



Culture as Collective Memories: An Emerging Concept in International Law and Discourse on Cultural Rights*

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ABSTRACT

For many years legal scholars have sought to elaborate on the notion of culture in the context of cultural rights. Various expressions of the concept can be found scattered in different international instruments. The multiple meanings that the concept evokes can sometimes be confusing and the variations easily affect the obligations that States are required to comply with. This article gives an account of how these different understandings of culture evolved, as well as their legal consequences. It further seeks to identify an emerging concept of culture that is currently embodied in the works of the United Nations human rights treaty bodies, that is, the concept of culture as collective memories. The significance of this development will be highlighted.

KEYWORDS: cultural rights, collective memory, Article 15(1)(a) International Covenant on Economic, Social and Cultural Rights, General Comment No 21 International Covenant on Economic, Social and Cultural Rights

1. INTRODUCTION

For decades, legal scholars have grappled with the elusive notion of ‘culture’.¹ Despite the difficulty in pinning down its content, ‘culture’ was considered a concept

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1 UNESCO, *Cultural Rights as Human Rights* (Paris: UNESCO, 1970) at 15–23; Prott, ‘Understanding One Another on Cultural Rights’, in UNESCO (ed.), *Cultural Rights and Wrongs: A Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights* (Paris: UNESCO, 1998) 164; McGoldrick, ‘Culture, Cultures, and Cultural Rights’, in Baderin and McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press, 2007) 448 at 449. The concept of ‘cultural rights’ is vague because interpretation of the word ‘culture’ varies widely: see Wilson, ‘Cultural Rights: Definitions and Contexts’, in Wilson and Hunt (eds), *Culture, Rights, and Cultural Rights: Perspectives from the South Pacific* (Wellington: Huia, 2000) 13 (‘defining cultural rights has proved to be a monumental task’); and Donders, *Towards a Right to Cultural Identity?* (Antwerp: Intersentia, 2002) at 2.

too important to abandon.² The protection of the cultural rights of individuals and communities has profound implications for an individual's access to culture which is in turn integral to his or her personhood.³

Boutros-Ghali, former United Nations (UN) Secretary General and ex-member of the Expert Committee on Cultural Rights, defined the right to have access to culture as follows:

By the right of an individual to culture, it is to be understood that every man has the right of access to knowledge, to the arts and literature of all peoples, to take part in scientific advancement and to enjoy its benefits, to make his contribution towards the enrichment of cultural life.⁴

The above definition was inspired from a textual reading of Articles 22, 25, 26 and 27 of the Universal Declaration of Human Rights (UDHR),⁵ where cultural rights were first recognised.⁶ As Boutros-Ghali noted, Article 22 of the UDHR states that '[e]veryone, as a member of society ... is entitled to realization ... of the economic, social and cultural rights, indispensable for his dignity and the free development of his personality'. Articles 25, 26 and 27 are the steps to be taken to achieve this goal. Assuming that the person has a minimum well-being (Article 25) and education (Article 26), Article 27 then provides that '[e]veryone 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'—a necessary element for an individual to realise his or her personality.⁷ This understanding of cultural rights was further supported by the 1968 United Nations Education, Scientific and Cultural Organization (UNESCO) Statement on Cultural Rights as Human Rights,⁸ which provided that one's access to culture included 'the possibility for each man to obtain the means of developing his personality, through his direct participation in the creation of human values'.⁹ Similarly, Articles 4(4) and 4(5) of the 1966 UNESCO

- 2 Anthropologist Thomas Eriksen was sceptical about the use of the word 'culture' in law because of its elusive nature. He argued that '[i]nstead of invoking culture, if one talks about local arts, one could simply say "local arts"; if one means language, ideology, patriarchy, children's rights, food habits, ritual practices or local political structures, one could use those or equivalent terms instead of covering them in the deceptively cozy blanket of culture. In a continuous world ... the concept of culture ... will have to go.' See Eriksen, 'Between Universalism and Relativism: A Critique of the UNESCO Concept of Culture', in Cowan, Dembour and Wilson (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001) 127. Nevertheless, the word 'culture' in the context of human rights is construed more as a 'capacity' or a freedom, and its application is not meant to be restricted to a list of cultural 'activities'. There is an inherent value to culture, that is, culture is a human condition and is a necessary embodiment of all societies and communities: see Holder, 'Culture as a Basic Human Rights', in Eisenberg (ed.), *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: University of British Columbia Press, 2006) 78.
- 3 Barth, *On Cultural Rights: the Equality of Nations and the Minority Legal Tradition* (Leiden: Martinus Nijhoff Publishers, 2008) at 6.
- 4 UNESCO (1997), supra n 1 at 9, 73.
- 5 GA Res 217A(III), 10 December 1948, A/810 at 71.
- 6 Szabo, *Cultural Rights* (Leiden: A. W. Sijthoff, 1974) at 43; and Barth, supra n 3 at 6.
- 7 UNESCO (1997), supra n 1 at 73; and Article 27, UDHR.
- 8 UNESCO (1997), supra n 1.
- 9 Ibid. at 106.

Declaration of the Principles of International Cultural Cooperation ('1966 Declaration on International Cultural Cooperation') provided that one of the aims of international cultural cooperation is 'to enable everyone to have access to knowledge, to enjoy the arts and literature of all peoples ... and to contribute to the enrichment of cultural life',¹⁰ thus raising the 'spiritual and material life of man'.¹¹ These instruments reaffirmed the importance of protecting one's access to culture which is essential to an individual's personal development.¹²

Nevertheless, the phrase 'access to culture' is ambiguous. For obvious reasons, what was meant by a right to 'access to culture' and the State obligations that this right entailed depended on the very understanding of 'culture'. Therefore, understanding how the definition of 'culture' evolved in international human rights law became crucially important.

The purpose of this article is to demonstrate how the definition of culture evolved in international legal discourse over time and how it impacted the way culture was construed in international law, especially by the UN human rights treaty bodies. It was widely thought that the concept of culture in international law and discourse embodied three different notions¹³: first, culture as high culture (that is, culture in the traditional 'classic highbrow' sense as including art, literature, orchestra music, theatre and architecture). Second, culture as popular culture (which involves culture in less elitist terms, as including the creative expressions of the mass public, such as popular, folk and contemporary music, movies, commercial radio and television, as well as other leisure-related activities including organised sports and social events). Third, culture as a way of life, which acknowledged the fact that culture is embedded in our daily activities,¹⁴ and encompassed our values, beliefs, practices and our ways of doing things and thinking.¹⁵ Nevertheless, as this article will show, the above understanding failed to accommodate an emerging understanding of 'culture', the content of which treats culture as sets of collective memories, a concept which acknowledges the aspect of culture that consists of shared ideas and beliefs of history,

10 Declaration of the Principles of International Cultural Cooperation, 4 November 1966, 14 UNESCO General Conference Rec, UNESCO 14C/Resolution at 86 (1967) ('1966 Declaration on International Cultural Participation').

11 Article 4(5) 1966 Declaration on International Cultural Cooperation. The preamble of the 1976 Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It provided that culture is 'becoming an important element in human life ... and that an essential premise for such progress as to ensure the constant growth of society's spiritual potential, based on the full, harmonious development of all its members and the free play of their creative faculties'. See 19 UNESCO General Conference Rec. UNESCO 19C/Resolution 4.126, Annex 1 at 29, 26 November 1976 ('1976 Recommendation on Participation in Cultural Life').

12 Barth, *supra* n 3 at 6; and UNESCO (1997), *supra* n 1 at 20.

13 This categorisation is provided by O'Keefe in his widely cited work, which remains very useful and highly relevant: see O'Keefe, 'The "Right to Take Part in Cultural Life" under Article 15 of the ICESCR' (1998) 47 *International and Comparative Law Quarterly* 904. See also Hunt, 'Reflections on International Human Rights Law and Cultural Rights', in Wilson and Hunt (eds), *Culture, Rights, and Cultural Rights: Perspectives from the South Pacific* (Wellington: Huia, 2000) 26; and McGoldrick, *supra* n 1 at 449.

14 O'Keefe, *supra* n 13 at 905; MacKay, 'Cultural Rights', in Salomon (ed.), *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* (London: Minority Rights Group International, 2005) at 83; and Thaman, 'Cultural Rights: A Personal Perspective', in Wilson and Hunt (eds), *Culture, Rights, and Cultural Rights: Perspectives from the South Pacific* (Wellington: Huia, 2000) 1.

15 O'Keefe, *ibid.*

ancestry and of life sustained in a community of individuals' memory, lived, signified, expressed and enacted, which gives heritage and cultural practices their meaning. Thus, for example, the spiritual relationship between indigenous people and their land is sustained by a collective memory, and so is the relationship between communities and significant historical events.

Section 2 of this article will give an account of how culture evolved in international legal discourse, especially through the works of UNESCO, the primary UN agency and intellectual powerhouse on issues concerning culture.¹⁶ Although most UNESCO instruments on culture aim at promoting international cooperation and best practices and as such do not confer individual or communities any substantive right, in contrast to the UN human rights treaties,¹⁷ over the course of time UNESCO has participated in elaborating the content of cultural rights through means such as organising expert conferences and international forums on cultural rights,¹⁸ participating in the drafting of the relevant provisions of human rights instruments containing cultural rights such as the UDHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁹ participating in drafting the ICESCR-reporting guidelines on the relevant provisions,²⁰ and participating in the Day of Discussion organised by the Committee on Economic, Social and Cultural Rights (CESCR), the treaty body of the ICESCR.²¹ Moreover, UNESCO has also adopted instruments which aim at elucidating and enriching the content of cultural rights, such as the 1966 Declaration on International Cultural Cooperation and the 1976 Recommendation on Participation in Cultural Life.²² Furthermore, UNESCO instruments also often provide the background context to the development of cultural rights in the international discourse and, in this sense, helpfully supplement some of the rationales behind the development of cultural rights in the works of the treaty bodies.²³ It is important to acknowledge that the CESCR, the first treaty body mandated to monitor the protection of cultural rights, was established more than 30 years after the adoption of the UDHR in 1948 when the right to participate in cultural life was first mentioned, and that work undertaken

16 Ibid. O'Keefe stressed the importance of UNESCO's body of work to the study of cultural rights, as it significantly affects how 'culture' in international legal discourse has evolved and developed: see *infra* n 24.

17 Francioni, 'Cultural, Heritage and Human Rights: An Introduction', in Francioni and Scheinin (eds), *Cultural Human Rights* (Leiden: Martinus Nijhoff Publishers, 2008) 1 at 3. Nevertheless, it is still important to note that '[a] majority of these instruments are linked directly or indirectly with human rights': see Symonides and Volodin, *UNESCO and Human Rights: Standard-Setting Instruments Major Meetings Publications* (Paris: UNESCO, 1999) at vi.

18 In 1952, UNESCO appointed the first Committee of Experts to study 'the right to participate in cultural life of the community' enshrined in Article 27(1) of the UDHR, setting out the scope of reference for the future elaboration of cultural rights. Singh, 'UNESCO and Cultural Rights', in UNESCO (ed.), *Cultural Rights and Wrongs: A Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights* (Paris: UNESCO, 1998) 146–160.

19 See text accompanying *infra* nn 41–59.

20 Symonides, 'UNESCO's Contribution to the Progressive Development of Human Rights' (2001) 5 *Max Planck Year Book of United Nations Law* 307 at 338.

21 CESCR, General Discussion on the Right to Take Part in Cultural Life as Recognized in Article 15 of the Covenant, 11 December 1992, E/C.12/1992/SR.17 at para 35.

22 Francioni, *supra* n 17 at 2.

23 Although it must be noted, as Hunt has succinctly argued, that there should have been more exchanges between CESCR and UNESCO: see Hunt, *supra* n 13.

to study and elaborate on cultural rights had begun before the CESCR's establishment, often undertaken by UNESCO.²⁴ As O'Keefe correctly pointed out, '[existing] literature[s] on cultural rights] ... makes little attempt to flesh out the [Article 15 of the ICESCR's] bare bones by reference either to its drafting or to UNESCO's efforts in this regard.'²⁵

Section 3 demonstrates how various expressions of 'culture' in international legal discourse entailed concrete human rights obligations in the human rights treaties monitored by the UN treaty bodies, with special emphasis on Article 15(1)(a) of the ICESCR (on the right to take part in cultural life) and Article 27 of the ICCPR (on the right of minorities to enjoy culture). When 'cultural rights' were first recognised, there was 'little appreciation of the nature of these rights and the corresponding obligations imposed on States'²⁶; nevertheless, obligations pertaining to 'cultural rights' slowly materialised. Article 15(1)(a) of the ICESCR (the right to take cultural life) was a critical starting point of this process, and will be the main focus of this article. The phrase 'cultural life', albeit vague, afforded the flexibility for different obligations to attach. On the other hand, the right to take part in cultural life was subsequently adopted by numerous conventions including the Convention on the Rights of the Child (CRC) (Article 31(1)),²⁷ the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Article 5(vi)),²⁸ the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) (Articles 43(1)(g) and 45(1)(d)),²⁹ the Convention on the Rights of Persons with Disabilities (CRPD) (Article 30),³⁰ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (Article 13(c)),³¹ which in combination show the importance of the right for vulnerable groups such as children, migrant workers, persons with disabilities and women, although each of these articles has a slightly different focus to the others.³² The practice which arises from these

24 For example, the first expert committee on cultural rights was established in 1952. In 1969, UNESCO held the first conference on cultural rights, entitled the Conference on Cultural Rights as Human Rights. From 1972 to 1981, UNESCO organised a series of intergovernmental conferences and regional conferences on cultural policies. The findings of the series of conferences were reported in the World Conference on Cultural Policy and were reflected in the 1982 Mexico City Declaration.

25 O'Keefe, *supra* n 13. For notable exceptions, see Donders, *supra* n 1; and Donders, *The Legal Framework of the Right to Take Part in Cultural Life* (Paris: UNESCO and Ashgate, 2007).

26 Fisher et al. (eds), *Human Rights and Cultural Policies in a Changing Europe: The Right to Participate in Cultural Life: Report of the Roundtable held in Helsinki (Finland) 30 April – 2 June 1993* (Helsinki: Helsinki University Press, 1994) at 73.

27 Article 31(1) International Convention on the Rights of the Child 1989, 1577 UNTS 3.

28 Article 5(vi) International Convention on the Elimination of All Forms of Racial Discrimination 1966, 660 UNTS 195.

29 Article 43 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, 2220 UNTS 3.

30 Article 30 International Convention on Rights of Persons with Disabilities 2006, 2515 UNTS 3.

31 Article 13 International Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13.

32 The respective differences reflect the special needs of these vulnerable groups. For instance, the construction of Article 15(1)(a) of the ICESCR is broad and general, whereas Article 13(c) of the CEDAW and Article 5 of the CERD stress the right to *equal* participation in cultural life and cultural activities, as the conventions address discrimination against women and racial discrimination, respectively. On the other hand, Article 30(1) of the CRPD provides not only the right of persons with disabilities to take part in

sources supplements and reaffirms some of the interpretations by the CESCR of Article 15(1)(a) of the ICESCR. This practice will be highlighted where relevant.

The practice of the Human Rights Committee (HRC), the treaty body of the International Covenant on Civil and Political Rights (ICCPR), is another important source of interpretation of cultural rights. Over the years, the HRC has developed a remarkable body of practice on the cultural rights of minorities based on Article 27 of the ICCPR, although it should be stressed that cultural rights and minority rights are different but overlapping categories of rights.³³ They are different in terms of their scope and purpose because the former addresses one's 'access to culture', whereas the latter addresses the survival and well-being of minority groups and embraces rights (political or otherwise) such as the right to self-determination.³⁴ They are different in terms of their application because while cultural rights are afforded to all, minority rights are only afforded to recognised minorities.³⁵ Nevertheless, the cultural rights of minorities and indigenous groups have become increasingly significant, especially when culture is being viewed by the treaty bodies as embodying a 'distinctive way of life'. That is, whether or not their 'access to culture' is unhindered depended on whether these minority and indigenous groups could continue to enjoy their 'way of living'. As will be demonstrated, this aspect of minority rights is occupying a central position in the most recent developments of cultural rights.³⁶ Expressions of culture as a 'way of life' is also found in the practice of other treaty bodies, most notably the CESCR and the Committee on the Elimination of Racial Discrimination (CtERD) which help clarify the concept and will therefore be considered below.

Section 4 highlights the emerging understanding of culture as collective memories. The concept 'collective memories' emerged as a response to earlier failures of international law to recognise that there is always a symbolic aspect to culture/cultural heritage. For instance, cultural objects and properties would not have acquired their cultural significance without the symbolic meanings these objects represent. The same holds true for intangible cultural heritage such as traditions, customs and dance performances, all of which embody some form of cultural meanings which render these acts culturally significant. These meanings are acquired by the individuals and are remembered and practiced by the community as a 'collective memory'. This section demonstrates how culture as 'collective memories' relates to different aspects of cultural rights protection. The obligations that this understanding entails is further highlighted in the General Comment No 21 of the CESCR.

cultural life on an equal basis with others, but further specifies the requirement of States to ensure that they have access to cultural materials in 'accessible formats'. The language contained in Article 30(1) of the CRPD sought to make explicit the needs of persons with disabilities, for example, by making it a requirement that cultural materials should be accessible to persons with sight, hearing or other forms of disabilities. To different vulnerable groups, 'access to culture' may entail different implications.

33 Szabo, *supra* n 6 at 108 ('[Cultural rights] in their totality are ... not considered identical to minority rights and *vice versa*: [while] minority rights are not considered to be *restricted* only to *cultural rights* ... , minorities' cultural rights are part of the range of general cultural rights' (emphasis in original)).

34 Prot, *supra* n 1 at 161, 168–69.

35 *Ibid.*

36 See text accompanying *infra* nn 74–98.

2. THE DEVELOPMENT OF 'CULTURE' IN INTERNATIONAL LEGAL DISCOURSE

International human rights law first contained express provisions to protect cultural rights in Article 27 of the UDHR, which provided:

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.

At the time of its inception, 'cultural rights' was a relatively new concept.³⁷ Although a few national constitutions, such as the 1946 French Constitution and the 1918 Soviet Constitution, provided for culture-related rights, both the UN Charter and the Constitution of UNESCO failed to recognise culture as falling within human rights; instead they regarded it as something that serves human rights and through which the universal enforcement of justice, the rule of law, human rights and fundamental freedom could be achieved.³⁸ Culture was, for many years, 'taken for granted'³⁹ and was frequently addressed within the context of other rights such as the right to religion, or freedom of opinion and expression.⁴⁰

A. Culture as High and Popular Culture

Culture has been derived as high culture from the *travaux préparatoires* of Article 27 of the UDHR and Article 15 of the ICESCR.⁴¹ During the drafting of the UDHR, the Czech delegate to the Commission on Human Rights (HRCComm) saw the Article 'as involving a duty on the part of States to bring "masterpieces" and "treasures of culture" within the reach of the masses'.⁴² Culture was also understood by other delegates to refer to the product of those few who could be called 'artists',⁴³ or

37 UNESCO (1997), *supra* n 1 at 9. In fact, initial proposals for the UDHR did not contain a reference to culture. A reference to culture was suggested by the US delegation to the Commission on Human Rights ('HRCComm') who proposed the enjoyment of 'minimum standards of economic, social and cultural well-being' as a worthy human rights category: see UNCHR Draft Committee on the International Bill of Rights, Documented Outline, 11 June 1947, E/CN.4/AC.1/3/Add.1; Donders, *supra* n 1 at 141; and Morsink, *The Universal Declaration of Human Rights: Origin, Drafts and Intent* (Philadelphia: University of Pennsylvania Press, 1999) 366.

38 *Ibid.* See also Constitution of the United Nations Educational, Scientific and Cultural Organization 1945, 4 UNTS 275.

39 UNESCO (1997), *supra* n 1 at 9.

40 *Ibid.*

41 For a detailed study of the drafting process of Article 27 of the UDHR and Article 15 of the ICESCR, see Morsink, *supra* n 37; Donders, *supra* n 1 at 141; Adalsteinsson and Thorhallson, 'Article 27', in Alfredsson and Eide (eds), *The Universal Declaration of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1999) 575; and O'Keefe, *supra* n 13.

42 O'Keefe, *ibid.* at n 14; and United Nations Department of Public Information, *These Rights and Freedoms* (New York: United Nations DoPI, 1950) at 70–1.

43 Adalsteinsson and Thorhallson, *supra* n 41.

'intellectual workers'.⁴⁴ A similar view was taken in the drafts of the ICESCR. While UNESCO's draft of Article 15 of the ICESCR⁴⁵ provided for access to books, publications and works of art and the preservation of certain cultural heritage as well as the cultural development of minorities, the final version subsequently adopted did not make specific references to what constitutes 'cultural life'.⁴⁶ During the limited discussions which took place at the HRCComm⁴⁷ and the United Nations General Assembly (UNGA)⁴⁸ on the content of 'cultural life', only the French delegate's contribution on the inclusion of the right of authors seemed to shed light on the meaning of culture (as high culture). The proposal was supported by the delegate of Uruguay, and was adopted in the final text.⁴⁹

The expansion of the concept of culture to include popular culture emerged in the late 1960s and 1970s; at that time, it was gradually perceived that culture has implications much further than anticipated in the UDHR.⁵⁰ Mass communication as

44 Ibid. Although it is tempting to read the Article as including the protection of minorities (or 'minority cultures') that was not the intention of the drafters of Article 27 of the UDHR. In fact, the protection of the rights of minorities was explicitly excluded.

45 UNESCO played an important part in the drafting process by submitting the first draft of the proposal of what would later become Article 15 of the ICESCR. Proposals concerning the right to education and cultural rights, along with comments submitted by UNESCO, were considered by the Commission on Human Rights at its 226–230th meeting: see E/CN.4/541; E/1992-E/CN.4/640. See also CESCR, Day of General Discussion: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Article 15(1)(c) of the Covenant), Background paper submitted by Maria Green, 9 October 2000, E/C.12/2000/15; and Donders, supra n 1 at 146.

46 One of the interesting issues was another proposal by UNESCO concerning the role of cultural communities. It suggested the inclusion in Article 15 of a reference to communities and to change the text into 'to take part in the cultural life of the communities to which he belongs'. It was argued that the individual normally participates in the cultural life of various communities. States should not only recognise the right of everyone to participate in his or her national cultural life, but should also respect the right to have access to foreign cultures or the cultural life of smaller communities within the State. However, this proposal was later rejected: see Donders, supra n 1 at 149.

47 The draft Article 30 (now Article 15) was adopted by the HRCComm at its seventh session. In the debates which took place in the HRCComm, the meaning of the term 'cultural life' was not discussed. It was noted that the USSR wanted to introduce a qualifier to the effect that science and culture should serve the interest of peace and democracy and that France urged the inclusion of author's rights: see A/C.3/SR.565; and Donders, supra n 1 at 148.

48 Similar to the discussion in the HRCComm, limited discussion took place on the content of 'cultural life' in the General Assembly. The USSR delegate reiterated his concern over the use of science and culture. The Czech delegate submitted an amendment to include 'peace and co-operation' as the justification for science and culture, and raised the issue of international cooperation in the field of science and culture. In a similar manner, Saudi Arabia submitted an amendment to the effect that science and culture should serve the interest of progress and democracy. The above proposals to limit the purpose of science and culture were rejected as it was felt that such a qualifier might invite State intervention in the areas of science and culture: see A/C.3/SR.798 at 11.

49 A/C.3/SR.798 at 9. The Uruguay delegate proposed that 'the right of the author and the right of the public were not opposed to but complemented each other. Respect for the right of the author would assure the public of the authenticity of the works presented to it'. On a literal reading, one might argue that the scope of culture envisaged by Article 15 of the ICESCR is at least broader than its predecessor, Article 27 of the UDHR, in the sense that the former included not only works of arts and literature produced by artists, but also different forms of architecture and monuments of historical and cultural significance as evident in the explicit reference to 'conservation' in Article 15(2) of the final text.

50 UNESCO (1997), supra n 1 at 61.

well as other cultural and technological advancement had greatly increased the interest of the population at large to culture.⁵¹ Culture became more accessible to people of different classes and social strata when such information and knowledge had not been so accessible in the past.⁵²

In the statement adopted by the 1968 UNESCO Conference of Experts on Cultural Rights, it was observed that there is a 'growing inclination to define culture in non-Elitist terms [and] a new recognition of the diversity of cultural values, artefacts and forms',⁵³ where culture was no longer considered the 'prerogative of the few'.⁵⁴ The 1976 UNESCO Recommendation on Participation in Cultural Life stated:

[C]ulture is not merely an accumulation of works and knowledge which an elite produces, collects and conserves in order to place it within reach of all; ... culture is not limited to access to works of art and the humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate.⁵⁵

The broadened scope of culture prompted the surfacing of the concept of 'popular participation in cultural life',⁵⁶ marking a significant shift in the interpretation of the right to participate in cultural life at the international level. Culture embraced several elements. In terms of its content, it included 'popular culture'⁵⁷ in which a right to culture is considered to mean access to books, films, radio, television, newspapers and magazines,⁵⁸ or what is generally referred to as 'access to knowledge'.⁵⁹ A second element of the concept included the 'democratization of culture', that is, the opening up of cultural institutions to the general public. This was strongly reflected in the 1976 Recommendation on Participation in Cultural Life which stated:

[E]verything that should be done by Member States or the authorities to democratize the means and instruments of cultural activity, so as to enable all

51 Ibid.

52 Ibid. at 60–1, states: "The quantitative increase of messages ... increases the extent of cultural exchange [and] ... heightens the general level of aspirations. The increased flow of information creates fruitful ground for the growth of intercultural communication."

53 Ibid. at 105.

54 Ibid.

55 Preamble 1976 Recommendation on Participation in Cultural Life.

56 Marks, 'Defining Cultural Rights', in Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjorn Eide* (The Hague: Martinus Nijhoff Publishers, 2003) 293 at 304–6.

57 This concept is sometimes referred to as 'mass culture' in UNESCO documents.

58 Although it is difficult to find within the provisions of the 1966 Declaration on International Cultural Cooperation a definition of culture or attempts to exhaustively set out its scope, Article 3 of the Declaration provided that international cultural cooperation should cover all 'intellectual and creative activities relating to education, science and culture'. See O'Keefe, *supra* n 13.

59 Article 4(4) 1966 Declaration on International Cultural Cooperation provided that international co-operation should be aimed at 'enab[ing] everyone to have access to knowledge, to enjoy the arts and literature of all peoples, to share in advances made in science in all parts of the world and in the resulting benefits, and to contribute to the enrichment of cultural life'.

individuals to participate freely and fully in cultural creation and its benefits, in accordance with the requirements of social progress⁶⁰

Further it called for the decentralization of facilities, activities and decisions concerning culture. Similarly, the need to 'democratize culture' was affirmed in the 1982 Mexico City Declaration,⁶¹ which reaffirmed the need to ensure the 'broadest possible participation in the creation of culture goods and decision-making as well as the dissemination of culture'⁶² on the basis of non-discrimination,⁶³ making express references to Article 27 of the UDHR.⁶⁴ Along with the stress in democratising culture, political participation in areas concerning cultural life became an emerging concern as highlighted in the 1976 Recommendation on Participation in Cultural Life.⁶⁵ Commenting on the 1976 Recommendation, Symonides argued that '[p]articipation in cultural life presupposes [the] involvement of the different social partners in decision-making related to cultural policy as well as in the conduct and evaluation of relevant activities'.⁶⁶

The notion 'participation' carried significant implications for the understanding of 'culture' in that culture was understood to embrace two dimensions: a passive culture and an active culture.⁶⁷ Passive culture referred to the freedom to enjoy or to 'consume' culture, whereas active culture referred to the freedom to pursue and contribute to every aspect of cultural life.⁶⁸ Likewise, Article 2(1) of the 1976 Recommendation provided two elements for the right to participate in cultural life: access to culture and the participation in cultural life. By the former, it meant that 'concrete opportunities [should be] available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and

60 Section A 1976 Recommendation on Participation on Cultural Life.

61 UNESCO, Mexico City Declaration on Cultural Policies, World Conference on Cultural Policies, 26 July to 6 August 1982 ('1982 Mexico City Declaration'), available at: portal.unesco.org/culture/en/files/12762/11295421661mexico_en.pdf/mexico_en.pdf [last accessed 19 August 2014].

62 Ibid. at para 18.

63 Ibid. at para 22. The importance of disseminating culture through education and mass media were also noted. See 1982 Mexico City Declaration at paras 30–40.

64 Ibid. at para 17.

65 Articles 3(c) and (d) 1976 Recommendation on the Participation in Cultural Life; see also 1982 Mexico City Declaration at para 21.

66 Symonides, 'The History of the Paradox of Cultural Rights and the State of the Discussion within UNESCO' (1993) *Les Droits culturels; une categorie sous-développée de droits de l'homme/Actes du VIIIe Colloque interdisciplinaire sur les droits de l'homme* 47 at 59.

67 Szabo, supra n 6 at 45–7. This argument was made by Robinson based on his study on the *travaux préparatoires* of Article 27(1) of the UDHR. It implied the right to both actively pursue and passively enjoy arts and scientific progress without limitation and interference: see Robinson, *The Universal Declaration on Human Rights: Its Origins, Significance, Application and Interpretation* (New York: Institute of Jewish Affairs, 1958). Boutros-Ghali comments that there are two meanings to culture: 'that of reception, where the human being is more or less a passive recipient of culture, and that of participation, where the human being is actively contributing to this general culture'. See UNESCO (1997), supra n 1 at 16. As will be shown, the idea of an active and a passive aspect of culture is still important today. See also Donders, supra n 1 at 147.

68 Szabo, supra n 6.

cultural property'.⁶⁹ By the latter, it implied that 'concrete opportunities [should be] guaranteed for all-groups or individuals-to express themselves freely, to communicate, act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and the cultural progress of society'.⁷⁰ From the wordings adopted, the interpretation of the right to participate in cultural life moved beyond negative State obligations to refrain to include positive State obligations to provide. The interpretation of the right also entailed obligations beyond simply ensuring equal opportunity to participate in cultural life.

By taking active culture into account, culture was viewed less as a product or manifestation than as a process.⁷¹ This had important implications. When culture is viewed as a process, culture includes different forms of artistic, creative and intellectual activities and expressions (as opposed to forms of cultural 'products').⁷² Moreover, culture read as a process presupposed rights that are necessary or are conducive to the process. Communication and transmission of culture becomes implicit, yet prominent, concepts which underlie the rights' protection, invoking other supporting rights such as the freedom of expression and information. Participation also presupposes the freedom of association and of assembly.⁷³

B. Culture as a Way of Life

Nevertheless, when one addresses the situation of minorities and the indigenous population, it is not sufficient to define access to culture as access to cultural institutions. Scholars engaged in this field are well aware of this. In the 1968 UNESCO Conference of Experts on Cultural Rights, it was thought that while culture could mean arts and humanity, the notion of culture could also be defined in a broader sense as a 'way of life'.⁷⁴ The meaning of a 'way of life' is very close to a group's habit of behaviour,⁷⁵ living style or the 'world view representing the totality of a person's encounter with the external forces affecting his life and that of his community'.⁷⁶ In this sense, while the definitions of high and popular culture conceive of cultural life as different forms of cultural activities, culture as a way of life refers to, 'the sum total

69 Article 2(a) 1976 Recommendation on Participation in Cultural Life.

70 Article 2(b) 1976 Recommendation on Participation in Cultural Life.

71 O'Keefe, *supra* n 13.

72 Article 3(a) 1976 Recommendation on Participation in Cultural Life ('the concept of culture has been broadened to include all forms of creativity and expression of groups or individuals, both in their ways of life and in their artistic activities').

73 McGoldrick, *supra* n 1 at 453. Subsequent UNESCO instruments reaffirm this point. Article 6 of the 2001 Universal Declaration on Cultural Diversity provided that 'freedom of expression, media pluralism ... and the possibility for all cultures to have access to the means of expression' are indispensable for ensuring access for all to cultural diversity: see Universal Declaration on Cultural Diversity, 2 November 2001, UNESCO 31/C Resolution 25 Annex I at 61 (2001).

74 UNESCO (1997), *supra* n 1 at 16, 25. It was remarked that if one does not distinguish cultures as being superior or inferior, or culture as desirable or undesirable, culture 'is very much a question of how people select their way of living'.

75 O'Keefe, *supra* n 13 at 905 ('society's underlying and characteristic pattern of thought').

76 *Ibid.*

of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups'.⁷⁷

The notion of a way of life was explicitly recognised in the 1982 Mexico City Declaration, as its preamble provided:

In its widest sense, culture may now be said to be the *whole complex of distinctive spiritual, material, intellectual and emotional features* that characterize a society or social group. It includes not only the arts and letters, but also *modes of life*, the fundamental rights of the human being, *value systems, traditions and beliefs*.⁷⁸

By extending beyond the notion of high arts and popular culture, and acknowledging the distinctive features of ways of thinking and ways in which peoples' lives are organised, this definition provided a broad and inclusive definition of culture on which subsequent works of UNESCO are based.⁷⁹ In a report delivered by the World Commission on Culture and Development to UNESCO entitled *Our Creative Diversity*, culture was acknowledged as 'a complex web of relations and beliefs, values and motivations'.⁸⁰ The 2001 UNESCO Universal Declaration on Cultural Diversity defined culture as 'the set of distinctive spiritual, material, intellectual and emotional features of society or a social group ... [encompassing] ... in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs'.⁸¹ The definition of culture as a 'way of life' (what is often erroneously referred to in legal literatures as *the anthropological definition*)⁸² is influential to the present

77 Stavenhagen, 'Cultural Rights: A Social Science Perspective', in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Text Book*, 2nd edn (Dordrecht: Martinus Nijhoff Publishers, 2001) 85 at 90.

78 Preamble 1982 Mexico City Declaration (emphasis added).

79 Donders, 'The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions', in Schneider and Van den Bossche (eds), *Protection of Cultural Diversity from a European and International Perspective* (Antwerp: Intersentia, 2008) 1; and Symonides, 'Cultural Rights', in Symonides (ed.), *Human Rights: Concept and Standards* (Paris: UNESCO, 2000) 175 at 180. By extending beyond art and heritage, it was thought that this definition 'recognizes the intricate tapestry of culture that defines societies'. See Thomas-Hoffman, 'Cultural Preservation and Protection', available at: www.mesacc.edu/~bricl07041/un/hs/culture.pdf [last accessed 19 August 2014].

80 World Commission on Culture and Development, *Our Creative Diversity: Report of the World Commission on Culture and Development* (Paris: UNESCO, 1996) at 7.

81 The preamble of the 2001 Universal Declaration on Cultural Diversity explicitly referred to the 1982 Mexico City Declaration.

82 See, for example, O'Keefe, *supra* n 13 at 905, 916–19. By using the definition of culture as a way of life and calling it 'anthropological', O'Keefe refers (in a footnote) to the concept of culture proposed by Ruth Benedict. In *Our Creative Diversity*, Marshall Sahlins (although himself an anthropologist) argued that '[a] great deal of confusion arises in both academic and political discourse when culture in the humanistic sense is not distinguished from "culture" in its anthropological senses, notably culture as the total and distinctive way of life of a people or society'. See World Commission on Culture and Development, *supra* n 80 at 12. However, it must be noted that there is no single definition in anthropology. For example, in 1952, Kluckhohn and Kroeber collected some 164 different definitions of culture used by anthropologists. Moreover, the boundaries of anthropology (if there ever are ones) are difficult to ascertain with precision. It is difficult, if not impossible, to fit anthropology in a single methodological box: see Kluckhohn and Kroeber, *Culture: A Critical Review of Concepts and Definitions* (New York: Vintage Books, 1952); and Moore and Sander, 'Anthropology and Epistemology', in Moore and Sander (eds), *Anthropology in Theory: Issues in Epistemology* (Malden: Blackwell Publishing, 2006) xi.

day.⁸³ Culture is no longer a consumer product, but ‘an expression of the identity of an individual or a community, including distinctive features, ways of thinking and the organization of people’s lives.’⁸⁴ To many (indigenous peoples in particular), it is the whole of human life.⁸⁵

The introduction of the notion of a way of life has had important implications for the application of cultural rights. The definition of culture as a way of life brought into direct relationship cultural rights and minority rights.⁸⁶ It provided a holistic protection for minority and indigenous populations (rather than protection in a piecemeal fashion, for example, by protecting discretely their language and religion).⁸⁷ In order to protect the way of life of minorities and indigenous peoples, it is essential to protect everything that is associated with the way in which their distinctive lifestyles are organised, including not only their language and religion but also their traditions and beliefs, their traditional indigenous knowledge, the eco-system and biodiversity associated with their livelihood⁸⁸ and their land—that is, the total material and non-material heritage of their cultures⁸⁹—so that these cultural heritage may be passed on to future generations.

Given the above context, it is not difficult to understand that along with the stress on the idea of a way of life came the heavy emphasis on land rights, especially in the context of indigenous populations. The protection of a traditional way of life is dependent on the preservation of the indigenous territory on which the people’s life is organised and in which traditional knowledge as well as emotional and spiritual attachments are embedded. Malezer, an aboriginal leader from Australia, co-chair of the National Congress of Australia’s First Peoples, testified that ‘[o]ur claim to a global identity is based upon our ancient cultures and viable relationships with our territories, in contrast to the modern political identities of nation states and consumer cultures.’⁹⁰ In this context, it is inappropriate to treat indigenous land as a commodity; rather, it should be seen as ‘a space of socio-economic, spiritual and cultural anchorage’.⁹¹

83 Preamble Universal Declaration on Cultural Diversity; These definitions are contained in the CESCR, General Comment No 21: Right of everyone to take part in cultural life (art. 15(1)(a)), 21 December 2009, E/C.12/GC/21; 17 IHRR 608 (2010).

84 Donders, *supra* n 79 at 3–4.

85 *Ibid.*

86 O’Keefe, *supra* n 13 at 918–19; and Xanthaki, *Indigenous Peoples and United Nations Standards: Self-determination, Culture, Land* (Cambridge: Cambridge University Press, 2007) at 8.

87 UNCHR, Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 28 July 1993, E/CN.4/Sub.2/1993/28 at para 31 (‘All elements of heritage should be managed and protected as a single, interrelated and integrated whole.’)

88 The importance of protection of the ecosystem and biodiversity is particularly stressed in UNESCO, *Biodiversity in UNESCO* (Paris: UNESCO, 2007), available at: unesdoc.unesco.org/images/0015/001514/1514023.pdf [last accessed 19 September 2014].

89 UNCHR, Final Report of the Special Rapporteur on Prevision of Discrimination and Protection of Minorities, 21 June 1995, E/CN.4/Sub.2/1995/26 at para 11 (‘The heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory.’).

90 Malezer, ‘Permanent Forum on Indigenous Issues: Welcome to the Family of the UN’, in Castellino and Walsh (eds), *International Law and Indigenous Peoples* (Leiden: Martinus Nijhoff, 2005) 67.

91 Gilbert, ‘Custodians of the Land’, in Craith, Langfield and Logan (eds), *Cultural Diversity, Heritage and Human Rights: Intersections in Theory and Practice* (New York: Routledge, 2010) 31 at 35.

In a report prepared by the former Commission on Human Rights Working Group on Indigenous Populations on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Special Rapporteur Irene Daes identified that 'a profound relationship exists between indigenous peoples and their lands, territories and resources'.⁹² This relationship 'has various social, cultural, spiritual, economic and political dimensions and responsibilities' and is crucial to the collective lives of the indigenous peoples.⁹³ Moreover, the inter-generational relationship between the land and the indigenous community is crucial to their identity, survival and cultural viability.⁹⁴ Read from this perspective, the indigenous land could also be seen as integral to the communities' right to a past, present and future. The right to a past refers to recognising the ownership or custodianship of the land which a people have traditionally occupied in the form of preservation or restitution.⁹⁵ The right to a present and a future refers to the right to maintain, protect, develop and revitalise cultural traditions and customs through the use of land.⁹⁶

To conclude, it has been argued that culture as a way of life sought to protect culture as a system.⁹⁷ It sought to protect culture in terms of its social organisation and bio-diversity/eco-system, as well as the symbolic universe pertaining to a specific time and space. From this vantage, an extensive amount of jurisprudence is dedicated to the protection of indigenous territorial rights. Moreover, rights articulated in this respect are largely 'collective' in nature and cannot be fulfilled without respect for other cultural-related rights. For example, important in this context is the right to self-determination which ensures the political involvement and participation of minority and indigenous groups in policies affecting their way of living. In the words of Daes, the protection of culture 'is connected fundamentally with the realization of the territorial rights and self-determination of indigenous peoples'.⁹⁸

3. THE PROTECTION OF CULTURAL RIGHTS IN THE WORKS OF THE UN HUMAN RIGHTS TREATY BODIES AND ASSOCIATED LEGAL OBLIGATIONS

The account given above of the development of culture in international legal discourse shows how culture evolved through the past decades of technological

92 UNCHR, Final Working Paper of the Special Rapporteur on the Promotion and Protection of Human Rights, 11 June 2001, E/CN.4/Sub.2/2001/21 at para 12.

93 Ibid. at para 20.

94 Ibid.

95 Article 14 International Labour Organization Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, 1650 UNTS 383 ('ILO Convention No 169'). Outside of the context of land, it could also be argued that the right to a past refers to the right to respect for their history and heritage and the right of redress to historical inequities.

96 See, for example, Article 11(1) of the UN Declaration on the Rights of Indigenous Peoples which provided that '[i]ndigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature'. See GA Res 61/295, 13 September 2007, A/61/L.67 and Add.1; 15 IHRR 280 (2008).

97 Stavenhagen, *supra* n 77 at 89.

98 UNCHR, Report of the Working Group on Indigenous Populations on its Eleventh Session, 23 August 1993, E/CN.4/Sub.2/1993/29 at para 4.

advancements and of shifting concerns. The notions of culture as high and popular culture and as a way of life have deeply affected the way which the CESCR interprets Article 15(1)(a) of the ICESCR.

The CESCR was established in 1986.⁹⁹ At the time of its inception, it was the only human rights treaty body that was specifically mandated to address cultural rights, by overseeing and monitoring the implementation of Article 15 of the ICESCR. However, during its first few years of establishment, Article 15 was only given limited attention by States parties in their periodic reports.¹⁰⁰ As a result, in 1990, the CESCR issued a set of Revised Guidelines ('1990 Revised Guidelines')¹⁰¹ which compiled a clear list of the information that States are required to provide in their periodic reports to the Committee under Article 15, providing the initial direction on which the Committee's future work on the article is based. The effects of the 1990 Revised Guidelines on the legal obligations of State parties under the provision will be explored in fuller detail below. In essence, the 1990 Revised Guidelines required States parties to provide information regarding the promotion of cultural development, the setting up of cultural infrastructures (such as museums and libraries), the role of mass media in the dissemination of culture and cultural information and the preservation of cultural heritage, as well as the 'promotion of cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions'.¹⁰² 'Culture' or 'cultural life' was not defined anywhere in the Guidelines.¹⁰³

Nevertheless, the scope of protection envisaged in the 1990 Revised Guidelines was considered insufficient to deal with violations of cultural rights. A subsequent attempt by the Committee to review the scope of Article 15 took place in 1992.¹⁰⁴ In that year, the CESCR held its first Day of General Discussion on the right to take part in cultural life, based on a report compiled by the then Senegal member, Samba Cor Konaté.¹⁰⁵ The Day of General Discussion sought to expand and consolidate the content of Article 15, in preparation for a General Comment on the article. The Day of Discussion was helpful in identifying and elaborating several important concepts that form the very basis of Article 15, such as the right to have access to culture, to enjoy its benefits, to demand its protection, to contribute to its development, and to cultural identification (for example, the right of an individual to assert her identity, and to establish relations with her cultural community). It highlighted the situation of minorities and argued that minorities should not only be given recognition and

99 On the implementation of ICESCR, see Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) at 1.

100 Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Leiden: Martinus Nijhoff Publishers, 2007) 48; and Donders, *supra* n 1 at 83.

101 CESCR, Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by State Parties under Articles 16 and 17 of the International Convention on Economic, Social and Cultural Rights, 17 June 1991, E/C.12/1990/8, Annex IV at 108 ('CESCR, 1990 Revised Guidelines'). The guidelines are intended to 'provide a uniformly applicable framework within which the Committee can work and enable it to demonstrate a consistency of approach from one report to another'.

102 *Ibid.*

103 *Ibid.*

104 Stamatopoulou, *supra* n 100 at 48.

105 CESCR, General Discussion on the Right to Take Part in Cultural Life as Recognized in Article 15 of the Covenant, 11 December 1992, E/C.12/1992/SR.17.

equal protection, but that in order to honour their right to take part in cultural life, priority must be given to the protection of their cultural rights, including their right to speak their language and to practice their customs.

However, the CESCR was not able to complete and adopt the anticipated General Comment¹⁰⁶ and the next Day of General Discussion on Article 15 did not take place until 2008.¹⁰⁷ During the period from 1992 to 2008, the CESCR interpreted the right to take part in cultural life primarily through its concluding observations.¹⁰⁸ Meanwhile, Article 15 received limited attention in General Comment No 5 (on persons with disabilities)¹⁰⁹ and General Comment No 6 (on the economic, social and cultural rights of older persons),¹¹⁰ where the CESCR sought to articulate the right to take part in cultural life in relation to these vulnerable groups. General Comment No 15 (on the right to water) also referred to the right to take part in cultural life when it noted the relationship between the use of water resources and its importance for the protection of the way of life of indigenous groups.¹¹¹ While General Comment No 17 adopted by the CESCR in 2005 elaborated on the protection of intellectual property protected under Article 15(1)(c) of the ICESCR,¹¹² it fell short of addressing Article 15(1)(a) on the right to take part in cultural life, which embraced a much wider aspect of cultural rights.

However, in December 2009, the CESCR adopted General Comment No 21 on Article 15(1)(a) of the ICESCR, marking a milestone in the development of cultural rights within the work of the treaty bodies. The contribution of General Comment No 21 is manifold. It summarised the interpretations of the provision by the CESCR as embodied in its earlier concluding observations and other General Comments. In addition, it further expanded on its previous work, incorporating the latest developments on cultural rights in the international arena which transformed the ways in which one can view 'culture' and thus cultural rights. It also articulated concrete and practical obligations under Article 15(1)(a), for example, by enumerating the minimum core obligations, as well as introducing acceptability and appropriateness tests pertaining the right—which further clarified the attribution of responsibility and improves the justiciability of the right.¹¹³ In essence, General

106 This was because of the death of the Committee member responsible, Samba Cor Konaté.

107 CESCR General Comment No 21, *supra* n 83 at para 5.

108 Individual communications under ICESCR were only available as of the 2013 entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, GA Res 63/117, 10 December 2008, A/RES/63/117.

109 CESCR, General Comment No 5: Persons with disabilities, 9 December 1994, E/1995/22; 2 IHRR 261 (1995).

110 CESCR, General Comment No 6: The economic, social and cultural rights of older persons, 8 December 1995, E/1996/22; 3 IHRR 253 (1996) at paras 36–42.

111 CESCR, General Comment No 15: The right to water (Articles 11 and 12), 20 January 2003, E/C.12/2002/11; 10 IHRR 303 (2003) at para 16(b).

112 CESCR, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (Article 15), 12 January 2006, E/C.12/GC/17; 13 IHRR 613 (2006).

113 For an introduction on the issue of justiciability concerning ESC rights, see CESCR, General Comment No 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24 at paras 9–10; Dennis and Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?'

Comment No 21 of the CESCR provided a comprehensive instrument for the interpretation of the right to take part in cultural life that was long overdue. Some of these aspects of the General Comment No 21 of the CESCR as well as the earlier documents relating to cultural rights are studied below.

The practice of the CESCR on the right to take part in cultural life comprises the most coherent and comprehensive work on cultural rights within the UN human rights treaty bodies. Nevertheless, as mentioned above, the practices of other treaty bodies has also contributed to the elaboration of 'culture', even though their practice in this respect is not as coherent as can be found in that of the CESCR. Most notably, the practice of the HRC on Article 27 of the ICCPR contains a vast amount of material, including views on individual communications on the right to enjoy culture, although its application is only limited to the cultural rights of minorities. This practice will also be explored in order to give a more complete picture as to how cultural rights developed.

A. Specific Obligations: Culture as High and Popular Culture

According to the 1990 Revised Guidelines adopted by the CESCR, the obligations in relation to high culture and to popular participation in cultural life involve primarily three areas: (1) the protection and promotion of arts, literature and other cultural activities; (2) the establishment and provision of access to institutional infrastructures; and (3) the role of mass media to protect and promote culture.¹¹⁴ The obligation on the part of the State in relation to the protection and promotion arts, literature and other cultural activities involves both negative and positive obligations. The former relates to freedom from censorship. For example, States are obliged to refrain from banning plays and prohibiting books and periodicals,¹¹⁵ as well as from imposing censorship on the mass media and on other literary and artistic works.¹¹⁶ Freedom from censorship has also been construed in terms of freedom of expression,¹¹⁷ although the latter construction is arguably broader, implying positive obligations to ensure access to arts and literature.¹¹⁸ Positive obligations may take various

(2004) 98 *American Journal of International Law* 462; and Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8 *Human Rights Law Review* 617.

114 CESCR, 1990 Revised Guidelines, at paras 1(a), (b) and (e). See also CESCR, Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, 24 March 2009, E/C.12/2008/2 ('CESCR, 2008 Reporting Guidelines') at para 67(a).

115 CESCR, Concluding observations regarding Kenya, 27 May 1993, E/C.12/1993/6 at para 19.

116 CESCR, Concluding observations regarding Egypt, 23 May 2000, E/C.12/1/Add.44 at para 25; CESCR, Concluding observations regarding Libyan Arab Jamahiriya, 16 May 1997, E/C.12/1/Add.15 at para 18; and CESCR, Concluding observations regarding Iran, 9 June 1993, E/C.12/1993/7 at para 7 ('concern over reports of censorship against expressions of a literary and artistic nature, and at the State party's notion of "cultural security" to justify such censorship'). See also CESCR General Comment No 21, supra n 83 at para 49(c).

117 CESCR, Concluding observations regarding the Democratic People's Republic of Korea, 29 November 1991, E/C.12/1991/4 at para 157 ('the machinery for the examination of works of art and literature for the purpose of publication could result in inadequate protection of freedom of expression').

118 CESCR, Concluding observations regarding Guinea, 28 May 1996, E/C.12/1/Add.5 at para 24 ('the provisions under article 15 are not being implemented satisfactorily. Access to culture remains difficult, as demonstrated ... by the high price of publications').

forms, such as the provision of support and subsidies to cultural associations and artists¹¹⁹ and, more importantly, through the setting up of cultural institutions and ensuring individual access to these cultural institutions.¹²⁰ On other occasions, the CESCR has noted the need to popularise such activities through the mass media—the process of which is often referred to as the ‘dissemination of culture’.¹²¹ Access to the mass media is further expanded to other forms of communication, including access to the internet.¹²² In this manner, one could also read (2) and (3) above as indicating the means for ensuring (1).

Besides the obligation to provide for access to cultural institutions and the mass media, States are required to ensure that these are provided in a non-discriminatory manner.¹²³ In particular, special emphasis has been placed on the importance of catering to the needs of vulnerable groups. General Comment No 5 of the CESCR on persons with disabilities urged States to ‘promote the accessibility to and availability of places for cultural performances and services’ to persons of disability.¹²⁴ General Comment No 6 of CESCR on the economic, social and cultural rights of older persons urged States to provide the elderly ‘with easier physical access to cultural institutions (museums, theatres, concert halls, cinemas, etc.)’.¹²⁵ In addition, mass media should also be provided in the minority languages.¹²⁶ The goal, as it is subsequently noted in General Comment No 21 of the CESCR, is for States parties to fulfil ‘[g]uaranteed access for all, without discrimination on grounds of financial or any other status,

119 CESCR, Concluding observations regarding Luxembourg, 26 June 2003, E/C.12/1/Add.86 at para 13.

120 CESCR, 1990 Revised Guidelines at para 1(b); and CESCR, 2008 Reporting Guidelines at para 67.

121 Marks, *supra* n 56 at 307; CESCR, Concluding observations regarding Germany, 5 January 1994, E/C.12/1993/17 at para 11. The obligation to ensure access to mass media and other forms of communication is also construed in relation to the freedom of information: see CESCR, Concluding observations regarding China, 13 May 2005, E/C.12/1/Add.107 at para 68; CESCR, General Comment No 21, *supra* n 83 at para 16(b) (‘[a]ccessibility also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person’s choice, and the access of communities to the means of expressions and dissemination’).

122 CESCR, Concluding observations regarding Libya Arab Jamahiriya, 25 January 2006, E/C.12/LYB/CO/2 at para 39.

123 See, for example, CESCR, Concluding observations regarding Austria, 14 December 1994, E/C.12/1994/16, the Committee ‘notes with satisfaction the allocation of subsidies for the promotion of the cultural activities of minorities’; CtERD, Concluding observations regarding Armenia, 14 August 2002, A/57/18 at para 281. In relation to women’s equal participation in cultural life, see CESCR, General Comment No 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Article 3), 11 August 2005, E/C.12/2005/3; 13 IHRR 1 (2006) at para 31. States parties are urged ‘to overcome institutional barriers and other obstacles, such as those based on cultural and religious traditions, which prevent women from fully participating in cultural life’; CESCR General Comment No 21, *supra* n 83 at para 25.

124 CESCR, General Comment No 5, *supra* n 109 at para 36.

125 CESCR, General Comment No 6, *supra* n 110 at para 40.

126 CtERD, Concluding observations regarding Albania, 10 December 2003, CERD/C/63/CO/1 at para 23 (‘persons belonging to minorities in Albania have very little access to radio and television in minority languages’); and CtERD, Concluding observations regarding Latvia, 10 December 2003, CERD/C/63/CO/7 at para 16. See also Article 17(d) CRC; and CESCR General Comment No 21, *supra* n 83 at para 52(b).

to museums, libraries, cinemas and theatres and to cultural activities, services and events'.¹²⁷

General Comment No 21 of the CESCR dramatically expanded the scope of participation in cultural life. General Comment No 21 recognised that cultural institutions and mass media are considered a part of 'cultural services' and are not only the sites in which culture is 'consumed'.¹²⁸ Rather, they play an active role in the assertion of values and identities.¹²⁹ General Comment No 21 stipulated that the right to access to culture included the right 'to know and understand his or her own culture and that of others through education and information ... [e]veryone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication'.¹³⁰ Thus, the role of cultural institutions and mass media in this respect also includes the promotion and dissemination of information and material aimed at developing and asserting a person's cultural identity and values.

To conclude, what the CESCR has tried to achieve through Article 15 of the ICESCR is to render the right to take part in cultural life a freedom as opposed to mere opportunities to engage in cultural activities. As General Comment No 21 succinctly summed up the position:

The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e. non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).¹³¹

Thus the right to take part in cultural life implies an obligation not only to set up cultural institutions as a part of rendering culture available to everyone, but also to subsidise and fund the production and exhibition of cultural goods through all forms of cultural services in order to bring such cultural goods and services within the reach of all.

B. Specific Obligations: Culture as a Way of Life

Until General Comment No 21, the protection of culture as a way of life was only mentioned scantily in the work of the CESCR.¹³² General Comment No 21 provides

127 CESCR, Concluding observations regarding Estonia, 19 December 2002, E/C.12/1/Add.85 at para 10. The CESCR noted with satisfaction that 'many cultural activities, such as theatrical performances, concerts, ballet and the like, continue to be subsidized in order to encourage the widest possible attendance.'

128 CESCR General Comment No 21, *supra* n 83 at para 49(b).

129 *Ibid.*

130 *Ibid.* at para 15(b).

131 *Ibid.* at para 6.

132 See, for example, CESCR, General Comment No 15, *supra* n 111 at paras 6, 7 and 16(d), which provided that for some indigenous peoples, the right to water and the right to access water resources is integral to preserving their way of living; and CESCR, Concluding observations regarding Mexico, 5 January 1994, E/C.12/1993/16.

that everyone has the right 'to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities'.¹³³ This is particularly important for indigenous peoples as the degradation of their particular way of life may ultimately entail the loss of their cultural identity.¹³⁴ As indigenous peoples have deep and intimate bonds with their ancestral lands, the protection of their way of life, in turn, entails the protection of their 'right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'.¹³⁵

Although the practice of the CDESCR is less clear on the obligations deriving from the concept of culture as a way of life, these obligations may be identified from practice of other treaty bodies. The CttERD, for instance, called upon States to 'recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation',¹³⁶ while highlighting the fact that the indigenous populations suffered the loss of land and resources to colonists, commercial companies and State enterprises and consequently imperilled their culture and historical identity.¹³⁷ The CttERD called upon States parties to 'provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics'¹³⁸ and to consult the indigenous population on matters concerning their rights and interests.¹³⁹ States are obliged to 'ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their languages'.¹⁴⁰

The notion of culture as a way of life is most prominent in the practice of the HRC on Article 27 of the ICCPR, which is the primary provision within the UN human rights treaties which addresses the rights of minorities. According to General Comment No 23 of the ICCPR (on Article 27 of the ICCPR):

Culture manifests itself in many forms ... [including] a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in

133 CDESCR General Comment No 21, supra n 83 at para 15(b); and see text accompanying supra nn 67–73 on active and passive culture.

134 CDESCR General Comment No 21, supra n 83 at para 36.

135 Ibid.

136 CttERD, General Recommendation XXIII: Rights of indigenous peoples, 18 August 1997, A/52/18 at Annex V; 5 IHRR 7 (1998) at para 4(a).

137 See, for example, CttERD, Concluding observations regarding Finland, 28 March 1996, CERD/C/304/Add.7 at para 11; CttERD, Concluding observations regarding Argentina, 10 December 2004, CERD/C/65/CO/1 at para 16.

138 Ibid. at para 4(c); CttERD, Concluding observations regarding Ecuador, 19 January 1994, A/48/18 at para 145; CttERD, Concluding observations regarding Sweden, 15 March 1994, A/49/18 at para 200.

139 CttERD, General Recommendation XXIII, supra n 136 at para 4(d); and CttERD, Concluding observations regarding Nicaragua, 16 August 1995, A/50/18 at paras 533–536.

140 CttERD, General Recommendation XXIII, supra n 136 at para 4(e).

decision which affect them ... The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of the society as a whole.¹⁴¹

The concept of a 'way of life' has been addressed extensively in various individual communications. For instance, the *Lubicon Lake Band Case* reaffirmed indigenous hunting, trapping and fishing activities as part of the people's way of life.¹⁴² In that case, the Lubicon Lake Cree Indians of Alberta in Canada complained that by allowing oil and gas exploration activities to be engaged in within their territory, the government endangered their traditional economic activities, threatening their indigenous traditions and practices, and their survival as a people.¹⁴³ The Committee recognised that the rights protected by Article 27 of the ICCPR included 'the rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong'¹⁴⁴ and found the Canadian government in violation of the Article. Similarly, the cases *Kitok v Sweden*,¹⁴⁵ *O. Sara et al. v Finland*¹⁴⁶ and *Äärelä and Näkkäläjärvi v Finland*¹⁴⁷ recognised Nordic Sami reindeer-herding practices of the Sami peoples as an integral part of their culture and way of life under Article 27 of the ICCPR.

Note that the notion of a 'way of life' does not only mean a 'primordial' way of living. In *Länsman v Finland*, the HRC commented that '[t]he right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context ... article 27 does not only protect traditional means of livelihood of national minorities. ... [The] adapted ... methods of reindeer herding over the years ... with the help of modern technology does not prevent them from invoking article 27'.¹⁴⁸ A similar decision was arrived at in *Mahuika et al. v New Zealand*.¹⁴⁹ The HRC thus acknowledges that traditional cultures do evolve as they develop.¹⁵⁰ The right to enjoy culture is not a right to enjoy a culture that is frozen 'at some point in time when culture was supposedly "pure" or "traditional"'.¹⁵¹

141 HRC, General Comment No 23: The rights of minorities (art. 27), 8 April 1994, CCPR/C/21/Rev.1/Add.5; 1-3 IHRR 1 (1994) at para 7. This interpretation is especially important. Article 27 of the ICCPR provides for, *inter alia*, the right to enjoy one's own culture. However, the HRC has not provided for a definition of culture; instead, it has, on various occasions, pointed to the ways in which culture is 'manifested'.

142 *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* (167/1984), A/45/40 ('Lubicon Lake Band Case').

143 *Ibid.* at para 16.2.

144 *Ibid.* at para 32.2.

145 *Ivan Kitok v Sweden* (197/1985), CCPR/C/33/D/197/1985 (1988).

146 *O. Sara et al. v Finland* (431/1990), CCPR/C/50/D/431/1990 (1994); 1-3 IHRR 14 (1994).

147 *Anni Äärelä and Jouni Näkkäläjärvi v Finland* (779/1997), CCPR/C/73/D/779/1997 (2001); 9 IHRR 20 (2002).

148 *Länsman et al. v Finland* (511/1992), CCPR/C/52/D/511/1992 (1994); 2 IHRR 287 (1995).

149 *Apirana Mahuika et al. v New Zealand* (547/1993), CCPR/C/70/D/547/1993 (2000); 8 IHRR 372 (2001).

150 Gilbert, *supra* n 91 at 36.

151 Aboriginal and Torres Strait Islander Social Justice Commissioner, Comments on the Taskforce Report Recommendations, 10 September 2001, at 9, available at: www.humanrights.gov.au/sites/default/files/content/social_justice/native_title/submissions/wataskforcesub.pdf [last accessed 19 August 2014].

These cases seem to suggest that culture construed as a way of life includes the protection of the economic activities of indigenous minorities, thus reinforcing the view that a 'way of life' embraces all forms of human activities of the indigenous community. However, this view is inaccurate. This is demonstrated in *Diergaardt v Namibia*.¹⁵² The Rehoboth Baster community complained that the expropriation and privatisation of communal land as well as the subsequent overuse of land by inexperienced newcomers led to the bankruptcy of many community farmers.¹⁵³ The applicants argued that such commercial activities 'robbed the community of the basis of its economic livelihood', thus undermining its 'cultural, social and ethnic identity'.¹⁵⁴ On this occasion, the HRC rejected the applicant's claim:

As the earlier case law by the Committee illustrates, the right of members of a minority to enjoy their culture under article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples. However, in the present case the Committee is unable to find that the authors can rely on article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture.¹⁵⁵

Nevertheless, the majority decision did not elaborate on what it is meant by 'a distinctive culture'. The concurring opinion may be more indicative of what the Committee members meant when the Committee referred to the element of distinctiveness:

... indigenous communities ... can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects In the present case, the authors ... cannot show that they enjoy a distinct culture which is intimately bound up with or dependent on the use of these particular lands, to which they moved a little over a century ago, or that the diminution of their access to the lands has undermined any such culture.¹⁵⁶

The *Diergaardt* communication has been described as introducing a 'distinctive culture test' in the work of the treaty bodies by which it is necessary that cultural

152 J. G. A. *Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia* (760/1997), CCPR/C/69/D/760/1997 (2000); 8 IHRR 46 (2001).

153 *Ibid.* at para 3.1.

154 *Ibid.*

155 *Ibid.* at para 10.6.

156 *Ibid.* at individual opinion of Elizabeth Evatt and Cecilia Medina Quiroga (concurring).

practice ‘must be central, not incidental, to the culture’.¹⁵⁷ In other words, the activities in question must be distinctive of the culture or one through which the group expresses its cultural distinctiveness.¹⁵⁸

This test is problematic in several ways. Firstly, the test is ethnocentric.¹⁵⁹ To say that activities are not integral to cultural distinctiveness is almost the same as saying that the hunting and fishing practices engaged by the Rehoboth Baster community are ‘not cultural (read: exotic) enough’. To use the words of the Australian Aboriginal and Torres Strait Islander Social Justice Commission in 2001, ‘[t]he enjoyment of culture should not be falsely restricted as a result of anachronistic notions of the “authenticity” of the culture’.¹⁶⁰ Secondly, it is arguable that the test is unduly harsh in the sense that even if the practices associated with the use of land could not be said to be ‘cultural’, economic survival is indispensable to ensure the survival of the indigenous way of life. In this sense, the decision potentially set a bad precedent for future communications, as the erasure of cultural diversity commonly begins with forms of economic isolation and deprivation which is often the result of deliberate State planning and policies—a form of slow killing. Thirdly, the obvious danger that lies in this test is that the HRC is left to interfere with what is cultural and what is not for the indigenous community, which may contradict their right to self-determination and development under Article 1 of the ICCPR,¹⁶¹ or, in the absence of clear and convincing guidelines as to what constitutes ‘distinctiveness’,¹⁶² may lead to arbitrariness in the application of the test.

Nevertheless, the individual communications considered above do point to the crucial importance of land in preserving the way of life of indigenous populations, which is also evident in other practice of the HRC and other UN human rights treaty bodies. For example, in 2006, the CttERD utilised its early warning and urgent procedures to call upon the USA to freeze any planned action concerning the privatisation of land that the Western Shoshone claimed as their ancestral lands.¹⁶³ Nevertheless, the protection of indigenous land rights as recognised by the treaty bodies has certainly extended beyond the right to exclusive use of communal land. General Comment No 21 of the CESCR and General Recommendation XXIII of

157 Eisenberg, ‘Identity and Liberal Politics: The Problem of Minorities within Minorities’, in Eisenberg and Spinner-Halev (eds), *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2005) 249. See *Ángela Poma Poma v Peru* (1457/2006), CCPR/C/95/D/1457/2006 (2009); 16 IHRR 695 (2009) at para 7.4. In this case the author claimed that the degradation in pastoral land owing to a water diversion project led to the death of thousands of livestock. The HRC decided that raising Llamas is an essential element of culture of the Aymara community ‘since it is a form of subsistence and an ancestral tradition handed down from parent to child’.

158 Castan, Joseph and Schultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edn (Oxford: Oxford University Press, 2013) at para 24.26.

159 Eisenberg, supra n 158; see also Eisenberg, ‘Reasoning about Identity: Canada’s Distinctive Culture Test’, in Eisenberg (ed.), *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: University of British Columbia Press, 2006) 34.

160 Aboriginal and Torres Strait Islander Social Justice Commissioner, supra n 151 at para 1.2.

161 Castan et al., supra n 158.

162 See HRC, Concluding observations regarding Japan, 19 November 1998, CCPR/C/79/Add.102 at para 14.

163 See CttERD, Early Warning and Urgent Action Procedure regarding the United States of America, 11 April 2006, CERD/C/USA/DEC/1.

the CtERD provided the rights of indigenous peoples to own, develop, control and use their communal land.¹⁶⁴ In addition, the same treaty bodies have called for the restitution of lands where these lands and territories traditionally owned by the indigenous communities are used without the free and informed consent of the group.¹⁶⁵ Only where such restitution is impossible, may restitution be substituted by just, fair and prompt compensation¹⁶⁶ and '[s]uch compensation should as far as possible take the form of lands and territories'.¹⁶⁷ The word 'restitution' could at times be misleading since it suggests that the rights of indigenous peoples to land arise from the fact that they are the first to own or to inhabit the land.¹⁶⁸ In this light, the concept of a way of life provides an alternative legal basis for invoking indigenous land rights by asserting that land is essential to the practice of culture,¹⁶⁹ i.e. by affirming the cultural importance of land rights for indigenous people as land is essential to maintaining their specific way of life, despite the ambiguity in the defining a 'distinctive culture'.

In sum, the concept of culture as a way of life provides a strong legal basis upon which the livelihood of indigenous population could be based. However, it is crucial to note that the concept of a way of life is sometimes confusing because it is often understood in two separate ways. One is the emphasis on 'distinctiveness', for example, the difference in the ways the lives of communities are organised, and thus the 'uniqueness and plurality of the identities of groups'.¹⁷⁰ This is clearly the view taken by the HRC in *Diegaardt v Namibia* as it articulated the 'distinctive culture test'.¹⁷¹ The view is also reflected in some of the works of the CESCR and CtERD

164 CESCR General Comment No 21, supra n 83, and CtERD General Recommendation XXIII, supra n 136 at para 5.

165 CESCR General Comment No 21, supra n 83 at paras 36–37, 55(e); and CtERD, General Recommendation XXIII at para 4(d).

166 Note that although the language is strong in the context of CtERD, the HRC seemed to balance the public interest (economic development) and the livelihood of the indigenous populations by taking the stance that a violation could only be found where the economic activities concerned substantially impair the indigenous ways of life: see *Jouni Lämsman et al. v Finland*, Communication (1023/2001), CCPR/C/83/D/1023/2001; 12 IHRR 617 (2005) at para 9.4; *Äärelä and Näkkäläjärvi v Finland*, supra n 154; and *Mahuika et al. v New Zealand*, supra n 156. In *Howard v Canada* (879/1999) CCPR/C/84/D/879/1999; 12 IHRR 919 (2005) at para 12.7 (emphasis added), the HRC decided that States parties 'may regulate activities that constitute an essential element in the culture of a minority, provided that the regulation does not amount to a de facto denial of this right' (emphasis added).

167 This entails special protection for the indigenous people as most States retain the right to 'take' property for public purposes upon the provision of just compensation. This doctrine is known as *dominium eminens*. However, it is also recognised that relocation and compensation may not be appropriate in order to comply with Article 27 of the ICCPR. In these circumstances, States must pay attention to the sustainability of the indigenous culture and way of life and must involve the indigenous communities in decision making: see HRC, Concluding observations regarding Chile, 30 March 1999, CCPR/C/79/Add.104 at para 22.

168 For example, Article 1(b) ILO Convention No 169.

169 Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham: Duke University Press, 2010) at 163; and Gilbert, supra n 91 at 36.

170 Article 1 Universal Declaration on Cultural Diversity; see also Thaman, supra n 14 at 1 ('Culture is defined as a shared way of living of a group of people, which includes their accumulated knowledge and understandings, skills and values, and which is perceived by them to be unique and meaningful.')

171 See text accompanying supra nn 160–164.

as they address the importance of preserving the culture and traditional way of life of indigenous populations.¹⁷² Yet, despite strongly echoing the idea of culture adopted in the 1982 Mexico City Declaration—that is, ‘the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group’¹⁷³—this view still limits the application of the right to enjoy culture under Article 27 of the ICCPR and excludes the possibility of cultural life that may be built upon, for example, a sense of communal solidarity such as in the context of a village or a community (although this aspect of ‘culture’ was arguably indirectly addressed in the individual communication *Lovelace v Canada*).¹⁷⁴

Another way to understand the concept of ‘way of life’ is given by O’Keefe who saw culture ‘as the internal frame of reference of that “way of life” from which these and other products spring’.¹⁷⁵ This depiction offers a much nuanced explanation of culture as primarily the symbolic expressions underlying all cultural manifestations. Stavenhagen notes that when culture is understood as a way of life ‘culture is ... seen as a coherent self-contained system of values, and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individual with the required signposts and meanings for behaviour and social relationship in everyday life’.¹⁷⁶ Given such a broad understanding, the protection of culture as a way of life embodies a wide range of human activities. In the context of the UN treaty bodies, protection in these regards includes the protection of all kinds of cultural heritage and land (on the basis of which forms of communal life spring), as well as activities which are embodied with symbolic meanings and from which identities and values are expressed. General Comment No 21 of the CESCR seems to echo this position by providing that ‘everyone has the right to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities’,¹⁷⁷ that is, everything associated with the surround environment that is endowed with collective meaning. As argued below, this understanding of culture as an ‘internal frame of reference’ is better understood as taking the form of collective memories.

4. AN EMERGING UNDERSTANDING OF CULTURE AS COLLECTIVE MEMORIES

Collective memories, in the simplest sense, are a shared set of ideas, beliefs or values (that is, sets of cultural narratives). These narratives do not exist ‘in the abstract’ but are remembered by individuals within a community, such that these ideas

172 Stavenhagen, *supra* n 77.

173 Preamble 1982 Mexico City Declaration.

174 See *Sandra Lovelace v Canada* (24/1977), CCPR/C/13/D/24/1977 (1981). Nevertheless, although the HRC clearly acknowledged in *Lovelace v Canada* the enjoyment of emotional ties as part of an individual’s enjoyment of culture, it did not seem to acknowledge that there could be a ‘culture’ on the basis of communal solidarity alone.

175 O’Keefe, *supra* n 13 at 916.

176 Stavenhagen, *supra* n 77 at 90. See, for example, Fribourg Declaration on Cultural Rights, 7 May 2007, available at: www1.umn.edu/humanrts/instree/Fribourg%20Declaration.pdf [last accessed 19 August 2014]; and Article 4(d) CESCR General Comment No 21, *supra* n 83 at paras 13, 43 and n 12.

177 CESC General Comment No 21, *supra* n 83 at para 15(b).

form part of the community's collective memory. Anthropologists Bonnell and Hunt noted that

narrative provides a link between culture as system and culture as practice. If culture is more than a predetermined representation of a prior social reality, then it must depend on a continuing process of deconstruction and reconstruction of public and private narratives. Narrative is an arena in which meaning takes form, in which individual connect to the public and social world, and in which change therefore becomes possible.¹⁷⁸

Cultural narratives and collective memories have profound meanings for individuals and the wider community. For example, Verkuyten observed:

Beliefs about origin and ancestry are often very important for people because they give them a place in time and address existential questions. Rituals, myths, monuments, statues, founding fathers, historical battles, and burial places can all come to represent (part of) this common origin and ancestry ... [and] reflect the continuing existence of the ethnic or national group in which the ancestors, contemporaries, and future generations are included ... Individuals can find meaningfulness by using these symbolic forms as means to experience the abstract symbolic content.¹⁷⁹

Thus, these narratives are what connect an individual with the wider group, as individuals understand the external environment through their practical engagement with it.¹⁸⁰ In this way, the change in understanding of culture as collective memories enables one to appreciate an aspect of culture that is different from understanding culture as high and popular culture or as a (distinctive) way of life. Culture consists of narratives which occupy our public space. These narratives form part of what we consider 'heritage' and are lived, remembered and sustained through the individual. In this light, the engagement in cultural life entails how these narratives are created, interpreted, sustained and lived, shaping a form of collective memory. To protect cultural rights is, then, closely associated with protecting the process and cultural space for the creation and reproduction of that dynamic and shifting 'community memory'.¹⁸¹

A. Cultural as Memories: International Legal Discourse

The concept of culture as collective memories evolved from the international protection of cultural heritage. From the early 1950s to 1970s, cultural heritage was often equated with cultural property, defined as the 'movable and immovable property of

178 Bonnell and Hunt, 'Introduction', in Bonnell and Hunt (eds), *Beyond the Cultural Turn New Directions in the Study of Society and Culture* (Berkeley: University of California Press, 1999) 1 at 17.

179 Verkuyten, *The Social Psychology of Ethnic Identity* (Hove: Psychology Press, 2005) at 87.

180 Geertz, *Interpretation of Cultures: Selected Essays of Clifford Geertz* (New York: Basic Books Inc, 1973).

181 McIntosh, 'Social Memory in Mande', in McIntosh, McIntosh and Tainter (eds), *The Way the Wind Blows: Climate, History, and Human Action* (New York: Columbia University Press, 2000) 141.

great importance to the cultural heritage of a country'¹⁸² such as monuments of architecture, archaeological sites and other works of art—a concept which parallels the notion of culture as 'high culture'.¹⁸³ Beginning in the 1970s, the concept of cultural heritage was expanded to include 'objects of artistic, archaeological, ethnological or historical interest'.¹⁸⁴ Under the definition of cultural property/heritage as objects, there are traditionally two ways of thinking about cultural heritage in the context of UNESCO.¹⁸⁵ One is to think of it as a national cultural heritage in which States have a 'special interest justifying national control in their import and export as well as giving them the right to demand for their repatriation' (as opposed to a mere commodity).¹⁸⁶ The other is to think of it as a component of a common world culture, regardless of their place of origin and location (that is, as a World Cultural and Natural Heritage),¹⁸⁷ which is 'based on the assumption that everybody has an interest in the greatest cultural achievements'.¹⁸⁸ Nevertheless, as culture is understood as a 'way of life', the concept of cultural heritage traditionally understood was radically expanded, which is particularly evident in the 1982 Mexico City Declaration where cultural heritage was defined to mean 'tangible and intangible works through which the creativity of that peoples finds expression'¹⁸⁹ giving individuals and communities the values and meaning to life. It also declared that '[e]very people has a right and a duty to defend and preserve its cultural heritage, since societies recognize themselves through the values in which they find a source of creative inspiration'.¹⁹⁰

In 1989, UNESCO adopted the Recommendation on the Safeguarding of Traditional Culture and Folklore ('1989 Recommendation on Traditional Culture and Folklore').¹⁹¹ Folklore, or the 'totality of tradition-based creations of a cultural community',¹⁹² was considered an 'integral part of cultural heritage and living

182 Article 1(a) Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, 249 UNTS 216; see also Article 1 Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, 13 UNESCO General Conference Rec., 19 November 1964, UNESCO 13C/Resolutions SHC/MD/3. From 1954 to 1970, four normative instruments were adopted on the topic of cultural property.

183 See text accompanying supra nn 41–49.

184 Merryman, 'Two Ways of Thinking About Cultural Property' (1986) 80 *American Journal of International Law* 831.

185 Ibid.

186 Ibid. at 832.

187 Ibid. See Convention for the Protection of the World Cultural and Natural Heritage 1972, 1037 UNTS 151.

188 Prott, 'Cultural Rights as Peoples' Rights in International Law', in Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988). Moreover, this is also reflected in the fact that the wilful destruction of cultural heritage at times of war is considered a war crime: see Francioni, 'Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity' (2004) 25 *Michigan Journal of International Law* 1209 at 1215–16.

189 1982 Mexico City Declaration at para 23.

190 Ibid. at para 24.

191 Recommendation on the Safeguarding of Traditional Culture and Folklore, 25 UNESCO General Conference Rec., 15 November 1989, UNESCO 25C/Resolutions, Annex I (1989) ('1989 Recommendation on Traditional Culture and Folklore').

192 Ibid. at Section A. For an account of the events which led up to the adoption of 1989 Recommendation on Traditional Culture and Folklore, see UNESCO, 'International Round Table: "Intangible Cultural Heritage-Working Definitions"', 14–17 March 2001, available at: www.unesco.org/culture/ich/doc/src/00075-EN.pdf [last accessed 19 August 2014].

culture'.¹⁹³ Cultural heritage was no longer restricted to tangible objects belonging to a country but considered as 'expressions of groups or individuals reflecting expectations of a community'.¹⁹⁴ It embraced manifestations such as language, literature, music, dance, games, mythology, rituals, custom, handicrafts and architecture, among others, and reflected values as well as the cultural and social identity unique to the community.¹⁹⁵ The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage ('2003 Convention on Intangible Cultural Heritage') reaffirmed the position taken by the 1989 Recommendation on Traditional Culture and Folklore and called for measures aimed at 'ensuring the viability of intangible heritage',¹⁹⁶ including, *inter alia*, their preservation, protection, promotion, transmission and revitalization.¹⁹⁷ The inclusion of intangible cultural heritage as a subject of protection under international law recognised intangible cultural heritage as an essential source of identity and strengthened the protection of the way of life of minorities and indigenous populations.¹⁹⁸

The adoption of the 1989 Recommendation and the 2003 Convention signified the beginning of the process where the distinction between tangible and intangible cultural heritage is gradually fading away.¹⁹⁹ This change is most evident in the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions²⁰⁰ ('2005 UNESCO Convention on Cultural Diversity') which was produced as a direct consequence of the 2001 Universal Declaration on Cultural Diversity.²⁰¹ Moving beyond the traditional compartmentalisation between tangible and intangible cultural heritage, Article 4 of the 2005 UNESCO Convention recognised the symbolic or aesthetic meanings and values attached to cultural expressions to be regarded as a subject of protection.²⁰² The logic behind this is that every tangible good contains an intangible aspect, and it is this symbolic dimension of heritage

193 Preamble 1989 Recommendation on Traditional Culture and Folklore.

194 Section A 1989 Recommendation on Traditional Culture and Folklore.

195 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003, 2368 UNTS 3 ('2003 Convention on Intangible Cultural Heritage'), entered into force in 2006 and now has 161 parties.

196 The Convention reaffirmed the Istanbul Declaration adopted by the Third Round Table Meeting of Ministers of Culture on 'Intangible Cultural Heritage, Mirror of Cultural Diversity': see UNESCO, 'Third Round Table of Ministers of Culture: Intangible Cultural Heritage: A Mirror of Cultural Diversity', 16–17 September 2012, available at: www.unesco.org/culture/ich/doc/src/00073-EN.pdf [last accessed 19 August 2014].

197 Article 2(2) 2003 Convention on Intangible Cultural Heritage.

198 Article 2(1) 2003 Convention on Intangible Cultural Heritage. See Kearney, 'Intangible Cultural Heritage: Global Awareness and Local Interest', in Smith and Akagawa (eds), *Intangible Heritage* (London: Routledge, 2009) 209. Kearney offers a more comprehensive understanding of heritage.

199 Ahmad, 'The Scope and Definitions of Heritage: From Tangible and Intangible' (2006) 12 *International Journal of Heritage Studies* 292.

200 Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, 2440 UNTS 311, entered into force in 2007 and now has 133 parties. See McGoldrick, *supra* n 1.

201 Donders, 'A Right to Cultural Identity in UNESCO', in Francioni and Scheinin (eds), *Cultural Human Rights* (Leiden: Martinus Nijhoff Publishers, 2008) 317 at 336. See UNESCO Res 32C/52, Desirability of Drawing Up an International Standard-setting Instrument on Cultural Diversity, 18 July 2003, UNESCO 32C/52.

202 Article 4 2005 UNESCO Convention on Cultural Diversity ('"cultural content" refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities').

that conveys meanings capable of being interpreted and appreciated.²⁰³ The symbolic dimension of heritage can also be found in intangible cultural heritage. Arizpe thus argued that intangible cultural heritage is essentially ‘not an object, not a performance, not a site; it may be embodied or given material form in any of these, but basically, it is an enactment of meanings embedded in collective memory’.²⁰⁴ Cultural diversity thus ensures that these cultural expressions could be ‘expressed, augmented and transmitted’ in any form without hindrance.²⁰⁵

It is in the above context that the concept of cultural memory emerged. In conceptual terms, it involved, firstly, an acknowledgement that “[h]eritage” only comes into being via the discourse of heritage and to this extent heritage, being by nature discursive, is always intangible’.²⁰⁶ This ‘discourse of heritage’ could be any set of cultural narrative such as beliefs about origin and ancestry, beliefs in spiritual relationships with nature, discourses of national pride or narratives of aesthetic standards such that communal memories are sustained by the cultural narratives that produce them. Meanings attached to cultural heritage do not exist in the abstract, but always ‘reside and live’ within the individual’s memory and are resignified, reaffirmed, refreshed and revitalised through the individual’s practice of culture. In order for these meanings to perpetuate, meanings must be practiced and enacted. In this regard, protecting intangible heritage through its transmission and revitalisation is closely related to cultural diversity. Cultural diversity ‘best occurs when people are enabled and allowed to pursue their lives in ways that are meaningful to them’²⁰⁷—that is, when the vibrant and dynamic nature of culture is acknowledged. In this sense, the respect for cultural diversity does not merely mean acknowledging difference as a fact, but also respect for ‘those cultures’ perceptions of their own identity, taking into account the social, intellectual and cultural processes that generate such identity and their holistic views of life’.²⁰⁸

- 203 This understanding comes very close to the concept of culture that symbolic anthropologists, such as Clifford Geertz, embrace. They argue that culture is best viewed as the symbolic realm that individuals engage in in their everyday lives: see Geertz, *supra* n 180 at 9, 89–91, 470. Symbolic anthropology studies how messages and meanings are conveyed through and in the context of symbols, as well as how they are incorporated and expressed. In this sense, culture involves the use of symbols in conveying meanings: see Barnard and Spencer, *Encyclopedia of Social and Cultural Anthropology* (London: Routledge, 1996) at 145.
- 204 Arizpe, ‘The Cultural Politics of Intangible Cultural Heritage’ (2007) 12 *Art, Antiquity and Law* 361 at 362. Ruggles and Silverman noted that ‘cultural heritage requires memory’: see Ruggles and Silverman, ‘Cultural Heritage and Human Rights’, in Ruggles and Silverman (eds), *Cultural Heritage and Human Rights* (New York: Springer, 2007) 3 at 12.
- 205 Article 4(1) 2005 UNESCO Convention on Cultural Diversity. While reaffirming that culture should be regarded as ‘the set of distinctive spiritual, material, intellectual and emotional features of society’, the 2005 UNESCO Convention on Cultural Diversity acknowledged that ‘[a]s a continuing, flexible and changing process, culture remodels tangible and intangible cultural heritage while inventing new forms of expression, thus revealing its infinite diversity’.
- 206 Byrne, ‘A Critique of Unfeeling Heritage’, in Akagawa and Smith (eds), *Intangible Heritage* (London: Routledge, 2009) 230.
- 207 Mountcastle, ‘Safeguarding Intangible Cultural Heritage and the Inevitability of Loss: A Tibetan Example’ (2010) 22 *Studia Ethnologica Croatica* 339 at 348.
- 208 UNESCO. International Round Table: ‘Intangible Cultural Heritage - Working Definitions’, Piedmont, Italy, 14–17 March 2001, available at: unesco.org/cultural/ich/doc/src/0075-EN.pdf [last accessed 19 September 2014].

B. Culture as Collective Memories in the Works of the Treaty Bodies

In the work of the treaty bodies, the idea of culture as collective memories could be seen slowly developing through the HRC's individual communications on indigenous land. In *Hopu and Bessert v France*,²⁰⁹ indigenous peoples who were descendants of the owners of a tract of land named Tetaitapu filed a complaint before the HRC claiming that the construction of a hotel complex approved by the State party would destroy their ancestral burial grounds which were significant to their culture and history. At the admissibility stage, the HRC found Article 27 of the ICCPR inapplicable owing to the State party's reservation to that Article.²¹⁰ However, the authors also relied on Articles 17 and 23, claiming that the destruction of ancestral burial groups would violate their rights to private and family life. The issue in dispute was whether the lack of a direct kinship link rendered the right to family inapplicable. The majority found in favour of the authors on the grounds that the concept of a 'family' should be given a broad interpretation, such that the concept of family is culturally determined and could extend beyond direct kinship link.²¹¹ The majority further noted that 'it transpires for author's claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life'.²¹²

A minority dissenting opinion by four members of the HRC²¹³ is indicative of the point that culture consists of collective memories. The minority noted that while the term family may be taken to denote one's extended family and other relatives, the term 'family' should not be extended to include 'all members of one's ethnic or cultural group ... [n]or ... one's ancestors, going back to time immemorial'.²¹⁴ In this context, the minority suggested that the majority stretched the legal understanding of the term 'family' in order to find a violation.²¹⁵ Furthermore, the dissenting minority correctly pointed out that the majority, albeit implicitly, acknowledged that the practice of ancestral burial as well as the burial grounds in question must have a particular symbolic meaning to the members of the group and it is on this ground, rather than on the legal construction of 'family', that the majority made its decision:

The [majority] mentions the authors' claim 'that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life.' Relying on the fact that the State party has challenged neither this claim nor the authors' argument that the burial grounds play an important part in their history, culture and life, the Committee concludes that the construction of the hotel complex on the burial grounds

209 *Hopu and Bessert v France* (549/1993), CCPR/C/60/D/549/1993/Rev.1 (1997); 5 IHRR 703 (1998).

210 *Hopu and Bessert v France* (549/1993), Admissibility Decision, CCPR/C/51/D/549/1993 (1994).

211 *Ibid.* at para 10.3.

212 *Ibid.*

213 Messrs Kretzmer, Buergenthal, Ando and Lord Colville.

214 *Ibid.* at dissenting opinion, para 4. The minority noted that the authors had 'shown no evidence that the burial ground is one that is connected to their family, rather than to the whole of the indigenous population of the area'.

215 *Ibid.*

interferes with the authors' right to family and privacy. The reference by the Committee to the authors' history, culture and life, is revealing. For it shows that the values that are being protected are not the family, or privacy, but cultural values. We share the concern of the Committee for these values. These values, however, are protected under article 27 of the Covenant and not the provisions relied on by the Committee. We regret that the Committee is prevented from applying article 27 in the instant case.²¹⁶

In other words, the dissenting minority suggested that, first, the majority was actually deciding on the basis of Article 27 of the ICCPR to which France has made a reservation and, second, if Article 27 of the ICCPR were not reserved by the State party, the symbolic attachment invested by the community to the land presents at least an actionable claim of a violation of the right.²¹⁷

The rationale adopted in *Hopu and Bessert v France* exemplified a subtle shift in the understanding of 'culture' by the HRC. In previous communications, such as *Diegraadt v Namibia*, a claim under Article 27 of the ICCPR would arise if it could be demonstrated that the manner which the life of an indigenous group is organised amounted to a 'distinctive way of life'.²¹⁸ However, *Hopu and Bessert v France* seems to suggest that a 'distinctive culture' is not required to be proven in order for a land claim under Article 27 to be successful; it is sufficient if a spiritual relationship with the disputed land is established.²¹⁹ The spiritual relationship that the community enjoyed through the disputed ancestral grounds, that is, the belief/conviction which is deeply held by the indigenous group, is a form of collective memory. It is a form of collective memory that is sustained by a set of cultural narratives—of the group's history, ancestral origin and life—that is memorised and lived by the indigenous group.

216 Ibid. at dissenting opinion, para 5.

217 Donders, 'Do Cultural Diversity and Human Rights Make a Good Match?' (2010) 61 *International Social Science Journal* 15 at 26. Donders noted that, before *Hopu and Bessert v France*, the HRC considered several similar cases against France and all were considered inadmissible. Note also that France's reservation to Article 27 was based the State's refusal to acknowledge that minorities exist, which is clearly inconsistent with the position taken by the HRC in its General Comment No 23, supra n 141 at para 5.2.

218 See text accompanying supra nn 153–159.

219 In fact the shift in emphasis in relation to indigenous land claims to one that relies on the existence of a spiritual relationship can be identified in the Inter-American jurisprudence, as noted by many. The leading case is *Mayagna (Sumo) Awas Tingni Community v Nicaragua* IACtHR Series C 79 (2001); 10 IHRR 758 (2003) at para 130(k). The case of *Awes Tingni v Nicaragua* was far reaching as it is the 'first legally binding decision by an international tribunal to uphold the collective land and resource rights of indigenous peoples in the face of a state's failure to do so': see Anaya and Grossman, 'The Case of Awes Tingni v Nicaragua: A New Step in the International Law of Indigenous Peoples' (2002) 19 *Arizona Journal of International and Comparative Law* 1 at 2. It also influenced a series of subsequent cases before the Inter-American Court of Human Rights and Inter-American Commission on Human Rights on indigenous land. See, for example, *Yakye Axa Indigenous Community v Paraguay* IACHtHR Series C 125 (2005); 15 IHRR 926 (2008); *Saramaka People v Suriname*, IACHtHR Series C 172 (2007); 16 IHRR 1045 (2009); and Case 12.465, *Kichwa Peoples of Sarayaku Community v Ecuador* No 56/69 (2010). For more background on the Awes Tingni group, see Vuotto, 'Awes Tingni v Nicaragua: International Precedent for Indigenous Land Rights?' (2004) 22 *Boston University International Law Journal* 219 at 225–28.

In General Comment No 21 of the CESCR the invocation of cultural grounds for the protection of indigenous land is much clearer. For instance, paragraph 36 of General Comment No 21 extended the understanding of culture to encapsulate the symbolic and emotional attachments which indigenous peoples invest in their land:

Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately their cultural identity. State parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.²²⁰

General Comment No 21 further provided that 'State parties must ... respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life'.²²¹ In essence, the rationale behind the protection of land is not the enjoyment of land *per se*, nor is it only a matter of ownership, but the acknowledgment and recognition that the land embodies the symbolic anchorage of memories, values, spiritual relationships and beliefs, as well as knowledge, indispensable for the maintenance of the indigenous way of life: so that communities can continue to be who they are. General Comment No 21 is indicative of this conclusion when it urges States to not only protect indigenous land, but also to ensure the availability of 'nature's gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity',²²² that is, the geographical space that is necessary for the creation and social reproduction of cultural meanings.²²³

Together, the narratives behind these symbolic references provides the basis for the development of the groups' intangible cultural heritage such as their 'languages, customs, traditions, beliefs, knowledge and history, as well as values, which make up identity and contribute to the cultural diversity of individuals and communities', as provided by the General Comment No 21 of the CESCR.²²⁴ In such ways, the UN human rights treaty body practice recognises not only the protection of participation in cultural life, but also 'the symbolic recognition and material support for the

220 CESCR, General Comment No 21, *supra* n 83 at para 36.

221 *Ibid.* at para 49(d).

222 *Ibid.* at para 16(a).

223 The Inter-American Commission on Human Rights took a similar stance and acknowledged that the function of indigenous land was not only to sustain communal life; it also serves as 'the geographical space necessary for the cultural and social reproduction of the group'. See Case 11.140, *Mary and Carrie Dann v United States* Report No 75/02 (2002); 10 IHRR 1143 (2003) at para 128.

224 CESCR General Comment No 21, *supra* n 83 at para 16(a).

expression and preservation of [communities'] cultural distinctiveness'.²²⁵ The concept of culture as consisting of sets of symbolic references and narratives is most evident in General Comment No 21 when it proclaims that 'culture is a broad, inclusive concept encompassing all manifestations of human existence'.²²⁶ Moreover, 'language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sports and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions'²²⁷ specified in General Comment No 21 as requiring of protection form part of our collective memories and/or continue to nurture collective memories. Viewed in this context, General Comment No 21 provided that '[t]he concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity'.²²⁸ Culture, thus understood, is a human condition and forms an integral part of human life.

The concept of culture as collective memories is also applicable to the situations of the majority populations (as opposed to the concept of a 'way of life' under Article 27 of the ICCPR which may require evidence of 'distinctiveness').²²⁹ Memorials, monuments, cemeteries, parks and other sites of historical significance often embody collective memories, such that acts of remembrance as well as open commemoration of historical events should be properly considered cultural expressions. Protecting an individual's freedom to engage in commemorative activities in this regard is perhaps the most effective guard against the distortion of collective memories of societal events. As Das remarked,

The demand for cultural rights has here come to be articulated in a context where cultural symbols have been appropriated by the state, which tries to establish a monopoly over ethical pronouncements. The state is thus experienced as a threat by smaller units who feel that their ways of life will be penetrated if not engulfed by this larger unit.²³⁰

In the above contexts, the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, in her report to the 17th Session of the Human Rights Council (UNHRC) on cultural heritage, addressed the contested nature of cultural narratives attached to heritage and called for States to protect the rights of individuals and communities to the 'identification, interpretation and development of cultural heritage'.²³¹ The concept of culture as 'collective memories' is made more explicit in the Special

225 Gilbert, *supra* n 91 at 36.

226 CESCR General Comment No 21, *supra* n 83 at para 11.

227 *Ibid.* at para 13.

228 *Ibid.* at para 12.

229 See text accompanying *supra* nn 152–158.

230 Das, 'Cultural Rights and the Definition of Community', in Mendelsohn and Baxi (eds), *The Rights of Subordinated Peoples* (Oxford: Oxford University Press, 1994) 124.

231 UNHRC, Report of the Special Rapporteur in the Field of Cultural Rights, 21 March 2011, A/HRC/17/38 at para 10.

Rapporteur's report to the 25th Session of the UNHRC which addressed extensively the role of cultural rights in memorisation processes, especially in the contexts of transnational justice where 'memory' plays a huge role in facilitating the reconciliation of past injustices.²³² As the Special Rapporteur recommended, '[m]emorialization should be understood as processes that provide the necessary space for those affected to articulate their diverse narratives in culturally meaningful ways'.²³³

Thus, collective memories embody forms of cultural narratives sustained and lived by individuals and communities. Viewing culture as collective memories enables one to move away from thinking of culture as primarily signifying 'difference'. It also renders possible a much more nuanced appreciation of the process which individuals engage with culture. This is important because culture—these narratives and memories that give us meaning—does not exist in the abstract, unchanging. As Nora famously argued, memory is not history.²³⁴ Memories are dynamic and vibrant and are lived by individuals and communities, while history is static and dormant. While history is a representation of the past,²³⁵ memory is what binds us to the past, always informing the present.²³⁶ Indeed, as General Comment No 21 of the CESCR acknowledged, culture/cultural life 'is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future'.²³⁷ Collective memories are not just nostalgic feelings about a place, time or event. They are 'powerful meaning-making tools both for the community and the individuals in the community ... providing a backdrop or context for much of people's identity'.²³⁸

To conclude, the concept of collective memories has several important implications for cultural rights. First, it implies an obligation on the part of States to protect and prevent communities from the radical transformation of cultural space without prior informed consent of local communities or genuine consultations, as exemplified in communication the *Hopu and Bessert v France* and General Comment No 21 of the CESCR.²³⁹ This obligation applies not only to indigenous populations but also to other minority groups and the majority populations as long as it can be shown that contested sites at issue embody important collective identities and memories.

232 UNHRC, Report of the Special Rapporteur in the Field of Cultural Rights: Memorialization Processes, 23 January 2014, A/HRC/25/49.

233 Ibid. at para 103.

234 Nora, 'Between Memory and History: *Lex Lieux de Memoire*' (1989) 26 *Representations* 7.

235 As noted, Kearney offers a more comprehensive understanding of heritage, stressing both its performative aspects and its temporal aspects: see Kearney, supra n 198; see also Brown, 'Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property' (2005) 12 *International Journal of Cultural Property* 40.

236 Lowenthal, *The Heritage Crusade and the Spoils of History* (Cambridge: Cambridge University Press, 1998) at xv ('heritage clarifies the past by infusing it with present purposes').

237 CESCR General Comment No 21, supra n 83 at para 11.

238 Pennebaker and Banasik, 'History as Social Psychology', in Pennebaker, Paez and Rimé (eds), *Collective Memory of Political Events: Social Psychological Perspectives* (Mahwah: Lawrence Erlbaum Associates Publishers, 1997).

239 See text accompanying supra nn 209–223; and CESCR, General Comment No 21, supra n 83 at paras 36, 55(e). General Comment No 21 also specifies that strategies and policies adopted in the areas of cultural life must be respectful of the cultural diversity of individuals and communities and that the right to take part in cultural life must be realised in a way pertinent and suitable to a given cultural modality or context respectful of the culture of individuals and communities: see CESCR, General Comment No 21, supra n 83 at paras 16(d) and 16(e).

Second, the concept of collective memories implies an obligation on the part of States to respect and facilitate the process within which these memories are sustained and transmitted through the expression and enactment of memories in the public sphere. While in the past similar obligations may be framed in the language of freedom of expression and assembly, or of a right to cultural expression/manifestation,²⁴⁰ viewing culture as collective memories provides a clearer conceptual link between expression and identity by viewing expression as an enactment of cultural narratives. Third, because memories can be easily appropriated by States, an emphasis should also be placed on education and history. In producing education materials, States have an obligation to consult minority groups to ensure that their history is represented in a manner respectful to them.²⁴¹ To be able to access one's history should now be properly considered an important aspect of cultural rights.²⁴² Last but not least, the purpose of cultural rights (that is, to protect one's access to culture)²⁴³ is rendered more evident via the concept of collective memories as the practice/enactment of a collective narrative is what links an individual to the wider group. No one can live in isolation. To connect to a wider group is a human need and what gives our life meaning.

5. CONCLUSIONS

This article has demonstrated how the concept of culture has evolved over the decades at the level of international discourse as well as in the work of the UN human rights treaty bodies, especially the CESC. As shown above, the expansion in the scope of protection has been dramatic: from protecting culture as high culture, to protecting culture as popular culture (which, *inter alia*, calls for the democratization of cultural institutions),²⁴⁴ and to the understanding of culture as a way of life, encompassing a wide range of protection including indigenous land, heritage and other forms of cultural expressions and manifestations. Along with these changes, the protection offered by the treaty bodies has also expanded from access to material culture, to addressing the daily and pressing issues which indigenous peoples face (the threat of being evicted directly or indirectly from the land which they traditionally occupy for instance). I have argued that when the concept of a way of life is understood as signifying a community's 'internal frame of reference', culture is deeply related to the community's world view, sustained in a group's collective memory.²⁴⁵ Cultural memories are sustained in cultural narratives that occupy our external environment. This means that it is no longer sufficient to read 'participation in cultural life' as only imposing an obligation to facilitate the cultural *process*, it also entails protecting the cultural *space* within which individuals are 'a product of culture and

240 Viewing culture as a manifestation is most evident in General Comment No 23, supra n 141 of the HRC. See text accompanying supra n 141.

241 CESC General Comment No 21, supra n 83 at paras 16(a), 27, 54(c).

242 Ibid.

243 See text accompanying supra nn 4–12.

244 Ibid. and CESC 2008 Reporting Guidelines, supra n 115 at para 67.

245 See also Rivière, *Investing in Cultural Diversity and Intercultural Dialogue: UNESCO World Report* (Paris: UNESCO, 2009) 112.

reproduce it through his or her own activities'.²⁴⁶ States thus have the obligation to refrain from the radical transformation/eradication of the cultural space, without prior consent from or genuine consultations with the local community. Meanwhile, protection of the appropriation of cultural symbols is best achieved through obliging States to refrain from interfering with the communities' forms of cultural expressions.

In this light, I have also demonstrated how the concept of culture plays an integral role in the application of cultural rights in various ways: it determines the purpose of cultural rights (that is, *why* it is important that international law protects cultural rights as human rights) as well as the scope of their application (that is, *what* to protect). Furthermore, understanding the nature of culture—the form 'culture' takes and the ways in which culture is sustained, expressed, transmitted or reproduced—often gives valuable guidance as to *how* cultural rights can best be protected.

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246 Eide, 'Cultural Rights as Individual Human Rights', in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook*, 2nd edn (Dordrecht: Martinus Nijhoff Publishers, 2001) 289 at 291.