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Right to take part in cultural life (article 15 (1) (a) of the Covenant)

Friday, 9 May 2008

Cultural rights and universality of human rights*

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* Reproduced as submitted.

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CULTURAL RIGHTS AND UNIVERSALITY OF HUMAN RIGHTS

Introduction

I am gratified by the invitation to attend this day of discussion on the right to take part in cultural life and offer in this paper some unfinished thoughts on the issues involved. We are presenting at this session under the heading of 'cultural rights and universality of human rights'. As the comments are rather 'raw' may I add in defence that although I have written a good deal in and around cultural matters concerning minorities and indigenous peoples,¹ I have offered little in the past on 'the right to take part in cultural life' as such. What I propose here is to address a limited spectrum of elements for understanding cultural rights and universality, followed by comments on how some issues have played out in the practice of the Committee on the Elimination of Racial Discrimination - CERD. I add the 'customary' disclaimer that these views, particularly those on CERD practice, would not necessarily be shared by colleagues on that Committee and that I do not speak on behalf of the Committee but in a private capacity.

If there is to be a comprehensible right to take part in cultural life there should be definite possibilities for giving substance to such a right and thereby providing guidance to states parties and other stakeholders on what the right entails in practice. The necessary analytical structures for a human right involve a conception of right-holder or right-holders, a subject-matter for the right and contexts for its exercise, and limitations on the right: notably structural limitations in relation to other human rights in the instrument in question. The right will not exist in a vacuum, but will be part of the family of human rights, which means a set of interconnections with other rights and that the right is capable of providing 'added value' to the *corpus* of human rights. The interconnection point also means that other members of the family of human rights can provide interpretative 'signposts' to resolving questions as to the applicability of the right in specific situations. We might also expect to be able to concretize relevant obligations for the State regarding the enjoyment of the right and obligations for non-State actors.² Exercises in norm clarification and elaboration can benefit from the standard-setting fundamentals set out in General Assembly resolution 41/120: the results should, *inter alia*, '(a) be consistent with the existing body of international human rights law'; '(b) be of fundamental character and derive from the inherent dignity and worth of the human person'; '(c) be sufficiently precise to give rise to identifiable and practicable rights and obligations'.

Taking Part In Cultural Life

¹ Notably *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991), and *Indigenous Peoples and Human Rights* (Manchester University Press, 2004).

² The author does not intend in this paper to enter into arguments concerning the nature of obligations of non-State actors. For further guidance in a wealth of literature, see A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006).

*'Culture manifests itself in many forms'*³

On the fundamentals of the right under discussion, we may or may not be encouraged by the remarks of Raymond Williams who, apropos of 'culture' said that the word 'is one of the two or three complicated words in the English language',⁴ to which we might add, 'and in other languages too'. Williams describes 'three broad active categories of usage ... (i) the ... noun which describes a general process of intellectual, spiritual and aesthetic development ... (ii) the ... noun ... which indicates a particular way of life, whether of a people, a period, a group, or humanity in general ... (iii) the ... noun which describes the works and practices of intellectual and especially artistic activity.'⁵ Bearing in mind the further remark by Williams that arguments and questions over the meaning of culture 'cannot be resolved by reducing the complexity of actual usage',⁶ it would seem that any right to culture or to participate in cultural life, etc., cannot be unduly reductionist. The Williams approach is not far removed from that of UNESCO as set out in the preamble to the Declaration on Cultural Diversity, according to which culture should be regarded as 'a set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.' Thus the complex term 'culture' may be divided into a triad of (perhaps Western-centric) 'high' culture, mass or globalized culture, and 'culture as a way of life' or 'culture in the anthropological sense'.⁷ The last of these, similar to Williams sense (ii) and aspects of the UNESCO account, was sometimes put forward as a list of traits that can be empirically observed, an approach which can lead to a static view of culture. According to Tylor, an early anthropologist, culture is: 'That complex whole which includes knowledge, belief, art, morals, law, custom and other capabilities and habits acquired by man as a member of society.'⁸ Later anthropology, while not necessarily abandoning the 'traits/characteristics' approach, has tended to understand culture as meaning a web of texts to be interpreted,⁹ or as process,¹⁰ emphasising the constant creation of culture. If culture is process,

³ 'With regard to the exercise of the cultural rights protected under article 27, the Committee observes that 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 decisions which affect them': paragraph 7 of Human Rights Committee General Comment no. 23 on The Rights of Minorities, CCPR/C/21/Rev.1/Add.5, 8.04.1994.

⁴ Raymond Williams, *Keywords* (London, Fontana Press, 1988), p. 87.

⁵ *Ibid.*, p. 90.

⁶ *Ibid.*, p. 91.

⁷ For variations on this triumvirate, see R. O'Keefe, 'The "right to take part in cultural life" under Article 15 of the ICESCR', *47 International and Comparative Law Quarterly* (1998), 904-23.

⁸ E. Tylor, *Primitive Culture* (London: Murray, 1871), vol. 1, p. 1.

⁹ C. Geertz, *The Interpretation of Cultures* (New York: Basic Books Inc., 1973)

¹⁰ Discussion in A. Gray, *Indigenous Rights and Development: Self-Determination in an Amazonian Community* (Providence and Oxford: Berghahn Books, 1997), pp.167-69.

Williams' noun becomes a verb,¹¹ cultures are not hermetically bounded and discrete, culture may be characterised as 'contested, fragmented, contextualised and emergent',¹² and human beings are 'agents' as well as 'bearers' or 'carriers' of culture.

It is worth recalling here that we are all 'in' culture in the broad sense and work through cultural lenses to more or less the same degree.¹³ Volpp's critique hits out at those who might imagine that they are free from culture whereas others are bent double by the weight of tradition: 'Those with power appear to have no culture; those without power are culturally endowed. Western subjects are defined by their abilities to make choices, in contrast to Third World subjects, who are defined by their group-based determinism.'

¹⁴In examining this mistaken dichotomous perception, she observes that 'Because the Western definition of what makes one human depends on the notion of agency and the ability to make rational choices, to thrust some communities into a world where their actions are determined only by culture is deeply dehumanizing.'¹⁵ On the other hand, the endless, kaleidoscopic self-invention cultural paradigm favoured by other theorists many not match the reality of existence for vast numbers of human beings for whom opportunities to 'revise' or 'refine' their life plans, 'challenge their situation' or 'disrupt the status quo' may be significantly less in evidence.¹⁶

On the Elements of a Right

Moving from 'culture' to 'cultural rights', the above reflections hint at a double conclusion. The first is that we are all 'in' culture, so that the concept of a substantive general right, not limited to specific communities, stands in appropriate relationship to the realities of human existence, and can be defended. The second is that because of the amorphous and complex nature of the subject matter 'culture' – and its extension 'cultural life' – finding a discrete substance for the right is a complex undertaking. This second aspect suggests that attempts to encapsulate the elements of the right in a neat, *a priori* definition, are likely to come to grief: 'definition' may be a jurisprudential step too far. Human groups or human activities are not always amenable to definition. We are aware of the lack of canonical definitions of

¹¹ B.V Street, 'Culture is a verb: anthropological aspects of language and culture', in D. Graddol, L. Thompson and M. Byram (eds), *Language and Culture*, papers of the 24th Annual Meeting of the British Association of Linguistics (1993), 23-43.

¹² R.A. Wilson, 'Human rights, culture and context: an introduction', in R.A. Wilson (ed.) *Human Rights, Culture and Context: Anthropological Perspectives* (London and Chicago: Pluto Press, 1997), pp. 1-27 at p. 9.

¹³ See A.A. An-Na'im, 'Problems of universal cultural legitimacy for human rights', in A.A. An-Na'im and F.M. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives* (Washington D.C: the Brookings Institution, 1990), pp. 331-67.

¹⁴ L. Volpp, 'Feminism versus multiculturalism', *101 Columbia Law Review* (2001), 1181-1218, at 1192.

¹⁵ *Ibid.*

¹⁶ T. Eagleton, *The Idea of Culture* (Oxford: Blackwell Publishers, 2000), *passim*.

‘minority’ and ‘indigenous people’ in international human rights law,¹⁷ and also that, despite the lack of consensus ‘definition’, we are able to understand with reasonable clarity to which groups we refer, even if the epistemology is not thoroughly grounded and there is a penumbra of uncertainty ringing the concepts. It would be difficult to read through the whole of the UN Declaration on the Rights of Indigenous Peoples without having, by the end of such a reading, a tolerably clear idea of which groups are comprehended by its terms – even in the absence of ‘definition’. Further, the definition approach may not sit well with the notion of cultural development, hybridization, creolization, interpenetration, etc., in that it might tend to suggest limits on cultural development within the parameters of the right. It is also true that, whether of human groups or not, there is a politics of definition, with the definer potentially claiming mastery over the defined: ‘language’ as Nebrija said, ‘is the perfect instrument of Empire.’¹⁸ Hence in the field of indigenous rights, the resistance by groups to definition in light of the ‘dynamic’ right to self-determination and self-definition. Better perhaps to take the methodology exemplified by the extensive guidelines to States parties already adopted by the Committee on Economic, Social and Cultural Rights – CESCR - and identify a non-finite series of elements, along the spectrum of which we can see the extent to which the right is being implemented by observing which among the range of elements are the subject of genuinely active efforts by State authorities.¹⁹

Cultural Rights and Other Rights

These last observations take us to another aspect of the substance of the right. On the one hand, we may say that culture is complex, and that the right must be stated in an equally complex manner in order that potentially important aspects are not deleted from consciousness. We also observe that a right to culture must depend upon, influence, and intersect with, a range of other human rights, including general rights to education, language, freedom of thought, conscience and religion, freedom of expression and association etc., as well as rights envisaged as applying to specific communities such as minorities and indigenous peoples. On the other hand, as McGoldrick observes, ‘some argue that the use of culture is usually misleading and that it would be better and more accurate to identify specific rights, for example, to expression, association, religion, specific minority rights, etc.’²⁰ McGoldrick cites Eriksson who argues that instead of ‘invoking culture, if one talks about, say, 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 equivalent terms instead of covering them up in the deceptively cosy

¹⁷ Informal and scientific definitions are plentiful in the literature, but international instruments have generally shied away from attempting definitional closure. Article 1 of ILO Convention 169 on Indigenous and Tribal Peoples is not an exception, being essentially a statement of the coverage of that Convention, without ‘universal’ pretensions.

¹⁸ *Gramatica de la lengua castellana*, Salamanca, 1492, edited with an introduction by I. Gonzalez-Llubera (Oxford University Press, 1926).

¹⁹ E/C.12/1991/1, Revised general guidelines regarding the form and contents of reports to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, 17/06/91.

²⁰ D. McGoldrick, ‘Culture, cultures and human rights’, in M.A. Baderin and R. McCorquodale (eds.), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007), pp. 447-73, at pp. 450-51.

blanket of culture.’²¹ The argument as I read it is that we should apply a version of conceptual ‘subsidiarity’ to bring the concepts closer to base, closer to the essence of what is required in order to address a situation in terms of human rights. The present author has addressed similar arguments in the context of claims of a right to autonomy in international law, questioning the extent to which the concept was useful if what is required is more minority schools, or cultural facilities, or approaches to the public administration through minority languages: if that is what is needed, why not say so, instead of making vague, unfocused, and perhaps undeliverable and political demands.²² Similar observations might also be applied to other ‘spacious’ concepts of international law, such as self-determination, a concept of greater emotive force than autonomy.

In response, apart from the obvious point that the concepts are with us in international law and doubtless here to stay, we may counter that human rights language does not have the precision of tax legislation and that its concepts are ‘open’ to a great extent. Hence the statements of treaty bodies and others that the convention in question is a living instrument which should be understood in line with changing circumstances which include fresh developments in human rights often the result of uncovering new situations, demands, or foci of oppression. The principle of effectiveness in the interpretation of treaties can also be called into play as a demand that we give instruments the best reading we can in order to achieve their purposes effectively. Human rights have to be worked through: solutions to human rights problems do not usually suggest themselves immediately, and even in the long term treaties are subject to ongoing processes of clarification. Even the more spacious concepts of human rights – take self-determination again - have a role such that their ‘deconstruction’ would leave holes in the fabric of international human rights which would not easily be ‘filled’ by smaller-scale alternatives. So complexity and conceptual scale in the case of cultural rights could be addressed through attention to their multiple aspects, through keeping alive the ongoing programme of furthering understanding of the right rather than ‘deconstructing’ it at every opportunity. In any case, a human rights strategy often has to make choices among norms as to which best addresses the essence of the case, choosing intelligently between the specific and the general norm. The specific Eriksson critique of ‘culture’ as an umbrella concept might of course also relate to cases where ‘culture’ is claimed as a justification for practices unlikely to be consistent with human rights – more of that later.

Community and Communities

²¹ T. Eriksson, ‘Between universalism and relativism: a critique of the UNESCO concepts of culture’, in J. Cowan, M.B. Dembour and R. Wilson (eds.), *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, 2001) - cited by McGoldrick, p. 451.

²² P. Thornberry, ‘Images of autonomy and individual and collective rights in international instruments on the rights of minorities’, in M. Suksi (ed.), *Autonomy: Applications and Implications* (The Hague: Kluwer, 1998), pp. 97-124.

A striking aspect of the phraseology of Article 15(1) is the use of the singular ‘*the* cultural life of *the* community’.²³ Concerning the analogous phraseology in article 27(1) of the Universal Declaration of Human Rights: ‘Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and share in scientific advancement and its benefits.’ Morsink warned in the context of the UDHR that

The double use of the definite article “the” in the first paragraph is ground for suspicions ... The article does not say, as it might have, that everyone has a right “to participate in the cultural life of his or her community.” This pluralistic wording would have allowed for the possibility and the likelihood that being a citizen of a certain State and participating in the cultural life of one’s community are for some people not one and the same thing. Article 27 seems to assume that “the community” one participates in and with which one identifies culturally is the dominant one of the nation-State. There is no hint here of multiculturalism or pluralism ... For some citizens this cultural life is that of the dominant group, nation, or community within the State ... For others this cultural life is the life of a religious, ethnic, or linguistic minority, whose members are loyal citizens of the State, but who do not find their identities fed by the dominant culture that informs state structures’²⁴

So bleak a reading is unlikely to commend itself for present purposes in light of the many developments subsequent to the Declaration which have increasingly recognised a diversity of ‘communities’. The international community and sundry varieties of domestic constitutions and laws have moved to greater recognition of the multicultural nature of all States, even if this does not eventuate in a philosophy of ‘multiculturalism’. Further, if we emphasise the right ‘to take part’ as a human right, it would not be appropriate to a right which may or may not, as a matter of choice, be exercised by those entitled to it, for the parameters of that right to be fully defined by governments or others who claim to speak for such a single national community. A static ‘single community’ reading would also be incompatible with the dynamic, agency-directed aspect of the right in question. This is one conceptual area which benefits from interpretation in the light of, *inter alia*, developments in international law relating to minorities and indigenous peoples. Thus, the present author wrote elsewhere that article 15(1) ‘has many dimensions; for indigenous peoples it appears to open possibilities of preservation and promotion of their own culture, while safeguarding access to the “outer world” on a non-discriminatory basis.’²⁵ International law increasingly recognises a plethora of cultural communities who should be accounted for in the reading of Article 15. The communitarian dimensions of the article have received and deserve further exploration in the work of the Committee on Economic, Social and Cultural Rights, including in the differentiated approach to communities reflected in the CESCR guidelines for State reports. The Guidelines thus require for purposes of Article 15(1) information from States parties on measures which address, *inter alia*, cultural identity as a factor of ‘mutual appreciation among individuals, groups, nations and regions’,

²³ Present author’s emphasis.

²⁴ J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999), p. 269.

²⁵ P. Thornberry, *Indigenous Peoples and Human Rights* ((Manchester University Press, 2004), p.197.

promotion ‘of awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous peoples’. States parties are also requested to report on ‘positive effects as well as difficulties and failures, particularly concerning indigenous and other disadvantaged and particularly vulnerable groups.’ Integrating the perspectives of a variety of communities into our conception of how the right is to be enjoyed does not detract from the universality of the right: on the contrary it reinforces it.

‘Taking Part’: Individual and Collective Dimensions

I will not engage in a long comment on the idea of ‘taking part’ in cultural life. Utilising the near-equivalent term of participation, this has risen to be one of the key terms of contemporary human rights law, and there is already a raft of commentary on the question. The texts on minorities and indigenous peoples contain probably the broadest expression of this right. When the UN General Assembly adopted the Declaration on the Rights of Persons belonging to Minorities, the provisions on participation were regarded as indicating a fresh turn in human rights standards. These provisions not only include reference to ‘general participation’ in ‘cultural, religious, social, economic and public life’,²⁶ but also to effective participation in ‘decisions on the national, and, where appropriate, regional level concerning the minority to which they belong or the regions where they live, in a manner not incompatible with national legislation.’²⁷ ‘Participation in decision-making’ was regarded as especially challenging as it potentially implicated a wide range of areas where minorities could be impacted by governmental decisions. While we are here addressing a universal and not simply a minority right, the adoption by the General Assembly of the word ‘effective’ to condition participation can be transferred to condition the term in analogous instruments which address general rights. Instruments on indigenous peoples are also very strong on participation. In ILO Convention 169 on Indigenous and Tribal Peoples, governments shall ‘Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in ... bodies responsible for policies and programmes which concern them.’ Further provisions strengthen the notion of consultations, which are to be undertaken ‘with the objective of achieving agreement or consent to the proposed measures.’ Article 18 of the UN Declaration on Indigenous Peoples is more ‘autonomist’ in tone: ‘Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.’

Further, the right of ‘everyone’ to take part in cultural life suggests, in a differentiated or multicultural society, that there are cultural dimensions to the enjoyment of culture (no paradox intended). Therefore, what counts as ‘taking part’ will, beyond a certain minimum platform, vary with the cultural

²⁶ Article 2.2.

²⁷ Article 2.3.

perspectives, values and contexts of the participants. Once we relax the notion of ‘community’ towards ‘communities’ a twin track approach to exercising participation rights and fulfilling State obligations suggests itself: members of cultural communities should be able to effectively enjoy the fruits of their cultural life, whilst enjoying access to the broader culture of the national community in a non-discriminatory manner. The first of these facets also suggests that communities must have the possibility to defend their culture effectively, since, as McGoldrick observes: ‘A right to participate in a culture can only exist if there is a culture.’²⁸ The defence of culture argument reaches beyond the cases of minorities and indigenous peoples to those social elements for whom culture is a precious asset but who are precluded from its effective enjoyment. Not only assimilationist pressures against particular groups militate against the enjoyment of culture but also poverty and disability which are further important, and distressing, aspects of vulnerability, among others.²⁹

A related element in this argument is that of collective rights. Again, if one accepts the idea of taking part in cultural life in light of particular cultural perspectives, the perspectives of many societies in this world are not orientated towards ‘the individual’ but reflect collective notions of social organization. The term ‘cultural life’ itself strongly suggests the collective. In arguments about collective rights, it is important to distinguish between ‘collective’ as adjective, and ‘collective’ as noun: between rights enjoyed by those with cultural and other bonds in common, and those held by the collective or group. There is a difference for example between the approach to collective rights in the texts on minority rights where the rights are those of individual members of minority groups to be exercised/enjoyed collectively, and texts on indigenous peoples where the group as such is the bearer of the right.³⁰ The standard formula in texts on minorities is that they address the ‘rights of persons belonging to minorities’,³¹ whereas indigenous rights are typically stated in the form: ‘indigenous peoples have’ the right in question -³² though the indigenous texts are interpenetrated with declarations of individual rights. International human rights law is not systematic in naming these distinctions but the first concept may be termed ‘collective rights’, and the second ‘group rights’. Negotiation between the second, ‘harder’ concept of rights – ‘group rights’ – and undifferentiated human rights with its ‘everyone has the right’ phraseology may be more difficult than

²⁸ McGoldrick, *ibid.*, p. 454. The statement may be taken as applying in particular to vulnerable groups and thus does not contradict the assumption made in the present paper that we are all ‘in’ culture.

²⁹ A.H. E. Morawa, ‘Vulnerability as a concept of international human rights law’, 6 *Journal of International Relations and Development* (2003), 139-55.

³⁰ P. Jones, ‘Human rights, group rights, and peoples’ rights’, 21 *Human Rights Quarterly* (1999), 80-107; M. A. Jovanovic, ‘Recognizing minority identity through collective rights’, 27 *Human Rights Quarterly* (2005), 625-51.

³¹ Hence the rather clumsily named UN ‘Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities’.

³² Thus the naming of the recent UN Declaration as the ‘United Nations Declaration on the Rights of Indigenous Peoples’, Article 1 of which states that ‘Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.’

negotiation with softer 'collective rights'. One reason for this is that if a group as such has a right, the right can be held against the members of the group. Group rights are not simply a matter of 'external defence' of the group but have 'internal' repercussions.³³ Hence in texts on indigenous peoples, the building in of 'saving clauses' designed to support more individualistic conceptions of rights and particular categories of persons.³⁴

On Limitations to the expression of culture

The last argument leads us to the limiting shores of cultural self-expression as envisaged in the texts on human rights. Culture is to be expressed and cultural life taken part in, but, apart from the question of what counts as culture, cultural practices are also susceptible to human rights examination. Not all 'limitation on cultural practices' questions have to do with collective rights/group rights - many for example have to do with rights of women - though arguments over group rights may shade imperceptibly into arguments over cultural practices. Just as 'culture' and the right to take part in cultural life are part of the substance of human rights, so also they can challenge the universality of human rights. We may understand 'universality' as about the applicability of human rights to all persons, to which we immediately add that 'universality' is not the same as 'uniformity' of human rights application.

Concerning limitations on the exercise of the right to take part in cultural life, two aspects stand out. The first is that, in summary, limitations (primarily limitations placed on the enjoyment of culture by the State) on the exercise of the right should be determined by law, be strictly necessary or necessary in a democratic society, be proportionate and non-discriminatory, etc., in order to count as legitimate restrictions. The detailed formulae on the acceptability of restrictions vary with the human rights texts in question but follow broadly the same lines. Another aspect is reflected in Article 5 of the Covenant: 'Nothing 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 and freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.' In addition to this last explicit instruction, we should recall that international instruments should be read

³³ W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995). See for example the UN Declaration on the Rights of Indigenous Peoples, Article 33.1: 'Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live'; Article 35: 'Indigenous peoples have the right to determine the responsibilities of individuals to their communities.'

³⁴ UN Declaration on the Rights of Indigenous Peoples, Article 22.1: 'Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration'; 22.2. 'States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.'

as a whole, so that it is standard practice to insist that the enjoyment or exercise of one right does not detract from the enjoyment of rights by others.

On the limits of cultural expression, only a few samples of limiting language need be recalled here. Paragraph 5 of the Vienna Declaration of the World Conference on Human Rights 1993 intimates a general standard: ‘While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.’³⁵ The same thought is repeated in instruments of global reach and those of a regional nature as well as in the law and practice of States, in general human rights instruments as well as those recognising the rights of specific communities. Article 5(a) of the Convention on the Elimination of Discrimination against Women requires States parties to take all appropriate measures 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.’ Article 4 of the UN Declaration on the Rights of Persons belonging to Minorities provides that ‘States shall take measures to create favourable conditions to enable persons belonging to minorities to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.’ Article 46 of the UN Declaration on the Rights of Indigenous Peoples puts it succinctly: ‘2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.’

Similar principles appear in UNESCO instruments specializing on cultural issues. Article 4 of the UNESCO Universal Declaration on Cultural Diversity,³⁶ under the heading of ‘human rights as guarantees of cultural diversity’, states in Article 4 that: ‘The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.’ And the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions³⁷ states in Article 2, under the heading of ‘principle of respect for human rights and fundamental freedoms’, that ‘Cultural diversity can be protected and promoted only if

³⁵ Declaration and Programme of Action of the World Conference on Human Rights 1993, A/CONF.157/23, 12 July 1993, paragraph 5.

³⁶ Adopted at the 31st session of the UNESCO General Conference, November 2001.

³⁷ Adopted at the 33rd session of the General Conference of UNESCO, October 2005.

human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms ... or to limit the scope thereof.’ The peremptory principle of non-discrimination is also part of this limiting apparatus, whether dealing with limitations on rights by the State or limitations on cultural self-expression by individuals or communities.

The UNESCO thesis, as expressed in the brief extracts above, argues that cultural diversity is aided by human rights and that cultural practices contrary to human rights are not to be tolerated. Earlier UNESCO work includes the Declaration on Principles of International Cultural Co-Operation,³⁸ Article 1 of which states that: ‘1. Each culture has a dignity and value which must be respected and preserved; 2. Every people has the right and the duty to develop its culture; 3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.’ This statement holds good if we make a distinction between cultural practices which are negative from a human rights viewpoint, and cultures as such, or cultural life in general. The distinction was observed by the Special Rapporteur of the Sub-Commission on Promotion and Protection of Human Rights on Traditional Practices affecting the Health of Women and the Girl-Child, who warned against ‘the dangers of demonizing cultures under cover of condemning practices harmful to women and the girl-child ... reports ... show how easy it is for the media ... to resort to racist imagery and demonize cultures, religions, and entire communities.’³⁹ The Rapporteur distinguished further between values and practices, suggesting that practices can be changed without adversely affecting cultural values. The line between values and practices may, however, be difficult to draw, and ‘practices’ cannot always easily be detached from the world view of the community in question. Over-zealous interventions from ‘outside’ can imply a patronizing, and hierarchical attitude to the group intervened against. Other authors distinguish between ‘core’ values and others. Thus Hurrell argues that

Although the precise line may be very hard to draw, there has to be a moral difference in a world of cultural, religious and social diversity between proscribing and preventing manifest violations of human rights and externally seeking to dictate the ways in which societies organize themselves and determine their priorities and values ... The promotion of universally proclaimed values does not preclude sensitivity to context but it does involve distinguishing between particularly important core norms and attempting to export complete ways of life and conceptions of the good.⁴⁰

³⁸ Adopted at the 14th session of the General Conference of UNESCO, November 1966.

³⁹ E/CN.4/Sub.2/1999/14, July 1999, paragraph 78.

⁴⁰ AS. Hurrell, ‘Power, principles and prudence: protecting human rights in a deeply divided world’, in T. Dunne and N. Wheeler (eds.), *Human Rights in Global Politics* (Cambridge University Press, 1999, pp. 277-302, at pp. 281-82.

The difficulty with this is that it is not abundantly clear how ‘core’ norms are to be constructed or imagined, whether it should be on the basis of moral argument, treaty law, customary law, *ius cogens*, non-derogability or restrictive ‘savings clauses’ to protect human rights, etc. Alston makes a similar observation to that of Hurrell, and writes of a flexible approach to interlocution with cultures ‘which situates the goals sought within the society in question.’⁴¹ This suggests bridge-building between the local and the global, and brings to the present author’s mind what a distinguished Turkish colleague once argued concerning democracy: applying his aphorism to human rights, we might say that ‘human rights cannot be exported, they must be imported.’

Some Reflections On Cerd Practice

Cultural Life and Non-Discrimination

The principle of non-discrimination in the enjoyment of human rights is a fundamental, peremptory principle of human rights, a universal principle, stemming from the repeated formula in the Charter of the United Nations regarding respect, etc., for human rights ‘without distinction as to race, sex, language, or religion’. The International Convention on the Elimination of All Forms of Racial Discrimination – ICERD - refines the UN Charter formula regarding ‘race’ into a prohibition of

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁴²

We may note initially the ‘cultural’ implications of this definition, particularly in references to ‘descent’, ‘national origin’, ‘ethnic origin’ and the express listing of the ‘cultural’ among the fields of public life. ICERD also includes among the incomplete list of human rights to be enjoyed without discrimination ‘the right to equal participation in cultural activities’,⁴³ a formula not far removed from ‘the rights ‘to take part in cultural life’.

The concept of discrimination is the subject of continual reflection by the Committee even if it has not definitively pronounced on all aspects. A point was made above on the difference between universality and uniformity. CERD has made it clear that non-discrimination does not imply uniform treatment for groups regardless of circumstances, General Recommendation 14⁴⁴ observing that ‘differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate’. *A contrario*, differential treatment will

⁴¹ P. Alston, ‘The UN’s human rights record: from San Francisco to Vienna and beyond’, *16 Human Rights Quarterly* (1994), 375-90, at 383.

⁴² Article 1.1.

⁴³ Article 5 (e)(vi).

⁴⁴ A/48/18, Chapter VIII B.

constitute discrimination ‘if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.’⁴⁵ CERD has insisted that, in appraising discrimination, ‘the specific characteristics of ethnic, religious and cultural groups be taken into consideration’,⁴⁶ and that, *inter alia*, ‘policies of forced assimilation amount to racial discrimination.’⁴⁷ The flexible approach to the understanding of discrimination means that the potential for that principle to act as merely a vehicle for cultural homogenization and assimilation is limited, though in the life of the Committee there has been support for a more assimilationist reading of the ethos of the Convention even if it was cloaked in the preferred terminology of ‘integration’.⁴⁸ Interpreted in the above manner, the effect of the equality principle on the enjoyment of cultural rights is seen as positively supporting access to culture and promoting diversity of cultures and forms of cultural expression.

Many forms of discrimination in contemporary life experienced by myriad groups are, it seems, ultimately ‘cultural’ in origin, whether we speak of discrimination on the basis of language, customs and traditions, spiritual practices, dress, approaches to lands and territories, etc., etc. Cultural differences appears to be at least as important a source of human rights violations as anything to do with race or colour, though of course race, colour and other grounds of discrimination may be compounded together with ‘culture’ in particular discriminatory scenarios, especially when linked with hierarchical notions of cultural superiority and inferiority. Culture-based discrimination may reflect in part what Special Rapporteur Doudou Diene⁴⁹ has called ‘identity tension’⁵⁰ and needs to be addressed at the level of society and not only at the level of the State, though legislation is necessary in order to set standards.⁵¹ Thus, the principle of non-discrimination both sustains and limits cultural expression. It sustains it through supporting diversity and access to culture, and limits it by insisting that the enjoyment of cultural life does not bear down against the rights of others. The flexibility of the notion of non-discrimination in CERD practice and the analogous practice of other treaty bodies should be taken into account when

⁴⁵ CERD General Recommendation 30 on Discrimination against Non-Citizens, paragraph 4.

⁴⁶ A/60/18, paragraph 169 (Laos).

⁴⁷ A/60/18, paragraph 318 (Turkmenistan).

⁴⁸ Thornberry, *Rights of Minorities*, pp. 272-80.

⁴⁹ UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

⁵⁰ For a succinct account of this concept among many reports and papers, see Doudou Diene, ‘The largest threat to democracy: racism and xenophobia’, *Forum Vilnius*, 3 October 2007, <http://www.forumvilnius.lt/news.php?extend.48>.

⁵¹ Thus Diene, *ibid.*, argues that ‘racism cannot be combated only by the law. The law can combat the visible part of racism on social, economic and political levels; the law can give visibility, power and social participation to minorities. But ... You have to use a double strategy- legal strategy and cultural-ethical strategy - the latter will allow us to reach the root causes of racism and eradicate it.’

appraising the importance of the principle as part of culture-promoting strategies and in appraising the nature of limitations on cultural expression.⁵²

On culture and its boundaries

As observed in the preceding section, ‘cultural’ issues pervade CERD practice, even in the absence of definition of the same. For the right to equal participation on cultural life, CERD asks States to report on ‘the right to equal participation in cultural activities’ in a manner not dissimilar to the Committee on Economic, Social and Cultural Rights:

States parties should, for example, report (a) on measures taken to enhance the right of all persons without discrimination to participate in cultural life, while at the same time respecting and protecting cultural diversity; (b) on measures taken to encourage creative activities by persons belonging to groups protected under the Convention, and to enable them to preserve and develop their culture; (c) on measures taken to encourage and facilitate their access to the media, including newspapers, television and radio programmes, and the establishment of their own media; (d) on measures taken to prevent racial hatred and prejudice in competitive sports and (e) on the status of minority, indigenous and other languages in domestic law and in the media.⁵³

The ‘triumvirate’ of culture described in earlier sections of this paper appears to be represented here, if less extensively than in the CDESCR Guidelines for the equivalent of this particular right. However, ‘cultural’ issues pervade the CERD-specific guidelines as a whole. For example, under part of the Guidelines for Article 7 concerning particular groups of victims or potential victims of racial discrimination, States parties are requested to provide information on

The role of institutions or associations working to develop national culture and traditions, to combat racial prejudices and to promote intra-national and intra-cultural understanding, tolerance and friendship among all groups; Support provided by the States parties to such institutions and associations, and more generally, action taken to ensure the respect and promotion of cultural diversity, for example in the area of artistic creation (cinema, literature, painting, etc.); The linguistic policies adopted and implemented by the State party.

One difficult area for CERD is the question of religion – an issue which might not trouble the Committee on Economic, Social and Cultural Rights to the same extent bearing in mind that ‘religion’ is listed among the grounds of non-discrimination in Article 2.2. of the Covenant on Economic, Social and Cultural Rights - ICESCR. The various references to ‘spiritual’ matters on the accounts of culture canvassed above should also be borne in mind. Work on ICERD was split off from work on religious discrimination in the drafting stages,⁵⁴ and although ‘freedom of thought, conscience and religion’ is referred to in Article 5, the peculiarity of the text is that religious freedom must be denied on ‘racial

⁵² See in general, W. Vandenhoele, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerp and Oxford: Intersentia, 2005).

⁵³ *Guidelines for the CERD-specific document to be submitted by States parties under Article 9, paragraph 1, of the Convention*, adopted by the Committee at its 71st session, 30 July-17 August 2007, CERD/C/71/Misc.1.

⁵⁴ D. Keane, *Caste-Based Discrimination in International Human Rights Law* (Aldershot: Ashgate, 2007), chapter 4. The decision to split subject matters was taken at the 17th session of the UN General Assembly – resolutions 1780 (XVII) and 1781 (XVII), both of 7 December 1962.

discrimination’ grounds before discrimination prohibitions are engaged. This led to notions of ‘intersectionality’ in CERD practice: the Committee will address cases of communities where there is a crossover of cultural and religious elements.⁵⁵ For many communities whose situation is addressed by CERD, particularly but by no means confined to the case of indigenous peoples, there are no clear lines between culture or tradition and religion, and efforts to separate out culture from religion could result in grafting a ‘structure’ on to a community which does not respond to realities including community self-perception. As a former Special rapporteur on Religious intolerance put it: ‘religion shares something of the definition of ethnicity, just as ethnicity is basic to religious identity’.⁵⁶ We might re-phrase this a reminder that religion too has cultural aspects. Conceiving CERD’s Article 1 remit in terms of broadly conceived ‘cultural’ or ‘ethno-religious’ groups⁵⁷ is capable of justifying a generous approach to group protection from discrimination. Perhaps the point of this is that the lines between ‘within mandate’ and ‘outside mandate’ aspects of ‘culture’ may break down even in a restrictive setting such as that of ICERD which does not expressly address a particular ground of discrimination. This reinforces the point above concerning the general unfeasibility of tight definitions in the field of culture, while also reminding us that the spiritual and the secular cannot be easily separated in particular contexts. Finding the ‘horizon’ for the right to take part in cultural life may be caught in the paradox that with every step towards the horizon, the horizon recedes in equal measure.

Communities

CERD devotes attention to a wide range of groups - the contemporary victims of racial discrimination; the ‘others’ of the contemporary imaginary. The Committee’s breadth of vision might have surprised the authors of the Convention. The abstract ‘grounds’ of discrimination in Article 1 did not immediately translate themselves into the targeted communities recognised in CERD practice, whose recognition required a slow building up of collective experience. There are overlaps among the Article 1 descriptors, as the *travaux* suggest that not every descriptor was understood to mark out a sharply defined conceptual space.⁵⁸ Victims of racial discrimination emerge from processes of globalization as well as from traditional enmities and practices, historical inequities, and traditional systems which continue to produce dehumanising effects. The Committee has devoted considerable time to minorities and indigenous peoples.⁵⁹ Roma figure prominently in CERD practice as a minority or as an ethnic group, with many aspects of their rights accounted for, from specific issues such as education to broader, holistic profiles of

⁵⁵ The CERD-specific Guidelines phrase the matter delicately: ‘The Committee would like to recall the possible intersectionality of racial and religious discrimination ...’. Compare the reference in Article 3 the UNESCO Declaration on Race and Racial Prejudice 1978 to ‘religious intolerance motivated by racist considerations’.

⁵⁶ Report by Abdelfattah Amor for the Durban World Conference on Racism, A/CONF.189/PC.1/7, 13 April 2000, paragraph 122.

⁵⁷ CERD concluding observations on Georgia in relation to the Yezidi Kurds, A/60/18, paragraph 246.

⁵⁸ Ion Diaconu, ‘The Definitions of Racial Discrimination’, E/CN.4/1999/WG.1/BP.10.

⁵⁹ P. Thornberry, ‘Confronting racial discrimination: a CERD perspective’, 5 *Human Rights law Review* (2005), 239-69.

discrimination. CERD tends to take it as read that national, ethnic, linguistic and religious minorities or cultural groups of various kinds come within the frame of Article 1.⁶⁰ Discrimination against indigenous peoples also frequently engages the Committee, which issued General Recommendation XXIII on indigenous peoples in 1997.⁶¹ The Committee frequently invites States that have not done so to ratify ILO Convention 169, and to support what was the draft UN Declaration on the Rights of Peoples as well as support that Declaration after its adoption. The text of the Convention does not include references to minorities or indigenous peoples, but this has not inhibited CERD from recommending attention to the rights of such groups as set out in international law.

By analogy with the general right to take part in cultural life in the ICESCR, the universalist character of ICERD has not inhibited the recognition of distinct cultural groups. The recognition of groups also includes recognition of the collective rights – even group rights, as set out above - particularly in the area of land rights, in light of the increased recognition of such rights in international human rights instruments. This development is possible on the basis of the nuanced approach to discrimination described above, on the textual basis of Article 1 (as well as article 5). Discrimination is defined in the Convention as distinctions, etc., which nullify or impair the enjoyment or exercise of human rights and fundamental freedoms. There is a structural connection between the Convention and the wider world of human rights. Non-discrimination provides the framework, and implicates the substance of rights in broad terms, but detailed specifications of what are the human rights and who is entitled to them, have developed in parallel texts of international human rights which inform the reading of the Convention. The point is not confined to minorities and indigenous peoples but applies to rights of women, rights of immigrant populations, rights of refugees, of children, etc: the full range of contemporary rights, even if all of this has not filtered into CERD readings of the Convention to the same extent.⁶² In sum, we have witnessed in CERD practice a practical, holistic integration of general universal norms with those of narrower scope and greater specificity.

Culture and its Limitations

The final parallel with today's tasks relates to cultural expression or the limits of cultural life. CERD's frequent grappling with issues culture leads to questioning the extent to which the Convention's discourse of equality can be 'married' with the discourse of cultural diversity. It can be framed as a debate on integration and assimilation, on equality and special measures, on non-discrimination and minority rights,

⁶⁰ According to an intensive study of treaty body practice, 'CERD tends to treat discrimination against minorities as a distinct theme, regardless of which prohibited grounds are specified': Wouter Vandenhoe, *Non-Discrimination and quality in the View of the UN Human Rights Treaty Bodies* (Antwerp and Oxford: Intersentia, 2005), p. 95.

⁶¹ General Recommendation XXIII, A/52/18, Annex V. Paragraph 4(b) of the Recommendation refers to discrimination based on 'indigenous origin or identity.'

⁶² Among many possible examples, see General recommendation 30 – superseding General Recommendation XI re non-citizens

or - fashionably - as an exploration of the 'ism' of 'multiculturalism'. CERD lacks a 'benchmark' General Recommendation on multiculturalism, despite suggestions from CERD members that the Committee should work towards the adoption of such a general recommendation.⁶³ The Committee discussed (inconclusively) the question of multiculturalism in 2005.⁶⁴ Members stressed that the Committee's notion of integration was different from assimilation, and that processes of nation building must be based on broad respect for human rights and cultural diversity.⁶⁵ There was broad support for the treatment of cultural and minority issues, including the area of language, on a case-by-case basis, with necessary flexibility.⁶⁶

For a diversity of cultural or ethnic groups, the question raised on the Convention's reach into the 'private' sphere intersects with issues concerning the reach of human rights prescriptions into cultural space, into endogamous cultural relations and traditions, from the global to the local.⁶⁷ More broadly, debates may be phrased in the language of universalism and cultural relativism or, as with today's session, 'cultural rights and universality of human rights'. Concerning the CERD approach to some traditional practices in light of demographic realities of ethnic and cultural diversity, one dilemma was given succinct expression by CERD member de Gouttes in the Committee's 2005 debate on multiculturalism:

Although the Committee was called upon to recognize the inherent value of each culture, it was nevertheless necessary to impose a limit on that recognition. That limit could be understood as the universality of human rights, which was the need to ensure universal respect for fundamental human rights, regardless of ... culture, tradition, etc. What that meant was that the Committee should not go so far as to support cultures that engaged in practices or customs that ran counter to the core human rights, as defined by United Nations human rights treaties. He believed that all Committee members could agree on such a limit.⁶⁸

Questions such as 'harmful customs',⁶⁹ caste discrimination⁷⁰ and caste-based prostitution,⁷¹ or analogous social discrimination against such groups as Burakumin⁷² or 'osu',⁷³ 'trokosi',⁷⁴ female genital

⁶³ Thornberry, CERD/C/SR.1724, paragraph 11; Agha Shahi, *ibid.*, paragraph 26.

⁶⁴ CERD/C/SR.1694, 8 March 2005; CERD/C/SR.1724, 17 August 2005.

⁶⁵ Thornberry, SR.1724, at paragraph 7

⁶⁶ For example Sicilianos, SR.1724 at paragraph 12.

⁶⁷ Article 1 of the Convention refers to its operation in fields of 'public life'. The Convention also obliges States to intervene in cases of discrimination by non-State actors. The text of the Convention does not delineate the private from the public with any degree of precision. It may be recalled that 'freedom of association' is also a right protected from discrimination by the Convention and the implications of this may cut across more 'interventionist' notions, especially for 'organizations' on a smaller scale. There is no clarity on how far down into social relations the Convention extends.

⁶⁸ CERD/C/SR.1724, paragraph 23.

⁶⁹ Concluding observations on Ghana, A/58/18, paragraph 116.

⁷⁰ Generalized by the Committee in General Recommendation 29, *supra*, n. 20.

⁷¹ Concluding observations on Nepal, A/59/18, paragraph 131.

mutilation,⁷⁵ marriage customs,⁷⁶ etc., have exercised the CERD from time to time and will continue to do so. Committee decision-making in the face of evidence of certain practices depends on two interconnected steps: (a) verifying the existence of a practice or questioning the practice in the light of human rights standards; and (b) deciding what to do about practices which the Committee regards as challenging basic ICERD principles. The first step of deciding what is or is not violative of human rights is essentially interpretative, bearing in mind also the flexibility of the principle of non-discrimination. In some cases, a particular determination that the principle has been violated will suggest itself; in other cases, the situation may be less clear.

Difficulties do not cease after a determination by CERD or other human rights body that practice X violates human rights norm Y. Condemning a practice does not displace the need for pragmatism or context-sensitivity in making recommendations. Thus, it is not always clear what is to result from observations recommending efforts by the State party to ensure that the rights of women are respected, irrespective of the community they belong to, especially where marriage is concerned, and calling for detailed information on the marriage rules and practices that apply in indigenous and tribal communities, especially when the Committee takes note at the same time of the State party's desire to respect the marriage customs of the various groups.⁷⁷ What steps appropriately follow? What is to happen when the information is obtained?

Specific recommendations are usually context-driven. CERD has on occasions adopted the expedient of referring in general terms to General Recommendation 25⁷⁸ or other relevant general recommendations.⁷⁹ In most cases, CERD indicates a general preference for non-coercive, educative strategies, in effect insisting that the 'constructive dialogue' so prized by the Committee should be carried on within States as well as between the Committee and the reporting State. Situations where the claims of culture are weakened - when there is evidence of mass defection and the notion of cultural 'belonging' is challenged - embolden the Committee into taking a stronger line against cultural practices. Unanswered questions regarding the public and private reach of the Convention can attain particular poignancy in the 'cultural' sphere. CERD prefers by and large to work through the medium of State authorities and hesitates to criticise cultural groups directly.

⁷² Concluding observations on Japan, A/56/18, paragraphs 165 and 166.

⁷³ Concluding observations on Nigeria, A/60/18, paragraph 290.

⁷⁴ Concluding observations on Ghana, A/58/18, paragraph 114.

⁷⁵ Concluding observations on Tanzania, A/60/18, paragraph 348.

⁷⁶ Concluding observations on Suriname, A/59/18, paragraph 204.

⁷⁷ *Ibid.*

⁷⁸ Concluding observations on Ghana, A/58/18, paragraph 114

⁷⁹ Notably those concerning communities - indigenous peoples, Roma, and caste groups.

Concluding remarks

Applying the above remarks to the task in hand today, we may observe that similar conceptual and interpretative problems beset all the treaty bodies in more or less equal measure so that experience in one body can assist reflection in another. For all bodies, ‘cultural’ questions raise their own peculiar difficulties, not least regarding the limits of cultural self-expression, and import notions of universality, cultural sensitivity, subsidiarity and relativism into arguments. The basic datum of the relativist has to be accepted, namely that the world exhibits a plurality of cultures and civilisations, whatever we call them, and we find pluralism in all societies. As the poet MacNeice put it: ‘world is crazier and more of it than we think: incorrigibly plural.’⁸⁰ But what follows from this basic datum of multicultural existence is disputed. There has to be a difference between denigrating certain cultural practices in the name of universality and denigrating the cultures that contain them. I am not sure that human rights advocates are always aware of the distinction but to ignore the distinction is to offer an essentially racist reading of human rights. It is important not to set ‘culture’ against human rights, bearing in mind the resilience and complexity of cultures and the unfinished nature of the human rights project.

The limitation of culture raises great issues for the human rights movement. Perhaps in the present context, it might not be advisable to try to ‘solve’ all such issues, or to define its boundaries as fixed points – I trust this advice is not presumptuous coming from a member of another treaty body. Also, whatever direction the discourse may take on the ‘big’ universality question, I hope my remarks could assist the view that complexity is not necessarily a reason for refusing further explication. Although difficult to pin down, the right to take part in cultural life appears capable of articulation in a complex manner, especially taking into account the extensive accretions of interpretation in the life of the treaty bodies and analogous bodies, and the development of international standards. I understand the drafting exercise to be a search for the essentials of the right and for the value it adds to other human rights. Perhaps it is a search for its basic constituents, rather than rococo details. What is clear is that there are victims of violations of cultural rights, examples of which I have only dimly adverted to in this paper. In a CERD discussion on multiculturalism, I made the following statement:

I think that we need to address multiculturalism and cultural issues in a balanced, sensitive and non-dogmatic way. Look at the positives of cultural respect, not simply the negatives. Let us stress the contribution of minorities to the stability of the state and to social harmony ... in the interpretation of our Convention, we should not forget the respect due to all peoples. We should not prescribe for others what we would not prescribe for ourselves; otherwise we are in effect inscribing the superiority of ‘our’ culture over all the rest.⁸¹

⁸⁰ *Snow*, Louis MacNeice.

⁸¹ On file with author; is a very much truncated version on the summary records of the meeting.

Perhaps that could be translated into today's exercise. The problem with violations of cultural rights is that the damage done may be irreparable, the loss irreversible, so cultural rights are as vital as any other, indispensable to human dignity. The aim of cultural rights as I read them, is not to 'freeze' the culture, but to give the members of the communities, and the communities themselves, the possibility of facing the world on their own terms, appropriating its cultural riches through the prism of their own conceptions, thereby making their distinctive contribution to the common heritage of mankind.

Finally, may I say that great general interest attaches to today's processes before the Committee on Economic, Social and Cultural Rights. I am sure that members of other treaty bodies and students of human rights everywhere will await with interest the results of your deliberations. I wish you well.

Patrick Thornberry

11.04.2008