issue of profound significance for the survival of minorities as such, although it was finally excluded from the definition of genocide. It was felt at the time of the drafting of the Convention that such issues should better be dealt with under the human rights agenda, in particular under the Universal Declaration of Human Rights, as related in Chapter One above. A draft article on cultural

tion of the Heritage of Indigenous Peoples (see Appendix Three), states that "Governments should provide indigenous communities with financial and institutional support for the control of local education through community-managed programmes, and with use of traditional pedagogy and languages".

⁷⁹ Report of the Special Rapporteur to the Commission on Human Rights, E/CN.4/1999/49, para. 66.

⁸⁰ Quoted by Patrick Thornberry in *International Law and the Rights of Minorities*, 1991, Oxford University Press, Oxford, New York, Toronto, p. 71. The Sixth Committee of the UN General Assembly decided not to include a provision on cultural genocide by 25 votes to 16 with 4 abstentions (*ibid.*, p. 73).

rights that was not included in the Universal Declaration of Human Rights was essentially about language rights in the education system, in public life and in public administration. It was widely assumed during the drafting of Article 27 of the Universal Declaration of Human Rights that states would not be placed under the obligation of providing special schools for persons belong to linguistic minorities.⁸¹

Through the field of education, especially public education that is state-controlled, states have always attempted to shape the "hearts and minds" of future citizens, to instill awareness of histories made up or true, to un-do histories, to create, re-create or do away with identities. Until the 1950s Maori children in New Zealand were still caned for speaking their language at school and it is only a sign of hope and lesson for others that today Maori is an official language in that country along with English. Despite very slow progress, the thinking on this issue has developed, so that it is today compelling to see linguistic education for minorities and indigenous peoples in a clearer, human rights framework.

Various experiences at the national level demonstrate this point. In Mexico, in the 1960s, the Ministry of Public Education inaugurated an indigenous educational curriculum at official primary schools, which eventually had several thousand bilingual teachers. Training, however of the bilingual teachers proved inadequate and the curriculum never received the necessary support and resources from the education authorities to become a genuine educational option for indigenous children. Twenty-five per cent of the indigenous population over 15 years of age is illiterate, women in greater proportion than men. Thirty-nine per cent of the indigenous population between 5 and 24 years of age does not attend school. In response to insistent requests from indigenous organizations, three indigenous universities have been established, as has the national Institute of Indigenous Languages. Indigenous bilingual and intercultural education has been one of the most visible results of indigenous policy in Mexico and certainly contributes to the cultural rights of indigenous peoples, although the indicators for this educational sector are still below national average. Still, government assistance is provided to 1,145,000 pupils from 47 indigenous groups in the form of 50,300 teachers in 19,000 educational centers through Mexico's bilingual and intercultural education programme.⁸²

⁸¹ Thornberry, *ibid.*, p. 179.

⁸² E/CN.4/2004/80/Add.2, paragraphs 49 and 62; E/CN.4/2005/88, para. 25.

In Chile, the Ministry of Education was reported to be starting up a bilingual intercultural education programme based on sound theoretical and pedagogical principles, as the country's educational system had not been able to meet indigenous peoples' demand for the protection, preservation and promotion of their traditional culture.⁸³

In Guatemala, the 1985 Constitution recognizes the value of indigenous languages and stipulates that in schools established in areas of predominantly indigenous population, education shall be conducted preferably in bilingual form. The Agreement on Identity and Rights of 1995 contains a broad range of measures for reviving and protecting indigenous languages and promoting their development and use, and initiating a major reform of the education system in order to consolidate bilingual and intercultural education and guarantee access to education for indigenous people. Although bilingual education has been accepted at the political level, problems of resources for it have continued, including teacher training and appropriate curricula and teaching materials.⁸⁴

In parts of the world other than Latin America, indigenous languages have been recognized as well, albeit at different levels.⁸⁵ In Sweden, for example, a law adopted in 2000 grants the right of individuals to use the Saami language in dealings with the administration and the courts. In the Russian Federation, the 1999 Federal Law on Guarantees of the Rights of Small Indigenous Peoples of the Russian Federation establishes protection for the traditional cultures and languages. Namibia's Constitution recognizes the Nama language and the South African Constitution promotes the protection of the Khoi, Nama and San languages. One of the best examples often cited is that of New Zealand, where Maori went from being a forbidden language at schools in the 1950s to being a funded language in pre-schools, primary schools, secondary schools and universities, through the adoption of the 1989 Education Act. In Canada, the government decided to establish and fund a new Aboriginal Languages and Cultures Centre, as part of an approach to preserve, revitalize and promote Aboriginal languages and cultures.⁸⁶

There has been much concern about the burden of the cost in recognizing minority and indigenous languages by the state in the system

⁸³ E/CN.4/2004/80/Add.4.

⁸⁴ E/CN.4/2003/90/Add.2, para. 51, 52, 54 and 55.

⁸⁵ Examples cited in E/CN.4/2002/97, paragraphs 32, 33 and 60.

⁸⁶ E/CN.4/2005/88/Add.3 para. 66, report of the Special Rapporteur on the human rights and fundamental freedoms of indigenous people on his mission to Canada.

of public education and in public administration. It is of course fully recognized by international human rights law and practice that a fair administration of justice and a fair trial in particular includes the requirement that the defendant will be provided with language facilities if he or she does not understand the official language.⁸⁷ Regarding the cost for use of minority and indigenous languages in the system of education and in public administration, it would be useful to conduct studies of programmatic costs. Some such studies have been conducted and are quoted in the 2004 UNDP Human Development Report, with eye-opener statistics that demystify this issue. The conclusion is that nowhere do the costs of bi-lingual education appear to be prohibitive and that they could definitely be met with some additional donor support.

The 2004 Human Development Report quoted the example of Guatemala where an examination of the costs and benefits of bilingual education for indigenous people estimated that there would be a \$5 million cost savings thanks to reduced repetitions, savings equal to the cost of providing primary education to about 100,000 students a year. Another study in Burkina Faso demonstrated that the annual recurrent costs (teachers, supplies, maintenance) per student in a bilingual school is 77,447 CFA francs, while in a bilingual school 104,962 CFA francs; and the chance of success in obtaining a primary education certificate is 72% in a bilingual school, while only 14% in a conventional monolingual school. Interesting statistics are also published in a 2004 paper of the Secretariat of the Convention on Biodiversity entitled "Indicators for assessing progress towards the 2010 target: status and

⁸⁷ See for example Principle 14 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, adopted by the UN General Assembly in 1988 (*A Compilation of International Human Rights Instruments, Volume 1 (First Part)*, United Nations, 1993, pp. 265-273); paragraph 6 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the UN General Assembly in 1990 (see *idem*, pp. 275-289); Article 18.3 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the UN General Assembly in 1990 (see *idem*, pp. 550-589); Article 5.1 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the UN General Assembly in 1985 (see *idem*, pp. 664-668). Recognized as the principle is, implementation is slow. It took for example until 2004 for Finland to pass the Saami Language Act that guarantees the use of the Saami languages by the courts and public authorities in the Sami homeland (Preliminary review by the Coordinator of the International Decade of the World's Indigenous People, E/2004/82, paragraph 53).

trends of linguistic diversity and numbers of speakers of indigenous languages".⁸⁸

While realism of the politicians in a country with many languages would consider the unequal treatment among them as normal, including due to resource reasons, an enlightened public policy must take into account the real cost to society of monolingual education. Such cost would need to factor in the resource and social implications of children and youth out of school, of delinquency, of lack of a trained workforce and of dependency on welfare.

Understandable as resource problems are, they are not always the real issue. It is clear that any public expense should be viewed holistically. For example, one should calculate the school drop out rate, or push-out rate as supporters of mother-tongue education call it, of minority or indigenous children at early ages due to the language barrier and what this means for a society at many levels and in the long-run. In terms of the cost of using minority or indigenous languages in public administration, one must ask the question to what extent a more equitable employment policy in the public sector of persons belonging to minorities or indigenous peoples, especially in geographical areas where such populations are concentrated, may not address the issue to a large extent. This is yet another demonstration of the inter-complementarity of human rights and, in the example just mentioned, such a policy would be a way of ensuring both cultural rights and the right to take part in the conduct of public affairs and have access to public service.

Along with the political and resource-related controversy there is considerable and irresponsible policy confusion created about the effectiveness of mother-tongue education, especially in the early stages of schooling, as many experts have underlined. One of the most eloquent experts on this issue, Tove Skutnabb-Kangas, points out that sound research shows that the longer indigenous and minority children in a low-status position have their own language as the main medium of teaching, the better they also become in the dominant language, provided, of course, that they have good teaching in it, preferably given by bilingual teachers. The worst results obtained in tests, including

⁸⁸ UNDP *Human Development Report: Cultural Liberty in Today's Diverse World*, 2004, UNDP publication, pp. 61-62; and UNEP/CBD/SBSTTA/10/INF/21.

high percentage of push-outs, were with students in regular submersion programmes where the students' mother tongues were either not supported at all or where they only had some mother-tongue-as-a-subject instruction. Skutnabb-Kangas concludes that minority children must be taught their own language as the main medium of teaching at least during the first 8–9 years of schooling, preferably longer. She is critical of the hesitance of the Advisory Committee on the Framework Convention on the Protection of National Minorities and points out that state reluctance to grant educational linguistic human rights to minorities is based on misplaced and outdated ideologies, that reflect a belief that the existence of minorities and their reproduction of themselves as minorities, partly through mother-tongue medium education, necessarily lead to the disintegration of nation states. In fact, she points out, it is lack of basic linguistic human rights that contributes to conflict and tension, while granting such rights might be part of a solution.⁸⁹

⁸⁹ Tove Skutnabb-Kangas, "How (unnecessary) political tension leads to confusion, controversies, contradictions, inconsistencies and, ultimately, lack of linguistic human rights in education", paper presented at the Council of Europe Conference "Filling the Frames" to mark the 5th anniversary of the entry into force of the Framework Convention on the Protection of National Minorities, Strasbourg, 30–31 October 2003. A similar paper was presented by Skutnabb-Kangas at the Third Session of the UN Permanent Forum on Indigenous Issues, on 11 May 2004. Skutnabb-Kangas also recalls that a draft article of the Convention on the Prevention and Punishment of the Crime of Genocide that was turned down by the UN General Assembly defined genocide also as "prohibiting the use of language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group" and she deplors such practices today. She also deplors the submersion type of language education for minority children today, which she criticizes as genocidal education not in line with international human rights standards. See also E/C.19/2005/7, an important Expert Paper on Indigenous Children's Education and Indigenous Languages submitted to the Fourth Session of the UN Permanent Forum on Indigenous Issues by Robert Dumbar, Ole Henrik Magga, Ida Nicolaisen, Tove Skutnabb-Kangas and Mililani Trask. See also by Skutnabb-Kangas, *Linguistic Genocide in Education—Or Worldwide Diversity and Human Rights?*, 2000, Laurence Earlbaum Associates, Mahwah, New Jersey; *Bilingualism or not—the Education of Minorities*, 1984, Clevedon, Avon: Multilingual Matters; Skutnabb-Kangas and Robert Philipson (eds) in collaboration with Mart Rannut, *Linguistic Human Rights: Overcoming Linguistic Discrimination*, 1994, Contribution to the Sociology of Language 67, Mouton and Gruyter, Berlin and New York. For an extensive publications list of Skutnabb-Kangas, see <http://babel.ruc.dk/~tovesku/>.

See also A. Afolayan, "Towards an Adequate Theory of Bilingual Education for Africa", in J.E. Alatis (ed.) *International Dimensions of Bilingual Education*, 1978, Georgetown University Press, Washington, D.C.; Marjut Akio "The Sami Language: Pressure of Change and Reification", in *Journal of Multilingual and Multicultural Development*, 1991, 12:1 & 2, pp. 93–103; Richard A. Benton *The Legal Status of the Maori Language*, 1979, Wellington, Maori Unit, New Zealand Council for Educational Research; Brian Street (ed.) *Cross-cultural Approaches to Literacy*, 1993, Cambridge University Press, Cambridge. Ruth Wodak & David Corson (eds.) *Language Policies and Political Issues in*

The compelling case for mother-tongue education based on solid research over many years by various experts,⁹⁰ makes it clear that, beyond politics, this issue is one of fundamental human rights for minority and indigenous children. Hopefully there will soon follow clearer political awareness and action so that more can change in this area, including a critical review of contemporary boarding schools for indigenous children and their often destructive impact on indigenous languages and cultures. According to The Hague Recommendations Regarding the Education Rights of National Minorities issued in 1996 by the OSCE High Commissioner on National Minorities these recommendations also apply to migrants, who are not citizens of the country where they live.⁹¹

At its Fourth Session in May 2005, the UN Permanent Forum on Indigenous Issues focused on primary education within the context of Millennium Development Goal 2 of the Millennium Declaration,⁹² which was one of its special themes for the Fourth Session. Millennium Development Goal 2 calls for primary education for all by the year 2015. The Forum took a major step in its recommendations on language in primary education, basing them squarely on major human rights instruments and recent work of the UN, including the 2005 report of the Special Rapporteur on the human rights and fundamental freedoms of indigenous people and an Expert Paper on Indigenous Children's Education and Indigenous Languages prepared by Forum members and academic experts.⁹³ Underlining the importance of mother-tongue education, the Forum recognized that indigenous peoples have the right, including treaty rights (as relevant) to quality primary education that is sensitive to their holistic worldviews, languages, traditional knowledge and other aspects of their cultures, which contribute to human dignity, identity and intercultural dialogue. The Forum further recognized that mother-tongue mediated bilingual education is indispensable for effective learning for indigenous children and for the reduction of dropout rates.

Education, Vol. I, *Encyclopedia of Language and Education*, 1998, Kluwer Academic Publishers, Dordrecht/Boston/London.

⁹⁰ *Ibid.*

⁹¹ <http://www.osce.org/hcnm/>

⁹² The Millennium Declaration is contained in General Assembly resolution A/RES/55/2.

⁹³ For the report of the Special Rapporteur, see E/CN.4/2008/88; for the Expert Paper, see E/C.19/2005/7.

The Permanent Forum recommended that states increase the number of indigenous persons in the educational sectors, including in policy, administration, teaching indigenous culture, history and contemporary society, indigenous languages and the production of educational materials. It also recommended the development by states of bilingual and culturally appropriate primary education for indigenous children to reduce dropout rates, stressing that the mother tongue must be the first learning language and the national language the second language. The Forum recommended that states and the UN system and other intergovernmental organizations pay attention to intercultural bilingual education for indigenous peoples at the preschool, primary and tertiary levels. Finally UNESCO and UNICEF were urged to continue promoting bilingual and cross-cultural education in Latin America and expand these experiences in other regions. Various other recommendations of the Permanent Forum on primary education focused on culturally appropriate education, including the need to review curricula in order to erase culturally discriminatory materials and enhance knowledge of indigenous cultures.⁹⁴

Language rights in the judicial system acquire another dimension, namely, the question about their respect does not only relate to respect for cultural rights, but also to respect of the right to a fair trial. Numerous and systematic problems are faced by indigenous peoples in this area, resulting often in denial of justice, violation of due process rights and long incarcerations of indigenous persons, who never fully realize, due to lack of linguistic and cultural understanding, why they were tried and incarcerated at all. Even if the right to an interpreter is laid down in the law, it is often not respected. The Special Rapporteur on the human rights and fundamental freedoms of indigenous people cites problems in various countries in this field, namely Mexico, Guatemala and others and has stressed the need for training of bilingual personnel in the justice system and availability of defense counsel familiar with the culture and circumstances of the indigenous communities.⁹⁵ A good example is that of New Zealand where legislation recognizes the right of Maori to speak Maori in courtrooms and provides translation

⁹⁴ For the full text of the UNPFII's recommendations on Millennium Development Goal 2, see E/2005/43, paragraphs 41 to 57.

⁹⁵ Report on Mexico, E/CN.4/2004/80/Add.2, paragraphs 29, 37 and 85; report on Guatemala, E/CN.4/2003/90/Add.2, paragraphs 34 and 36.

services for the judiciary, while documents may be served and filed in Maori as well.⁹⁶

Language rights also extend to the freedoms to have mass media in indigenous and minority languages. There are various examples from national practice in this area. In Mexico, community radio stations operate in certain areas, some with support from the National Commission for the Development of Indigenous Peoples and private organizations, albeit with significant resource-related difficulties.⁹⁷

Another dimension of language rights is the one connected with the names of persons and with geographical names. It is well known that all over the world and throughout the centuries histories of conquest are written and revised over geographical names, the change of which represents the effort of those who dominate to conquer the memory, culture and identity of the dominated. Where this becomes an even more obvious affront to the person is when a minority or indigenous person is not allowed to use their own name, i.e. the name from their own culture and language, or where parents are not allowed to give their children such names. In Morocco, for example, parents are often not able to give their children an indigenous name, because the registrars refuse to acknowledge indigenous names. Although the Royal Decree of 17 October 2001 recognized the Amazigh dimension of Moroccan identity and a new law on the registry system was adopted in 2002, parents must still use a list of non-indigenous names in choosing children's names.⁹⁸

3. *Freedom of Religion*

Religion is closely linked to culture and therefore respect for freedom of religion is an important element for the right to participate in culture, not only of religious minorities but also of national or ethnic minorities and indigenous peoples. The human rights instruments are clear on this subject and so are the draft instruments on indigenous rights and I have referred to some of their provisions above. Limitation of religious practices is permissible when they violate internationally recognized human rights, as has been discussed above. There is thus a clear link

⁹⁶ E/CN.4/2004/80, para. 64.

⁹⁷ E/CN.4/2004/80/Add.2, para. 50.

⁹⁸ Background paper presented at the Expert Seminar on Indigenous Peoples in the Administration of Justice by Hassan Id Balkassm (HR/MADRID/IP/SEM/2003/BP.15).

between Articles 18 (freedom of thought, conscience and religion) and 27 (right to participate in cultural life) of the Universal Declaration of Human Rights. The right to participate in cultural life is linked to various other rights as well, as mentioned in Chapter Three C.7 above, as for example freedom of expression, freedom of movement, right to work and others.

Cultural rights are broader and go beyond the coverage of cultural manifestations of a religious nature, to manifestations that are linked to other aspects of a person's identity or identities, especially ethnic and linguistic. As is known, freedom of religion legal regimes at the national and international levels are much better defined and institutionalized than those on cultural rights. As Humphrey had indicated during the drafting of the Universal Declaration of Human Rights, religious minorities would be fully protected by Article 18 and the anti-discrimination provisions of Article 2 of the Declaration, while an article on the cultural rights of ethnic and linguistic minorities would add to their protection.⁹⁹ While such article was never included in the Universal Declaration of Human Rights in 1948, Article 27 of the Universal Declaration, together with subsequent instruments and jurisprudence, form today's solid legal base for the protection of the cultural rights of minorities and indigenous peoples.

There is confirmation of the links between freedom of religion and cultural rights in the practice of UN human rights bodies. While a full discussion of freedom of religion is beyond the purview of this study, I would like to mention some examples as an illustration.

The Committee on Economic and Social Rights has considered that providing subsidies for constructing places of worship for various religions contributes to the realization of the right to participate in cultural life.¹⁰⁰ The Special Rapporteur on freedom of religion and belief has also accepted and called for respect of land-based religions of indigenous peoples which are closely linked to their identities.¹⁰¹ Special

⁹⁹ Morsink, *Supra* 13, p. 270. In the chapter on the legislative history of Article 27 of the Universal Declaration of Human Rights I explain the controversy about the inclusion or non-inclusion of minority rights in the Universal Declaration.

¹⁰⁰ For example E/1999/22, para. 175 regarding the Netherlands.

¹⁰¹ In his report on a country visit to Australia, the Special Rapporteur analyzed the legal challenges of land claims by the Aboriginals and called for conciliatory settlement between the parties, see E/CN.4/1998/6/Add.1, paragraphs 79 to 90 and 125. The Special Rapporteur also visited the United States of America and made similar remarks and recommendations, see E/CN.4/1999/58/Add.1, paras. 52-69.

attention to the issue of access to sacred sites is systematically paid by the Special Rapporteur on the human rights and fundamental freedoms of indigenous people, who has noted problems in various parts of the world in that respect, due to environmental projects, especially mega projects, or military occupation. The Special Rapporteur has pointed out that in many cases, the destruction of indigenous communities goes hand in hand with the destruction of their sacred sites and the various manifestations of their cultural heritage that are so important to the preservation of indigenous identity.¹⁰² At the same time the Special Rapporteur noted the creation in Guatemala of a joint commission to oversee the conservation and administration of Mayan sacred places and that a law on sacred sites was adopted.¹⁰³

As part of religious freedom, respect for the spirituality and identity of indigenous inmates in several prisons of the United States has proven beneficial. Indigenous representatives have repeatedly asked for indigenous prisoners to have the right to have access to native spiritual leaders and counsellors, sacred medicines and instruments such as sage, cedar, sweetgrass, tobacco, corn pollen, sacred pipes, medicine bags, eagle feathers and headbands and ceremonies such as the sweat lodge and pipe ceremonies.¹⁰⁴

9. *Education of the Larger Society*

Public information and the education of the larger society about indigenous peoples and minorities is viewed as crucial by international bodies, such as the General Assembly, the UN Permanent Forum on Indigenous Issues and the Special Rapporteur on the human rights and fundamental freedoms of indigenous people,¹⁰⁵ and this norm has emerged from the assumption that non-discrimination policies must

¹⁰² E/CN.4/2005/88/Add.2, para 31 regarding Colombia. The Special Rapporteur also cites an example in Japan, where the building of a hydroelectric dam in Nibutani, land sacred for the Ainu people, caused the submergence of their sacred ceremonial sites another example cited are the dams built during the 1950s and 1960s around the Missouri River basin in the United States that cost indigenous nations an estimated 142,000 hectares of their best land, including a number of burial and other sacred sites (E/CN.4/2003/90, paragraphs 20 and 60).

¹⁰³ E/CN.4/2003/90/Add.2, para. 19.

¹⁰⁴ E/CN.4/2004/80, para. 62.

¹⁰⁵ See respectively A/60/270 containing the plan of action of the Second International Decade of the World's Indigenous People, E/2005/43, paragraphs 47, 48, 50 and 52.

be supported by a participatory and informed civil society. The role of the media has been repeatedly stressed in combating racism and discrimination vis-à-vis indigenous peoples and minorities. Indigenous communities should have access to mainstream media and the media should refrain from exploiting or sensationalizing their heritage. Policies should encourage the presentation of minority cultures in mainstream media and the world of the arts.

The Special Rapporteur on the human rights and fundamental freedoms of indigenous people has stressed the role of the media. Within the context of his visit to Chile, he noted the complaints of Mapuche organizations that the press and broadcast media did not give them the same coverage as they do to the "powers that be" and considered that the situation violated their human right to information. The Special Rapporteur underlined that the media have the duty to put forward an objective and balanced view of such important issues as the struggle for the human rights of indigenous peoples.¹⁰⁶ He also recommended that, in the absence of legislation, the mass media should adopt measures of self-regulation in order to eliminate vestiges of racism and ethnic discrimination in their programmes and content and actively promote the vision of a multicultural and democratic society.¹⁰⁷

School curricula and textbooks should teach understanding and respect for the heritage of indigenous peoples and minorities.¹⁰⁸ In fact intercultural education is promoted by Latin American countries at the school level. In order to spread this concept to the larger society, policies should, for example, support the translation of literature from indigenous languages into the majority languages in order to enhance mutual understanding.

10. *Contact With Kin Beyond Borders*

Another significant element regarding cultural rights of indigenous peoples or minorities is their right to freely contact their kin beyond

¹⁰⁶ E/CN.4/2004/80/Add.3, para. 55 (report on Chile).

¹⁰⁷ E/CN.4/2003/90/Add.2, para. 93 (report on Guatemala).

¹⁰⁸ E/CN.4/1998/6/Add., paragraphs 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".

national borders. This aspect of international cooperation which is recognized in the Copenhagen Document, paragraph 32.4, the Draft Declaration on the Rights of Indigenous Peoples, Article 35, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 2, acquires particular significance given the suspicion that is often prevalent between neighboring states whose kin minorities live in the other's territory, suspicion sometimes steeped in painful histories. However, it is in these cases that the freedom for international cultural cooperation so clearly enshrined in international instruments is especially relevant. Multiethnic society is a reality that one cannot "solve".¹⁰⁹ It is part of our world and here to stay, irrespective of national borders often drawn arbitrarily during the times of colonialism and empires. Being a minority should not be felt as being in a cage, with freedom of movement and contact with kin communities suspected implicitly or explicitly, discouraged or simply suppressed. Such confinement would only be likely to create frustration and simmering tensions. Free cultural cooperation with kin communities across borders is key to the respect of cultural rights and also to the preservation of peace and understanding between peoples and states. Obviously this right has to be subject to legal limitation and administration required by security or other legitimate considerations. One could for example devise a special regional identity card for indigenous or minority persons of the area on both sides of a border so that they can be assured free movement by agents of the state.

The draft United Nations Declaration on the Rights of Indigenous Peoples¹¹⁰ provides in Article 36 that indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across the borders and that states shall take effective measures to facilitate the exercise and implementation of this right.

¹⁰⁹ Walter Kemp ed., "Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities", 2001, Kluwer Law International, The Hague/London/Boston, p. 106.

¹¹⁰ Human Rights Council resolution 2006/2 of 29 June 2006, see website of the Office of the High Commissioner for Human Rights, www.ohchr.org.

11. *Cultural Rights, Self-Determination and Autonomy*

There is a question whether to ground cultural rights of minorities and indigenous peoples in the right to self-determination. The right to self-determination as proclaimed in common Article 1 of the two International Covenants on human rights, in its internal aspect, can be used to define the right of peoples within a state to freely enjoy their cultural life. This is for example the case with the draft United Nations Declaration on the Rights of Indigenous Peoples¹¹¹ which states in Article 3 that indigenous peoples have the right of self-determination and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Article 31 states that indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions. Article 33 provides that indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards. There is no reference to self-determination in the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities.

Some believe that attempts to define and promote cultural rights that also support an option of full political as well as cultural autonomy, under the umbrella of self-determination can be counter-productive.¹¹² Cultural development is certainly one of the elements of the right to self-determination. However, the right to participate in cultural life also stands on its own as an internationally recognized human right, albeit interrelated with other rights. Conceptually the right to self-determination would, from the start, give more weight to the collective aspect of cultural development of a people, but in practice there are many difficulties. For some, the legal difficulty lies in that the term "peoples"

¹¹¹ *Ibid.*

¹¹² Stephen Hansen, "The Right to Take Part in Cultural Life: Towards Developing Core Obligations Related to Article 15(1)(a)", paper presented to the Committee on Economic, Social and Cultural Rights, April 2001, p. 10.

has not been defined. Minorities do not necessarily fall under the definition of "peoples". There is also a distinction made between minorities and indigenous peoples, although neither of these terms has a formal international definition. In the hope of establishing a separate regime with greater legal entitlements for indigenous peoples, indigenous rights advocates have frequently rejected calling indigenous groups minorities. But this has not necessarily been endorsed by international practice, which sees the two as distinct but overlapping categories subject to common normative considerations.¹¹³ Today's international law has developed so that, although cultural development is part of self-determination, cultural rights also stand on their own. The recognition of collective aspects of cultural rights for minorities or indigenous peoples does not need to pass via the concept of the right to self-determination, which is complex and often politically charged.

The norm that minorities and indigenous peoples must be free to have their own institutions on cultural matters and to participate in cultural decision-making resonates systematically in international instruments and practice. Transparent and participatory democracy and pluralism are the vehicles for the respect of cultural rights in their collective aspect. International human rights instruments and the practice of the Human Rights Committee, the bodies of the Organization of American States (OAS) and the Organization for Security and Cooperation in Europe (OSCE) are all consistent on this matter.

Pointing to the practice of the Human Rights Committee under Article 27 of the International Covenant on Civil and Political Rights, Martin Scheinin underlines the link of Article 27 to Article 1 of the Covenant regarding the right to self-determination. Scheinin points out that the criterion of meaningful consultation of indigenous peoples by governments that the Committee has applied can be linked to the political dimension of self-determination, and the sustainability test to the economic or resource dimension of self-determination. Despite this link, Scheinin is also obliged to point out that, since the individual complaint procedure under the Covenant cannot be used for Article 1 on the right to self-determination, the issue of effective participation or meaningful consultation of indigenous peoples in relation to any

¹¹³ S. James Anaya, *Indigenous Peoples in International Law*, 1996, Oxford University Press, New York/Oxford, pp. 99-100. Anaya sees cultural integrity as one of the international norms elaborating upon the requirements of indigenous peoples' self-determination.

measures related to land or other natural resources may receive close attention only under Article 27. Scheinin therefore concludes that indigenous peoples and their representatives should put more emphasis on the economic or resource dimension of the right to self-determination as justification for their more general claims on self-determination and in their everyday struggle for a stronger say in decision-making that affects their lives.¹¹⁴ In other words, the essentially political difficulty with the right to self-determination can be bypassed through Article 27 and cultural rights.

The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE (1990), in paragraph 33 indicates that the participating states will protect the ethnic, cultural, religious and linguistic identity of national minorities in their territory and create conditions for the promotion of that identity; they will take measures to that effect after due consultations, including contacts with organizations or associations of such minorities, in accordance with the decision-making procedures of each state. The 1989 ILO Convention on Indigenous and Tribal Peoples, Convention No. 169, in Article 2.1, also places emphasis on participation by establishing the responsibility of governments to developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

Sometimes the concepts of self-governance and internal self-determination are evoked in connection with cultural rights of minorities or indigenous peoples.¹¹⁵ In the doctrine developed by the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE), Max Van der Stoep, "internal" self-determination can also have a non-territorial character (sometimes referred to as personal, cultural or extra-territorial autonomy). The UN Working Group on Minorities has also discussed the issue in a similar

¹¹⁴ Martin Scheinin, "The Right to Self-Determination under the Covenant on Civil and Political Rights", in *Operationalizing the Right of Indigenous Peoples to Self-Determination*, P. Aikio and M. Scheinin eds., 2000, Institute for Human Rights, Abo Akademi University, Finland, pp. 193, 195 and 199.

¹¹⁵ In the Draft Guidelines for the Protection of the Heritage of Indigenous Peoples, the Special Rapporteur has included the provision that "governments, international organizations and private institutions should support the development of educational, research and training centers which are controlled by indigenous communities, and strengthen these communities' capacity to document, protect, teach and apply all aspects of their heritage".

vein, indicating that cultural autonomy effectively seeks to protect a culturally defined, rather than a territorially defined, group, through the right to self-rule or self-management.¹¹⁶ This type of autonomy or self-governance is also useful when the minority population is widely dispersed within a state and could relate, *inter alia*, to the use and official recognition of names in minority languages, the right to use their own symbols, to determine their own education curricula for teaching in minority languages and other forms of cultural expression.¹¹⁷ The Committee on the Elimination of Racial Discrimination has also supported cultural autonomy of minorities.¹¹⁸

This emerging consensus for cultural autonomy of minorities is different from the sum of other civil, political, economic, social and cultural rights, in that it captures better the group aspect of cultural rights as they pertain to the minority and especially the fact that the state should interface, in terms of policy-making and programmes, with the organizations representing the minority on such matters. State practice in this area is still sparse,¹¹⁹ but the concept of cultural autonomy is useful and can address many situations, especially for political demands that are not linked to use of land or territory, but on the many other aspects of cultural rights regarding the minority.

12. *Cultural Heritage and Traditional Knowledge*

Cultural heritage is seen as a source of pride and continuing inspiration for people, a testimony of cultural and historic continuity, a repository of wisdom from past generations onto future ones. Drawing on their cultural heritage becomes especially important for people or groups fighting discrimination and marginalization and whose cultures and very identity are under threat.¹²⁰ It is this structural vulnerability that

¹¹⁶ E/CN.4/Sub.2/2001/22.

¹¹⁷ Walter Kemp ed., "Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities", 2001, Kluwer Law International, The Hague/London/Boston, p. 110.

¹¹⁸ For example A/51/18, para. 111 regarding Hungary, where the Committee commends the government for its new policy "based on the principles of preservation of their self-identity, special preference treatment and cultural autonomy".

¹¹⁹ *Idem*.

¹²⁰ At the 2003 conference of the International Association for Traumatic Stress Studies held in Chicago, I participated at a panel on "Culture, Trauma and Cultural Rights". Although the only jurist on the panel, I found it interesting that the other speakers—psychologists by profession—were stressing the same point from their own

makes the protection of cultural heritage by the human rights regime especially necessary.

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. The reaction of the famous aboriginal artist Banduk Marika, whose work was illegally copied by a company and turned into the infamous "Carpet Case" in the Australian court system, epitomizes the meaning of this violation. Banduk said she was hurt when she found out about the carpets and the stolen Aboriginal design.

... They didn't understand the importance of the art-art is my culture-my identity.¹²¹

The presentation of the "Carpet Case" below aims at introducing the subject by putting in relief many of the issues connected with the protection of cultural rights of indigenous peoples, including communal ownership of traditional knowledge and the interface between traditional legal custom and national law.¹²² In 1993, imported carpets from Viet Nam reproducing copyright works of indigenous artists in Australia were found to be infringements of each indigenous artist's works. The artistic works embodied pre-existing cultural clan images that were, in some instances, altered by the carpet manufacturers, thereby distorting the cultural message of their works. The artists instituted a copyright action against the company which had imported the carpets from Viet Nam, Indofurn Pty Ltd, successfully winning their case in a landmark Federal Court decision M* (deceased) v. Indofurn representing an accommodation of copyright law to protect indigenous art and cultural expression.

research. Case studies presented by the other panelists were about the Ethiopian Jews in Israel and Bosnian youth immigrants in Chicago and my paper focused in cultural rights of indigenous peoples.

¹²¹ Quoted in Terri Janke's *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, WIPO, Geneva, 2003, p. 14. Janke provides an interesting analysis of the Carpet Case.

¹²² The summary is based on Terri Janke's case study, *ibid.*, pp. 9-27.

The carpets reproducing the works of several prominent indigenous artists were discovered by the National Indigenous Arts Advocacy Association (NIAAA). Three artists, George M* (deceased), Kumant Tjapangati (deceased) and Banduk Marika, together with the Public Trustee of the Northern Territory on behalf of deceased artists brought an action against Indofurn import company, which imported the carpets from Viet Nam. NIAAA became aware of the carpets when they were contacted by a salesperson from a Sydney carpet store, who was checking, at the request of clients, whether the "Aboriginal carpets" for sale were authentic. NIAAA identified the carpets as copying the original works of several well-known Aboriginal artists. In the course of the proceedings it was discovered that Indofurn had imported approximately 200 carpets, some being sold for over A\$4,000 each.

Banduk Marika, an Aboriginal artist of the Rirratjingu clan from Yirrkala, is the only artist who was still living and interviewed for the case study after the court decision. Her work, "Djanda and the Sacred Waterhole", was copied directly from an educational portfolio produced by the National Australian Gallery. Banduk explained the significance of her painting and its link to traditional knowledge:

The image in question relates to the site in Rirratjingu clan land where our creation ancestors, the Djankawu, visited on their journey across Arnhem Land. The Djankawu were the original ancestors of the people of the Dhuwa moiety.

The image is associated with a place on Rirratjingu land called Yalangbara (which is Port Bradshaw south of Yirrkala) and represents the events associated with the Djankawu that took place there. My rights to use this image arise by virtue of my membership of the land ownership group. The right to use the image is one of the incidents arising out of land ownership.

When the Djankawu handed over this land to the Rirratjingu they did so on the condition that we continued to perform the ceremonies, produce the paintings and the ceremonial objects that commemorate their acts and journeys. Yolngu guard their rights in paintings and the land equally. Aboriginal art allows our relationship with the land to be encoded, and whether the production of artworks is for sale or ceremony, it is an assertion of the rights that are held in the land.

The place, Yalangbara, and the particular story of the Djankawu associated with it do not exist in isolation. They are part of a complex or "dreaming track" stretching from the sea off the east coast of Arnhem Land through Yalangbara, across the land to the west of Ramingining and Milingimbi.

Djanda is the sand goanna and the image relates to information about that country on a number of levels. Djanda is part of a bigger story, the nature of which cannot be disclosed generally.

Regarding communal ownership of the image by the Rirratjingu clan community, Banduk noted:

My artwork which has been reproduced on carpets by the respondents herein is known as the "Djanda Sacred Waterhole". The image is an image which belongs to my clan, the Rirratjingu, and forms part of the mythology of the Djangkawu creation story. The image is of great importance to my clan and also has importance to clans in neighbouring areas, which have rights in this image.

Banduk is the daughter of Mawalan (1), leader of the Rirratjingu clan of northeast Arnhem Land until his death in 1967. Mawalan (2) is now the senior representative of the clan and he had given permission to Banduk to depict the image. Mawalan is responsible for the land and associated clan designs. Under customary law of the Yolngu people, any decisions pertaining to their estate require the direct input of Rirratjingu traditional owners and/or persons designated as ritual and territorial guardians. Under Aboriginal customary law and regimes, artwork will often depict secret parts of a dreaming that will only be recognized and understood by those who are initiated into the relevant ceremonies, or at least have a close knowledge of the cultural significance of the story, thus it is significant that any reproduction is accurate in every respect and with full, proper permission of the artist and community so as not to offend the traditional owners. Regarding the impact of infringement on the artist and the culture, Banduk noted:

Even though I know that I am not responsible for the reproduction I am still concerned about the ramifications for me and my work within Yolngu society, and I greatly fear a loss of reputation arising from Yolngu associating me with the reproduction. I fear that my family and others may accuse me of giving permission of the reproduction behind their backs without consulting and seeking permission in the manner require by our law and culture. I fear that this could result in my family and others deciding that I cannot be trusted to use important images such as this one any more.

Recognizing the repercussions of unauthorized reproduction under Aboriginal customary law, the Australian court noted:

If permission has been given by the traditional owners to a particular artist to create a picture of the dreaming, and the artwork is inappropriately used or reproduced by a third party, the artist is held responsible for the breach which has occurred, even if the artist had no control over or no knowledge of what occurred.

In the past the offender could have been put to death, while the repercussions today take different forms of punishment, including taking away the rights to participate in ceremonies, the removal of the right to reproduce designs of stories of the clan, being outcast from the community, or being required to pay money.

The issue before the court was whether a work incorporating pre-existing traditional designs and images was original and therefore subject to copyright protection. The court found that, although the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality. The court found copyright infringement of the original works and ordered delivery of the unsold carpets and a collective award of damages to the artists of some A\$188,640. The artists, however, never received the total awarded monies, as Indofurn was wound up and the active director was declared bankrupt, while the two non-executive directors appealed successfully against their part of the award. The artists received some monies from the sum paid into court and the sales of some of the carpets organized by NIAAA for their benefit. Banduk decided to burn the carpets in a private ceremony. However, one of the carpets has been put on display in the Buku-Larrnggay Mulka Museum to serve as a reminder of the case and the importance of maintaining the integrity of the artwork.

The Carpet case served to raise awareness within Australia. There has been greater assertion by artists as to copyright and the community responsibilities. There is more awareness within the arts and manufacturing industry, as well as in the legal system, including the judiciary. However, the case also showed that there is a long way before indigenous artists and their contributions, as well as the contributions of their communities, are fully recognized and protected.

The conceptual distinction between cultural heritage and traditional knowledge has not always been clear, the two often perceived as similar, especially in the context of indigenous cultural heritage and traditional knowledge. Cultural heritage has been addressed for a long time, including at the normative level, while traditional knowledge is an area identified relatively more recently as one requiring a normative framework. By now, more than eleven intergovernmental bodies deal with indigenous traditional knowledge, a clear sign of its significance, not just for the indigenous world, but for the non-indigenous world as well. One distinction in the understanding of the two terms is that cultural heritage is viewed more as a body of culture from the past, in the form of monuments for example, that need to be protected and preserved for posterity, in a certain sense, unchanged or frozen in the time of their production. The concept of indigenous traditional knowledge, while including the idea of culture coming from the past,

is also understood as the body of culture that needs, not only to be protected, but also developed and promoted as a contemporary good, with all that this means for the lives, human rights and development of contemporary communities that have produced and are still holding and continue producing this knowledge.

The protection of cultural heritage has been internationally codified, especially 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.¹²³ 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, the discussion of which is covered in Chapter Two E above. 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 that go beyond intellectual property regimes, copyright and trademark actions, which have economic remedies as their main focus.¹²⁴

¹²³ *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 UNDRIFT Convention on Stolen or Illegally Exported Cultural Objects.

¹²⁴ As mentioned in the introduction to this book, the book is not dealing with intellectual property issues as such, which in most legal systems are viewed as part of commercial law and are definitely treated as such by a large part of international law.

The draft *Aboriginal and Torres Strait Islander Commission's (ATSIC) Cultural Rights Policy: Which Way Our Culture*, places cultural rights under the umbrella concept of Indigenous

The questions that arise are multiple: What protection can indigenous peoples draw from intellectual property regimes and what are the limits of these regimes? What are the challenges for traditional knowledge holders? What does a human rights approach to protection of cultural heritage offer? What are the human rights challenges in protecting traditional knowledge as belonging to a group or an individual? Who should enjoy the exclusive right to commercially exploit intangible traditional know-how and creativity? What could be an appropriate approach to protecting cultural heritage and traditional knowledge as part of cultural rights? How should exclusivity and proprietorship be reconciled with the promotion of creativity, cultural exchange and cross-fertilization, or other goals, such as research and education?

The concept of indigenous cultural heritage is given special prominence in debates at the UN, the World Intellectual Property Organization (WIPO) and also at UNESCO. Attention to this area from a human rights perspective has been paid by the Working Group on Indigenous Populations of the UN Sub-Commission on the Promotion and Protection of Human Rights, previously known as Sub-Commission on Prevention of Discrimination and Protection of Minorities. Erica-Irene Daes, Chairperson/Rapporteur of the UN Working Group on Indigenous Populations from 1984 to 2001, conducted a study, mandated by the Sub-Commission on the "Protection of the Cultural and Intellectual Property of Indigenous Peoples".¹²⁵ In 1993 Daes was mandated to expand her 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.¹²⁶ A definition of "indigenous heritage" is given in the UN study on the "Protection of the heritage of indigenous people"¹²⁷ in the draft guidelines prepared by Special Rapporteur Daes, as follows:

cultural heritage", underlines cultural rights as collective rights and describes the "Right to Cultural Integrity" as including "the right to our distinct characteristics and our right to exist as distinct peoples.... This also includes our right to genetic integrity". ATSIC was abolished by the Australian government in 2003.

¹²⁵ E/CN.4/Sub.2/1993/28.

¹²⁶ E/CN.4/Sub.2/1994/31, Annex and subsequently revised and appearing in E/CN.4/Sub.2/1995/26.

¹²⁷ E/CN.4/Sub.2/1995/26, Annex, paras. 11 and 12.

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.

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.¹²⁸

For years, indigenous representatives at various world fora have pressed the issue of recognition and protection of their traditional knowledge and cultural heritage. As a result, the 1992 Rio Declaration on Environment and Development and Agenda 21 recognized that, because of their knowledge and traditional practices, indigenous peoples may play a vital role in sustainable development and called for appropriate policies and legal mechanisms to empower indigenous peoples in the enjoyment and control over the knowledge, resources and practices that comprise their cultural heritage.¹²⁹ International agreements address the ways in which knowledge is protected, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the Convention on Biological Diversity (CBD). Articles 8(j) and 10 (c) of CBD state the following:

Article 8

Each Contracting Party shall, as far as possible and as appropriate: ... (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities

¹²⁸ According to James Anaya, for indigenous peoples cultural integrity means the continuation of a range of cultural patterns, including patterns that establish rights to lands and natural resources, and are embodied in indigenous customary law and institutions that regulate indigenous societies; see *Indigenous Peoples in International Law*, New York/Oxford: Oxford University Press, 1996, p. 5.

¹²⁹ A/CONE.151/26 (volume 1), Annex 1; and A/CONE.151/26 (volume 3), Annex 2.

embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Article 10

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

Two working groups have been established under CBD, one under article 8(j) and one on Access and Benefit Sharing where debates are taking place, which are closely linked to indigenous peoples' customary rights. Although CBD carries potential for the recognition of traditional knowledge, critics point to the attempted fossilization and reduction of indigenous peoples into "communities" embodying "traditional lifestyles", which has negative implications for the application of the Convention.¹³⁰ The point is precisely that indigenous peoples view traditional knowledge as a "living thing" with direct implications on the contemporary indigenous communities, both internally and in terms of their relations with the non-indigenous society and the state, thus the human rights aspect of the issue is crucial. In the CBD text quoted above, the tension of states' notion of the extent of their obligations in this area and indigenous aspirations is epitomized by the phrases "as far as possible", "as appropriate" and "subject to its national legislation". However, it is part of the dynamic nature of international law to develop through practice and interpretation the understanding of such terms.

The current status of the debate on intellectual property regimes and traditional knowledge is perhaps best viewed through the debates of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization (WIPO). The relationship between intellectual property and the rights and interests of indigenous and local communities has been the subject of discussion for some time.¹³¹

¹³⁰ Raja Devasish Roy, "Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples", in *Defending Diversity: Case Studies*, Chandra Roy, ed., 2004, The Sámi Council, Swedish Section, p. 140.

¹³¹ For a general description of WIPO's work, see: *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, prepared by Terri Janke for WIPO,

The term “traditional knowledge” is generally used at two levels: in the broad sense, traditional knowledge includes both the ideas and the expressions of the ideas which were developed by indigenous and local communities in a traditional way; in the narrow sense, traditional knowledge refers only to knowledge as such, that is only to the ideas, not their expression; in the narrow sense traditional knowledge describes those elements that may be protected by intellectual property rights. “Traditional” does not necessarily mean that the knowledge is ancient. Traditional knowledge is also contemporary knowledge. WIPO maintains that it is important not only to protect and preserve traditional knowledge created in the past, which may be in the brink of disappearance, but also to envisage a system that contributes to the promotion and dissemination of innovations that are based on continuing use of tradition.

The extent to which intellectual property protection of traditional knowledge is the right approach is part of the debates. Intellectual property protection, provided both in national and international legal instruments, refers to the protection of the results of creative intellectual activity against misappropriation and misuse. Such protection may take the form of exclusive property rights, such as certain rights in copyright or patents, or non-proprietary measures, such as equitable remuneration schemes and moral rights in copyright. It might also mean protection against consumer deception and unfair competition through the protection of trademarks, geographical indications and national symbols and the law of passing off, and protection against the disclosure and misuse of confidential information. The aim of intellectual property regimes is to give the originators of intellectual works, including collective ones, a say over whether, and if so how, their works are used by others, providing acknowledgement and respect for originators and their distinctive reputations, and sharing the benefits of use of their works—thus both cultural and economic interests are addressed. While WIPO’s work is not limited to the use of current intellectual property systems to protect traditional knowledge and traditional cultural expressions, it addresses most directly the intellectual property—like protection of traditional knowledge and traditional cultural expressions, whether

Geneva, 2003; “Culture as Commodity? Intellectual Property and Expressions of Traditional Cultures”, *WIPO Magazine*, July–August 2003; “Protection of Traditional Knowledge and Genetic Resources”, *WIPO Magazine*, Nov.–Dec. 2003.

through intellectual property systems, adapted intellectual property systems and/or *sui generis* measures. Intellectual property-like protection can be “defensive”, i.e. protection “from intellectual property”, and/or “positive” protection, i.e. protection against misappropriation and misuse “by intellectual property”.¹³²

The elements of traditional knowledge most intensely debated are linked to the use of biological diversity and its components, such as medicinal plants. In order to be effective, traditional knowledge protection has to be practically feasible and accessible to the groups it is supposed to benefit. National laws are currently the prime mechanism for achieving practical benefits for traditional knowledge protection. The main challenges confronting traditional knowledge holders include the following:

- (a) Many traditional practices are lost, either through acculturation or diffusion. They are also lost through the loss of indigenous languages, which are vehicles of traditional knowledge and practices. Various communities have recognized a need for documentation of traditional knowledge held by their elders and others in the community. Such documentation should be conducted following the decision of the community-holder of traditional knowledge and it requires a different approach, including decisions by the community as to the information they would like to keep confidential within the community and information they may wish to share with others, and the terms for sharing it.
- (b) There is sometimes lack of respect and appreciation for traditional knowledge. Thus more awareness raising about the value of this

¹³² Information Note of the World Intellectual Property Secretariat of the World Intellectual Property Organization (WIPO) for the International Workshop on Indigenous Traditional Knowledge, Panama City, September 2005 (see www.un.org/csa/socdev/unpfii; the report of the workshop appears in document E/C.19/2006/2 and in the above-mentioned website). As stated in the above-mentioned Information Note, WIPO’s most recent work programme in this area commenced, in 1998 and 1999, with a series of fact-finding missions in 28 countries during which more than 3000 persons, mainly representatives of indigenous and traditional communities, were consulted with. The insights provided by those communities were distilled into a report and have continued to guide WIPO’s work in this area (WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders, Pub. 768, see also www.wipo.int/tk/en/tk/fin/report/index.html). A wide range of case-studies, databases, surveys, laws and other resources are available at www.wipo.int/tk/en/resources/.

knowledge is needed both in the group where it was produced and in the rest of society.¹³³

- (c) Commercial exploitation of traditional knowledge by others raises the question of its legal protection, but also the challenge of using formal legal systems by the traditional knowledge holders, who may not have the means to access them.
- (d) Loss of links of indigenous communities to territories, destruction of ecosystems, climate change, people movements and urbanization, are further challenges for the preservation, protection and promotion of indigenous traditional knowledge.
- (e) Discriminatory government policies and lack of coherent and informed national policies towards indigenous peoples and indigenous knowledge in particular provide additional obstacles to the holders of traditional knowledge.

Various definitions, terms or understandings of traditional knowledge used by academia and intergovernmental bodies show the complex nature of the issue which is part of the complexity of human societies and the diversity of worldviews. While different terms or working definitions coexist, what appears less debatable is that understanding of traditional knowledge and approaches on traditional knowledge require being holistic and comprehensive. For example, traditional knowledge refers to "the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles", according to the Convention on Biological Diversity, Article 8(j). WIPO has established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in 2000 without defining the term. It has however underlined the complex nature of traditional knowledge that encompasses the forms of traditional know-how, innovations, information, practices, skills and learning of traditional knowledge such as traditional agricultural, environmental or medicinal knowledge. The Food and Agriculture Organization stresses the value of "local rural technologies" in the conservation and utilization of plant

¹³³ The UN Permanent Forum on Indigenous Issues, at its third session in 2004, pointed out in particular about indigenous women's traditional knowledge that "... Western-based and male-oriented systems of knowledge are given predominance, while indigenous and traditional systems of knowledge are being devalued, ignored or seen as mere 'obstacles to development'. Knowledge systems of indigenous women, as the essence of their cultural expression and identity, are thus faced with the double bias of Western and male forms of ethnocentrism" (E/C.19/2004/43, para. 30).

genetic resources. UNESCO has a range of inter-disciplinary activities dealing with traditional knowledge and has tried to formulate some elements towards a working definition. The full definition proposed by UNESCO in the framework of joint work with the International Council of Science (ICSU) states: "*Traditional knowledge is a cumulative body of knowledge, know-how, practices and representations maintained and developed by peoples with extended histories of interaction with the natural environment. These sophisticated sets of understandings, interpretations and meanings are part and parcel of a cultural complex that encompasses language, naming and classification systems, resource use practices, ritual, spirituality and worldviews*". In the World Health Organization, emphasis is placed on traditional medicinal knowledge.¹³⁴

As the debates on the issue of indigenous cultural heritage and traditional knowledge progress, more views have been aired in recent times about the need to add a non-intellectual property approach to strategies. This was for example one of the conclusions of an interesting 2003 WIPO publication of case studies regarding aboriginal cultural heritage in Australia.¹³⁵

The direction of the debates at WIPO's Intergovernmental Committee point towards the use of a multi-pronged approach combining intellectual property protection, non-proprietary and non-intellectual property measures and especially created *sui generis* regimes, including both defensive and positive measures. Indigenous representatives participate at the debates actively and a lot of attention is paid on the creation of *sui generis* regimes for indigenous traditional knowledge.

While such regimes are being discussed, intellectual property protection measures, from which indigenous peoples should benefit are being used, for example in protecting confidential information and preventing unauthorized use of traditional knowledge. We note that there is a difference between such protection and the "preservation/safeguarding" with which indigenous peoples are often more concerned. In other words, for some custodians of traditional culture, intellectual property protection means the possibility to commercially exploit tradition-based creations and innovations, but for others it means preventing the use and commercialization of their cultural heritage and traditional knowledge.

¹³⁴ Background Paper prepared by the Secretariat of the UN Permanent Forum on Indigenous Issues for the International Technical Workshop on Indigenous Traditional Knowledge, Panama City, September 2005, see www.un.org/esa/socdev/unpfi.

¹³⁵ *Minding Culture: Case Studies on Intellectual Property and Traditional Expressions* prepared by Terri Janke for WIPO, Geneva, 2003.

The fact that in most legal systems intellectual property rights expire after some time and the items protected become part of the "public domain" poses another challenge under intellectual property law.

These intense debates have yielded some positive results on the ground. For example, geographical indications have been registered in respect of handicrafts in Mexico, the Russian Federation and Portugal. Australia is preparing a draft amendment to the Copyright Act for the creation of communal moral rights in indigenous cultural materials.¹³⁶ In Aotearoa/New Zealand Maori cultural traditions are infusing the society at large and have even crossed over into international communities and markets. This is the result of Maori themselves having fostered a renaissance in Maori cultural pride and competence. Use of some Maori cultural traditions by third parties has been permitted on the basis of informed consent, direct Maori participation, culturally appropriate use and agreement that no exclusive property rights be sought by the third party. Maori have also registered a certification trade mark to be used in relation to authentic Maori creative arts, which has caused the Maori cultural industry to flourish. Trademarks legislation in Aotearoa/New Zealand has also been amended to prevent the registration of marks that would be culturally offensive to Maori.¹³⁷ In Panama a *sui generis* law enacted in 2000 at the initiative of indigenous authorities and experts from Panama provides collective intellectual property-type rights in respect of indigenous creative designs and crafts.¹³⁸

A range of valuable practical activities are being undertaken by communities at the local and community levels which pragmatically address needs identified by the communities themselves. These are participatory, capacity-building, multi-disciplinary and inter-cultural in character. An example is a project undertaken within the Subanen community in the South of the Philippines aimed at the documentation of their ethno-botanical indigenous traditional knowledge. Modern encryption tools, layered rights of access and copyright in the documentation itself were used by the community concerned to protect its interests. This project also responded to the need for enhanced dialogue between

¹³⁶ Information Note of the Secretariat of the World Intellectual Property Organization (WIPO) for the International Workshop on Indigenous Traditional Knowledge, Panama City, September 2005 (see www.un.org/csa/socdev/unpfii; the report of the workshop appears in document E/C.19/2006/2 and on the above-mentioned website).

¹³⁷ Report of the International Workshop on Indigenous Traditional Knowledge, Panama City, September 2005, E/C.19/2006/2, para. 16.

¹³⁸ *Idem*, para. 17.

traditional and modern science. In some cases, these kinds of projects are undertaken with the assistance or support of an intergovernmental organization, fund or agency.¹³⁹

Viewing traditional knowledge under the human rights regime raises various other challenging questions: To whom does traditional knowledge "belong", to a group, to individuals, to both? What are the limits between cultural heritage and traditional culture being used as a source of legitimate inspiration and commodification? What is the limit between freedom of cultural expression of an individual and the group's requirement for permission in the use of tradition for new works, in accordance with indigenous customary law, the latter being viewed as part of indigenous cultural heritage?

Although the purpose of this analysis is not to provide the answers to all these challenges, I argue that a human rights approach to questions of indigenous heritage and knowledge 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; (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. In addition, a cultural rights approach in terms of indigenous peoples requires the state to adopt awareness-raising and educational measures *vis-à-vis* the dominant society, to inspire appreciation and respect for indigenous traditional heritage and knowledge, including understanding of the special conditions required for outsiders to commercially exploit traditional knowledge, especially the free prior and informed consent of the community and benefit sharing.

The Committee on Economic, Social and Cultural Rights addressed the vulnerability of minorities and indigenous peoples in its General

¹³⁹ *Idem*, para. 18. The report of the International Workshop on Indigenous Traditional Knowledge contains a number of other examples as well. The expert papers presented by UN agencies and indigenous experts are posted on the website of the Secretariat of the UN Permanent Forum on Indigenous Issues, www.un.org/csa/socdev/unpfii.

Comment No. 17 on article 15, paragraph 1(c) of the Covenant regarding the right to benefit from the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he or she is the author. The Committee first of all acknowledged that, although the wording generally refers to individual creators, this right can, under certain circumstances also be enjoyed by groups of individuals or by communities. With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, states parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, states parties should respect the principle of free, prior and informed consent of the indigenous authors concerned and the oral or other customary forms of transmission of scientific, literary or artistic production; where appropriate, they should provide for the collective administration by indigenous peoples of the benefits derived from their productions. States parties in which ethnic, religious or linguistic minorities exist are under an obligation to protect the moral and material interests of authors belonging to these minorities through special measures to preserve the distinctive character of minority cultures.¹⁴⁰ The underlying principles in the Committee's approach, as seen from the above-mentioned comment, are attention to the most vulnerable and promotion of special measures to face these particular situations—an approach consistent with the philosophy of human rights law.

Misappropriation of traditional knowledge need not be deliberate, and there is also a danger of wrongly awarding intellectual property rights, so that communities that have produced, preserved or developed traditional knowledge over several generations are not compensated

¹⁴⁰ General Comment No. 17 (2005), E/C.12/GC/17, paragraphs 2, 32 and 33.

for its use. The evidence of misappropriation of traditional knowledge is shocking. The UNDP 2004 Human Development Report quotes a 2000 study concluding that 7,000 patents had been granted for the unauthorized use of traditional knowledge including misappropriation of medicinal plants. The issue is to find ways to reconcile the provisions of different international intellectual property regimes in order to protect traditional knowledge for the benefit of the indigenous community and promote its appropriate use within the wider society. The Human Development Report concludes that loans to countries and companies for projects that wrongly acquire property or do not compensate communities should be withdrawn. The Report considers three measures as essential: a) the explicit recognition of indigenous peoples' rights over their physical and intellectual property, b) requiring consultations with indigenous communities and their participation for the use of any resource, thus ensuring informed consent, and c) empowering communities by developing strategies to share benefits.¹⁴¹

The United Nations Permanent Forum on Indigenous Issues, at its third session in 2004, paid special attention to cultural heritage.¹⁴² It recommended in particular that states adopt legislation acknowledging that traditional knowledge of indigenous peoples is their inalienable cultural heritage and embodies their cultural identity. The Permanent Forum also recommended that states make available such legislation and information in local indigenous languages and put in place policies and mechanisms to increase indigenous women's access to markets and capital in order to enable them to turn their traditional skills into sustainable forms of income generation. The Forum encouraged states to facilitate the establishment of civil society organizations, including indigenous organizations, to assist in the preservation and protection of indigenous cultural heritage. UNESCO and other cultural institutions and academic institutions were encouraged to examine and document the instrumental role of women in indigenous societies as custodians of sacred knowledge and power, and as medicinal specialists, and to highlight indigenous women's traditional skills, arts and crafts and to publicize them through the media, cultural institutions and other means.

¹⁴¹ UNDP *Human Development Report: Cultural Liberty in Today's Diverse World*, 2004, UNDP publication, pp. 11, 86, 93, 94.

¹⁴² E/C.19/2004/43, paras. 32, 33, 34, 37, 40-44.

Regarding the work of WIPO, the Permanent Forum encouraged WIPO and its Member States to take practical steps to ensure that inappropriate and unauthorized documentation and publication of traditional knowledge and traditional cultural expressions/folklore does not occur, and to reinforce the capacity of indigenous peoples to make informed decisions whether and, if so, how documentation should occur, including through the development of toolkits and guides which should have this as their aim. Furthermore, based on international human rights standards, the Forum has been promoting the principle of free prior and informed consent. The Forum confirmed its readiness to provide expert input to the work of WIPO, such as its work on studying how customary and indigenous laws and protocols could be recognized and applied within national, regional and international systems for the protection of traditional knowledge and cultural expressions. In an interesting move towards standard-setting, the Forum recommended that the Secretariat of the Convention on Biological Diversity, the Office of the High Commissioner for Human Rights, UNESCO, WIPO, the World Trade Organization and other relevant United Nations system organizations, under the auspices of the Permanent Forum, establish guidelines, ethical codes of conduct, "best practices" and practical guidelines relating to indigenous peoples' cultural heritage and access to and use of traditional cultural expressions and knowledge, in close cooperation with indigenous peoples.

This rich international work of more than eleven intergovernmental organizations on traditional heritage and knowledge demonstrates the strong interests, both economic and moral, vested in this area by societies, both dominant societies and indigenous peoples and communities who are holders of such knowledge. The tension and the ensuing clashes are about the terms of the sharing of such knowledge, if the traditional owners so decide. One may say, using the analogy of the original dogma of colonization, that for many in the dominant society traditional knowledge seems to be there to be "occupied" and exploited as a kind of *terra nullius*, since the communities who own this knowledge come from "different" cultures and legal customs and happen to be viewed as marginal, expected to conform and bow to the patterns of the dominant societies and legal systems. At the same time, the human rights paradigm, which has brought indigenous issues to international visibility in the last fifty years, presents creative opportunities and sets parameters. An important parameter that needs to be reconciled within the human rights regime is the relation, not only between the group-

traditional knowledge holder and dominant society, but also between the group and individual members within it. The challenge in this respect is the enjoyment of an individual's freedom of expression and freedom to participate in cultural life in its broad sense and the individual's obligations under the customary laws of his or her community. Another problem commonly surging is the relation between research and traditional knowledge: there is a marked tension to reconcile when one side may view unauthorized research as poaching and the other views it as a good faith exercise. Such issues, the conflicts that ensue and the possible solutions will have to be the object of further analysis before some satisfactory responses are found.

The world has changed today in that the voice of indigenous peoples and what constitutes for them a just system is heard more loudly than before. While exploitation of their traditional knowledge still continues, without their consent and without benefit sharing, the international legal regime has, at many levels, realized the need for change so this injustice is corrected—and the normative work at various international bodies is a demonstration of that. States are also gradually recognizing the need to improve the situation, as some examples mentioned above show, where practical solutions are sought through laws and institutional arrangements. Despite the rapid developments in this field, considerable time is still needed for the *sui generis* regimes to be formulated, as they require reconciling some deep differences in economic interests and legal and philosophical thinking between dominant and indigenous societies.

13. *Positive State Measures*

To fulfill the cultural rights of groups also means that the state must take positive measures and commit resources when necessary. Defining the parameters of the obligation to fulfill is no easy matter. Difficulties include lack of or limited resources and the major question of how resources are to be distributed. In other words, the issue for the state is to balance the interests of majority and minority groups. Positive discrimination is not an unfamiliar concept in international human rights instruments in favour of minorities. 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 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” (emphasis added). It is clear that the parameters of positive measures are defined in terms of duration, i.e. such measures should be of a temporary nature, namely until equal enjoyment of human rights has been achieved, as otherwise the positive measures could constitute discrimination vis-à-vis other parts of the population. Positive measures should also be of a special nature, i.e. relevant to the disadvantaged group, a minority or an indigenous community, for example financial assistance for community radio programmes in indigenous languages, as is the case in some parts of Mexico.

Article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities describes the obligation of states to “create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, tradition and customs...”. But the Declaration is more tentative further down: “...States should [*not shall*] take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue”. The Draft Declaration on the Rights of Indigenous Peoples has much stronger language in terms of the positive obligations of the state, but this instrument has not yet been adopted and it is known that the issue of resources that the establishment of such state obligations would entail is one of the issues. By the same token, such positive measures to protect and create the conditions for the promotion of the ethnic, cultural, linguistic and religious identity must respect the principles of equality and non-discrimination with respect to other citizens of the state.¹⁴³ The Human Rights Committee has included a view along these lines in its General Comment on Article 27 of the International Covenant on Civil and Political Rights, namely that “positive measures must respect the provisions of articles 2(1) and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population”.¹⁴⁴

¹⁴³ Copenhagen Document, para. 33.

¹⁴⁴ CCPR/C/21/Rev.1/Add.5, para. 6.2.

Paragraph 1 of Article 2 of the International Covenant on Civil and Political Rights reads as follows: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights

Positive measures are also discussed extensively within the context of the principle of non-discrimination and equality discussed in Chapter Three C above. The focus in this chapter to indigenous peoples or minorities requires re-stating that positive state action for real equality should not aim at assimilation, but at ending their marginalization. The term “integration” is often used to describe such positive policies, meaning that integration is used as the opposite of marginalization.¹⁴⁵ In the doctrine developed by the OSCE High Commissioner on National Minorities, integration assumes that the distinctive identity of the minority can be maintained, while, at the same time, the minority should be part of the society at large.¹⁴⁶ According to the CSCE Copenhagen Document, paragraph 32, “Persons belong 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 at assimilation against their will”. The Committee on the Elimination of Racial Discrimination has also shown interest in the cultural integrity of minorities and indigenous or tribal peoples and against assimilation policies.¹⁴⁷ These ideas also permeate the Draft Declaration on the Rights of Indigenous Peoples. It is essential that the state must consult the institutions of minorities and indigenous peoples when it needs to make decisions on cultural matters that concern them, for example in the area of education.

recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

Article 26 reads as follows: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

¹⁴⁵ We should be aware that this understanding of “integration” is not always shared in policy discussions. For example, in the discussion of the German immigration bill by the German Parliament, immigrants would be prodded to become more “integrated” in German society and, within this framework, long-term foreign workers would be allowed to bring children only younger than 12, so that the children would be more likely to attend German schools and learn the language (*New York Times*, 23 March 2002).

¹⁴⁶ Kemp, *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities*, 2001, Kluwer Law International, the Hague/London/Boston, p. 106.

¹⁴⁷ For example the Committee, when examining the report of Bangladesh, asked how the government was “ensuring that they [*indigenous peoples*] continued to live according to their original customs” (A/44/18, para. 73 regarding Bangladesh). In A/51/18, para. 111 regarding Hungary, the Committee praised the government for the review of former assimilation process that allows minorities to regain their linguistic and cultural identity.

At the same time, the human rights framework requires a holistic approach, namely that minorities and indigenous peoples must also respect and promote internationally recognized human rights vis-à-vis individuals and other groups within them. This idea is included both in the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities and in the Draft Declaration on the Rights of Indigenous Peoples. Obviously, minorities and indigenous people, as citizens, are also required to respect national law overall, law which is presumed to originate from the majority.

There is a fine line between state policies of respect for freedom of participation in cultural life by minority and indigenous groups and marginalization of such groups. It is possible that too strong or unconditional a push for these communities institutionally to take care of their own cultural needs and for the state to abstain from action will be simply convenient for the state, "letting the state off the hook" in terms of positive obligations and ending up in continuing marginalization of the groups themselves. The other fine line is that between positive action by the state and assimilation. There are no ready-made recipes as to how to apply positive action in favour of the cultural rights of groups.

Ideally the state should, in a spirit of true equality between majority and minority, take such measures as are necessary in order to assist the minority to preserve, develop and promote its cultural identity. The more the minority is able to fulfill the task of retaining its identity through its own resources, the less onerous will be the duties devolving upon the state. The standard of obligation is necessarily a relative one and uniform conduct is not required.¹⁴⁸ Here again the holistic framework of human rights requires that if aspects of a minority culture run contrary to internationally recognized human rights, for example reluctance to educate girl children, the state should not take any positive measures to encourage such practices of the group, rather the opposite, i.e. the state in such a cases should protect the human right of the girl child to education without discrimination based on sex.

The clash of values of the minority with those of the majority is often discussed within the context of personal law. There is no doubt that personal law, customary or religious, reflecting values of the minor-

ity community on birth, marriage, death and inheritance, profoundly reflects cultural values of the minority and forms part of its cultural integrity. Measuring such values against international human rights norms, especially regarding women and girls, poses one of the biggest challenges to the role of the state regarding cultural rights at the group level. It would be contrary to the philosophy and precepts of human rights law to state that *all* values of each group, constituting part and parcel of its cultural integrity, must be upheld, respected and promoted by the state, including by positive measures. Debates have been fervent on this in several parts of the world, especially regarding the provisions of religious law applied by minorities vis-à-vis women and girls, with the consent of the state. It should be added that, within the politics and conflicts of minorities and the state in which they live, it is not uncommon to view as "progressive" or pro-minority or as a sign of tolerance and multiculturalism the acceptance of the personal law regimes of the minorities by the state, which in a sense is ready to close its eyes to the adverse effects of such regimes on individual members of such communities, especially women and girls. From a human rights law point of view, however, the acceptance by the state of such separate customary or religious legal regimes of minorities should be whether they conform to human rights standards. The state is in fact responsible under international human rights law to respect, protect and fulfill the fundamental human rights of all persons on its territory without discrimination, including persons belonging to minorities. The state, in other words, cannot justifiably fail to apply human rights norms to minority persons by invoking the culture, religion or legal custom of the minority group.

The elements discussed in this chapter are guidelines that we find in international law and practice regarding the cultural rights of indigenous peoples and minorities. An overall principle that summarizes these guidelines is that whenever the state needs to intervene to protect or fulfill the cultural rights of minorities or indigenous peoples, and especially when conflicts between competing groups need to be managed, the operating principle for laws, policies, resource allocation and other action must be to create an enabling environment for diverse cultures to flourish, within a holistic context of human rights. At the same time, as I stress elsewhere in this book, positive state measures for the fulfillment of the cultural rights of minorities and indigenous peoples are an essential way of addressing historical injustices with moral, political and material implications for society.

¹⁴⁸ Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford University Press, 1991, pp. 185-186.

CONCLUSIONS AND RECOMMENDATIONS

While a lot is debated about culture in today's world and a lot more is done in the name of culture in politics, national or international, little attention has been paid to cultural rights. One of the reasons is the concern that cultural rights might invoke cultural relativism and thus undermine the universality concept. Another difficulty is the definition of cultural rights which is linked to the concept of culture, itself fluid and changing. Some also consider cultural rights as a "luxury", something only for societies at a certain stage of development. Political sensitivities of governments at the national and international level are also at the root for this neglect, especially the fear that group identities could threaten the so-called nation state.

The wording of international human rights instruments in terms of cultural rights may be elliptic, non-systematic or unclear - in short, imperfect - but a careful examination of international legal texts, the jurisprudence and other case law of international bodies and international and national practice reveals the elements of cultural rights that do not appear to the naked eye.

Readers who are not specialists in cultural rights may be interested in particular in the confrontation between individual and group rights that has been alluded to many times in these pages and that has of course been a very actively debated question in human rights generally. One thing I want to point to in this conclusion is the significance of cultural rights in this debate.

Cultural rights include both rights of individuals and rights of groups. This book has focused mostly on the right to participate in cultural life, which is the most comprehensive of cultural rights.

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

- a) Non-discrimination and equality.
- b) Freedom from interference in the enjoyment of cultural life, and freedom to create and contribute to cultural life.
- c) Freedom to choose in which culture(s) and cultural life to participate, the freedom to manifest one's culture.
- d) Freedom of dissemination.
- e) Freedom to cooperate internationally.
- f) Right to participate in the definition, preparation and implementation of policies on culture.

In addition, as I have shown, various other human rights and fundamental

freedoms are interdependent and interrelated vis-a- vis the right to participate in cultural life, including freedom of movement, freedom of expression, the right to education and the right to work. What I could say more is that the full enjoyment of cultural rights depends on these other rights, but also that there is a weakness in the understanding of these other rights if cultural rights are not factored in.

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

In addition to the above normative elements pertaining to the cultural rights of individuals, the cultural rights of minorities and indigenous peoples have the following characteristics and involve the following special obligations for states:

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

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

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

d) The cultural rights of minorities and indigenous peoples, both as groups and as individuals, consist of: the right to education; the right to use their language in private life and various aspects of public life, such as before judicial authorities and to identify themselves as well as place names; the right to establish their own schools; access to

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

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

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

g) Although cultural rights have not always been called collective rights in international instruments, it is logically and morally impossible not to recognize the collective elements of cultural rights when speaking about minorities and indigenous peoples. International instruments recognize that cultural rights must be guaranteed for persons belonging to national or ethnic, religious and linguistic minorities and indigenous peoples, not only individually, but also as collectivities in community with other members of their group.

The minimum core obligations of states regarding cultural rights consist of the basic elements outlined below, which are extensively analyzed in various chapters of this book, especially chapter III.D. The elements of the state's core obligations constitute the other side of the equation that requires human rights to be accompanied by corresponding obligations:

- a) Non-discrimination in law and practice;
- b) Non-interference in the freedom of cultural expression and of individuals and groups, including its dissemination within and beyond borders;
- c) Protection by the state, within the purview of the regular discharge of police and justice functions, of the freedom to participate in cultural life when it is under threat by non-state actors;
- d) Ensuring representative participation of society, including of minorities and indigenous peoples, in the definition, preparation and implementation of policies on culture.
- e) Promoting policies of respect for cultural rights and cultural diversity within society, especially through education, formal and non-formal.
- f) Taking steps to the maximum of available resources to fulfill conditions and correct circumstances that will allow the full enjoyment of cultural rights, especially those of marginalized and disadvantaged groups.

The analysis in this book points to guidelines found in international law and practice for states to follow in case of conflict of rights. An overall principle that summarizes these guidelines is that whenever the state needs to intervene to protect or fulfill the cultural rights of indigenous peoples and minorities, and especially when conflicts between competing groups need to be managed, the operating principle for laws, policies, resource allocation and other action must be to create an enabling environment for diverse cultures to flourish, within the overall context of internationally recognized human rights.

If taken seriously, the implementation of cultural rights can also achieve transfer of resources to minorities and indigenous peoples from the dominant society and thus help mend age-old historic injustices and discriminatory practices. While there are political difficulties in any appeal to cultural rights, there are also opportunities that match and outweigh these difficulties: cultural rights have a real world political strength, and they also make both moral and “material claims” through which it is possible for some quantity of power to change hands and for historic injustice to be addressed.

The research for this book has shown that respect for minority and indigenous peoples’ cultural rights is also linked to issues of conflict and peace. For the sake of peaceful societies and peaceful relations among states, the vision of public policies should be away from sustaining, encouraging or creating myths of a cultural or “blood” purity of society, but rather focus on the re-shaping of national identities to include today’s multicultural realities¹. In this century of increasing awareness about the need for preventive measures, it is likely that sooner rather than later politicians will have to deal with this issue, and international organizations should be able to assist in those processes. Human development, in order to be sustainable, will have to take place in a culturally respectful and relevant policy environment that addresses people’s cultural rights.

There are people who will present human rights, especially cultural rights, as if these issues were marginal to peace or to economic and social development. This book is written to help avert such impressions. At the same time, crucial as cultural rights are in the preservation or building of peace and in development, they should not be viewed only in terms of their functionality in these crucial areas of each society. Cultural rights should also be appreciated and respected as distinct human rights, as part of each person’s and each group’s humanity and integrity.

Women suffer from certain cultural practices and they are also hampered in the exercise of certain of their cultural rights. Their participation in cultural life raises special challenges to the principle of non-discrimination on the basis of gender. Often neither the legal sphere of the state nor the social norms of the community or the family provide a free, equal and democratic space for women to fully enjoy their cultural rights as individuals or as members of culturally distinct groups. Given the fundamental role of

¹ Elsa Stamatopoulou, “Protection of national minorities and Kin-States: An International Perspective”, in *The Protection of National Minorities by their Kin-State*, European Commission for Democracy through Law, 2002, Council of Europe Publishing, Collection: Science and Technique of Democracy No. 32, p.105

women in passing on culture to future generations as creative agents of culture, respect for their cultural rights can have an especially profound impact on society, both in the private and in the public sphere.

Many of the challenges of perception, prejudice and occasional violence that societies face due to massive migrations could be dealt with by attending to the cultural rights of migrants. Measures such as intercultural education and access by the migrants' cultures to the media offer possible policy responses towards promoting understanding between the cultures of migrants and the dominant society. Human rights monitoring bodies should send a clear signal to states by a strict monitoring of the cultural rights of migrants.

A review of some UN development programmes shows inadequate attention to cultural rights, despite the general awareness that local cultures should be taken into account. It also demonstrates that culturally sensitive policies can contribute to the sustainability of programmes and their effects over the long term. Taking cultural diversity into account widens the range of options open for everyone and is one of the roots of development, not simply in terms of economic growth, but also as a means for people to achieve a more satisfactory intellectual, emotional, moral and spiritual existence.

Conclusions from the review of some UN peace operations include the following:

a) If there is an ethnic element in the conflict, there is generally a UN focus on cultural rights; yet lack of a full understanding of what cultural rights are weakens their promotion and protection on the ground.

b) Focus on cultural rights in the terms of reference of a UN peace mission gives direction to the programmes on the ground.

c) If a mission does not contain cultural rights elements in its terms of reference, even human rights focal points or units do not usually understand cultural rights to be part of their mandate, or simply do not understand cultural rights at all; however, once awareness of the issue is there, promotion of cultural rights is clearly appreciated as part and parcel of building a long-term peace.

d) Like UN development programmes, peace operations must be also aware that in order to be effective they have to take local cultures into account and use local cultural means to pursue their peace-building efforts, as for example traditional justice systems.

The recommendations in this book are based on an evaluation of the gaps in policy attention to and understanding of cultural rights and are meant to stimulate a concerted effort at various levels, with the international bodies having a significant role to play. Since states have the primary responsibility for the protection and promotion of all human rights of people in their territories, including cultural rights, they should increase their attention to and action on these rights. First, states should act to implement cultural rights at the national level. At the same time, donor countries should increase voluntary contributions for the enhancement of the cultural rights assistance programmes of the various voluntary funds for human rights of the Office of the High Commissioner for

Human Rights, of other UN agencies, funds and programmes and also provide earmarked resources for peace operations. Donor countries should also increase their attention to cultural rights programmes within the framework of bilateral assistance.

Both at the conceptual and at the monitoring level, the Committee on Economic, Social and Cultural Rights should demonstrate leadership in the area of cultural rights. The Committee's contribution is indispensable, as it is the most appropriate international expert forum to carry out this analysis and share it with states, other international bodies and civil society. The Committee should therefore enhance its effort in preparing a General Comment on Article 15(1)(a), and in this regard should hold another "Day of General Discussion" on the right to participate in cultural life and bring together UNESCO, experts and non-governmental organizations, including indigenous organizations and organizations of minorities and others. In examining states' reports on implementation of the International Covenant on Economic, Social and Cultural Rights, the Committee should devote systematic attention to the right to participate in cultural life. At the same time it is indispensable for the Committee to review the guidelines for reporting by states, so as to spell out the elements of cultural rights that governments will be expected to address in their reports. Another step should be for the Committee to encourage the development of indicators and benchmarks in the area of cultural rights. The Committee should convene a meeting and foster dialogue with other treaty bodies on the subject as well as with UN minority-related mechanisms and UN indigenous-related mechanisms, including the Special Rapporteur on the human rights and fundamental freedoms of indigenous people, the UN Permanent Forum on Indigenous Issues and the UN Working Group on Indigenous Populations. Finally, in order to increase the visibility of its work on cultural rights, the Committee should review the format and substance of its reports.

Human rights treaty bodies and extra-conventional mechanisms of the UN Human Rights Council should pay more attention to the right to participate in cultural life when examining the situation of human rights around the world. The weight of these extra-conventional mechanisms, in human rights, political and legal terms, is such that appropriate attention to cultural rights on their part could have a catalytic effect in country policies. In addition, the peer review of states members of the Human Rights Council should also include the situation of cultural rights in those countries.

Given the fact the majority of countries have minorities and indigenous peoples, such attention could help strengthen public policies for the respect of the identity of these communities, even mend historic injustices towards these communities by the majority population, and it could 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, ones that would go beyond symbolism and also touch on material demands that some cultural rights entail, such as language rights for minorities. Given the link between peace and human rights, the human rights special rapporteurs could become "ambassadors" for cultural rights and show some of the way towards cultural rights policies that could prevent or respond to various conflicts, especially those linked to minorities and indigenous peoples. It is

regrettable that the input of human rights special rapporteurs in this area, with the exception of the rapporteur on indigenous people, is a still unexplored territory, while the potential for a positive international contribution is enormous. However, in order for this contribution to happen, the most central expert human rights treaty body in this area, namely the Committee on Economic, Social and Cultural Rights, needs to take leadership in placing cultural rights squarely on the human rights map. Otherwise, interventions on cultural rights by individual rapporteurs or UN policy-making bodies without a clear sense of what cultural rights are can lead to weak results.

UNESCO should be encouraged to be a more active contributor to the work of the Committee on Economic, Social and Cultural Rights, and cooperation between UNESCO and the Office of the High Commissioner for Human Rights should be strengthened. UNESCO should also facilitate the participation of indigenous peoples' organizations in their normative, monitoring and other deliberations, especially those dealing with cultural diversity, traditional knowledge and cultural heritage. Given UNESCO's limited field presence and participation in the preparation of UN development programmes, its influence has not been adequately reflected in UN operations. It is therefore important for UNESCO to play a more active role in inter-agency affairs so as to strengthen its influence in making the link between culture and development at the field level.

UN development programmes, funds and agencies, as well as other intergovernmental and non-governmental organizations, should view cultural development as part of human development, with special emphasis on vulnerable groups or parts of the population. With this consideration in mind they should: a) develop staff multicultural competencies to understand the communities where they operate and work with them to develop the best programme content; b) review programme monitoring and evaluation efforts on successful initiatives that integrate cultural and religious factors into their design and advocacy strategies; c) issue policy decisions on cultural and religious dimensions in programming; d) ensure that knowledge sharing mechanisms include information on culture and religion; e) carefully select appropriate entry points (such as HIV/AIDS) for opening up dialogue with religious and cultural institutions and leaders; f) expand partnerships and coalitions with key organizations and other actors working in the development area, including indigenous peoples and minorities; g) prepare cultural rights indicators for development programming; h) encourage donors to fund programmes on cultural development; i) develop workable models for the preservation and promotion of the use of traditional knowledge including, as appropriate, legal mechanisms to protect such knowledge against misappropriation; j) support the collection and analysis of information on customary laws and practices relating to traditional knowledge; k) ensure the broadest possible participation of local, indigenous and minority communities in deliberations and decision making relating to traditional knowledge; l) and improve awareness of the role of traditional knowledge in fostering local innovation and development.

International peace operations should include the promotion and protection of cultural rights in their terms of reference, especially if a situation involves indigenous peoples and minorities; the mission's budget should include resources for the

implementation of the relevant programmes. Training of staff in peace operations should include a unit on the elements of cultural rights and methods for their promotion and protection. Recommendations (a) to (e) and (j) above are equally valid for peace operations.

The UN Security Council should explicitly include items falling under the right to participate in cultural life in the identification of exceptions to sanctions regimes. Given the fundamental significance of cultural rights, the Security Council should consider appropriate measures that will allow cultural activities by civil society, including international cultural cooperation, to continue, such as participation in artistic events and scientific conferences. Allowing cultural expression of the population of the state under sanctions would help sustain the dignity, the morale and possibly even the spirit of resistance of such populations. It would be useful for the Council to systematize and formalize its ideas on exceptions to sanctions connected with the right to participate in cultural life, thus boldly recognizing the fundamental value of cultural participation for human dignity.

The Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance, the Programme of Action of the Global Agenda for Dialogue among Civilizations and the Programme of Action of the Second International Decade of the World's Indigenous People provide a ground on which various actors can undertake new efforts in favour of cultural rights. Technical cooperation programmes, especially those of the Office of the UN High Commissioner for Human Rights, should also integrate cultural rights. There is a role that OHCHR can play through its technical cooperation programme and voluntary funds that has not yet been fully explored. In a sense, this is understandable given the relative invisibility of cultural rights in the work of human rights bodies and the difficulty of defining the very concept of cultural rights. As progress is made in this area, the hope is that OHCHR will include the promotion of cultural rights in the technical cooperation programme and the work of voluntary funds under its administration.

Some areas where the Office of the High Commissioner and other international actors might find meaningful ground for technical assistance in the field of cultural rights would be: (a) promoting language rights; (b) promoting participation of women, youth, children, minorities, indigenous peoples and migrants in cultural life; (c) promoting the adoption of laws and the establishment of administrative structures for non-discrimination in the right to participate in cultural life; (d) promoting the establishment of institutions for the democratic participation of people in national or local decisions affecting culture; ensure that women's participation is also guaranteed under such participation schemes; (e) promoting media awareness of cultural rights, especially those of disadvantaged vulnerable groups, such as migrants or indigenous peoples; (f) promoting laws and policies for improving the access to cultural sites (museums, theatres, etc.) for the elderly, the persons with disabilities, the poor and others requiring special attention; (g) promoting community, grassroots projects on cultural rights.

The Office of the High Commissioner for Human Rights could also initiate a comprehensive awareness-raising effort for cultural rights with its interagency partners, such as pursuing the inclusion of cultural rights in the terms of reference of human rights units of peace operations and requesting monitoring and reporting on the issue in the field. The Office of the High Commissioner could also (a) bring the issue of cultural rights as a theme for discussion at the meetings of Chairpersons of human rights treaty bodies and of Special Rapporteurs; (b) conduct appropriate training of its staff to create awareness of cultural rights. (c) take the initiative for a consultation on cross-fertilization on cultural rights among human rights mechanisms with the participation of experts from treaty bodies, and experts on indigenous rights, minority rights on freedom of religion and others, d) continue its support to UN country teams in the form of fielding human rights advisors, holding regional workshops for UN country teams, government officials and indigenous organizations; the UN Permanent Forum on Indigenous Issues and OHCHR should collaborate in that regard.

Much remains to be done in particular for the cultural rights of indigenous peoples, and the various international mechanisms in place should be activated. At the normative level, solid protection and promotion of these rights should be ensured in the international instruments currently being drafted by the United Nations and the Organization of American States. The international human rights monitoring mechanisms, including the United Nations Special Rapporteur on the human rights and fundamental freedoms of indigenous people, should focus on this neglected category of human rights.

The UN Permanent Forum on Indigenous Issues should make proposals to the UN system for the active inclusion of cultural rights of indigenous peoples in development programmes. For example, in collaboration with indigenous peoples and governments concerned, the UN could develop a list of sacred and ceremonial sites that require special measures for their protection and conservation, and provide financial and technical assistance to indigenous peoples and states for these purposes. Respecting the free, prior and informed consent of indigenous peoples in such a project is indispensable-as the cultural protocols and other considerations of indigenous peoples for such sites will need to be followed. The UN operational agencies, as well as the international financial institutions and regional and bilateral development assistance programmes, should provide financial and technical support to indigenous communities for capacity-building and exchanges of experience focused on local control of research and education. A great gap that remains to be filled is that between the needs and requests by indigenous communities to fund cultural projects, such as for example community museums, and the availability of resources for such projects. It is time for funders to realize that cultural projects of this kind are far from being a luxury. They can contribute immensely to the morale, self-confidence and overall economic and social development of people and their communities, especially for groups long marginalized and discriminated against. Given the significant lack of awareness and capacity on indigenous issues, the UNPFII and its secretariat should develop a practical toolkit, the primary users of which would be UN country teams, governments and civil society as well as other donors at country level. The UNPFII should develop a basic set of indigenous peoples' specific targets and

indicators to which programme designers at country level can look for reference to implement country programmes. The UNPFII should promote increased referral and advisory services for UN country teams regarding indigenous issues.

UN country teams (UNCTs) should advocate and support programmes aimed at enhancing availability of ethnically disaggregated accurate and reliable data. While assessing the situations of indigenous peoples, UNCTs should take into consideration indigenous peoples' special social, cultural, 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.

Given the increasing impact of the private sector on national and local cultures through globalization, the awareness and contribution of the private sector to cultural rights should be encouraged. The human rights principles to which the private sector is now called to conform should be deepened and elaborated to include cultural rights. While multinational companies are pursuing their interests around the world and while their cultural influence is undeniable, it is imperative for them to operate within human rights frameworks that include cultural rights. Especially relevant are the duties of the private sector to respect the traditional knowledge and the intellectual property of indigenous and local communities, as explained in Chapter IV.A above.

Non-governmental organizations, including human rights organizations, women's organizations and anti-racism organizations as well as other agents of the organized public opinion, should demonstrate an informed interest in cultural rights.

There is a challenge for the media in the promotion of cultural rights as they may be inclined to sensationalize what they see as the marginal exotic. The media should be visionary in conveying the potential of human diversity, outside the constraints of cultural prejudice, political correctness or influential economic and political interests.

As the research for this book has shown, the media are of fundamental importance for cultural rights, especially those of minorities, indigenous peoples and other marginalized groups. The media therefore have special social responsibility to facilitate access for minority cultures and to present such cultures to the larger society. Such presentations should avoid sensationalizing the heritage of minority, indigenous or other culturally distinct communities. This approach is not about the media being politically correct. The representation of a culture means first understanding that culture is the vehicle that allows a person or a group to belong to human society. Communicating to the public a culture different from our own, and in a way that respects human rights, means respecting the dignity of those whose culture we depict. Representation of "the other" should then involve an interpretation of that culture in terms that will help us recognize and understand the humanity of people who are of a different culture. Few would disagree that sensationalizing the culture of a socially vulnerable group and turning it into an object of voyeurism hardly respects human dignity.

In the absence of legislation, the mass media should adopt measures of self-regulation in order to eliminate vestiges of racism and ethnic discrimination in their programmes and content and actively promote the vision of a multicultural and democratic society.

To conclude my conclusions, it is clear that international human rights bodies have interpreted cultural rights as encouraging a multicultural society where cultures will coexist, freely interact, and benefit from each other. No international human rights body has advocated hierarchical models where the dominant or mainstream culture would enjoy the special favour of the state. The challenges are undeniably complex, but the policy efforts aiming at the respect, promotion, and fulfillment of cultural rights are feasible and my research suggests that they can have an unexpectedly large impact on society.

Readers who have gotten this far will have understood that cultural rights are issues different from those that emerge from the very familiar issue of *culture vs. human rights*. And yet, in a speculative spirit, it might be worth asking whether in any sense the protection of cultural rights could indeed be seen as a partial solution to the culture vs. human rights problem. Were we to convince policy makers at the national and international level to actively and visibly pursue the promotion and protection of cultural rights, we would have certainly gone a long way towards calming the politics of “culture wars”, racial and other identity politics and the bigotry and identitarian fanaticism they trigger. We would be on the way towards creating a *polis* where one would focus less on identities that divide us and more on the many cultures we share and enjoy.