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Foundations of Collective Cultural Rights in International Human Rights Law

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Published in:

Cultural rights as collective rights: an international law perspective

DOI:

[10.1163/9789004312029_006](https://doi.org/10.1163/9789004312029_006)

[Link to publication](#)

Citation for published version (APA):

Donders, Y. (2016). Foundations of Collective Cultural Rights in International Human Rights Law. In A. Jakubowski (Ed.), Cultural rights as collective rights: an international law perspective (pp. 87-112). (Studies in intercultural human rights; No. 7). Leiden: Brill Nijhoff. DOI: 10.1163/9789004312029_006

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FOUNDATIONS OF COLLECTIVE CULTURAL RIGHTS
IN INTERNATIONAL HUMAN RIGHTS LAW

Yvonne Donders

Amsterdam Law School Legal Studies Research Paper No. 2015-23

Amsterdam Center for International Law No. 2015-12



Amsterdam Center for International Law
University of Amsterdam

RESEARCH PAPER SERIES

ACIL Research Paper 2015-12

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Cite as: ACIL Research Paper 2015-12,
available at www.acil.uva.nl and [SSRN](#)

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Foundations of Collective Cultural Rights in International Human Rights Law

Yvonne Donders¹

1. Introduction

Although collective cultural rights are included in international human rights law, their precise place and their nature and significance are not well-explored or understood. This paper aims to show where collective cultural rights can be found in international human rights law and explore how these rights fit in the general body and framework of international human rights law. While aware that there is a lot to be said about collective cultural rights from non-legal points of view, the starting point in this paper is international human rights law. This implies that the analysis of collective cultural rights is framed by positive law and international legal instruments, such as treaties and conventions, as well as by soft law instruments, such as declarations, recommendations and resolutions.

In section 2, the two categories of the rights at the centre of this paper – collective rights and cultural rights – are defined. Although collective rights and cultural rights are part of international human rights law, they remain rather imprecise and unspecified. Consequently, different lists can be drawn up of rights that can fall within one, or both, categories. Below a distinction is drawn between a) different types of collective rights, including rights for collectivities as such, rights for individuals as members of collectivities, and rights with a collective interest or object; and b) between different types of cultural rights, including rights that explicitly refer to 'culture' and rights that relate to culture or have a cultural dimension.

Sections 3 and 4 analyse various contentious issues surrounding collective rights and cultural rights in international human rights law. The question is, for instance, whether collective rights fall within the category of human rights, which are traditionally viewed as individual rights. Also the lack of clarity on the subject of collective rights and the possible tension between collective rights and individual rights are addressed. Interestingly, in much of the debate on collective rights, cultural rights are used as examples of such collective rights. Cultural rights, it is argued, are rights that clearly demand a collective approach, since cultures are formed and changed by the joint history and activity of and within cultural communities. At the same time, culture is a concept of which the dynamics are not easily translated into substantive legal rights.

Section 5 outlines the different forms of collective cultural rights in international human rights law. This paper does not intend to provide an extensive overview of all collective cultural rights included in international human rights law. It rather provides examples of legal provisions in international human rights law that can be classified as collective cultural rights to show the different forms these rights may take.

Section 6 elaborates on how collective subjects and collective interests are integrated in international human rights law and analyses how and to what extent collective cultural rights provisions provide answers to the above-noted issues. It

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explains the rationale of the inclusion of collective cultural rights, but also notes that the two central components of collective cultural rights, namely 'community' and 'culture', remain difficult to define. Moreover, they are not static notions, which makes their translation into substantive rights a complex matter. Some of these issues could be solved in practice, as is shown in the caselaw. This paper however focuses on the explication and classification of collective cultural rights provisions, leaving the issue of supervision of these rights at the national and international levels to others.

2. Explaining Terminology: Collective Rights and Cultural Rights

2.1 Collective Rights

The term 'collective rights' has taken the form of a basket into which different sorts of human rights can be placed, all of which have some kind of collective dimension. The terminology used in the academic and professional 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 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.²

In this paper 'collective rights' is used as an umbrella notion that covers:

- *Community rights*, which are human rights provisions of which the subject or rights-holder is a collective entity, such as a people or a community.³ Examples of community rights are the common Article 1 of the International Covenant on Civil and Political Rights (1966, ICCPR) and the International Covenant on Economic, Social and Cultural Rights (1966, ICESCR) on the right of peoples to self-determination, as well as several provisions of the UN Declaration on the Rights of Indigenous Peoples (2007) setting forth the rights of indigenous peoples to self-determination and cultural autonomy;
- *Communal rights*, which are human rights provisions of which the subject or rights-holder is an individual recognized as a member of a collective entity, and in which this membership is often explicitly referred to. A prominent example is Article 27 ICCPR setting forth the right of members of minorities to enjoy their own culture "in community with the other members of their group". A similar provision is in Article 30 of the Convention on the Rights of the Child

² For an overview of their usage, including a distinction between subjects, beneficiaries and legal persons, see: Corsin Bisaz *The Concept of Group Right in International Law – Groups as Contested Right-Holders, Subjects and Legal Persons* (Martinus Nijhoff Publishers Leiden Boston 2012) 7-12. Compare also the different usage in various handbooks: A Belden Fields 'Collective or Group Rights' in: D Forsythe (ed.) *Encyclopaedia of Human Rights* (OUP Oxford volume 1 2009) 345; P Alston, H Steiner et al. *International Human Rights. Text and Materials* (second edition OUP Oxford 2000) 1290; D Moeckli, S Shah and S Sivakumaran (eds.) *International Human Rights Law* (OUP Oxford 2010) 366; W Kälin and J Künzli *The Law of International Human Rights Protection* (OUP Oxford 2009) 32.

³ While these rights are often referred to as group rights, I prefer the term community rights. The term 'community' implies some form of a continuous structure and social or cultural bond. A community is supposed to be more than the sum of its members, and is based on common values and beliefs carried by its members, which refer to past history, the present and future. The historical and cultural ties are crucial; we do not refer to other social groups such as women, homosexuals, disabled people etc., who may share a distinct lifestyle, but not a history and culture, as communities. See, also, Miodrag A. Jovanovic "Recognizing Minority Identities Through Collective Rights" *Human Rights Quarterly* (Vol. 27 2005) 636-637.

(CRC, 1989). Another example is Article 12 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Family (CRMW, 1990), containing the right of migrant workers to manifest their religion, “either individually or in community with others”;

- *Individual rights with a collective dimension*, which 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, such as the right to take part in cultural life as included in Article 15(1)a ICESCR, the right to freedom of assembly and association (Articles 21 and 22 ICCPR) and the right to education (Articles 13 and 14 ICESCR).

The collective dimension in this categorisation primarily refers to the *subject* of the right. The collective dimension can also be found in the *object* of the right, being a collective interest.⁴ Without fully anticipating the following paragraphs, it can be argued that in the case of cultural rights, the subject as well as the object of these rights have a collective dimension. It is therefore understandable that cultural rights are considered to reflect ‘real’ collective rights.⁵

2.2 Cultural Rights

The categorisation 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).⁶ 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’.

Cultural rights can be broadly defined as 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. In this paper, cultural rights is used as an umbrella notion that covers provisions containing:

- *Rights that explicitly refer to culture* - The prime examples are the right of everyone to take part in cultural life, as laid down in Article 15(1)(a) ICESCR and the right of members of minorities to enjoy their own culture, practise their own religion and speak their own language, as laid down in Article 27 ICCPR.
- *Rights that have a direct link with culture* - In theory it might be defensible to claim that almost every human right can be linked to culture. However, the rights with the most direct link with culture are the right to self-determination

⁴ Raz also made this distinction between rights held by collective agents and rights related to collective interests, in J Raz *The Morality of Freedom* (Clarendon Press 1986) 166.

⁵ M Galenkamp, *Individualism versus Collectivism – The concept of collective rights* (Gouda Quint 1998) 21-25; M Galenkamp, “Collective Rights: Much Ado About Nothing? A Review Essay” *Netherlands Quarterly of Human Rights* (3/1991) 291.

⁶ *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.

(Article 1 ICESCR and ICCPR), the rights to freedom of religion (Article 18 ICCPR), freedom of expression (Article 19 ICCPR) freedom of assembly and association (Articles 21 and 22 ICCPR) and the right to education (Articles 13 and 14 ICESCR).

Apart from these rights explicitly or directly related to culture, it appears that many human rights have a *cultural dimension*. Although some human rights may at first glance appear to have no direct link with culture, most of them have important cultural implications. For instance, the right to health (Article 12 ICESCR) may have important cultural connotations insofar as certain ways of treatment or the use of certain (traditional) medicines are concerned. Culture also plays a decisive role in sexual and reproductive health. The Committee on Economic, Social and Cultural Rights, the international independent supervisory body of the ICESCR, has specifically acknowledged that an important element of the right to health is accessibility, which implies that "...all health facilities, goods and services must be...culturally appropriate, *i.e.*, respectful of the culture of individuals, minorities, peoples and communities."⁷

Another example is the right to adequate food (Article 11 ICESCR). The preparation and consumption of food have clear cultural connotations. The importance of the cultural dimension of food is reaffirmed by the fact that several food traditions, such as French cuisine, the Mediterranean diet, and the traditional Mexican kitchen, have been recognized as part of intangible cultural heritage.⁸ The Committee on Economic, Social and Cultural Rights has also stated that the guarantees concerning the right to food should be culturally appropriate and acceptable.⁹

Civil and political rights may also have a cultural dimension. For instance, the right to a fair trial 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.¹⁰ 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.¹¹

⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 14, The Right to the Highest Attainable Standard of Health (Article 12)* 11 August 2000 para. 12c.

⁸ These have been added to the list of intangible heritage in 2010 under the *Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted on 17 October 2003, entered into force on 20 April 2006, UNESCO Doc. MISC/2003/CLT/CH/14. See: <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011>.

⁹ Committee on Economic, Social and Cultural Rights *General Comment No. 12, The Right to Adequate Food (Article 11)* 12 May 1999 paras. 7, 8 and 11.

¹⁰ See Article 14 ICCPR and Article 6 ECHR and ECtHR, *Kamasinski v. Austria*, Appl. No. 9783/82, 19 December 1989, para. 74.

¹¹ ECtHR, *Buckley v. the United Kingdom*, Appl. No. 20348/92, 25 September 1996 and ECtHR, *Chapman v. the United Kingdom*, Appl. No. 27238/95, 18 January 2001.

3. Collective Rights in International Human Rights Law

Although collective rights have been included in international human rights law, their place remains rather contested and controversial. Disagreement over whether collective rights can or should be designated as human rights, the relationship between collective and individual rights, and the definition of the subject of collective rights are the main issues in this controversy.

Karl Vasak, who initiated the international debate on collective rights, divided human rights into three 'generations'. The first generation contained civil and political rights, the classic freedom rights, which were based on state-abstention. The second generation consisted of economic, social and cultural rights, also called 'rights of credit', requiring an active role of the state. According to Vasak, a third generation of human rights was to be added in the form of collective rights, based on fraternity and solidarity. These latter rights were required to overcome the inequalities in the world which impeded the enjoyment of the first two categories of rights. Vasak mentioned the following rights as examples of the third generation of human rights: the right to development, the right to environment, the right to peace, the right to co-ownership of the common heritage of mankind, and the right to communicate.¹²

Vasak's terminology, employing the notion of 'generations', was not well chosen.¹³ The term 'generation' is confusing, since it suggests that one generation precedes and replaces the other, while, in fact, all three generations are meant to mutually strengthen each other. Furthermore, dividing human rights into strictly separate categories is not only difficult – is the right to freedom of religion a civil right or a cultural right? – but it is also no longer tenable. Freedom rights, i.e. civil and political rights, may also demand state action, for instance the right to vote, the right to a fair trial and the right to demonstrate, while economic, social and cultural rights can require the non-interference by the state, for instance the freedom to choose education and freedom to form trade unions. Moreover, it is broadly agreed that all human rights are indivisible, interdependent, interrelated and of equal importance.¹⁴

The strict division between individual rights and collective rights can also be disputed. As argued above, collective rights include different types of rights with a collective dimension, reflected in the subject and/or the object of the right. There are also several grades of 'collectiveness' of the subject. Many individual rights are perhaps formally conferred upon individuals, but are to be enjoyed or exercised as members of a collective entity, or at least jointly with others. Furthermore, there are rights that are conferred upon individuals which can procedurally be asserted by a collective agent. Communities or organisations can bring a claim to defend the rights of individuals via a 'class action' or 'collective action'.

¹² K Vasak "Pour une troisième génération des droits de l'homme", in: C Swinarski (ed.) *Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff The Hague 1984) 839-840. See, also, S P Marks "Emerging Human Rights: A New Generation for the 1980s?" *Rutgers Law Review* (33 1981) 435-452.

¹³ See, for example, J Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press London 1989) 144-145; P H Kooijmans "Human Rights – Universal Panacea? Some reflections on the so-called human rights of the third generation" *Netherlands International Law Review* (Vol.37 no. 3 1990) 316-317.

¹⁴ As reaffirmed by States in the *Vienna Declaration and Programme of Action*, adopted after the World Conference on Human Rights, Vienna, A/CONF.157/23, 12 July 1993, Article 5.

Despite the lack of agreement on various aspects, the idea of recognising collective rights has become more widely shared. Supporters of collective human rights emphasize that the codification of human rights had focused too much on an individualistic outlook of the world and of human nature. They argue that the individualistic approach of human rights fails to address collective global issues, such as the promotion of development, the protection of the environment, as well as the specific needs of communities. Accordingly, two different sorts of collective rights have come to be developed: rights that concern a collective interest, such as peace, development or a clean environment; and rights for certain collective entities, such as peoples or minorities.¹⁵

Discussions on collective rights have often focused on a strict yet wide division between, on the one hand, purely individual rights and on the other purely community rights. These debates broadly concern three issues, summarized below.¹⁶

The first issue is whether or not community rights can be called 'human' rights. Critics of community rights argue that human rights stem from natural rights that are meant to defend the *individual* against the state. Human rights are those rights that human beings possess simply because they are human beings, based on the protection of human dignity and individual freedom. Protection of collectivities does not fit the individual nature of human rights. Even if the idea of collective entities having rights could be supported – in fact, some were already accepted to have rights, including families, associations, corporations etc. – these rights cannot be *human* rights, which are considered to be, by definition, to be individual rights. Supporters of community rights argue, however, that the natural rights theory was not entirely alien to these rights and that community rights could also be human rights. Individuals do not live in isolation, but need communities to give their life meaning and value. They also argue that not only individual freedom, but also solidarity, could be a basis for human rights.

A second issue concerns the possibility of conflicts between individual rights and community rights. An argument against community rights is that the development and promotion of community rights might lead to the neglect or even violation of individual rights. For instance, community rights may be abused by leaders of oppressive regimes who wish to justify their disrespect of individual human rights. On the other

¹⁵ Leighton McDonald, "Can Collective Rights and Individual Rights Coexist?" *Melbourne University Law Review* (Vol. 22 1998) 312; Chandran Kukathas, "Are there any Cultural Rights?" *Political Theory* (Vol. 20 February 1992) 108, referring to various sources of Vernon Van Dyke. It should be noted that one such collective right was already included in international legal instruments, namely the right of peoples to self-determination (Articles 1 ICCPR and ICESCR).

¹⁶ For a more extensive analysis of these arguments, see P R Baehr and K van der Wal "Human Rights as Individual and as Collective Rights" in: J Berting et al. (eds.) *Human Rights in a Pluralist World* (Meckler Westport/London 1990) pp. 33-37; J Donnelly "Human Rights, Individual Rights and Collective Rights" in: J Berting et al. (eds.) *Human Rights in a Pluralist World* (Meckler Westport/London 1990) 42-43, 48-49; J Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press London 1989) 144-145; P H Kooijmans "Human Rights – Universal Panacea? Some reflections on the so-called human rights of the third generation", in: *Netherlands International Law Review* (Vol.37 no. 3 1990) 316-317; Leighton McDonald "Can Collective Rights and Individual Rights Coexist?" *Melbourne University Law Review* (Vol. 22 1998) 354; Chandran Kukathas "Are there any Cultural Rights?" *Political Theory* (Vol. 20 February 1992) 110; Miodrag A Jovanovic "Recognizing Minority Identities Through Collective Rights" *Human Rights Quarterly* (Vol. 27 2005) 630-645.

hand, it is argued that there may also be conflicts between individual rights and that, in principle, all human rights can be abused. Thus the fact that there can be a conflict between individual and community rights or potential abuse of rights is no reason to ban community rights from the human rights discourse.

A third issue is whether a collective entity can be an agent with an independent moral standing to claim rights that could not be reduced to individual rights.¹⁷ Which collective entities are eligible to be the subject of collective rights and how can they be identified and defined? Communities do not have fixed boundaries and there are no rigid distinctions between them. Opponents of community rights emphasize that communities do not have a distinct existence and identity separate from their members. This lack of a clear separate identity leads to a lack of agency, and therefore communities cannot be the proper subjects of rights.¹⁸ Supporters of community rights argue that these rights are meant for those communities which have some kind of 'substantive connection'. This connection is, unlike the case of associations and companies, not so much based on a common aim to which the members are willingly committed. The communities that could be subjects of community rights must exist independently of such a common aim. Possible collective subjects are peoples, indigenous peoples, minorities (national, ethnic, religious) or other communities connected by race, ethnicity, religion, culture, language, or history, and seized with a collective interest.¹⁹

Indeed the above-mentioned collectivities are included in international law as legal subjects. However, no legal definition of any of them has been accepted by states. While definitions have been proposed and used by international bodies and academics - for instance the famous definition of 'minorities' by Capotorti and of 'indigenous peoples' by Cobo²⁰ - these have not been legally accepted by states.

¹⁷ Miodrag A. Jovanovic, "Recognizing Minority Identities Through Collective Rights" *Human Rights Quarterly* (Vol. 27 2005) 630-633. Bisaz argues that there is no principle or conceptual reason why communities could not be rights-holders, even if the communities cannot be defined and membership is flexible. See Corsin Bisaz *The Concept of Group Right in International Law – Groups as Contested Right-Holders, Subjects and Legal Persons* (Martinus Nijhoff Publishers Leiden Boston 2012) 12-20, 32.

¹⁸ DM Johnston "Native Rights as Collective Rights: A Question of Group Preservation" in: W Kymlicka (ed.) *The Rights of Minority Cultures* (OUP Oxford 1995) 182-183; M Walzer "Pluralism: A Political Perspective" in: W Kymlicka (ed.) *The Rights of Minority Cultures* (OUP Oxford 1995) 149-150; JW Nickel "Group Agency and Group Rights" in: W Kymlicka and I Shapiro (eds.) *Ethnicity and Group Rights* (New York University Press, New York/London 1997) 235-238, 241, 253.

¹⁹ Corsin Bisaz *The Concept of Group Right in International Law – Groups as Contested Right-Holders, Subjects and Legal Persons* (Martinus Nijhoff Publishers Leiden Boston 2012) 28-29.

²⁰ According to Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is: "A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language", UN Doc. E/CN.4/Sub.2/384/Rev.1, 1977, para. 568.

'Indigenous Peoples' were defined by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, as follows: "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal

The lack of agreement on a suitable definition is caused by the fact that any definition chosen implies that some collective entities would fall within the definition and others would fall outside the definition. States prefer to make the decision on the definition of these collective entities themselves, not by force of international law, since such recognition may have important legal, political and social implications.

The inclusion of different types of collective rights in international human rights law demonstrates that, although not all legal issues have been solved, there is no doubt that communities play an important role in the well-being of the individual and that community membership is an important component of human dignity. There is broad agreement that individuals do not enjoy their human rights in total isolation, but also as community members. Many individual human rights specifically protect the individual as a member of a community, for example, the ban on discrimination on the basis of one's belonging to a particular community. They also protect the community as such in an indirect manner, for example, through freedom of speech, religion and association. Some wish to leave it there and argue that individual rights offer sufficient justice to collective entities and their interests as well.²¹ Others, however, continue to advocate for community rights.²²

4. Cultural Rights in International Human Rights Law

In recent years, it can no longer be argued that cultural rights are neglected,²³ at least not by scholars and international monitoring bodies. Many academic studies have been conducted on cultural rights.²⁴ Furthermore, a group of academics has

system", "Study of the problem of discrimination against indigenous populations", UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4, 1986.

²¹ J Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press London 1989) 150-151; J Donnelly "Human Rights, Individual Rights and Collective Rights" in: J Berting et al. (eds.) *Human Rights in a Pluralist World* (Meckler Westport/London 1990) 43-44, 49-50; Chandran Kukathas "Are there any Cultural Rights?" *Political Theory* (Vol. 20 February 1992) 107; David Miller "Group Rights, Human Right and Citizenship", *European Journal of Philosophy* (Volume 10 issue 2 August 2002) 188-192.

²² Michael Freeman "Are there Collective Human Rights?" *Political Studies* (Volume 43 (1) August 1995) 28-29; Leighton McDonald "Can Collective Rights and Individual Rights Coexist?" *Melbourne University Law Review* (Vol. 22 1998) 352-362.

²³ 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 J Symonides "Cultural Rights" in J Symonides (ed.) *Human Rights: Concept and Standards* (UNESCO Publishing Paris 2000) 175. Special Rapporteur Türk also argued that cultural rights had received "by far the least amount of serious attention". See UN Doc. E/CN.4/Sub.2/1992/16, 3 July 1992, § 187, p. 49; § 198-199, pp. 51-52.

²⁴ See, *inter alia* YM Donders *Towards a Right to Cultural Identity?* (Intersentia Antwerp 2002); F Francioni & M Scheinin (eds.) *Cultural Human Rights* (Martinus Nijhoff Publishers Leiden 2008); SA Hansen "The Right to Take Part in Cultural Life: Towards Defining Minimum Core Obligations Related to Article 15(1)(A) of the International Covenant on Economic, Social and Cultural Rights" in: A Chapman and S Russell (eds.) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia Antwerp 2002) 279-304; S Marks "Defining Cultural Rights" in: M Bergsmo (ed.) *Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjorn Eide* (Martinus Nijhoff Publishers Leiden 2003) 293-324; P Meyer-Bisch (ed.) *Les Droits Culturels, une catégorie sous-développée de droits de l'homme, Actes du VIIIe Colloque interdisciplinaire sur les droits de l'homme* (Fribourg Editions Universitaires 1993); Laura Reidel "What are Cultural Rights? Protecting Groups with Individual Rights" *Journal of Human Rights* (9:1 2010) 65-80; A Vrdoljak (ed.) *The Cultural Dimension of Human Rights*, Collected Courses Volume (European University Institute Florence and OUP 2013).

adopted the Fribourg Declaration on Cultural Rights, containing a list of existing cultural rights provisions, as well as an extensive commentary on the content and obligations of states with respect to these rights.²⁵ At the UN level, the Committee on Economic, Social and Cultural Rights has adopted a General Comment on a prominent cultural right, namely the right to take part in cultural life (Article 15(1)a ICESCR).²⁶ Another important development in the further elaboration of cultural rights is the mandate of the Special Rapporteur in the Field of Cultural Rights, which was extended in April 2012 by the Human Rights Council.²⁷

The elaboration of cultural rights by scholars and monitoring bodies does not, however, imply that all legal issues surrounding these rights have been resolved. An important remaining issue is the fact that culture is a concept, the dynamics and complexity of which do not easily translate into legal terms. Culture is not a static notion, but a dynamic one which can develop and change over time. It is less a product than a process, which has no well-defined boundaries and is influenced by internal and external interactions. Culture can refer to many things, varying from cultural ‘products’ per se, such as arts and literature, to culture as a way of life, with all of life’s multi-faceted dimensions. Culture has both an objective and a subjective dimension. The objective dimension is reflected in visible characteristics such as language, religion, or customs, while the subjective dimension is reflected in shared attitudes, ways of thinking, feeling and acting. In addition, culture has both an individual and a collective dimension. Cultures are developed and shaped by communities. Individuals can identify with one or several of these cultural communities – ethnicity, nation, family, religion, etc. – and in that way shape their own individual cultural identity. The broadness and complexity of the concept of culture has implications for the legal definition of cultural rights and for their implementation and protection.

It should be noted that many studies and reports treat 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. As shown above however, it is not fully clear which rights belong to the category of cultural rights. Moreover, some human rights, for instance the rights to freedom of religion and freedom of expression, are cultural rights, but they could also be considered political or civil rights. If the aim is to improve the promotion and protection of cultural rights, this can best be done 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.

²⁵ *Déclaration des droits culturels* drafted by the Fribourg Group of experts and launched in Geneva on 8 May 2007, see: (<http://www.unifr.ch/iiedh/fr/publications/declaration-de-fribourg>); Patrice Meyer-Bisch and Mylène Bidault, *Déclarer les droits culturels, commentaire de la Déclaration de Fribourg* (Fribourg Editions Universitaires 2010).

²⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 21 on The Right of Everyone to Take Part in Cultural Life* (Article 15 para. 1(a) of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, 21 December 2009. The Council of Europe Parliamentary Assembly adopted a Recommendation on the right of everyone to take part in cultural life, Recommendation 1990, adopted by the Assembly on 24 January 2012 (4th sitting).

²⁷ See UN Doc. A/HRC/RES/19/6, *Resolution adopted by the Human Rights Council, Special Rapporteur in the field of cultural rights*, 3 April 2012.

5. Collective Cultural Rights in International Human Rights Law

Cultural rights have a special position in the discussion on collective rights. While most individual human rights refer in principle to individuals, separate from their communities, cultural rights refer directly to individuals as *members* of communities. Cultural rights protect the individual within the cultural community against the state or against other communities, and cultural rights also protect cultural communities as such.

Some have argued that cultural rights are inherently collective. Indeed it is clear that all cultural rights have a collective dimension apart from an individual dimension.²⁸ For some, however, this collective dimension does not have to be translated into cultural rights for collective entities, in other words, community rights.²⁹ Others, however, regard cultural rights as prime examples of community rights, because of the collective cultural interest that is linked to joint membership.³⁰

In tracing the development of collective cultural rights in international human rights law, two rights can be considered to be at the very basis of the protection of cultural communities: the right to exist as a cultural community and not be subjected to cultural genocide, and the right to equality and non-discrimination. Other collective cultural rights can be roughly grouped as follows: individual rights with a collective cultural dimension, which can mainly be found in the instruments on human rights for all; communal cultural rights, which can mainly be found in instruments for minorities; and community cultural rights, which are mainly included in instruments for indigenous peoples.

5.1 Cultural Genocide

One of the prime examples of a community cultural right is the right of a community to exist and to be protected from cultural destruction, i.e. cultural genocide.³¹ The term 'cultural genocide' has been used to describe situations where

²⁸ A Margalit and M Halbertal "Liberalism and the Right to Culture" *Social Research* (Vol. 61 No. 3 Fall 1994) 491, 497-499.

²⁹ Chandran Kukathas "Are there any Cultural Rights?" *Political Theory* (Vol. 20 February 1992) 114.

³⁰ M Galenkamp *Individualism versus Collectivism – The concept of collective rights* (Gouda Quint 1998) 119 and Chapter 7; P Meyer-Bisch "Les Droits Culturels Forment-ils une Catégorie Spécifique de Droits de l'Homme? Quelques difficultés logiques" in: P Meyer-Bisch (ed.) *Les Droits Culturels, une catégorie sous-développée de droits de l'homme, Actes du VIIIe Colloque interdisciplinaire sur les droits de l'homme* (Editions Universitaires Fribourg 1993) 38-39. JB Marie "Les Droits Culturels: Interface entre les Droits de l'Individu et les droits des Communautés" in: P Meyer-Bisch (ed.) *Les Droits Culturels, une catégorie sous-développée de droits de l'homme, Actes du VIIIe Colloque interdisciplinaire sur les droits de l'homme* (Editions Universitaires Fribourg 1993) 203-207, 213; A Eide "Cultural Rights as Individual Human Rights" in: A Eide, C Krause and A Rosas (eds.) *Economic, Social and Cultural Rights – A Textbook* (Second Revised Edition Martinus Nijhoff Publishers Dordrecht 2001) 300-301; LV Prott "Cultural Rights as Peoples' Rights in International Law" in: J Crawford (ed.) *The Rights of Peoples* (Clarendon Press Oxford 1988) 95-97; David Miller "Group Rights, Human Right and Citizenship" *European Journal of Philosophy* (Volume 10 issue 2 August 2002) 180.

³¹ For an extensive analysis of the concept of cultural genocide in international law, see Yvonne Donders "Old Cultures Never Die? Cultural Genocide in International Law" in I. Boerefijn et al (eds.) *Human Rights: Pre-Conflict, In Conflict, and Post-Conflict* (Liber Americorum Professor Bastiaan de Gaay Fortman Intersentia March 2012) 278-304

the culture of a community – including language, religion, customs, cultural expressions and/or cultural institutions – is systematically attacked, restricted, prohibited, or destroyed by a state or state organs. Cultural genocide is not the same as physical genocide and therefore does not fit within the current legal usage of the word ‘genocide’ in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).³² Genocide presupposes the intent to physically destroy, in whole or in part, a certain biological group. If a culture is destroyed, the individuals may physically survive, but the community may cease to exist, because its existence depends on the shared consciousness of its members, manifested through culture, including *inter alia* language, religion and customs.³³

Genocide is not only prohibited by the Genocide Convention, but its prohibition is also recognized as a *ius cogens* norm and as international customary law, which is binding upon all states. Although the Genocide Convention does not give substantive rights to communities and is directed instead at the possible perpetrators of genocide, i.e. states, it is clear that communities can be seen as right-holders.³⁴ Some, however, question whether the protection against cultural genocide is indeed a community cultural right, because the right to be free from cultural destruction is nothing more than the corollary of the right to life of individuals making up the community.³⁵

Cultural genocide, or rather the prohibition thereof, is as such not included in international law instruments. However, as the prohibition of genocide is a non-derogable norm, even of a *ius cogens* nature, it is hard to dismiss the prohibition of cultural genocide as devoid of legal meaning. Moreover, the protection against cultural destruction is part of international human rights law, international humanitarian law, international criminal law, as well as the international treaties on cultural heritage.³⁶

5.2 Equality and Non-Discrimination

Discrimination is often related to community membership and to the characteristics of a community, which gives the prohibition of discrimination a collective dimension. At the same time, the basis of cultural rights, or more broadly of respect for cultural differences, also lies in the right and principle of non-discrimination and equality.

It is now broadly recognized that non-discrimination and equality also mean the right to be different. Indeed, equality and non-discrimination not only imply that equal situations should be treated equally, but also that unequal situations should be

³² *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, entry into force 12 January 1951.

³³ Patrick Thornberry *International Law and the Rights of Minorities* (1991) 57.

³⁴ Corsin Bisaz *The Concept of Group Right in International Law – Groups as Contested Right-Holders, Subjects and Legal Persons* (Martinus Nijhoff Publishers Leiden Boston 2012) 96-97.

³⁵ David Miller “Group Rights, Human Right and Citizenship” *European Journal of Philosophy* (Volume 10 issue 2 August 2002) 183-184.

³⁶ Yvonne Donders “Old Cultures Never Die? Cultural Genocide in International Law” in: I. Boerefijn et al (eds.) *Human Rights: Pre-Conflict, In Conflict, and Post-Conflict* (Liber Americorum Professor Bastiaan de Gaay Fortman Intersentia March 2012) 278-304.

treated unequally. At the international level, it is understood that “the enjoyment of rights and freedoms on an equal footing...does not mean identical treatment in every instance.”³⁷ Consequently, not all differences in treatment constitute discrimination, so long as the criteria for differentiation are reasonable and objective and serve a legitimate aim.³⁸ Difference in treatment may also involve positive action to remedy historical injustices, social discrimination, or to create diversity and proportional group representation.³⁹ This right to affirmative action can be seen as a collective right, but it should be noted that this right is of a temporary character, aimed at restoring past injustices or disadvantages, which is not the same as a permanent collective right to non-discrimination and equality.⁴⁰

Apart from respect for diversity within the equality principle, collective cultural rights provisions, including community, communal and individual rights specifically promoting and protecting cultural diversity, have been included in international human rights instruments. The state approach towards cultural rights has been mainly individual. Cultural rights were reduced to the rights to freedom of expression, including language and artistic creation, as well as the rights to religion, association and education. In relation to the rights of minorities and indigenous peoples, however, a broader and more collective approach has been adopted, often pressured by the communities themselves asking for the recognition of their collective cultural rights.

5.3 Individual Cultural Rights with a Collective Dimension

Most cultural rights in international human rights instruments, just like other rights, are defined as individual rights. These rights are, however, for the most part enjoyed in connection with other individuals or within the context of communities. For instance, the individual right to take part in cultural life, although not containing a

³⁷ Human Rights Committee, *General Comment No. 18, Non-Discrimination*, 10 November 1989, para. 8. The European Court of Human Rights has reaffirmed this in many cases, including the cases of *Thlimmenos v. Greece*, Appl. No. 34369/97, 6 April 2000, para. 44 and *D.H. and others v. the Czech Republic*, Appl. No. 57325/00, 7 February 2006, para. 44.

³⁸ Legal doctrine generally distinguishes between differentiation, distinction and discrimination. Differentiation is difference in treatment that is lawful; distinction is a neutral term which is used when it has not yet been determined whether the difference in treatment is lawful or not; and discrimination is difference in treatment that is arbitrary and unlawful. Consequently, only discriminatory treatment is prohibited. See M Bossuyt, *Prevention of Discrimination – The Concept and Practice of Affirmative Action* (UN Doc. E/CN.4/Sub. 2/2002/21, 17 June 2002) para. 91, p. 20.

³⁹ See, also, Article 1(4) of the *International Convention on the Elimination of Racial Discrimination*, adopted by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force on 4 January 1969: ‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.’ The Human Rights Committee has further stated that the principle of equality under Article 26 ICCPR may sometimes require States parties to take affirmative action to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the ICCPR. Human Rights Committee, *General Comment No. 18, Non-Discrimination*, 10 November 1989, para. 10.

⁴⁰ Corsin Bisaz *The Concept of Group Right in International Law – Groups as Contested Right-Holders, Subjects and Legal Persons* (Martinus Nijhoff Publishers Leiden/Boston 2012) 70-75; Miodrag A Jovanovic “Recognizing Minority Identities Through Collective Rights” *Human Rights Quarterly* (Vol. 27 2005) 638-639.

reference to shared enjoyment, can only be enjoyed together with other members of a cultural community. This approach is confirmed in the General Comment on this provision adopted by the Committee on Economic, Social and Cultural Rights. The Committee stated that the term 'everyone', as the 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."⁴¹ The rights to freedom of expression, association and religion also have a strong collective dimension in relation to both the object of the rights as well as their enjoyment. However, formally speaking, these rights are defined as individual rights.

5.4 Communal Cultural Rights for Members of Minorities

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'. This line was also followed 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 of the provisions, speak of the rights of 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 other words, the provisions of the Declaration are communal rights.

In some provisions of the Declaration 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 and shall encourage conditions for the promotion of that identity." This provision is not drafted as a substantive right of individuals, but as a recommendation to states. Although such provisions recognize a 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.

5.5 Community Cultural Rights for (Indigenous) Peoples

One of the first community rights adopted in international human rights law was the right of peoples' to 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.⁴² A proper implementation of

⁴¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 21 on The Right of Everyone to Take Part in Cultural Life* (Article 15 para. 1(a) of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, 21 December 2009, para. 9.

⁴² 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* (Antwerp – Oxford - Portland Intersentia December 2008) 99-122. See, on the right of self-determination, including the external and internal dimension, *inter alia*, P Aikio and M Scheinin (eds) *Operationalising the Right of Indigenous Peoples to Self-Determination* (Åbo/Turku Institute for Human Rights Åbo Akademi University 2000); K Henrard *Devising an adequate system of minority protection : individual human rights, minority rights and the right to self-determination* (The Hague Nijhoff Publishers 2000); H Hannum *Autonomy, Sovereignty*

the right to internal self-determination, including a peoples' right to preserve its cultural, ethnic, historical and territorial identity, may imply some form of self-government or autonomy in the economic, social and/or cultural field.⁴³ Indigenous peoples mainly use the right to (internal) self-determination to demonstrate their desire to exist freely and to develop as distinct communities. They wish to live according to their own values and beliefs, and to be respected by states and other communities.⁴⁴

Based on the importance of the right to self-determination, indigenous peoples have always demanded to be recognized as a collective entity and advocated for community rights. One of the treaties where this played a significant role is Convention 169 on Indigenous and Tribal Peoples in Independent Countries (Convention 169), adopted by the International Labour Organisation in 1989. Convention 169 was a revision of Convention 107 on Indigenous and Tribal Populations (Convention 107) adopted in 1957, which was criticized for its paternalistic approach to assimilating indigenous peoples into the non-indigenous community.⁴⁵ Convention 169, in contrast to Convention 107, uses the term 'peoples' instead of 'members of populations', thus incorporating a community rights approach. This approach does not, however, take the form of substantive community rights for indigenous peoples as such, but instead reflects states' obligations towards those peoples. For instance, Article 4 provides that states shall take special measures "for safeguarding the...institutions...cultures and environment of the peoples concerned" and Article 5(a) provides that "the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected..." Indigenous peoples are not the subjects of these provisions, but the beneficiaries.

Article 1(3) of ILO Convention 169 furthermore makes clear that, "[t]he use of the term 'peoples' in this Convention shall not be construed as having any implications as

and Self-Determination. The Accommodation of Conflicting Rights (revised edition, Philadelphia University of Pennsylvania Press 1996).

⁴³ L Hannikainen "Self-Determination and Autonomy in International Law" in: M Suksi (ed.) *Autonomy: Applications and Implications* (The Hague Kluwer Law International 1998) 90; H Hannum *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights* (revised ed. Philadelphia University of Pennsylvania Press 1996) 474; K Myntti "The Right of Indigenous Peoples to Self-Determination" in: P Aikio and M Scheinin (eds.) *Operationalising the Right of Indigenous Peoples to Self-Determination* (Åbo/Turku Institute for Human Rights Åbo Akademi University 2000) 128-129.

⁴⁴ Erica-Irene Daes *Explanatory note concerning the draft declaration on the rights of indigenous peoples* (19 July 1993 UN Doc. E/CN.4/Sub.2/1993/26.Add. 1) para. 28; SJ Anaya *Indigenous Peoples in International Law*, (Oxford OUP 2004) 103-106; B Kingsbury 'Reconstructing Self-Determination: A Relational Approach', in: P Aikio and M Scheinin (eds) *Operationalising the Right of Indigenous Peoples to Self-Determination* (Åbo/Turku Institute for Human Rights Åbo Akademi University 2000) 24; K Myntti 'The Right of Indigenous Peoples to Self-Determination' in: P Aikio and M Scheinin (eds.) *Operationalising the Right of Indigenous Peoples to Self-Determination* (Åbo/Turku Institute for Human Rights Åbo Akademi University 2000) 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 2) 131; E-I 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: P Aikio and M Scheinin (eds) *Operationalising the Right of Indigenous Peoples to Self-Determination* (Åbo/Turku Institute for Human Rights Åbo Akademi University 2000) 79-80.

⁴⁵ *ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries*, adopted by the International Labour Conference at its 76th session, 27 June 1989; *ILO Convention 107 on Indigenous and Tribal Populations, 1957*. ILO Convention 169 has a limited number of 20 States Parties.

regards the rights which may attach to the term under international law.” In other words, the use of the term ‘peoples’ has no implications regarding the right of self-determination as understood in international law. The right of self-determination was not included in Convention 169 because states were opposed to its incorporation in the final text.⁴⁶

The UN Declaration on the Rights of Indigenous Peoples, adopted in 2007, includes true community rights. The title of the Declaration, as well as several provisions, give rights to indigenous peoples as such, at the same time recognising that individual members also have these rights. As stipulated in Article 1: “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.”

Apart from the right to self-determination, the Declaration includes several community cultural rights. For instance, Article 5 provides 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, as a soft law instrument, is not legally binding upon states.

6. Integrating Collective Subjects and Collective Interests in International Human Rights Law

As shown above, collective cultural rights in various types and forms are included in international human rights law. These different types of collective cultural rights exist alongside each other and do not have to be mutually exclusive. The rationale of collective cultural rights is the recognition of the value and worth of cultures and cultural identities for human dignity, and of the fact that cultural communities are crucial in shaping these identities and therefore important for individuals’ dignity, well-being and development. Cultural communities are valuable for their role in shaping the personality and identity of individuals by providing choices and opportunities. Individual identity and freedom are strongly connected to a sense of belonging to a cultural community.⁴⁷

⁴⁶ SJ Anaya *Indigenous Peoples in International Law* (Oxford OUP 2004) 60; HR Berman “The International Labour Organisation and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference” *Review of the International Commission of Jurists* (No. 41/1988) 52–54. In fact, the ILO Manual on the Convention explains that this formulation does not mean that self-determination is denied by the Convention, but “...it is left to the United Nations to decide how the term should be interpreted in general international law”; L Swepston and M Tomei *A Guide to ILO Convention 169 on Indigenous and Tribal Peoples* (Geneva International Labour Office 1995) 10.

⁴⁷ A Margalit and M Halbertal “Liberalism and the Right to Culture” *Social Research* (Vol. 61 No. 3 Fall 1994) 503-505. See also A Margalit and J Raz, “National Self-Determination” in: W Kymlicka (ed.) *The Rights of Minority Cultures* (Oxford OUP 1995) 87; J Raz “Multiculturalism: a liberal perspective” in: NJH Huls en HD Stout (eds.) *Recht in een multiculturele samenleving* [Law in a multicultural society] (Tjeenk Willink Zwolle 1993) 135-136.

Collective cultural rights are incorporated in instruments containing human rights for all, but they have been more prominently included in instruments relating to minorities and indigenous peoples. Although cultural rights always have a collective dimension, they are not always community rights. In international human rights law, some cultural rights provisions are truly community rights, others are communal rights, and yet others are individual rights with the potential to be collectively enjoyed. Looking at the object of the rights, it may be said that some rights protect a collective cultural interest, whereas others protect an individual cultural interest, and some protect both.

Collective cultural rights confirm that some collective cultural interests cannot be reduced to merely individual interests. This makes collective cultural rights important first and foremost as claims for collective cultural interests, even if these rights are exercised by individuals.⁴⁸ These collective interests, such as culture, language, religion, land or custom, remain, however, difficult to define and they are also dynamic and heterogeneous, which makes them unspecified as objects of substantive rights. Collective cultural rights, in particular community cultural rights, should therefore respect the dynamic character of the community and its culture and not 'absolutise' collective cultural identities or 'lock' individuals into their community culture.⁴⁹ Protection should not imply that cultural communities or cultures are 'fenced in'. Involving the cultural community itself in the process of implementing cultural rights is therefore critically important.

The question remains, however, to what extent collective cultural rights, in particular community rights, are needed to appreciate the value of cultural communities. In light of the legal difficulties posed by the concept of community rights, it is understandable that states have often chosen to adopt individual rights or communal rights. It remains, however, disputed whether cultural communities are sufficiently protected by individual rights and communal rights, or whether they need community cultural rights.

The above shows that the inclusion of community cultural rights in international human rights law has not solved all legal and conceptual issues. It is still disputed to what extent collective entities can be the subjects of cultural rights, and whether a community can be an independent agent with the capacity to exercise such rights. And even if collectivities are accepted as possible subjects of rights, the lack of

⁴⁸ Leighton McDonald "Can Collective Rights and Individual Rights Coexist?" *Melbourne University Law Review* (Vol. 22 1998) 320.

⁴⁹ J Waldron "Minority Cultures and the Cosmopolitan Alternative" in: W Kymlicka (ed.) *The Rights of Minority Cultures* (OUP Oxford 1995) 95, 105-108; M Walzer "Comment on Taylor's Politics of Recognition" in: A Gutman (ed.) *Multiculturalism – Examining the Politics of Recognition* (Princeton University Press Princeton 1994) 100-101; Ch Kukathas "Are There Any Cultural Rights?" in: W Kymlicka (ed.) *The Rights of Minority Cultures* (OUP Oxford 1995) 231-232, 234, 236, 238-239; Ch Kukathas "Cultural Toleration" in: W Kymlicka and I Shapiro (eds.) *Ethnicity and Group Rights* (New York University Press New York/London 1997) 77-78, 88; A Margalit and M Halbertal "Liberalism and the Right to Culture" *Social Research* (Vol. 61 No. 3 Fall 1994) 503-505; A Margalit and J Raz "National Self-Determination" in: W Kymlicka (ed.) *The Rights of Minority Cultures* (OUP Oxford 1995) 87; W Kymlicka *Multi-Cultural Citizenship – A Liberal Theory of Minority Rights* (Clarendon Press Oxford 1995) 108-109; DM Johnston "Native Rights as Collective Rights: A Question of Group Preservation" in: W Kymlicka (ed.) *The Rights of Minority Cultures* (OUP Oxford 1995) 181, 187-188, 194.

internationally-agreed definitions of peoples, minorities and indigenous peoples implies that it is not clear which collective entities can enjoy these rights. The issue of the relationship between the community and its individual members, and the fear that community rights may suppress individual freedoms, remains present. Community cultural rights are meant to protect the collective cultural identity of a community. The cultural identity of a community is, however, made, developed and changed by the members of the community. To what extent are members truly able to participate in the decision-making processes? What if the collective interest and the individual interest conflict? Is there some kind of hierarchy between community cultural rights and the individual cultural rights of members of these communities? Is, for instance, the integrity of the community to be considered more important than individual autonomy?

The potential conflict between various human rights, whether individual and/or collective, is not a unique phenomenon. The general rule is that there is no strict hierarchy between human rights and therefore there is no strict order of giving preference to certain (individual or collective) rights. It therefore cannot be argued that collective rights always prevail, for example because of the numbers of persons that benefit therefrom. Neither will individual rights always prevail; everything depends on the concrete situation and context at hand. Not only lawmakers and policy makers, but also courts and supervisory bodies are accustomed to balancing the various interests involved.⁵⁰

The tension and potential conflict between community and individual interests also raises another important issue, namely that of the possible negative sides of cultures. 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 intrinsically dignified. It may be a mechanism for exclusion and control. Cultures may harm or oppress people and hinder their personal development. Some cultural practices are very questionable from a human rights perspective. Community cultures are dynamic, not fixed and homogeneous, and there may be internal differences in the interpretation of the culture of the community, for instance between sub-communities or between the elite and the masses.⁵¹ The important question thus arises: who decides what the culture of a community is composed of, and which cultural aspects and practices should be protected?

From a human rights perspective, imposing cultural identities and values upon individual members who no longer share these values should be avoided. In other words, individual rights should prevail in cases where the community is oppressive or imposes a cultural identity on individuals. Because communities derive their existence from the members they are comprised of and need the voluntary support of (the majority of) their members, they should only be able to survive if their members

⁵⁰ Michael Freeman "Are there Collective Human Rights?" *Political Studies* (Volume 43 (1) August 1995) 30, referring to J Raz *The Morality of Freedom*, 250-257, 308-313. Leighton McDonald "Can Collective Rights and Individual Rights Coexist?" *Melbourne University Law Review* (Vol. 22, 1998) 324, 366, 373-374.

⁵¹ Michael Freeman "Are there Collective Human Rights?" *Political Studies* (Volume 43 (1) August 1995) 34; Ch Kukathas "Are there any Cultural Rights?" *Political Theory* (Vol. 20 February 1992) 113.

sufficiently value its survival.⁵² This position rests on the assumption that the basis of cultural communities is formed by the individual right to associate, and that cultural communities ultimately matter to the extent that they affect individuals.⁵³

In other words, community cultural rights can be supported only to the extent that individuals remain autonomous and free to develop their own cultural identity. Accordingly, some criteria should be elaborated for collective entities to be eligible for community rights. Cultural communities may have a certain amount of freedom to arrange their internal structure and institutions and they may also put limited pressure on their members to follow the cultural norms of the community. However, cultural communities should always guarantee and respect the rights and freedoms of their individual members. They should not only refrain from cruel, inhuman and degrading treatment of their members, but communities should also respect the right of their members to take part in the decision-making processes that determine and develop the community's cultural life. Moreover, the community should be based on non-coercive membership and respect the individual's right and freedom to leave the community. In order to be able to make informed choices about membership in the community, communities should also respect the rights of their members to participate in society at large, e.g. through education, expression, information, election processes and labour.⁵⁴

Collective cultural rights reflect the integration of collective subjects and collective interests in international human rights law. It is now broadly accepted that human rights are seldom enjoyed in complete isolation and that human rights, even those formulated as individual rights, should benefit the community as well. The call for the recognition of collective interests, including culture, and collective subjects, including cultural communities and peoples, is accepted by the inclusion of collective cultural rights in international human rights law. While the inclusion of collective cultural rights in international legal instruments is of important symbolic value, nevertheless the legal significance of these rights lies in their actual implementation and enforcement. Collective cultural rights, in particular community cultural rights, continue to pose

⁵² Michael Freeman "Are there Collective Human Rights?" *Political Studies* (Volume 43 (1) August 1995) 34; B Parekh, *Rethinking Multiculturalism – Cultural Diversity and Political Theory* (Macmillan Press Basingstoke 2000) 169; Ch Kukathas "Are there any Cultural Rights?" *Political Theory* (Vol. 20 February 1992) 113.

⁵³ J Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press London 1989) 151; J Donnelly "Human Rights, Individual Rights and Collective Rights" in: J Berting et al. (eds.) *Human Rights in a Pluralist World* (Meckler Westport/London 1990) 51; Kymlicka also argues that communities may have collective rights as external protection against the majority, but may never impose internal restrictions upon its members. See Chapter III, Section 2.4. Ch Kukathas "Are there any Cultural Rights?" *Political Theory* (Vol. 20 February 1992) 112, 116.

⁵⁴ Michael Ado "Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights" *Human Rights Quarterly* (Vol. 32 No. 3 August 2010) 624-625; 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 April-June 2004) 18; Eva Brems, "Reconciling Universality and Diversity in International Human Rights Law" in: Andras Sajó (ed.) *Human Rights with Modesty: the Problem of Universalism* (Koninklijke Brill 2004) 227, 229; YM Donders *Towards a Right to Cultural Identity?* (Antwerp Intersentia 2002) 103-105, 338; Laura Reidel, "What are Cultural Rights? Protecting Groups with Individual Rights" *Journal of Human Rights* (9:1 2010) 70-74, 78; Leighton McDonald "Can Collective Rights and Individual Rights Coexist?" *Melbourne University Law Review* (Vol. 22 1998) 372; Ch Kukathas "Are there any Cultural Rights?" *Political Theory* (Vol. 20 February 1992) 117, 128, 133-134.

complex and difficult issues. The two central components of collective cultural rights, namely a community and a culture, are difficult to define and they are not – and should not be – static notions. Both are dynamic, changeable concepts, which makes their translation into substantive rights a difficult matter. Can the culture of a community be sufficiently determined and agreed upon by the community as a whole so as to give a determinate scope and normative content to a collective cultural right? Will communities, even without a legal definition, be able to claim rights while fully respecting the individual rights of their members? Some cases adjudicated in international tribunals indeed show that collective cultural rights can be enjoyed by communities and that states have obligations to respect and implement these rights.⁵⁵

⁵⁵ For instance, the African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya*, Communication 276/2003, May 2009 (endorsed by the African Union in January 2010); Inter-American Court of Human Rights, *Mayagna (Sumo) Indigenous Community of Awas Tingi versus the Republic of Nicaragua*, Ser. C, Case No. 79, judgment of 31 August 2001.