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CULTURAL RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW: FROM CONTROVERSY TO CELEBRATION

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I Introduction

II Categorizing Human Rights: Which Rights are Cultural Rights?

III The Object of Cultural Rights: Cultures and Cultural Life

1 The Dynamic Concept of Culture

2 Taking Part in Cultural Life

IV The Subject of Cultural Rights: Individual, Community or Both?

1 Community Rights

2 Communal Rights

3 Individual Rights with a Collective Dimension

V Limitations to the Enjoyment of Cultural Rights

VI Cultural Rights: Universal or Relative Rights

VII Concluding Remarks: Remaining Challenges for Cultural Rights

I. Introduction

The year 2019 marks an important celebration for cultural rights. Ten years ago the United Nations Human Rights Council adopted a resolution establishing the mandate of an Independent Expert in the field of Cultural Rights.² The mandate was originally established for three years, but it was since extended and in 2012 the title of the mandate was changed into Special Rapporteur on Cultural Rights.³

The Special Rapporteur noted in her ten year report that significant progress has been made in the promotion and protection of cultural rights, but that at the same time important challenges remain, including extremism, proliferation of cultural relativism, cultural excuses for human rights violations, and climate change which threatens cultural heritage. She emphasized that the world "...desperately needs full implementation of its cultural rights and other human rights."⁴ The Human Rights Council (HRC) endorsed this report and reaffirmed that States have the responsibility to promote and protect cultural rights for all without discrimination.⁵ On earlier occasions the HRC emphasized the importance of cultural rights to enhance cultural pluralism, and as being essential for development, peace, the eradication of poverty and building of social cohesion.⁶

It is also ten years ago that the UN Committee on Economic, Social and Cultural Rights, the independent body monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights, adopted a General Comment on

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² Human Rights Council, *Independent Expert in the Field of Cultural Rights*, U.N. Doc. A/HRC/10/L.23 (2009).

³ Human Rights Council, *Special Rapporteur in the field of cultural rights*, U.N. Doc. A/HRC/RES/19/6 (2012). The most recent extension was: Human Rights Council, *Mandate of the Special Rapporteur in the field of cultural rights*, U.N. Doc. A/HRC/RES/37/12 (2018).

⁴ *Cultural rights: tenth anniversary report, Report of the Special Rapporteur in the field of cultural rights*, U.N. Doc. A/HRC/40/53 (2019) para. 4.

⁵ Human Rights Council, *Promotion of the enjoyment of the cultural rights of everyone and respect for cultural diversity*, U.N. Doc. A/HRC/40/L.11 (2019), para. 5.

⁶ Human Rights Council, *Promotion of the enjoyment of the cultural rights of everyone and respect for cultural diversity*, U.N. Doc. A/HRC/31/L.17 (2016), paras. 6 and 7.

one of the most prominent cultural rights in international human rights law: the right to take part in cultural life.⁷ With this General Comment the Committee gave guidance to States parties on how to respect, protect and fulfil this right.

The fact that these developments happened ten years ago might create the impression that cultural rights are by now a fully accepted, understood and respected group of human rights. Indeed, cultural rights may no longer be considered as being neglected and ignored⁸ and they may no longer be called the “Cinderella of the human rights family.”⁹ Apart from the work and reports of the Special Rapporteur on Cultural Rights and the UN Committee on Economic, Social and Cultural Rights, the last decade, a substantive amount of academic studies have been devoted to the analysis and further elucidation of cultural rights.¹⁰ The fact that there is more attention for cultural rights should however not obscure the fact that there is continuous debate about the place of cultural rights in the human rights discourse, as well as about their scope, meaning and (lack of) implementation. As the Special Rapporteur noted: “The implementation of cultural rights at the national and international levels remains one of the main outstanding challenges.”¹¹

This article aims to provide a concise overview of the development and different aspects of cultural rights in international human rights law, addressing *inter alia* the significance of cultural rights, the definition of cultural rights, the link between cultural rights and other human rights, as well as limitations of cultural rights. This article is restricted to international human rights law and focuses on the UN instruments and their interpretation by their monitoring mechanisms. Other UN documents and academic literature is also referred to. Cultural rights also form part of and are increasingly studied within other fields of international law, such as international criminal law, international humanitarian law, international cultural heritage law and international investment law, but these fall outside the scope of this article. Also left out are developments related to cultural rights as incorporated in regional human rights instruments, as well as relevant case-law in this regard.¹²

II. Categorizing Human Rights: Which Rights are Cultural Rights?

⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/21 (2009).

⁸ For a long time, it was argued that the category of cultural rights was, compared to the other categories of civil, political, economic and social rights, underdeveloped or neglected. See Janusz Symonides “Cultural Rights,” in Janusz Symonides ed., *Human Rights: Concept and Standards* (2000), p. 175. Patrice Meyer-Bisch ed., *Les Droits Culturels, une catégorie sous-développée de droits de l’homme, Actes du VIII^e Colloque interdisciplinaire sur les droits de l’homme* (1993).

⁹ Halina Niec ed., *Cultural Rights and Wrongs – A Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights* (1998), p. 176.

¹⁰ Yvonne Donders, *Towards a Right to Cultural Identity?* (2002); Francesco Francioni and Martin Scheinin eds., *Cultural Human Rights* (2008); Lucky Belder and Helle Porsdam eds., *Negotiating Cultural Rights: Issues at Stake, Challenges and Recommendations* (2017); Federico Lenzerini, *The Culturalization of Human Rights* (2014); Patrice Meyer-Bisch and Mylène Bidault, *Déclarer les droits culturels, commentaire de la Déclaration de Fribourg* (2010); Ana Vrdoljak ed., *The Cultural Dimension of Human Rights, Collected Courses Volume* (2013); Andreas Wiesand, Kalliopi Chainoglou, Yvonne Donders and Anna Sledzinska-Simon eds., *Culture and Human Rights: The Wroclaw Commentaries* (2016). Similarly, much output has been published on cultural heritage, cultural genocide and other related topics.

¹¹ *Cultural rights: tenth anniversary report*, *supra* note 4, para. 48.

¹² See for an overview of recent case-law, also in regional systems: Yvonne Donders, “Towards a Right to Cultural Identity? Yes, Indeed!,” *Diritti Umani e Diritto Internazionale* (Società editrice il Mulino) Vol. 12, No. 3 (2018), pp. 523-548.

The very notion of 'cultural rights' is the first aspect of the complexity of these rights. It is remarkable that the category or group of cultural rights is often referred to as one single unit. Many studies, reports and articles treat and analyze the category of cultural rights as a whole instead of focusing on one or more substantive provisions. This gives the false impression that cultural rights form one comprehensive category of rights and that it is clear which rights belong, and which do not belong, to this category. It is however far from clear and determined which rights are cultural rights. Moreover, it is questionable whether human rights can be categorized in clearly distinct groups at all. The fact that a certain right is considered a cultural right does not mean that it cannot also be considered a civil, political, economic or social right. For instance, the rights to freedom of religion and freedom of expression can be seen as cultural rights, but they can also be considered political or civil rights. The right to education is also a right with many different dimensions, which can be cultural, civil, economic, social and political. The notion of cultural rights therefore firstly raises the question which human rights form part of this category or group.

The categorization of human rights, including cultural rights, stems from the titles of two international human rights treaties that were adopted in 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹³ Although cultural rights are included in the title of the ICESCR, the text of this treaty does not make clear which provisions in the treaty belong to the category of cultural rights. In fact, none of the international legal instruments provides a definition of 'cultural rights', and consequently different lists could be compiled of international legal provisions that could be labelled as 'cultural rights'.¹⁴

Cultural rights can be broadly defined as those human rights that directly promote and protect the cultural interests of individuals and communities, and that are meant to advance their capacity to preserve, develop and change their cultural identity.¹⁵ The Special Rapporteur on Cultural Rights has interpreted the mandate as covering "...rights in the field of culture" and has adopted a broad approach to cultural rights as protecting "...the rights for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, their world view and the meanings they give to their existence and their development through, *inter alia*, values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life. They may also be considered as protecting access to cultural heritage

¹³ International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976; International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

¹⁴ Yvonne Donders, "Do Cultural Diversity and Human Rights make a Good Match?," *International Social Science Journal* 199 (2010), pp 18-20; Rodolfo Stavenhagen, "Cultural Rights: a Social Science Perspective," in Halina Niec ed., *Cultural Rights and Wrongs, A Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights* (1998), pp. 89-92; Stephen Marks, "Defining Cultural Rights" in M. Bergsmo ed., *Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjorn Eide* (2003), pp. 295-296.

¹⁵ Yvonne Donders, "Cultural Rights and the UNESCO Convention: More than Meets the Eye?," in Christiaan De Beukelaer, Miikka Pykkönen and JP Singh eds., *Globalization, Culture and Development - The UNESCO Convention on Cultural Diversity* (2015), p. 117.

and resources that allow such identification and development processes to take place.”¹⁶

In other words, ‘cultural rights’ is an umbrella notion that covers provisions containing rights that explicitly refer to culture and rights that have a direct link with culture. The prime examples of rights that explicitly refer to culture are the right of everyone to take part in cultural life (Article 27 of the Universal Declaration of Human Rights (UDHR) and Article 15(1)(a) ICESCR)¹⁷, the right of members of minorities to enjoy their own culture, practice their own religion and speak their own language (Article 27 ICCPR) and the right to freely pursue cultural development as part of the right of self-determination (Article 1 ICCPR and Article 1 ICESCR).¹⁸ Examples of rights that have a direct link with culture are the rights to freedom of religion (Article 18 ICCPR), freedom of expression and information (Article 19 ICCPR), freedom of assembly and association (Articles 21 and 22 ICCPR) and the right to education (Articles 13 and 14 ICESCR).

The Universal Declaration on Cultural Diversity includes an interesting provision called “cultural rights as an enabling environment for cultural diversity.”¹⁹ This provision affirms that cultural rights include human rights of both sorts indicated above. It explicitly mentions Article 27 UDHR and Articles 13 and 15 ICESCR. It then continues mentioning certain rights, without referring to specific treaty provisions: “All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.” It is noticeable that the right to freedom of religion and the right of self-determination are not explicitly mentioned here and neither are cultural rights of minorities or indigenous peoples, probably because of political sensitivity and lack of State consensus.

The Convention on the Rights of the Child (CRC) also contains cultural rights of both sorts.²⁰ Article 31 CRC contains the right children to rest and leisure, to engage in play and recreational activities and “...to participate freely in cultural life and the arts”. According to the same provision States are required to “...respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.” Article 30 CRC includes the right to enjoy culture for children belonging to minorities or indigenous peoples and Article 23 CRC includes the right to individual development for disabled children including their cultural and spiritual

¹⁶ *Report of the Independent Expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, U.N. Doc. A/HRC/14/36 (2010), para. 9; *Report of the Special Rapporteur in the field of cultural rights*, U.N. Doc. A/HRC/31/59 (2016), para. 7.

¹⁷ The right to participate in cultural life is also included in the International Convention on the Rights of All Migrant Workers and Member of Their Families (1990), article 43, the Convention on the Rights of the Child (1989), article 31 and the Convention on the Rights of Persons with Disabilities (2006), article 30.

¹⁸ See also the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly (2002); UN Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly (2007).

¹⁹ Universal Declaration on Cultural Diversity, Paris UNESCO, 2 November 2001, article 5.

²⁰ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

development. The right to education is included in Articles 28 and 29 of this treaty, whereby it is specifically mentioned that "...education of the child shall be directed to...his or her own cultural identity, language and values...". The UN Committee on the Rights of the Child emphasized the importance of cultural rights for children in its General Comment on Article 31 CRC.²¹

Apart from human rights provisions explicitly or directly related to the concept of culture, the implementation of human rights often has a cultural component to be taken into account and/or respected. This can be called the cultural dimension of human rights. Although some human rights may at first glance appear to have no direct link with culture, the implementation of human rights often has important cultural implications. This is quite clear for, for instance, the right to education, which is why it is recognized as a cultural right in itself. The Committee on Economic, Social and Cultural Rights has maintained that the form and substance of education, including curricula and teaching methods should be culturally appropriate, of good quality and adaptable to the needs of changing societies, communities and students within their diverse social and cultural settings.²²

The cultural dimension or the need for cultural sensitivity has also been recognized in relation to other human rights. The Committee on Economic, Social and Cultural Rights has acknowledged that an important element of the right to health, included in Article 12 ICESCR, is the accessibility of health facilities, goods and services. This implies that these health facilities, goods and services should be "...culturally appropriate, *i.e.*, respectful of the culture of individuals, minorities, peoples and communities."²³ Another example is the right to adequate food, included in Article 11 ICESCR. The Committee on Economic, Social and Cultural Rights has stated that the guarantees concerning the right to food should be culturally appropriate and acceptable.²⁴

The cultural dimension of several civil and political rights has also been recognized. For instance, the right to a fair trial, included in Article 14 ICCPR, includes the right to be informed of the charges in a language that one can understand, as well as the right to free assistance of an interpreter if a person cannot understand or speak the language used in court.²⁵ Specific ways of living related to culture, such as living in a caravan, which is the traditional way of living of gypsies, may fall within the scope of the right to respect for one's private life and home.²⁶

²¹ Committee on the Rights of the Child, *General Comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)*, U.N. Doc. CRC/C/GC/17 (2013), paras. 5 and 12.

²² Committee on Economic, Social and Cultural Rights, *General Comment 13, Right to Education*, U.N. Doc. E/C.12/1999/10 (1999) para. 6 (c) and (d).

²³ Committee on Economic, Social and Cultural Rights, *General Comment No. 14, The Right to the Highest Attainable Standard of Health (Article 12)* (2000), para. 12c; Yvonne Donders, "Exploring the Cultural Dimensions of the Right to the Highest Attainable Standard of Health," *Potchefstroom Electronic Law Journal*, Vol. 18. No. 2 (2015), pp. 179-222.

²⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 12, The Right to Adequate Food (Article 11)* (1999), paras. 7, 8 and 11.

²⁵ Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007), paras. 31, 33 and 40.

²⁶ This has been explicitly recognized by the European Court of Human Rights in *Buckley v. the United Kingdom* (App no 20348/92) European Court of Human Rights, 25 September 1996; *Chapman v. the United Kingdom* (App no 27238/95) European Court of Human Rights, 18 January 2001; *Winterstein v. France* (App no 27013/07) European Court of Human Rights, 17 October 2013.

In other words, a large group of human rights provisions incorporated in various international instruments could fall within the category of cultural rights. One could thereby argue that cultural rights are a good example of the indivisibility, interdependence and interrelatedness of all human rights. In the words of the Human Rights Council: "...cultural rights are an integral part of human rights, which are universal, indivisible, interrelated and interdependent"²⁷

This, however, also raises the question how useful and practical it is to categorize human rights. Cultural rights may transverse the different categories of human rights, but most likely all categories overlap. While attention for cultural rights has perhaps increased by referring to them as a single group, improving the promotion and protection of cultural rights is better served by further analysis and elucidation of specific cultural rights provisions. They differ too much in terms of scope, normative content and corresponding State obligations to consider them all as one package. While fully aware of this concern, some general overarching issues are dealt with below, including the objects and subjects of these rights, and several more controversial aspects of cultural rights, such as harmful practices and the link between cultural rights and cultural relativism.

III. The Object of Cultural Rights: Cultures and Cultural Life

What is the object of cultural rights? In other words, what is protected and promoted by cultural rights? Broadly speaking, cultural rights protect cultures, or more specifically cultural interests, cultural lives and cultural identities. All these are broad, complex and dynamic concepts, which makes their translation into legal terms and their concrete advancement and implementation very challenging.

1. The Dynamic Concept of Culture

Culture is defined in the preamble of the Universal Declaration on Cultural Diversity 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."²⁸ The Committee on Economic, Social and Cultural Rights also adopted a broad definition of culture, encompassing "...*inter alia*, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives."²⁹

The Human Rights Committee (HRCee), monitoring the implementation of the ICCPR, has consistently applied a broad and dynamic approach to the concept of culture in relation to Article 27 ICCPR on the right to enjoy culture for members of

²⁷ Human Rights Council, *Promotion of the enjoyment of the cultural rights of everyone and respect for cultural diversity*, U.N. Doc. A/HRC/40/L.11 (2019), para. 1.

²⁸ UNESCO Universal Declaration on Cultural Diversity, Paris, 2 November 2001.

²⁹ Committee on Economic, Social and Cultural Rights, *supra* note 7, para. 13.

minorities. In various individual cases and in its General Comment on this provision, the HRCee affirmed that all kinds of cultural, social and economic activities can fall under the protection of this right. For instance, it has recognized education in a minority language as “fundamental part of minority culture”, to be protected under Article 27 by negative as well as positive measures by the State.³⁰ The HRCee further maintains that the concept of culture includes for example a particular way of life associated with the use of land resources, especially in relation to indigenous peoples.³¹ The HRCee also recognized the dynamic character of culture. It has maintained that Article 27 not only protects the traditional means of livelihood of minorities or other communities. The fact that, for example, technological innovations are used or that these means are adapted to the modern way of life and technology, does not imply that Article 27 is no longer applicable.³²

In other words, the concept of culture can refer to many things, varying from cultural products, such as arts, music and literature, to the cultural process or culture as a way of life. While culture as a concept may be referred to in the singular, it should actually be understood as being plural: As emphasized by the Special Rapporteur: “‘Culture’ means cultures”.³³ Importantly, cultures are not inactive, but they can develop and change over time. Cultures cannot be seen as merely a product, they are living and interactive processes, without well-defined boundaries, influenced by internal and external interactions. In other words, cultures are not static, but dynamic human constructs, constantly subject to reinterpretation.³⁴

Cultures furthermore have an individual and a collective dimension, because they are developed and shaped by individuals and by communities. Individuals identify with several cultural communities – ethnicity, nation, family, religion, etc. – thereby shaping their personal cultural identity.³⁵ In general, cultures are considered to be important to human beings and to communities. In the words of the World Commission on Culture and Development: “...culture shapes all our thinking, imagining and behavior...a dynamic source for change, creativity, freedom, and the awakening of innovative opportunities. For groups and societies, culture is energy, inspiration and empowerment.”³⁶ The Committee on Economic, Social and Cultural Rights also noted that “[c]ulture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.”³⁷

³⁰ Human Rights Committee, *Mr. Rakhim Mavlonov and Mr Shansiy Sa'adi v. Uzbekistan*, Comm. No. 1334/2004, 29 April 2009, paras. 8.6 and 8.7.

³¹ Human Rights Committee, *General Comment No. 23 (art. 27)*, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994), para. 7.

³² Human Rights Committee, *Ilmari Lämsmä et al. v. Finland*, Comm. No. 511/1992, 26 October 1994, para. 9.3; Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Comm. No. 547/1993, 27 October 2000, para. 9.4.

³³ *Report of the Independent Expert in the field of cultural rights* (2010), *supra* note 16, para. 6; *Report of the Special Rapporteur in the field of cultural rights* (2016), *supra* note 16, para. 8.

³⁴ *Report of the Independent Expert in the field of cultural rights* (2010), *supra* note 16, para. 6; *Cultural rights: tenth anniversary report*, *supra* note 4, para. 16; *Study of the Human Rights Council Advisory Committee on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind*, U.N. Doc. A/HRC/22/71 (2012) para. 40.

³⁵ Yvonne Donders, *Towards a Right to Cultural Identity?* (2002), pp. 29-32; Yvonne Donders, “Do Cultural Diversity and Human Rights make a Good Match?,” *International Social Science Journal*, Vol. 199 (2010), p. 15; Will Kymlicka, *Multicultural Citizenship – A Liberal Theory of Minority Rights* (1995), p. 83; Bikuh Parekh *Rethinking Multiculturalism – Cultural Diversity and Political Theory* (2000), pp. 143-144, 153.

³⁶ World Commission on Culture and Development, *Our Creative Diversity* (1995), p. 11.

³⁷ Committee on Economic, Social and Cultural Rights, *supra* note 7, para. 13.

At the same time, culture is not an abstract or neutral concept: it is shaped by its instrumentalisation, in which negotiation, contestation and power structures play a role. Culture is not necessarily an intrinsically dignified concept and cultures are not valuable no matter how they are brought about.³⁸ Cultures may be mechanisms for exclusion and control. They may harm people or be oppressive to them and hinder their personal development. Some harmful aspects of cultures are reflected in cultural practices that are very questionable from a human rights perspective. Examples of such harmful practices include female genital mutilation, widow cleansing, forced marriage and forced prostitution. In other words, cultural expressions and cultural activities should be assessed also on the basis of the process of their development and the role of human rights and freedoms in the decision-making.³⁹ In relation to cultural rights, this implies that these rights cannot be enjoyed unlimitedly, a topic that will be dealt with below.

The broadness, dynamics, complexity and sensitivity of the concept of culture are serious challenges in relation to the advancement of cultural rights. This can be illustrated by the elaboration of the normative content of the right to take part in cultural life.

2. Taking Part in Cultural Life

The object of the right to take part in cultural life contains two elements: taking part and cultural life. The scope of both concepts has been broadened over the years.

At the time of its inclusion in Article 15(1)a ICESCR, the right to take part in cultural life was mainly meant to make the 'high' material aspects of culture more broadly available. No reference was made to cultural communities, instead the emphasis lay on participation in the national cultural life. Moreover, the drafters did not have in mind the 'popularization' of culture. The right to take part in cultural life did not imply the right of all people to enjoy these cultural activities that they themselves found worthwhile. Cultural access did not mean that the masses could rule on which cultural activities should be available and accessible. The intention was to increase access mainly to aspects of 'high' culture, in other words the classic concept of culture as including arts, literature, theatre and museums.⁴⁰

The normative content and State obligations of the right to take part in cultural life have been extensively elaborated by the Committee on Economic, Social and Cultural Rights in its earlier mentioned General Comment 21. In this General Comment the Committee adheres to a very broad concept of culture and cultural life, not restricting them to (aspects of) 'high culture'. According to the Committee, cultural life encompasses "...all manifestations of human existence (...) through which individuals, groups of individuals and communities express their humanity and the

³⁸ *Study of the Human Rights Council Advisory Committee*, *supra* note 34, paras. 39-40. This contradicts to a certain extent the Declaration of Principles of International Cultural Co-operation, adopted 4 November 1966, which states in Article 1 that "Each culture has a dignity and value which must be respected and preserved". While this may be true in principle, certain cultural expressions and practices have been labelled as "harmful". This issue is dealt with further in section V of this paper.

³⁹ *Report of the Independent Expert in the field of cultural rights* (2010), *supra* note 16, para.25.

⁴⁰ Yvonne Donders, "The legal framework of the right to take part in cultural life," in Yvonne Donders and Vladimir Volodin eds., *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007), pp. 231-272.

meaning they give to their existence.”⁴¹ This list is non-exhaustive and shows the potential broadness of the scope of this provision.

As regards the concept of ‘taking part’, the Committee in its General Comment distinguishes three different meanings within this notion: participation in, access to and contribution to cultural life. These dimensions reflect both the passive and the active side of participation. This denotes that people have access to cultural life and to enjoy its benefits, without any form of discrimination. It also means the right to have access to information concerning cultural life. Taking part in cultural life implies that cultural life be protected and preserved, in particular its cultural and artistic heritage. On the more active side, taking part in cultural life implies the right and freedom to choose and to change a cultural affiliation and to freely contribute to cultural life and its development by means of creative or other activities. Such freedom includes a right to self-identification, which is essential to the dignity of individuals. Taking an active part in cultural life also implies the right to take part in the decision-making process in relation to cultural life.

In the General Comment the Committee further identifies several crucial elements of the right to take part in cultural life that States need to implement and ensure.⁴² These include:

- *Availability*, which means that cultural goods and services have to be available in sufficient quantity, including operational aspects such as buildings, facilities and materials. General Comment 21 includes a large list of possible issues in para. 16(a).
- *Accessibility*, which means that cultural goods and services have to be accessible to everyone on the basis of non-discrimination. They should also be geographically and economically accessible (affordable) and there should be access to information. Special attention should be given to older persons, persons with disabilities and persons living in poverty.
- *Acceptability*, which means that the policies and strategies adopted by the State have to be acceptable to individuals and communities and that they should be consulted.
- *Adaptability*, which means that the policies and strategies should be flexible and relevant to be able to adapt to the needs of individuals and communities.
- *Appropriateness*, which refers to the obligation of the State to advance and realize other human rights, in particular the rights to food, health, housing, water and education, in a way that is appropriate to the cultural context and respectful of the culture of individuals and communities.

The above shows that the concepts of culture and cultural life have been given an increasingly broad scope. This implies that cultural rights, or rights related to the promotion and protection of cultures, exemplified by the right to take part in cultural life, entail a whole range of rights and corresponding negative and positive State obligations. The next question is who actually enjoys cultural rights.

IV. The Subject of Cultural Rights: Individual, Community or Both?

⁴¹ Committee on Economic, Social and Cultural Rights, *supra* note 7, para. 13.

⁴² *Ibid.*, para. 16.

Who can enjoy cultural rights? In other words, who are the subjects of cultural rights? As stated above, the concept of culture has an individual and a collective dimension. Accordingly, cultural rights demand not only an individual, but also a collective approach. This leads to the question: are cultural rights individual rights or collective rights, or both?⁴³

It should first be noted that the term 'collective rights' is not very clear and has been used as a basket in which different sorts of human rights with some kind of collective dimension could be contained. The terminology used in academic literature to describe human rights with a collective dimension is very inconsistent. Terms such as collective rights, peoples' rights, minority rights, group rights and community rights are used intermixed to describe: rights for collective entities as such, rights for individuals as members of such collective entities, and rights with a collective interest or object.⁴⁴

Taken from international human rights law, generally speaking, collective rights come in three forms: as community rights, as communal rights and as individual rights with a collective dimension.

1. Community Rights

Community rights are international human rights provisions of which the subject or rights-holder is a collective entity, such as a people or a community. Prime example of a community right in international human rights law is the right of peoples of self-determination, incorporated in the ICCPR and the ICESCR as the common first Article. This right has an important cultural component, linked to the internal dimension of self-determination.⁴⁵ A proper implementation of the right to internal self-determination includes a peoples' right to preserve its cultural, ethnic, historical and territorial identity, which may imply some form of self-government or autonomy in the economic, social and/or cultural field.⁴⁶

⁴³ Yvonne Donders, "Foundations of Collective Cultural Rights in International Human Rights Law," in: Andrzej Jakubowski ed., *Cultural Rights as Collective Rights - an International Law Perspective* (2016), pp. 85-112.; Chandran Kukathas, "Are there any Cultural Rights?" *Political Theory*, Vol. 20 (1992), p. 114. Marlies Galenkamp, *Individualism versus Collectivism – The concept of collective rights* (1998) Chapter 7; Asbjorn Eide "Cultural Rights as Individual Human Rights," in A Eide, C Krause and A Rosas eds., *Economic, Social and Cultural Rights – A Textbook* (2001), pp. 300-301; Lyndell Prott, "Cultural Rights as Peoples' Rights in International Law," in James Crawford ed., *The Rights of Peoples* (1988), pp. 95-97; David Miller "Group Rights, Human Right and Citizenship" *European Journal of Philosophy*, Vol. 10, Iss. 2 (2002), p. 180.

⁴⁴ See, for an overview of usage, including a distinction between subjects, beneficiaries and legal persons: Corsin Bisaz, *The Concept of Group Right in International Law – Groups as Contested Right-Holders, Subjects and Legal Persons* (2012), pp. 7-12.

⁴⁵ Yvonne Donders "The UN Declaration on the Rights of Indigenous Peoples: a Victory for Cultural Autonomy?," in Ineke Boerefijn and Jenny Goldschmidt eds., *Changing Perceptions Of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman* (2008), pp. 99-122. See, on the right of self-determination, including the external and internal dimension, *inter alia*, Pekka Aikio and Martin Scheinin eds., *Operationalising the Right of Indigenous Peoples to Self-Determination* (2000); Kristin Henrard, *Devising an adequate system of minority protection : individual human rights, minority rights and the right to self-determination* (2000); Hurst Hannum, *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights* (1996).

⁴⁶ Lauri Hannikainen, "Self-Determination and Autonomy in International Law," in Marku Suksi ed., *Autonomy: Applications and Implications* (1998), p. 90; Hurst Hannum, *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights* (1996), p. 474; Kristian Myntti, "The Right of Indigenous Peoples to Self-Determination," in Pekka Aikio and Martin Scheinin eds., *Operationalising the Right of Indigenous Peoples to Self-Determination* (2000), pp. 128-129.

Based among others on the importance of the right of self-determination, indigenous peoples have always demanded to be recognized as a collective entity and advocated for community rights.⁴⁷ The UN Declaration on the Rights of Indigenous Peoples, adopted in 2007, indeed includes community cultural rights. Apart from the right of self-determination, the Declaration includes in Article 5 for instance that “[i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.” Article 8(1) stipulates that “[i]ndigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture”. The Declaration further contains community cultural rights to practice and revitalize cultural traditions and customs, including manifestations of culture (Article 11 and 12); and land rights (Article 25 and 26). The Declaration as soft law instrument is not legally binding upon States.

2. Communal Rights

The second form of collective cultural rights are communal rights, which are international human rights provisions of which the subject or rights-holder is an individual recognized as a member of a collective entity, whereby this membership is often explicitly referred to.

Article 27 ICCPR is the main example of a communal cultural right. It guarantees the right of members of minorities to enjoy their culture, explicitly referring to the right to do so “...in community with other members of their group...”. A similar provision is provided for in Article 30 CRC and in Article 12 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Family (CRMW), containing the right to manifest religion for migrant workers “...either individually on in community with others...”⁴⁸

Communal rights can also be found in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted in 1992. The title as well as most provisions, speak of rights of (individual) members of minorities. Article 3(1) of the Declaration stipulates, however, that “[p]ersons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.” In some provisions the minority as such is mentioned, for instance in Article 1(1): “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories...” This provision is not drafted as a substantive right, but as a

⁴⁷ Erica-Irene Daes, *Explanatory note concerning the draft declaration on the rights of indigenous peoples*, U.N. Doc. E/CN.4/Sub.2/1993/26.Add.1 (1993), para. 28; SJ Anaya, *Indigenous Peoples in International Law* (2004) 103-106; Benedict Kingsbury, “Reconstructing Self-Determination: A Relational Approach,” in Pekka Aikio and Martin Scheinin eds., *Operationalising the Right of Indigenous Peoples to Self-Determination* (2000), p. 24; Kristian Myntti, “The Right of Indigenous Peoples to Self-Determination,” in Pekka Aikio and Martin Scheinin eds., *Operationalising the Right of Indigenous Peoples to Self-Determination* (2000), p. 128; RT Coulter, “The Draft UN Declaration on the Rights of Indigenous Peoples: What is it? What does it mean?,” *Netherlands Quarterly on Human Rights* (1995) p. 131; Erica-Irene Daes, “The Spirit and Letter of the Right to Self-Determination of Indigenous Peoples: Reflections on the Making of the United Nations Draft Declaration,” in Pekka Aikio and Martin Scheinin eds., *Operationalising the Right of Indigenous Peoples to Self-Determination* (2000), pp. 79–80.

⁴⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of 18 December 1990, entry into force 1 July 2003.

recommendation to States. Although such provisions recognize the minority as a collective entity, the community is not the subject of a right, but more its beneficiary. The Declaration, unlike article 27 ICCPR, is not legally binding.

3. Individual Rights with a Collective Dimension

The third form of collective cultural rights are individual rights with a collective dimension. These are human rights provisions of which the subject or rights-holder is an individual and no explicit reference is made to a collective entity, but whereby the enjoyment of the right has a clear collective dimension.

Most cultural rights in international human rights instruments are defined as individual rights. These rights are, however, for a large part enjoyed in connection with other individuals or within the context of communities. For instance, the individual right to take part in cultural life, as included in Article 15(1)a ICESCR, although not containing a reference to shared enjoyment, can merely be enjoyed together with other members of a cultural community. This approach is confirmed in General Comment 21, in which the Committee on Economic, Social and Cultural Rights stated that ‘everyone’ as subject of the right to take part in cultural life refers to the individual or the collectivity. “[C]ultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.”⁴⁹ Other examples are the rights to freedom of assembly and association (Articles 21 and 22 ICCPR), freedom of religion (Article 18 ICCPR), freedom of expression (Article 19 ICCPR) and the right to education (Articles 13 and 14 ICESCR). All these rights have a strong collective dimension in relation to the object of the rights as well as their enjoyment. Formally speaking, however, these rights are defined as individual rights.

The State approach towards cultural rights, reflected in the international instruments, has been mainly individual. States have been anxious to empower communities as a whole with cultural rights for fear of such a collective approach endangering the stability of the society. Despite this anxiety, collective cultural rights, including community rights and communal rights, formed an important part of the elaboration of instruments containing rights of minorities and indigenous peoples. In the words of the Special Rapporteur: “The existence of collective cultural rights is a reality in international human rights law today.”⁵⁰ In other words, the subjects of cultural rights are individuals as well as communities. The fact that they can all enjoy cultural rights may however also raise certain tensions between individuals and communities or between different communities.

V. Limitations to the Enjoyment of Cultural Rights

It has often been argued that cultural rights should not be promoted nor protected, because they could justify questionable cultural activities, such as the discriminatory treatment of women, examples of which are forced marriages, bride price, female

⁴⁹ Committee on Economic, Social and Cultural Rights, *supra* note 6, para. 9.

⁵⁰ *Report of the Independent Expert in the field of cultural rights* (2010), *supra* note, para. 10.

genital mutilation, widow cleansing, and less rights compared to men with regard to land ownership or inheritance.⁵¹

In general the ICESCR and the ICCPR confirm in Article 5 that “[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.” Another general rule is that “...no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”⁵²

More specifically, cultural rights, like other human rights, can, under certain circumstances, be limited by the State. The general framework of such limitations is outlined in Article 29(2) UDHR, in which it is stated that “...in the exercise of his rights and freedoms, everyone shall be subject to only such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society...”

Limitation clauses can be found in most human rights instruments, sometimes incorporated in a particular provision, sometimes as a general provision for the whole treaty. An example of the latter is Article 4 ICESCR that gives States the possibility to limit the enjoyment of the rights in the Covenant, but only on the condition that these limitations are “...determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

Whether or not a limitation of a cultural right by law is justified depends on the actual circumstances. On the one hand, the phrase ‘for the general welfare’ is vague, possibly allowing States to abuse it to justify certain cutbacks. On the other hand, it should be prevented that the unlimited exercise of cultural rights seriously endangers the rights of others or of society as a whole.

The Committee on Economic, Social and Cultural Rights has indicated in relation to the right to take part in cultural life that limitations may be necessary, “...in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights.” Apart from reaffirming the general criteria for limitations as laid down in Article 4 it added that limitations must be proportionate and that the “...least restrictive measures must be taken when several types of limitations may be imposed.”⁵³ The Committee interestingly also linked limitations to the right to take part in cultural life to other (cultural) rights, stressing “...the need to take into consideration existing international human rights standards on limitations that can or

⁵¹ See, also, *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Intersections between culture and violence against women*, U.N. Doc. A/HRC/4/34 (2007) and *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk - Addendum - 15 Years of the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences (1994-2009) - A Critical Review*, U.N. Doc. A/HRC/11/6/ Add. 5 (2009); *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, The enjoyment of cultural rights by women on an equal basis with men*, U.N. Doc. A/67/287 (2012).

⁵² *Universal Declaration on Cultural Diversity* (2001) article 4; *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005) article 2.

⁵³ Committee on Economic, Social and Cultural Rights, *supra* note 7, para. 19.

cannot be legitimately imposed on rights that are intrinsically linked to the right to take part in cultural life, such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association.”⁵⁴

In other words, cultural practices that are clearly in conflict with international human rights norms cannot be justified as being protected by cultural rights. Cultural practices are very diverse, which makes it impossible to make general statements about their acceptability in relation to human rights. The scope of their possible conflict with human rights depends on the particular context of the case. Several UN treaty bodies have given their assessment and opinion on specific practices that they consider harmful and therefore against the respective treaty.

The Committee on the Elimination of All Forms of Discrimination Against Women adopted in 1990 a General Recommendation on female circumcision, urging States to eradicate this practice harmful to the health of women.⁵⁵ In its General Recommendation on violence against women, adopted in 1992, the Committee stated that “[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision...” It found these practices to be depriving women of their rights as protected by the treaty.⁵⁶

The HRCee has stated in its General Comment on the equal enjoyment of rights, adopted in 2000, that “States Parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s rights to equality before the law and to equal enjoyment of all Covenant rights.”⁵⁷ It also listed a number of harmful cultural practices as violations of human rights. The HRCee identified female infanticide, widow burning and dowry killings as violations of the right to life. It further considered forced abortion, forced sterilization and forced genital mutilation as violations of the right not to be subjected to inhumane and degrading treatment; and it called forced male guardianship a violation of the freedom of movement.⁵⁸

The Committee on Economic, Social and Cultural Rights has stated that States violate the right to take part in cultural life when they fail “...to take steps to combat practices harmful to the well-being of a person or group of persons.” It mentioned female genital mutilation and allegations of the practice of witchcraft as specific examples of such harmful practices attributed to customs and traditions.⁵⁹

⁵⁴ Committee on Economic, Social and Cultural Rights, *supra* note 7, para. 19.

⁵⁵ Committee on the Elimination of All Forms of Discrimination Against Women, *General Recommendation No. 14, Female Circumcision*, 1990.

⁵⁶ Committee on the Elimination of All Forms of Discrimination Against Women, *General Recommendation No. 19, Violence against Women*, 1992.

⁵⁷ Human Rights Committee, *General Comment No. 28, Equality of Rights Between Men and Women (Article 3)*, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) para. 5.

⁵⁸ *Ibid.*, paras. 10, 16.

⁵⁹ Committee on Economic, Social and Cultural Rights, *supra* note 7, para. 64.

In 2014 the Committees of the CEDAW and the CRC adopted a joint General Comment on harmful practices.⁶⁰ The purpose of this document was "...to clarify the obligations of States parties to the Conventions by providing authoritative guidance on legislative, policy and other appropriate measures that must be taken to ensure full compliance with their obligations under the Conventions to eliminate harmful practices"⁶¹ The Committees provided for comprehensive criteria to identify harmful practices⁶² and they specifically listed and elaborated on female genital mutilation, child and/or forced marriage, polygamy and crimes committed in the name of so-called honor as examples of harmful practices.

These general comments and general recommendations are not legally binding upon States, but they show how treaty bodies have elaborated on the (in)compatibility of certain cultural practices with human rights.

It should be noted that harmful cultural practices are often formally prohibited by national laws. Even so, they may be practiced, and sometimes even condoned by States. This shows that the law cannot by itself change cultural practices. Changes in cultural practices are most successful if they arise within the cultural communities themselves and are not imposed from outside, by the law or by the State. Strategies to eliminate harmful practices are more effective if they use the positive elements of traditional values and use local cultures and traditions that support and underpin human rights.⁶³

This does of course not relieve States from the responsibility to find ways to promote such changes. Several treaties emphasize the role of States parties in eradicating harmful cultural practices. The CEDAW, for instance, states in Article 5 that "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."⁶⁴ The CRC contains in Article 24(3) that "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."⁶⁵

VI. Cultural Rights: Universal or Relative Rights

Cultural rights have often been connected to the broader debate on the universality or relativism of human rights.⁶⁶ When discussing the establishment of the mandate of the

⁶⁰ *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices*, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18 (2014).

⁶¹ *Ibid.*, para. 2.

⁶² *Ibid.*, paras. 15 and 16.

⁶³ *Study of the Human Rights Council Advisory Committee*, *supra* note 34, para. 45-52

⁶⁴ See, also, Rikki Holtmaat and Jonneke Naber, *Women's Human Rights and Culture-From Deadlock to Dialogue* (2011), pp. 9-50.

⁶⁵ Although 'traditional practices' are not defined, it becomes clear from the drafting documents that this provision was targeted against FGM. See Sonia Harris-Short, "International Human Rights Law: Imperialist, Inept and Ineffective? Cultural relativism and the UN Convention on the Rights of the Child", *Human Rights Quarterly*, Vol. 25, No. 1 (2003) pp. 130-181, at 136-137.

⁶⁶ This debate has been conducted from the very moment international human rights law was being formed and has been dealt with in great detail by many human rights scholars: "Statement on Human Rights," 49 *American*

Special Rapporteur, several States expressed their concern that the recognition of cultural rights would undermine the universality of human rights and merely defend cultural relativism and be used to justify traditional norms and practices that violate human rights.⁶⁷

In essence, supporters of the universality of human rights assert that every human being has certain human rights by virtue of being human. Consequently, all persons should equally enjoy human rights, because these rights are inalienable and meant to protect human dignity. Supporters of cultural relativism emphasize the empirical fact of immense cultural diversity in the world. Cultural relativists, accordingly, claim that there are no cross-cultural universal human values and that the variety of cultures implies that human rights can and should be interpreted differently. In between, moderate forms of both theories exist.⁶⁸

Moving away from the strict division or choice between a universalist or a cultural relativist approach to human rights, the idea has taken hold that respect for cultural diversity, including the advancement of cultural rights, can well be consistent with the notion of universality of human rights, because different levels or forms of universality could be distinguished.

The Special Rapporteur on Cultural Rights noted that: “Universality means that human beings are endowed with equal human rights simply by virtue of being human, wherever they live and whoever they are, regardless of their status or any particular characteristics.”⁶⁹ This level or form of universality concerns the application of human rights, also called formal universality. This level is not subject to large debate. The idea that human rights should apply universally and should be universally enjoyed – by all persons on the basis of equality and human dignity – is not very controversial. International human rights instruments clearly endorse this universality approach. The UDHR, for example, not only refers to universality in its title, but also states in Article 1 that “all human beings are born free and equal in dignity and rights.” The UDHR as well as the international human rights treaties speak of ‘everyone’, ‘all persons’ or ‘no one’, affirming that all human beings have these rights and freedoms, no matter where they were born or to which State or community they belong.

Another level or form of universality is the universality of the normative content and implementation of human rights. This level is subject to considerable debate. Nowadays, however, there seems to be general agreement that the universal value

Anthropologist 539, 542, 1947, submitted to the UN Human Rights Commission drafting the Universal Declaration of Human Rights. See on universalism and cultural relativism, *inter alia*, Jack Donnelly, *Universal Human Rights in Theory and Practice* (1989), pp. 107-160; Douglas Lee Donoho, “Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards,” *Stanford Journal on International Law*, Vol. 27 (1990-1991), pp. 345-391; Fernand de Varennes, “The Fallacies in the ‘Universalism versus Cultural Relativism’ Debate in Human Rights Law,” *Asia Pacific Journal on Human Rights and the Law* No. 1 (2006), pp. 67-84; Eibe Riedel, “Universality of Human Rights and Cultural Pluralism,” in Ch. Starck ed., *Constitutionalism, Universalism and Democracy: A Comparative Analysis* (1999), pp. 25-52; Ann-Belinda S. Preis, “Human Rights as Cultural Practice: An Anthropological Critique”, *Human Rights Quarterly*, Vol. 18 No. 2 (1996), pp. 286-315.

⁶⁷ *Cultural rights: tenth anniversary report*, *supra* note 4, para. 10.

⁶⁸ *Study of the Human Rights Council Advisory Committee*, *supra* note 34, paras. 10-16; Jack Donnelly, *Universal Human Rights in Theory and Practice*, (2nd ed. 2003); Philip Alston and Ryan Goodman, *International Human Rights* (2013) Chapter 7, Conflict in Culture, Traditional Practices, Challenges to Universalism, pp. 531-556; Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, *International Human Rights Law* (2018) Chapter 3, Critiques, pp. 50-59.

⁶⁹ *Universality, cultural diversity and cultural rights, Report of the Special Rapporteur in the field of cultural rights*, U.N. Doc. A/73/227 (2018), para. 2.

and application of human rights does not necessarily imply the uniform implementation of these rights. In other words, while human rights apply universally to everyone on the basis of their human dignity, the implementation of these rights does not have to be uniform. The Special Rapporteur on Cultural Rights has also endorsed this approach: “Universality is about human dignity, not about homogeneity.”⁷⁰ The international human rights system should allow sufficient flexibility to be receptive to cultural differences, between and among States, communities and individuals.⁷¹ States have also endorsed the idea that all human rights are universal, indivisible and interdependent and interrelated, but that the significance of national and regional particularities and various historical, cultural and religious backgrounds may be taken into account.⁷² This approach has been called the “universalization” of human rights⁷³, the “relative universality of human rights”⁷⁴ or “inclusive universality”.⁷⁵ Common to these approaches is the idea that the universal legitimacy of human rights allows for a certain variety in their operation, which is enhanced by internal cultural discourse and external cross-cultural dialogue.⁷⁶

Similarly, the promotion of cultural rights, emphasizing the value of different cultures and endorsing specificities, should not be equated with cultural relativism. Some proponents of cultural relativism indeed use cultural rights as a justification for their arguments.⁷⁷ As the Special Rapporteur notes: “Cultural rights are a critical component of the universal human rights system, and that system provides their greatest guarantee.”⁷⁸ Cultural rights are not per se an attack on universality, nor are they equivalent to cultural relativism. On the contrary, cultural rights are part of the universal human rights framework and can have many positive implications for the advancement and enjoyment of universal human rights.⁷⁹ The fact that cultural rights draw special

⁷⁰ *Ibid.*, para. 8.

⁷¹ The European Court of Human Rights has adopted this approach by stating that, while the purpose of the European Convention on Human Rights was to lay down international standards, “this does not mean that absolute uniformity is required.” See *Sunday Times v. United Kingdom*, European Court of Human Rights, Appl. No. 13166/87 (1991), para. 61.

⁷² Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5.

⁷³ Advisory Council on International Affairs, *Universality of Human Rights. Principles, Practice and Prospects*, Advice No. 63 (2008), p. 19.

⁷⁴ Jack Donnelly, “The Relative Universality of Human Rights”, *Human Rights Quarterly* Vol. 29 (2007), pp. 281-306, at 281 and 300. The debate however continues: Michael Goodhart, “Neither Relative nor Universal: A Response to Donnelly”, *Human Rights Quarterly*, Vol. 30, No. 1 (2008), pp. 183-193 and Jack Donnelly, “Human Rights: Both Universal and Relative (A Reply to Michael Goodhart)”, *Human Rights Quarterly*, Vol. 30, No. 1 (2008), pp. 194-204; Reza Afshari, “Relativity in Universality: Jack Donnelly’s Grand Theory in Need of Specific Illustrations”, *Human Rights Quarterly*, Vol. 35, No. 4 (2015), pp. 854-912.

⁷⁵ Eva Brems, “Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam”, *Human Rights Review*, Vol. 5, No. 3, (2004), pp. 5-21, at 11-12; Eva Brems, “Reconciling Universality and Diversity in International Human Rights Law,” in Andras Sajó ed., *Human Rights with Modesty: the Problem of Universalism* (2004), pp. 213-230, at 223-225. Other authors agree that the international human rights system should be or is flexible enough to integrate cultural differences: Niels Petersen, “International Law, Cultural Diversity and Democratic Rule: Beyond the Divide Between Universalism and Relativism,” *Asian Journal of International Law*, No. 1 (2011), pp. 149-163, at 149-150; David Kinley, “Bendable Rules: The Development Implications of Human Rights Pluralism,” in B. Tamanaha, C. Sage and M. Woolcock eds., *Legal Pluralism and Development – Scholars and Practitioners in Dialogue* (2012), pp. 50-65.

⁷⁶ Abdullahi Ahmed An-Na’im ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (1991), pp. 4-5; David Kinley, “Bendable Rules: The Development Implications of Human Rights Pluralism,” in B. Tamanaha, C. Sage and M. Woolcock eds., *Legal Pluralism and Development – Scholars and Practitioners in Dialogue* (2012), pp. 50-51.

⁷⁷ *Universality, cultural diversity and cultural rights*, *supra* note 69, para. 51.

⁷⁸ *Ibid.*, para. 3; *Cultural rights: tenth anniversary report*, *supra* note 4, para. 17.

⁷⁹ *Universality, cultural diversity and cultural rights*, *supra* note 69, para. 11, 14 and 57.

attention to the cultures of individuals and communities does not stand in the way of the norms as such having universal value. Cultural rights are universally applicable to all communities and individuals, regardless of their geographical place or specific background, on the ground that cultures and cultural identities are important elements of human dignity. At the same time, States have a certain margin of discretion when implementing human rights, in order to be able balance the different cultural interests, take specific situations and context into account, but also to protect against harmful cultural practices.⁸⁰

VII. Concluding Remarks: Remaining Challenges for Cultural Rights

The last decade, important progress has been made in the rise of awareness and appreciation of cultural rights. There has been an increased interest in cultural rights, in academia, but also within the UN framework. The work of the Special Rapporteur on Cultural Rights and that of UN treaty bodies, in particular the Committee on Economic, Social and Cultural Rights, has made very important contributions to the recognition and further elaboration of cultural rights as human rights. The mandate of the Special Rapporteur has thereby lived up to its promise to ensure that cultural rights would be understood as being applicable to everyone and to clarify the position of cultural rights within the universal human rights system.⁸¹

The increased attention and elaboration of cultural rights has given cultural rights a much more prominent place in international human rights law. Cultural rights are by now recognized as protecting and promoting cultures and cultural identities as crucial aspects of human life and human dignity. In other words, cultural rights are seen as real human rights that have the same value as other human rights of a civil, economic, political or social nature. This does, however, not mean that cultural rights are fully understood and guaranteed. Important challenges for both aspects remain.

For instance, the general acknowledgment of the importance of cultural rights has not completely resolved all controversies and the cautious attitude of certain States towards these rights. A significant number of States still doubt that cultural rights are substantive, enforceable human rights and instead see them more as policy-oriented rights that do not impose direct, definite legal obligations. When discussing the establishment of the mandate of the Special Rapporteur, several States expressed strong concerns, stating that they did not consider cultural rights as individual rights, “or even human rights at all”, but rather as issues relegated to culture and therefore falling under the responsibility of UNESCO.⁸² This attitude has not significantly changed for some States.

Part of the controversy about cultural rights is caused by the vagueness and dynamics of the notion itself. As stated above, the categorization of human rights is questionable. The grouping of different human rights all together under one broad heading is not merely difficult to do, but also not very helpful in the further explication and implementation of these rights.

⁸⁰ *Ibid.*, para. 54.

⁸¹ *Cultural rights: tenth anniversary report*, *supra* note 4, para. 11.

⁸² *Ibid.*, para. 10.

The above shows that there are many provisions in international human rights law that promote and protect cultural interests and that would therefore qualify as cultural rights. The broad and dynamic notion of culture, including not only cultural products, but also process-oriented aspects such as association, language, religion and education, implies that the category of cultural rights includes many different human rights. Cultural rights are the rights to create and enjoy cultural products and the rights to have access to and participate in cultural life, as well as the rights to freedom of association, expression, religion and the right to education. Cultural rights may also refer to the cultural dimension of human rights, such as the rights to private life, family life and health.

The dynamic and comprehensive notion of culture further marks the complexity of the normative content of cultural rights. Cultural rights, illustrated by the right to take part in cultural life, have a broad scope and object, since the notions of culture and cultural life cover many different aspects and interests. Furthermore, the subjects of cultural rights are individuals as well as communities. Collective human rights, in particular those related to (cultural) self-determination, remain controversial for many States. There may also be tensions between individual cultural interests and collective cultural interests, or between different collective cultural interests, potentially leading to tensions in societies. Consequently, cultural rights are to be enjoyed by individuals and communities, but at the same time, the enjoyment of these rights can be restricted by States to protect certain legitimate aims, for instance the rights of others or public order. Moreover, cultural rights cannot be invoked or interpreted in such a way as to justify harmful cultural practices or the denial or violation of certain human rights and fundamental freedoms. States are the main duty-bearers of these rights and they have to balance the different interests at stake.

In conclusion, there is certainly reason to celebrate the fact that cultural rights are accepted as real human rights, or in the words of the Human Rights Council as "...an integral part of human rights."⁸³ To further advance their enjoyment by as many individuals and communities as possible, continuous elaboration of the normative content of different cultural rights, as well as monitoring of their specific promotion and protection is needed. Moreover, it is crucial to inform and educate people about cultural rights, because not many people may be aware of their existence and potential. Hopefully this article has made a contribution in this respect.

⁸³ Human Rights Council (2019), *supra* note 5, para. 1.