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UNIVERSITY OF AMSTERDAM



## CULTURAL HERITAGE AND HUMAN RIGHTS

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# CULTURAL HERITAGE AND HUMAN RIGHTS

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## 1. Introduction

Cultural heritage has been included in public international law because of its value as part of the history of humanity; hence the need for its legal protection not only at national, but also at international level. In international law, in particular humanitarian law, the concept of ‘cultural property’ was used for a long time as the source of protection.<sup>1</sup> The concept of cultural property referred to objects that had value mainly as commodity that could be bought and sold. Ownership and the rights of the possessor were central and directly related to control over the objects and over access to them. The value of these objects as part of the cultural heritage of a community or individual, although sometimes mentioned, was not central in this approach.

In more recent years, the concept of ‘cultural heritage’ has become more *en vogue*. Cultural heritage is considered to be of such value that safeguarding is necessary because of a public interest, irrespective of ownership.<sup>2</sup> Whereas the concept of ‘cultural property’ is fairly static and mainly refers to tangible objects, the concept of ‘cultural heritage’ is a more dynamic and flexible notion that includes physical or material (tangible) elements, as well as immaterial (intangible) elements. Cultural heritage is developed, created, interpreted, and re-interpreted in a dynamic world of interaction.<sup>3</sup>

An important feature of the concept of cultural heritage is its link with peoples, communities and cultural identities. Cultural heritage not only has an objective dimension, but it is particularly important for its subjective dimension, in terms of how it is perceived by individuals and

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<sup>1</sup> For instance, in the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (hereafter ‘Hague Convention’)

<sup>2</sup> Francesco Francioni, ‘Culture, Heritage and Human Rights: An Introduction’ in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Brill 2008) 7; Pok Yin S. Chow, ‘Culture as Collective Memories: An Emerging Concept in International Law and Discourse on Cultural Rights’ (2014) 14(4) *Human Rights Law Review* 611, 636–638.

<sup>3</sup> UN Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights, Fardia Shaheed (21 March 2011) UN Doc A/HRC/17/38, 3, paras 4–7; UN Human Rights Council, Report of the Special Rapporteur in the field of cultural rights (3 February 2016) UN Doc A/HRC/31/59, para 8; Francioni, ‘Culture, Heritage and Human Rights’ (n 2), 7–8, 14–15; Neil A. Silberman, ‘Heritage Interpretation and Human Rights: Documenting Diversity, Expressing Identity, or Establishing Universal Principles?’ (2012) 18(3) *International Journal on Heritage Studies* 245, 246–247; Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press 2013) 145–147.

communities as being associated with their cultural identity and their sense of belonging to a community. It is precisely the intrinsic link between cultural heritage and cultural identity of individuals, groups and humankind that justifies the national and international protection and preservation of cultural heritage.<sup>4</sup>

Member states of UNESCO have adopted several legal instruments concerning the protection of cultural heritage. The protection of cultural heritage is also included in instruments on conflict and war, including international humanitarian law and international criminal law. These fields of international law, however, do not necessarily take a human rights approach to cultural heritage. Cultural heritage is protected as important value for humanity, but in these instruments cultural heritage is not particularly protected as a right, or as part of or a precondition for human rights advancement.

In recent years, however, the link between cultural heritage and human rights has been strengthened. In international law, a shift appears to be visible from the protection of cultural heritage as such, based on its historical value for humanity, its uniqueness and non-renewable character, to the protection of cultural heritage as crucial value for peoples and individuals in relation to the (re)construction of their cultural identity.<sup>5</sup> This connection between cultural heritage and human rights is recognized by states in the Human Rights Council<sup>6</sup> and also confirmed by the UN Special Rapporteur on Cultural Rights, who emphasized that ‘considering access to and enjoyment of cultural heritage as a human right is a necessary and complementary approach to the preservation/safeguard of cultural heritage’.<sup>7</sup>

The interlinkages between cultural heritage and human rights form a complex web of different issues. In short, human rights serve the creation, preservation, protection, promotion, and enjoyment of cultural heritage. At the same time, preservation and enjoyment of, and access to, cultural heritage are human rights in and of themselves. Finally, human rights can also protect *against* cultural heritage that is considered to be in tension or conflict with human rights. Although no explicit rights to cultural heritage are included in international human rights treaties, several human rights provisions in these treaties imply rights for individuals and communities related to their cultural heritage, which in turn imply negative and positive obligations for states.

The increased interconnection between the different fields of public international law related to the protection of cultural heritage can be well-illustrated by the famous case of Al Mahdi before

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<sup>4</sup> Janet Blake, ‘On Defining the Cultural Heritage’ (2000) 49(1) *International and Comparative Law Quarterly* 61, 82.

<sup>5</sup> Francioni, ‘Culture, Heritage and Human Rights’ (n 2) 6–7.

<sup>6</sup> UN Human Rights Council, Cultural Rights and the Protection of Cultural Heritage (27 September 2016) UN Doc A/HRC/33/L.21; Cultural Rights and the Protection of Cultural Heritage (19 March 2018) UN Doc A/HRC/37/L.30.

<sup>7</sup> UN Human Rights Council, Report of the Independent Expert (n 3) para 2; UN Human Rights Council, Report of the Special Rapporteur (n 3) paras 47–51.

the International Criminal Court (ICC). In September 2016, a Trial Chamber of the ICC sentenced Ahmad Al Faqi Al Mahdi to nine years' imprisonment for the war crime of intentionally destroying cultural heritage in attacks he directed aimed at religious and historic buildings in Timbuktu, Mali.<sup>8</sup> The Trial Chamber recognized the value of the cultural heritage beyond the mere status of property or value for humanity, linking the heritage to the cultural identity and dignity of the community concerned. It stated that 'the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu'.<sup>9</sup> They were an integral part of the religious life of its inhabitants and constitute a common heritage for the community. Furthermore, most sites were recognized as UNESCO World Heritage sites. The ICC therefore concluded that 'the entire international community, in the belief that heritage is part of cultural life, is suffering as a result of the destruction of the protected sites'.<sup>10</sup>

The aim of this chapter is to broadly unravel the interlinkages between cultural heritage and human rights, focusing on international treaties on cultural heritage and international treaties on human rights. The overlapping fields of international humanitarian law and international criminal law, as well as the regional legal frameworks, are left to other chapters in this volume. While the legal differences between heritage treaties and human rights treaties in terms of their scope of application, reciprocity, implementation, monitoring, and denunciation were explored elsewhere,<sup>11</sup> here the focus is on the substantive content of these treaties in terms of how the promotion and protection of cultural heritage and human rights are mutually related. This relationship has intensified over the years through the simultaneous or synchronized development and elaboration of the concepts of culture, cultural heritage, and cultural rights in international law.

Below, an overview is first given of the UNESCO instruments on cultural heritage and cultural diversity and their human rights angles, showing how cultural heritage has been increasingly linked to human rights. Then human rights treaties are explored as regards their link with cultural heritage, showing how several human rights provisions imply rights related to cultural heritage and corresponding negative and positive obligations for states. The last part brings these two together by exploring a human rights approach to cultural heritage, including the concepts of access, contribution, participation, and enjoyment, as well as the limitation of human rights in cases of harmful or contentious cultural heritage.

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<sup>8</sup> *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15 (27 September 2016).

<sup>9</sup> *Ibid.*, para 38.

<sup>10</sup> *Ibid.*, para 39.

<sup>11</sup> Yvonne Donders, 'Protection and Promotion of Cultural Heritage and Human Rights through International Treaties: Two Worlds of Difference?' in Charlotte Waelde et al. (eds), *Research Handbook on Contemporary Intangible Cultural Heritage: Law and Heritage* (Edward Elgar Publishing 2018) 54–77.

## **2. UNESCO cultural heritage instruments and human rights**

UNESCO is well-known for its work in the field of the protection of cultural heritage. From its establishment the organization has promoted international collaboration in the field of cultural heritage, mainly from the idea that states should protect cultural heritage because of its significance for humanity and as a means of international cooperation, thereby fostering mutual understanding and preventing international conflicts. In the UNESCO heritage instruments, increasing emphasis is placed on the importance of cultural heritage for the construction and expression of cultural identity and on the link between cultural heritage and cultural diversity. In other words, a shift has taken place from safeguarding cultural heritage for the public at large to protection of cultural heritage of and for communities concerned. Accordingly, elements of a human rights approach, including the value of human dignity and the principles of participation, contribution, and access can be increasingly found in these instruments, reflecting a growing consensus among states on these matters. Regional heritage instruments show a similar development.<sup>12</sup>

The UNESCO treaties are classical international treaties in the sense that they mainly have a horizontal character as agreements between states creating mutual rights and obligations. Their provisions compel states parties to promote cultural diversity and to safeguard cultural heritage and take measures to identify and delineate cultural heritage. The Conventions do not have a vertical character providing for substantive rights of individuals and/or communities to cultural heritage. This interstate focus is also reflected in the monitoring system of these conventions, which is fully in the hands of states.

The implementation of UNESCO instruments is monitored via a reporting procedure laid down in article VIII of its Constitution. The organization also has a communication procedure adopted by Decision 3.3 of the Executive Board in 1978, but this procedure is confidential and it

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<sup>12</sup> Regional heritage instruments show a similar development: the more recent the instrument, the more comprehensive the definition of cultural heritage included and the stronger the link with rights of individuals and communities. For instance, the OAS Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations (adopted 16 June 1976) AG/RES 210 (VI-O/76) ('Convention of San Salvador') uses the term 'cultural property' and concerns only the tangible elements of cultural heritage. Access to cultural heritage and participation by individuals or communities in the process are not explicitly included. The African Union Cultural Charter for Africa (adopted 5 July 1976, entered into force 19 September 1990) AU Doc 0014, puts emphasis on the protection and promotion of 'African cultural heritage', particularly in relation to the post-colonial assertion of African identity. It is not made clear what is meant by 'African cultural heritage', but it seems to refer to cultural heritage on the African continent, not further specified to different states, peoples, or communities. The ASEAN Declaration on Cultural Heritage (adopted 25 July 2000) defines cultural heritage in a broad manner, including tangible and intangible elements, and it establishes the clear link between cultural heritage, identity and human rights in the preamble. The Council of Europe Framework Convention on the Value of Cultural Heritage for Society ('Convention of Faro'), adopted in 2005, also embraces a broad definition of cultural heritage and is most outspoken about human rights related to cultural heritage (for instance, articles 1 and 12), although the formulation of the provisions is state-oriented and does not give concrete rights to individuals and/or communities.

is therefore unknown whether complaints have been filed concerning cultural heritage.<sup>13</sup> The reporting procedure implies that member states must periodically submit a report on the action taken in the field of the recommendations and conventions adopted by UNESCO. These reports are considered by the Committee on Conventions and Recommendations (CCR), which is a subsidiary body of UNESCO's Executive Board composed of representatives of thirty member states. The CCR considers the reports without a dialogue with the member states. It drafts a report on its findings to the Executive Board, which sends it with its comments to the General Conference. States have not always consistently respected their reporting obligations. Reports have come in at irregular intervals and they are of different quality.

The heritage treaties have their own monitoring system. They are monitored by intergovernmental committees composed of representatives of the states parties. The UNESCO Conventions' bodies are the conferences of parties, which established intergovernmental committees.<sup>14</sup> The World Heritage Committee and the Committee for the Safeguarding of the Intangible Cultural Heritage both review states parties' reports every six years and advise the states parties on the implementation of their respective treaties and other matters arising from their reports.<sup>15</sup> There is no systematic input by NGOs or other stakeholders in this procedure, although they can participate in the debates. Furthermore, the states parties to the heritage treaties have developed the habit of adopting so-called Operational Guidelines, in which they elaborate guidelines on the practical implementation and application of the provisions of the respective Convention.

### **5.1. Cultural Heritage Conventions**

Member states of UNESCO have adopted three Cultural Heritage Conventions: The Convention concerning the Protection of the World Cultural and Natural Heritage (1972); the Convention on the Protection of the Underwater Cultural Heritage (2001); and the Convention on the Safeguarding of the Intangible Cultural Heritage (2003). These Conventions provide for definitions of the different categories of cultural heritage and are meant to safeguard cultural heritage at national and international level. The widespread state support, in particular for the World Cultural and Natural Heritage Convention and the Intangible Heritage Convention,

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<sup>13</sup> See on this procedure Yvonne Donders, 'UNESCO's Communications Procedure on Human Rights' in Nigel Rodley and Tara Van Ho (eds), *Research Handbook on Human Rights Institutions and Enforcement* (Research Handbooks on Human Rights Series, Edward Elgar Publishing 2019).

<sup>14</sup> Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (hereafter, 'World Heritage Convention') Part III arts 8–10; Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 1 (hereafter 'Intangible Cultural Heritage Convention') Part II, arts 4–8.

<sup>15</sup> World Heritage Convention art 29; Intangible Cultural Heritage Convention art 29.

confirms the general agreement among states from all different parts of the world on the importance of cultural heritage protection and promotion.

As indicated above, the UNESCO Heritage Conventions show a shift from the protection of cultural heritage for the public at large and emphasis on the sovereignty and rights of states (Convention on World Cultural and Natural Heritage and Convention on Underwater Cultural Heritage) to the protection of cultural heritage of and for specific cultural communities, involving them in the process of identification and protection (Convention on Intangible Cultural Heritage).

The Conventions on World Cultural and Natural Heritage and on Underwater Cultural Heritage were drafted to protect the physical, material elements of cultural heritage. These tangible elements of cultural heritage are often connected to territory. According to article 1 of the Convention on Cultural and Natural Heritage, cultural heritage includes

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

The Convention distinguishes natural heritage from cultural heritage, defining them separately in article 2. However, in many instances, natural heritage has important cultural connotations and, vice versa, cultural heritage can be embedded in a natural environment. The Convention on Underwater Cultural Heritage also emphasizes in its preamble that underwater cultural heritage is an integral part of the cultural heritage of humanity ‘and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage’.

For a number of years, it has been realized that an important part of cultural heritage consists of non-physical or immaterial aspects, so-called intangible cultural heritage. The definition of intangible cultural heritage is, according to article 2(1) of the Convention on Intangible Cultural Heritage,

the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.

This definition, remarkably, focuses on the will of communities and individuals and not solely on the sovereign rights and control of states, recognizing that it is communities and individuals who create and maintain cultural heritage. At the same time, it should be noted that it is still primarily states that hold the power to select and legally recognize cultural heritage.

In the Convention on Intangible Cultural Heritage, a direct link is established between intangible cultural heritage and cultural identity. In article 2(1) it is stated that

intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity.

Languages, in particular regional or minority languages, are often included as part of intangible cultural heritage. The Convention on Intangible Cultural Heritage recognizes the vital role of languages in the expression and transmission of living heritage. Article 2(a) confirms that language is a vehicle of intangible cultural heritage, essential to the identity of individuals and groups. Most intangible cultural heritage domains – including, for instance, rituals, performing arts, and handicrafts – depend on language for their day-to-day practice and intergenerational transmission. In the domain of oral traditions and expressions, language is not merely a vehicle, it is the very essence. Accordingly, promotion and protection of cultural heritage also implies measures in the field of languages.

The division between tangible and intangible heritage should not be taken too strictly. Tangible heritage also contains intangible dimensions. ‘Cultural heritage requires memory.’<sup>16</sup> Material and physical heritage needs to be placed in a historical and cultural context in order to understand its value. The inclusion of intangible elements into the definition of the concept of cultural heritage has enhanced the human dimension of cultural heritage and has thereby strengthened the human rights approach to cultural heritage. The intangible elements of cultural heritage have a more direct link with the construction of the cultural identity of a community or nation. Whereas the original approach to the physical or material aspects of cultural heritage mainly concerned the protection of the objects themselves and the sovereignty of states, adding the intangible elements reinforced the perspective of the link with cultural communities, including their relationship with cultural heritage as part of their cultural identity. As cultural identity is considered to be part of human dignity, its link with human rights, in particular cultural rights, is more firmly established. Cultural heritage is no longer merely considered as being of outstanding value to humanity but also as being of crucial importance to individuals and communities as part of their identity.

Another important aspect of cultural heritage in the UNESCO Conventions, linking it to human rights, is education. All instruments include that states parties have the obligation to include cultural heritage in educational programmes and to raise awareness on the existence and value of cultural heritage. The Convention on World Cultural and Natural Heritage, in article 27, provides

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<sup>16</sup> Helaine Silverman and D. Fairchild Ruggles, ‘Cultural Heritage and Human Rights’ in Helaine Silverman and D. Fairchild Ruggles (eds), *Cultural Heritage and Human Rights* (Springer 2007) 12.

that states parties should develop educational programmes to strengthen people's appreciation and respect for cultural heritage and they should also inform the public of dangers threatening cultural heritage. The Convention on Intangible Cultural Heritage is more specific and also includes special measures to be taken in relation to cultural communities. Article 14 holds that states should implement educational, training, awareness-raising, and information programmes with(in) communities aimed at ensuring recognition of, respect for, and enhancement of the intangible cultural heritage in society.

Yet another element reaffirming and strengthening the link between cultural heritage and human rights is the increased participation of the peoples and communities concerned in the recognition, preservation and promotion of cultural heritage. The Intangible Cultural Heritage Convention determines that states should identify and define the elements of intangible cultural heritage 'with the participation of communities, groups and relevant non-governmental organizations' (art 11). Moreover, article 15 of this Convention provides that:

Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.

## **5.2. *Other UNESCO instruments***

The link between cultural heritage and cultural identity was already recognized in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, adopted in 1989. This recommendation includes a definition of folklore that is closely connected to intangible cultural heritage and marks its link with cultural identity:

Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

Worth mentioning also is the UNESCO Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It (1976). This recommendation includes, in article 2(a), a broad approach of access to culture as

concrete opportunities available to everyone, in particular through the creation of appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property.

Another instrument that reaffirms the link between cultural heritage and human rights is the UNESCO Declaration on the Intentional Destruction of Cultural Heritage, adopted in 2003. This Declaration clearly marks the link between cultural heritage and human rights by stating in the preamble that

cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights.

The Declaration proclaims the important obligation of states not to intentionally damage or destroy, or allow for damage or destruction of, cultural heritage. The intentional destruction of cultural heritage is also linked to the debate on cultural genocide, which is dealt with elsewhere in this volume.<sup>17</sup>

The member states of UNESCO also adopted several instruments on cultural diversity that include references to cultural heritage.<sup>18</sup> The UNESCO Universal Declaration Cultural Diversity (2001), for instance, reaffirms the value of cultural heritage in article 7 as a record of human experience and aspirations, which should be preserved and enhanced in order to foster creativity, diversity and to promote intercultural dialogue. The same Declaration reaffirms the importance of cultural rights as ‘an enabling environment for cultural diversity’ (art 5). It includes that:

The flourishing of creative diversity requires the full implementation of cultural rights...All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the

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<sup>17</sup> See, also, Yvonne Donders, ‘Old Cultures Never Die? Cultural Genocide in International Law’ in Ineke Boerefijn et al. (eds), *Human Rights: Pre-Conflict, In Conflict, and Post-Conflict* (Intersentia 2012) 278–304; Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford University Press 2016); Ana F. Vrdoljak, *International Law, Museums, and the Return of Cultural Objects* (Cambridge University Press 2006) 162–179.

<sup>18</sup> Member states of UNESCO have adopted other international instruments on cultural issues, including cultural products or the rights of cultural creators and artists. These instruments reaffirm the importance of (aspects of) culture, but do not contain explicit references to cultural heritage. These instruments include; The Agreement on the Importance of Educational, Scientific and Cultural Materials (adopted 22 November 1950, entered into force 21 May 1952) 131 UNTS 25 (‘Florence Agreement’); The Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215 (‘The Hague Convention’); Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358; The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995, entered into force 7 January 1998) 2421 UNTS 457; UNESCO, Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It (26 November 1976) UNESCO Doc 19 C/Resolution, Annex I; UNESCO, Recommendation on the Status of the Artist (adopted 27 October 1980) UNESCO Doc 21C/Resolutions; UNESCO, Declaration of the Principles of International Cultural Co-operation (4 November 1966) UNESCO Doc 14 C/8.I; UNESCO, Declaration on Race and Racial Prejudice (27 November 1978) UNESCO Doc 20 C/18.

cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) reiterates that cultural diversity is the common heritage of humanity, but it does not refer explicitly to the protection of cultural heritage.

The above clearly shows a large consensus among states on the importance of the protection and promotion of cultural heritage, including an amplified focus on its link with human rights through the cultural identity and dignity of peoples, communities, and individuals. The heritage conventions increasingly use the language of or make references to ‘rights’, and they increasingly take a human rights approach by linking cultural heritage to identity and human dignity and by including education, participation, and inclusion as important elements of heritage protection. In the monitoring of these treaties, states also embrace the link of these treaties with human rights.<sup>19</sup> The conventions, however, do not create human rights to heritage or make explicit references to or further elaborate existing human rights, such as the rights to freedom of expression and religion or the right to education. As noted, the UNESCO Conventions on cultural heritage mainly provide for interstate obligations and do not directly confer rights upon individuals or communities, although they are the beneficiaries. In the human rights instruments discussed below, individuals and communities not merely beneficiaries; they are the subjects of rights. Moreover, international human rights are monitored not by states but by independent committees which also provide important interpretation of these norms.

### **3. Human rights instruments and cultural heritage**

As stated above, there are no explicit references to cultural heritage in international human rights treaties and there exists no express international provision containing a right to cultural heritage.<sup>20</sup> At the same time, several human rights provisions in international human rights law have an important link with cultural identity and consequently with cultural heritage.

Monitoring bodies of the various conventions have elaborated on this link as well and have extended the content of various existing human rights provisions as to include rights to cultural heritage. Human rights treaties are all monitored by treaty monitoring bodies composed of

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<sup>19</sup> Yvonne Donders, ‘Cultural Rights and the UNESCO Convention: More than Meets the Eye?’ in Christiaan De Beukelaer, Miikka Pyykköinen and J.P. Singh (eds), *Globalization, Culture and Development: The UNESCO Convention on Cultural Diversity* (Palgrave MacMillian 2015) 117–131.

<sup>20</sup> There is one explicit reference to ‘heritage’ in art 22(1) of the African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (‘African Charter’): ‘All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.’ This provision does not refer to the cultural heritage of peoples, communities or individuals, but to the common heritage of mankind.

independent experts. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) are supervised by the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (ESCR Committee) respectively.<sup>21</sup>

The HRC and the ESCR Committee have various procedures at their disposal to carry out their monitoring function. The HRC and the ESCR Committee conduct a state reporting procedure. The committees regularly assess reports submitted by states on how they implement and comply with the treaties, including a meeting with representatives of the states parties. The committees then adopt Concluding Observations on each state party in which they indicate the positive aspects as well as recommendations for improvement of their implementation and compliance.

The committees also have complaints procedures at their disposal. Firstly, there is a mechanism for states parties to submit a complaint to the HRC or the ESCR Committee about an alleged violation of the respective treaty by another state party.<sup>22</sup> This interstate procedure is an optional procedure to which states have to consent explicitly.<sup>23</sup> It should, however, be noted that no interstate complaint has ever been brought to the HRC or the ESCR Committee. Secondly, both bodies have a procedure for the submission of individual complaints. These procedures are also optional. One important element of this procedure is that all local remedies have to be exhausted before a complaint can be submitted to the international body. The outcome of the procedure before the HRC and the ESCR Committee is a non-binding view. The individual communication procedure before the ESCR Committee is relatively new and, so far, no complaints concerning cultural heritage have been filed. The HRC has had several cases concerning culture in relation to minorities. The treaty bodies put down their elaboration of provisions in their respective treaties as developed by the reporting procedure and communication procedure in General Comments or General Recommendations. These form non-binding but authoritative interpretations of the treaty norms.

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<sup>21</sup> The HRC was established in Part IV of the ICCPR arts 28 to 45, which set out the composition and functions and procedures of the HRC. The ICESCR did not contain provisions on a monitoring body, but the ESCR Committee was established by a Resolution of the Economic and Social Council (ECOSOC) 1985/17 of 28 May 1985 to carry out its monitoring functions.

<sup>22</sup> ICCPR art 41; ICESCR Optional Protocol art 10.

<sup>23</sup> Similarly, states can bring cases against other states before the ICJ if both have accepted the jurisdiction of the ICJ. These cases may also concern alleged violations of human rights treaties. See, for instance the case of *LaGrand (Germany v United States of America)*, judgment of 27 June 2001; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, judgment of 14 February 2002; *Avena and Other Mexican Nationals (Mexico v United States of America)*, judgment of 21 March 2004; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, judgment of 24 May 2007; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, judgment of 20 July 2012. Pending cases: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*.

The most prominent human rights provisions in relation to cultural heritage are the right to take part in cultural life and the rights of (members of) minorities and indigenous peoples to enjoy their own culture, practise their own religion, and speak their own language. Other human rights important for cultural heritage are the right to self-determination, the rights to freedom of expression and religion, the right to respect for private life, and the right to education.

### **5.3. *The right to take part in cultural life***

The right to take part in cultural life is incorporated in article 27 of the Universal Declaration of Human Rights (UDHR) as well as in article 15(1)(a) of the ICESCR. This right can also be found in other international treaties, such as the Convention on the Elimination of Racial Discrimination (1965, ICERD, art 5), the Convention on the Elimination of All Forms of Discrimination Against Women (1979, CEDAW, art 13), the Convention on the Rights of the Child (1989, CRC, art 31) and the Convention on the Rights of Migrant Workers and Their Families (1990, ICRMW, art 43).

The scope and normative content of this right are determined by the definition of its two main concepts of ‘participation’ and ‘cultural life’. Interestingly, both have been elaborated in an increasingly broad manner, comparable to the development of the notion of cultural heritage.

Article 27 UDHR contains the right of everyone ‘freely to participate in the cultural life of the community’. The drafting process shows that states at that time had a narrow concept of culture in mind, reflecting mainly arts, literature, and education. The background of article 27(1) was the fact that culture used to be something of a small elite, in which large parts of the population did not take part. Article 27(1) was considered to be an encouragement to the state to have the masses participate in culture and to make culture available to them. At that time, culture did not refer to a specific lifestyle or to the tradition of a community, or to aspects such as language or religion. Most likely the term ‘community’ referred to the national community or the nation-state and, maybe, to the world community. In any case, it did not refer to the situation of minorities, indigenous peoples, or other local or regional communities, and there was no sign of multiculturalism or pluralism.<sup>24</sup> The scope and normative content of article 27 have, however, developed over the years, and the intentions of the drafting states may no longer be the most relevant tool of interpretation. Human rights instruments are living instruments and subsequent practice, such as the adoption of the ICESCR including article 15(1)a, is a crucial element in the elaboration and interpretation of this right.<sup>25</sup>

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<sup>24</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999) 269; Yvonne Donders, ‘Study on the Legal Framework of the Right to Take Part in Cultural Life’ in Yvonne Donders and Vladimir Volodin (eds), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (UNESCO 2007) 242–245.

<sup>25</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31.

Article 15(1)a ICESCR is formulated differently from article 27 UDHR, namely as the right of everyone to take part in cultural life. The references to freedom and to the community were left out. The concept of ‘cultural life’ has evolved in accordance with the development of the concept of culture. During the drafting process of the ICESCR, the concept of culture was considered in its classic and elitist form as including arts, literature, theatre, and museums. Similar to article 27 UDHR, the state played the central role of making this ‘high culture’ available to the masses. Over the years, the concept of culture, and thus of cultural life, expanded. The ESCR Committee began to broaden the concept of culture. In the first guidelines for the state reporting procedure it referred to culture in a plural form, including popular forms of culture and all manifestations and expressions – for example, folk music, handicrafts, popular press, television, and radio. The general public was to be more directly involved in cultural affairs. In its General Comment 21 on this provision, adopted in 2009,<sup>26</sup> the Committee considers culture in its broadest form as a way of life of a society and, consequently, as a dynamic process apart from its material side and products.<sup>27</sup>

The ESCR Committee recognizes that culture is a living process that is historical, dynamic, and evolving, relating to the past, present, and future.<sup>28</sup> It considers culture further as a broad and dynamic notion, encompassing

inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.<sup>29</sup>

Although no explicit mention is made of cultural heritage, it appears from this description that cultural heritage, including its material and non-material aspects, is an essential part of cultural life.

The Committee indicates four essential conditions for the right to take part in cultural life to be realized, which are also relevant to cultural heritage. It maintains that cultural goods and

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<sup>26</sup> Committee on Economic, Social and Cultural Rights, General Comment No 21, Right to Take Part in Cultural Life (art 15, para 1(a), of the International Covenant on Economic, Social and Cultural Rights) (21 December 2009) UN Doc E/C.12/GC/21.

<sup>27</sup> Donders, ‘Study on the Legal Framework’ (n 24) 246–255; Roger O’Keefe, ‘World Cultural Heritage: Obligations to the International Community as a Whole?’ (2004) 53(1) *International and Comparative Law Quarterly* 189; Rodolfo Stavenhagen, ‘Cultural Rights: A Social Science Perspective’ in Asbjorn Eide, Caterina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2nd edn, Martinus Nijhoff 2001); Silberman, ‘Heritage Interpretation and Human Rights’ (n 3) 248–249; Chow, ‘Culture as Collective Memories’ (n 2) 613, 617–624.

<sup>28</sup> Committee on Economic, Social and Cultural Rights, General Comment No 21 (n 26) para 11.

<sup>29</sup> *Ibid.*, para 13.

services should be: sufficiently available or accessible (physically, financially, in terms of information, and without discrimination); acceptable (including consultations to be held with individuals and communities concerned); adaptable (flexible); and appropriate or adequate.<sup>30</sup> Here, also, no direct reference is made to cultural heritage, but it is clear that cultural goods and services relate directly to cultural heritage.

According to the Committee, the notion of participation, or taking part, has several dimensions or components, including participation in, access to, and contribution to cultural life. From a more passive perspective, to take part means to have access to cultural life and to enjoy its benefits, without any form of discrimination. It also means to have access to information concerning cultural life. Taking part in cultural life implies that cultural life be protected and preserved, including its cultural and artistic heritage. From a more active perspective, taking part in cultural life implies the right and freedom to choose and to change a cultural affiliation and to freely contribute to cultural life and its development by means of creative or other activities. Taking an active part in cultural life also implies the right to take part in the decision-making process concerning cultural life. All these aspects of participation, access, enjoyment, and contribution are closely related.<sup>31</sup> In short, the elaboration of the right to take part in cultural life by the ESCR Committee implies various rights related to access to, enjoyment of, and participation in cultural heritage.

The link with cultural heritage is also confirmed in the obligations that states have under this provision. The Committee maintained, for instance, that the obligation to respect the right to take part in cultural life implies the adoption of specific measures ‘aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group ... to have access to their own cultural and linguistic heritage and to that of others’.<sup>32</sup> The Committee places special emphasis on cultural heritage of minorities and indigenous peoples. States parties should respect free access by minorities to their own culture and heritage and should be able to freely exercise their cultural identity and practices. States parties must also respect the rights of indigenous peoples to their culture and heritage, in particular by maintaining and strengthening the spiritual relationship with their ancestral lands, which are indispensable to their cultural life.<sup>33</sup>

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<sup>30</sup> Ibid, para 16. This so-called A-scheme is well-known in relation to economic, social, and cultural rights. It was most extensively elaborated by the late Professor Katarina Tomasevski, Special Rapporteur on the Right to Education, in her preliminary report; see Commission on Human Rights, Preliminary report of the Special Rapporteur on the Right to Education, Katarina Tomasevski, submitted in accordance with Human Rights Commission resolution 1998/33 (13 January 1999) UN Doc E/CN.4/1999/49. The Committee on Economic, Social and Cultural Rights has used it in all subsequent General Comments on economic, social and cultural rights.

<sup>31</sup> Ibid, para 15; Donders, ‘Study on the Legal Framework’ (n 24); Chow, ‘Culture as Collective Memories’ (n 2) 620.

<sup>32</sup> Committee on Economic, Social and Cultural Rights, General Comment No 21 (n 26) para 49(d).

<sup>33</sup> Ibid.

More broadly the Committee maintains that states parties are required to:

- (a) Respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters; Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others.
- (b) Respect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups, in economic development and environmental policies and programmes.<sup>34</sup>

In the first paragraph, the Committee refers to ‘human experience’, but it seems to place emphasis on the protection of the material or tangible aspects of cultural heritage, such as sites, monuments, and art works. The second paragraph refers more generally to cultural heritage of groups and communities, with special attention required for vulnerable groups. However, in the section on implementation of the right to take part in cultural life at national level, the Committee is clear in stating that states parties

should go beyond the material aspects of culture (such as museums, libraries, theatres, cinemas, monuments and heritage sites) and adopt policies, programmes and proactive measures that also promote effective access by all to intangible cultural goods (such as language, knowledge and traditions).<sup>35</sup>

Although the use of the term ‘goods’ in relation to the intangible is somewhat confusing, the broad approach towards cultural heritage is clear.

Article 15(2) ICESCR contains the positive obligation of states to take measures for the conservation, development, and diffusion of culture. States should not only promote popular participation in culture in general, but should also actively support the accessibility of cultural activities and heritage to the widest possible audience. The obligation to conserve, develop, and diffuse culture entails state protection, preservation, and promotion of cultural heritage. This implies, in particular, the protection of monuments, sites, cultural property, and museums. It also implies protection of traditional culture and folklore, or crafts, including active support for the study, promotion, and diffusion of these activities, including, for example, the circulation of educational and cultural materials.

States parties are required to take appropriate legislative, administrative, judicial, budgetary, promotional, and other measures aimed at the full realization of rights related to cultural heritage and at improving the conditions under which cultural heritage rights can be enjoyed. An important starting point is the ratification of relevant international treaties, including human rights treaties

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<sup>34</sup> *Ibid*, para 50.

<sup>35</sup> *Ibid*, para 70.

and the UNESCO and regional instruments on cultural heritage, and their transformation or inclusion in national laws and regulations. States should further develop and adopt policies to implement these laws and establish, maintain, and support institutional infrastructures for cultural heritage.

The ESCR Committee identified several specific obligations to fulfil under the right to take part in cultural life that are relevant to the promotion and protection of cultural heritage. For example, states are obliged to adopt policies that enable people of different cultural communities to choose freely their way of life and to engage freely and without discrimination in their own cultural practices and the practices of others.<sup>36</sup> States are also obliged to develop programmes and policies to preserve and restore cultural heritage and to guarantee access for all, without discrimination, to museums, libraries, cinemas, and theatres and to cultural activities, services, and events.<sup>37</sup>

States should not merely adopt policies that protect and promote cultural diversity and that facilitate access to a broad and diversified range of cultural expressions; they should also set up an institutional framework and cultural infrastructure and support cultural institutions necessary for the implementation of such policies.<sup>38</sup> This also means granting financial or other assistance to cultural actors, including artists, and public and private cultural organizations, engaged in creative activities.<sup>39</sup>

Since rights to cultural heritage also imply active participation in the decision-making process on cultural heritage, states should ensure that individuals and communities can take part in general political processes. States should, for example, ensure representation of different communities in relevant decision-making bodies, consult them, or have them participate actively in matters of their concern. States also have international obligations, mainly to foster assistance and cooperation to protect and promote cultural heritage. This could imply facilitating and promoting cultural exchanges, but also intellectual or financial support to states that have difficulties in protecting cultural heritage. Furthermore, in drafting new international agreements, for example on trade, states should take the right to access to cultural heritage into account and ensure this right is respected.

The Committee identified several core obligations to ensure the satisfaction of minimum essential levels of the right to take part in cultural life. In relation to cultural heritage, core obligations include the obligation to take legislative and any other necessary steps to guarantee non-discrimination and gender equality in the enjoyment of rights to access and participation in

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<sup>36</sup> Ibid, para 52(d).

<sup>37</sup> Ibid, para 54.

<sup>38</sup> Ibid, para 52(a).

<sup>39</sup> Ibid, para 52(d).

cultural heritage and to eliminate any barriers or obstacles that inhibit or restrict access to cultural heritage. Another important core obligation is to allow and encourage the participation of individuals and communities in the design and implementation of laws and policies that affect them. According to the Committee, states parties should obtain free, prior, and informed consent of individuals and communities when the preservation of cultural resources related to their way of life and cultural expressions is at risk.<sup>40</sup>

#### **5.4. *The right to enjoy culture for minorities and indigenous peoples***

Cultural rights, including rights related to cultural heritage, have special relevance for cultural communities including ethnic, religious, and linguistic minorities and indigenous peoples. Article 27 ICCPR contains the right of members of minorities to enjoy their own culture, practice their religion and speak their own language. It follows from the practice of the HRC that indigenous peoples can also invoke this right.<sup>41</sup>

In several cases, and in its General Comment on article 27, the HRC has endorsed a broad and dynamic interpretation of the concept of ‘culture’ as a way of life, including, for example, economic activities such as fishing and hunting.<sup>42</sup> Since these economic activities often concern land, the issue of land rights has gained importance under article 27 ICCPR, even though it is not explicitly referred to in this provision. Culture is further considered a dynamic notion. The fact that, for example, modern equipment or techniques are used for handicraft, music performances, or traditional economic activities such as reindeer hunting or fishing, does not make them less an issue of culture, to be protected under this provision.<sup>43</sup>

In its General Comment, the HRC clearly links the right to enjoy culture to the survival and dynamic development of the cultural, religious, and social identity of minorities, without explicitly mentioning cultural heritage.<sup>44</sup> The link with identity, however, confirms that cultural heritage forms part of culture and that culture cannot be enjoyed without the protection, promotion, and enjoyment of cultural heritage.

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<sup>40</sup> Ibid, para 55(e).

<sup>41</sup> Human Rights Committee, General Comment No 23: The Rights of Minorities (art 27) (8 April 1994) CCPR/C/21/Rev.1/Add.5, paras 3.2, 7.

<sup>42</sup> Ibid, para 7; Human Rights Committee: *Kitok v Sweden* (27 July 1988) Comm No 170/1984 and 197/1985; *Ilmari Länsman et al v Finland* (8 November 1994) Comm No 511/1992; *Jouni E Länsman et al v Finland* (30 October 1996) Comm No 671/1995; *Apirana Mahuika et al v New Zealand* (27 October 2000) Comm No. 547/1993; *Kalevi Paadar, Eero Paadar and his family, Veijo Paadar, and Kari Alatorvinen and his family v Finland* (5 June 2014) Comm No 2102/2011; Yvonne Donders, ‘The Cultural Dimension of Economic Activities in International Human Rights Jurisprudence’ in Valentina Vadi and Bruno de Witte (eds), *Culture and International Economic Law* (Routledge 2015) 33–49.

<sup>43</sup> See, for example, the following cases of the Human Rights Committee: *Ilmari Länsman et al v Finland* (8 November 1994) Comm No 511/1992; *Jouni E Länsman et al v Finland* (30 October 1996) Comm No 671/1995; *Apirana Mahuika et al v New Zealand* (27 October 2000) Comm No. 547/1993; *Kalevi Paadar, Eero Paadar and his family, Veijo Paadar, and Kari Alatorvinen and his family v Finland* (5 June 2014) Comm No 2102/2011.

<sup>44</sup> Human Rights Committee, General Comment No. 23 (n 41) para 9.

In its jurisprudence, the HRC established a set of criteria to determine whether specific state interference with article 27 constitutes a violation of this provision. In general, state measures which interfere with the enjoyment of culture must have a reasonable and objective justification and be compatible with the other provisions in the ICCPR. Furthermore, the state has the obligation to consult the community involved, and to limit the impact of the measures taken.<sup>45</sup>

Article 27 ICCPR formed the inspiration for the adoption in 1992 of the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities. This Declaration, which is not legally binding, does not include a specific reference to cultural heritage. Apart from repeating the wording of article 27 ICCPR, (elements of) the protection of cultural heritage can be found in several provisions, but more as an obligation upon states and not a substantive right of individuals or minorities. Article (4)2, for instance, includes that states shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions, and customs.

The only explicit references to cultural heritage in a human rights instrument can be found in the UN Declaration on the Rights of Indigenous Peoples, adopted in 2007. This Declaration includes in article 31 that:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

This provision contains several rights to cultural heritage for indigenous peoples, as well as protection of their intellectual property. It also reaffirms the importance of actively involving indigenous peoples in all phases of the process of cultural heritage. The Declaration is not legally binding but has been a source of inspiration for indigenous peoples to plead for their rights.<sup>46</sup>

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<sup>45</sup> Human Rights Committee: *Ivan Kitok v Sweden* (27 July 1988) Comm No 197/1985; *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* (26 March 1990) Comm No 167/1984; *Ilmari Länsman* (n 43); *Jouni E Länsman* (n 43); *Mahuika et al v New Zealand* (27 October 2000) Comm. No. 547/1993; *Angela Poma Poma v Peru* (24 April 2009) Comm No 1457/2006; *Kalevi Paadar, Eero Paadar and his family, Veijo Paadar, and Kari Alatorvinen and his family v Finland* (5 June 2014) Comm No 2102/2011.

<sup>46</sup> The African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights have in several cases referred to the UN Declaration on the Rights of Indigenous Peoples. See, for instance, *African Commission on Human and Peoples' Rights v Kenya* (ACHPR 26 May 2017) paras 127–131; *Kalina and Lokono Peoples v Surinam* (IACtHR 25 November 2015) para 122.

### **5.5. Other human rights relevant to cultural heritage**

Many other human rights norms in international law have an important cultural dimension and the advancement of these norms is also linked to cultural heritage, in particular the intangible elements of cultural heritage. For example, the right to freedom of expression (art 19 ICCPR, art 13 ICRMW) is essential for the development and maintenance of tangible and intangible cultural heritage, because much of cultural heritage is based on forms of expression, physical (for example, painting, writing) or oral (for example, singing, performing). The HRC maintains that freedom of expression includes cultural and artistic expression, teaching, and religious discourse.<sup>47</sup> As stated above, language is recognized as an important vehicle for intangible cultural heritage. This is also recognized in relation to freedom of expression. The HRC stated that freedom of expression protects all forms of expression and the means of their dissemination, including spoken, written, and sign language, as well as non-verbal expression such as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress, and legal submissions.<sup>48</sup> Similarly, the right to information (art 19 ICCPR) plays an important role in relation to access to cultural heritage. People need to be informed of the existence and background of cultural heritage and of the possibilities to access it or participate in it.

Much cultural heritage has an important religious connotation. Consequently, the right to freedom of thought and religion (art 18 ICCPR, art 12 ICRMW) has relevance for the promotion and protection of cultural heritage. Similarly, the right to respect for private life has shown to be of relevance in relation to the protection of traditional lifestyles.<sup>49</sup>

The right to education is another example. The rights to cultural heritage can be better enjoyed if people are educated and informed. At the same time, education contributes to the promotion and protection of (access to) cultural heritage. Education has been identified as an important part of the right to take part in cultural life. The ESCR Committee has maintained that the right to take part in cultural life includes the right to know and understand one's own culture

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<sup>47</sup> Human Rights Committee, General Comment No 34, art 19: Freedoms of opinion and expression (12 September 2011) CCPR/C/GC/34, para 11. The HRC bases this on its jurisprudence; see *Ross v Canada* (18 October 2000) Comm No 736/97; *Shin v Republic of Korea* (16 March 2004) Comm No 926/2000.

<sup>48</sup> Human Rights Committee, General Comment No 34 (n 47) para 12, referring to the following jurisprudence; *Kivenmaa v Finland* (31 March 1994) Comm No 412/1990; *Shin* (n 48); *Fernando v Sri Lanka* (31 March 2005) Comm No 1189/2003; *Shchetoko et al v Belarus* (11 July 2006) Comm No 1009/2001; *Zundel v Canada* (20 March 2007) Comm No 1341/2005.

<sup>49</sup> The European Court of Human Rights has dealt with cases concerning cultural heritage under the right to property (art 1 Prot. 1): *Catholic Archdiocese of Alba Iulia v Romania* App No 33003/03 (ECtHR 25 September 2012); *Beyeler v Italy* App no 33202/96 (ECtHR 5 January 2000); *Debelianovi v Bulgaria* App No 61951/00 (ECtHR 29 March 2007); *Kozacioglu v Turkije* App No 2334/03 (ECtHR 19 February 2009) and under the right to respect for private life (art 8 ECHR): *Sargsyan v Azerbeidzjan* App No 40167/06 (ECtHR 16 June 2015); *Ahunbay v Turkey* App No 6080/0629 (ECtHR 29 January 2019). For an analysis of several other cases related to religion and private life, see Yvonne Donders, 'Do Cultural Diversity and Human Rights make a Good Match?' (2010) 61(199) *International Social Science Journal* 15, 27–29; Lixinski, *Intangible Cultural Heritage* (n 3) 162–170.

as well as the culture of others through education and information. It also implies the right to receive quality education and training with due regard for cultural identity and to learn about forms of expression. These rights can be enjoyed individually or jointly with others or as a community.<sup>50</sup> States have positive obligations to ensure cultural education, including education and awareness-raising on the need to respect cultural heritage and cultural diversity.<sup>51</sup> The right to education is also explicitly included in articles 13 and 14 ICESCR, article 10 CEDAW, and article 30 ICRMW. Article 13 ICESCR explicitly indicates that this right should promote understanding and tolerance among all nations and all racial, ethnic and religious groups.

Also important in relation to cultural heritage is the right of peoples to self-determination (art 1 ICCPR and ICESCR). This right includes that peoples have the right to freely pursue their cultural development and to freely dispose of their natural wealth and resources, which has a clear link with cultural heritage. The right of self-determination is one of the most controversial norms among the human rights instruments. It broadly contains an external and an internal dimension.<sup>52</sup> The external dimension of self-determination means a people's capacity to free itself from colonial or racist rule.<sup>53</sup> The internal dimension of self-determination implies the presence of a government representing the whole people of a state without distinction and a commitment by that government to respect human rights and freedoms, with a special focus on the rights of peoples and communities. This internal dimension is reflected in the reference in articles 1 ICCPR and ICESCR to the right to freely pursue economic, social, and cultural development. Consequently, the right to internal self-determination includes the right to preserve cultural, ethnic, historical, and territorial identity, in which cultural heritage plays an important role.

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<sup>50</sup> Committee on Economic, Social and Cultural Rights, General Comment No 21 (n 26) para 15(b).

<sup>51</sup> *Ibid.*, paras 53, 54(c).

<sup>52</sup> On the division between the external and internal dimension of self-determination, see, inter alia, S.J. Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004); P. Aikio and M. Scheinin (eds), *Operationalising the Right of Indigenous Peoples to Self-Determination*, (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* (Martinus Nijhoff 2000); H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (revised ed, University of Pennsylvania Press 1996); Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014); Explanatory note concerning the draft declaration on the rights of indigenous peoples, by Erica-Irene Daes, 19 July 1993, UN Doc E/CN.4/Sub.2/1993/26.Add. 1, para. 17 and 19.

<sup>53</sup> This can imply secession and the establishment of a new sovereign and independent state, the free association or integration with another independent state, or any other political status freely determined by the people involved. Despite the references to 'all peoples' in the Covenants, in practice, the right of external self-determination has been limited to colonial situations or peoples under racist rule. No state has accepted an unconditional right of self-determination for *all* peoples, and the right of self-determination does not imply a general right to secession, because the principles of national unity and territorial integrity generally prevail over claims of self-determination. See, also, Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States, 24 October 1970, UN Doc A/RES/2625 (XXV), Annex, under the heading 'The principle of equal rights and self-determination of peoples'.

The HRC has excluded article 1 on the right of self-determination from its individual complaints procedure, since this right is conferred upon peoples, not individuals.<sup>54</sup> The HRC has, however, several times indicated the link between self-determination and the right to enjoy culture in article 27.<sup>55</sup> The right of indigenous peoples to self-determination is also included in article 3 of the UN Declaration on the Rights of Indigenous Peoples in similar language as article 1. Article 4 of the Declaration adds the right of indigenous peoples to autonomy or self-government in matters concerning their internal and local affairs.

### **5.6. Individual and collective rights and cultural heritage**

It may be questioned whether rights related to cultural heritage are individual rights, collective rights, and/or group rights.<sup>56</sup> Bearing in mind the background and features of cultural heritage as constructive for the cultural identity of communities and nations, a collective right seems most appropriate. However, there is continuing debate about the possible conflict between individual rights and collective or group rights.

The existing international human rights law framework provides mainly for individual rights. Exceptions are the right of peoples to self-determination (arts 1 ICCPR and ICESCR and arts 3 and 4 UNDRIP) and the right of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions (art 31 UNDRIP). The individual rights in human rights treaties are, however, recognized as having a strong collective dimension. Sometimes the collective dimension is explicit, such as in article 27 ICCPR, according to which the right can be enjoyed ‘in community with others’. Sometimes it is more implicit – for instance, in relation to the right to take part in cultural life. Article 15(1)(a) speaks of the right of ‘everyone’ to take part in cultural life, reflecting that the subject of this right is the individual. However, participation in cultural life has a strong collective connotation. Taking part in cultural life implies the existence of a cultural life linked to a cultural community. In other words, the right to take part in cultural life can only be enjoyed in the context of a cultural collectivity. The ESCR Committee also strongly promotes the collective dimension of the right to take part in cultural life.<sup>57</sup>

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<sup>54</sup> Human Rights Committee, *Lubicon Lake Band v Canada*, Comm No 167/1984, paras 13.3, 32.1, and 32.2. The HRC does, however, consider claims by individuals submitted collectively, although not under art 1.

<sup>55</sup> Human Rights Committee, *Apirana Mahuika et al. v New Zealand*, Comm No 547/1993, para 9.2.

<sup>56</sup> Collective rights are rights for individuals as members of a collective entity, whereas group rights are rights for a group or community as such. Corsin Bisaz, *The Concept of Group Right in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons* (Martinus Nijhoff 2012); Yvonne Donders, ‘Foundations of Collective Cultural Rights in International Human Rights Law’ in Andrzej Jakubowski (ed), *Cultural Rights as Collective Rights: An International Law Perspective* (Brill/Nijhoff 2016).

<sup>57</sup> Committee on Economic, Social and Cultural Rights, General Comment No 21 (n 26) para 9.

#### **4. A human rights approach to cultural heritage**

Although instruments and norms related to the promotion and protection of cultural heritage and those related to human rights were developed separately, their scope and content overlap, providing for several common issues. Some of these issues affirm the positive and mutually strengthening relationship between cultural heritage and human rights; others reflect certain challenges to this relationship.

##### **5.7. *Access, contribution, participation, enjoyment***

Above, the interdependent concepts of access, contribution, participation, and enjoyment were identified as important to cultural heritage. Access can be defined as the ability to enter, visit, and/or view a place or space, in person or otherwise. However, the concept of ‘access’ in a human rights framework has a broader connotation, linked to inclusion, participation, and development. In fact, access can be considered a precondition to meaningful participation and inclusion. From a human rights perspective, access means the *actual* ability to enter, visit, and/or view, which implies the facilitation and creation of conditions for access and inclusion, based on non-discrimination and equal opportunities, including special measures for disadvantaged groups.

Access, contribution, participation, and enjoyment also have an important economic dimension, meaning that it should be affordable to all. For instance, excessive (entry) prices for cultural heritage that many people cannot afford may practically prevent them from participating and having access to cultural heritage. Although an entrance fee may be necessary, attention should be paid that price is not an insurmountable obstacle to access and participation.

Access to and participation in cultural heritage does not mean an unlimited right for all to visit any site or to have access to every *oeuvre* whenever one wants. The protection and preservation of these sites and *oeuvres* needs to be taken into account. A difference in access or participation can, for instance, be made according to the proximity of the individual or community to the cultural heritage involved. For example, a specific indigenous site may be fully accessible to the indigenous people involved, but not to the general public. Differentiation is possible in access and in participation in the decision-making processes according to the particular interest of the group involved, such as originators or source communities who are the custodians of the heritage and keep it alive; individuals and communities who consider the heritage as part of their identity but are not actively involved in its maintenance; scientists and artists; and the general public.<sup>58</sup>

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<sup>58</sup> UN Human Rights Council, Report of the Independent Expert (n 3) 16–17, para 62.

Nowadays, apart from physical access, other forms of non-physical access should also be considered. Access via internet and the use of new technologies can make collections of libraries, museums, and cultural sites more widely available and accessible. UNESCO has recognized the importance of heritage in digital form in the Charter on the Preservation of Digital Heritage (2003). In this Charter, particular attention is paid to access to digital heritage, while recognizing the need to find a balance between unlimited access to digital heritage and the right to privacy and intellectual property rights. Article 2 reaffirms that the purpose of preserving digital heritage is to ensure that it remains widely accessible, which implies that there should be no unreasonable restrictions to access to digital heritage materials, in particular those in the public domain. At the same time, sensitive and personal information should be protected from unjustified interference, which means that a fair balance has to be struck between the legitimate rights of creators and other rights holders and the interests of the public to access digital heritage materials.

Access, contribution, and participation also imply rights related to participation in the decision-making processes and monitoring procedures, including rights to information and education on the structure and functioning of the legal and policy regime. The determination of what is or what is not cultural heritage is not a matter of fact. It involves a procedure, formal or informal, of identification, selection, and recognition.<sup>59</sup> Recognition – whether formal or not – is therefore an important feature of cultural heritage. Cultural heritage can be recognized at the national and/or international level. Important factors in this process is who decides which objects, issues and expressions are worthwhile preserving, and who do or should participate in this process.<sup>60</sup>

How identification, selection, and recognition take place at national level varies between countries, but it is clear that state authorities are the ones making the final decisions. Recognition of cultural heritage can thus potentially also be a tool for oppression. For instance, cultural heritage may be recognized selectively to force certain cultural communities to integrate or assimilate into mainstream society. Limited access to and/or exclusion of access may be used as political or social pressure tools. The past can be constructed and re-constructed in a certain way, or emphasis can be placed on particular parts of the past, according to political processes and the will to shape public opinion, to unite or to separate peoples and communities.<sup>61</sup> Moreover, controversy and competing claims and interests may be in place. Different communities and/or the state may claim ownership of, interest in, and rights to certain cultural heritage. Economic development or tourism – which also may have large economic value – may be important interests that are not shared by

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<sup>59</sup> William Logan, 'Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection' in Helaine Silverman and D. Fairchild Ruggles (eds), *Cultural Heritage and Human Rights* (Springer 2007) 34.

<sup>60</sup> UN Human Rights Council, Report of the Independent Expert (n 3) 5, para 9.

<sup>61</sup> *Ibid*, 5, para 11; Silverman and Ruggles, 'Cultural Heritage and Human Rights' (n 16) 3.

all involved equally. Knowledge, images and designs can be used without proper authorization or shared benefits.<sup>62</sup>

A human rights approach to cultural heritage requires close involvement of the cultural communities concerned in the process at all stages of identification, selection, and recognition of cultural heritage. This implies more than mere information or consultation; it entails meaningful participation and, preferably, no decision-making without prior and informed consent of the communities concerned. The right to free, prior, and informed consent is increasingly developed in international law, in particular in relation to land rights for minorities and indigenous peoples.<sup>63</sup> In relation to cultural heritage it is also a standard rule as part of the inscription procedure under the UNESCO Conventions.<sup>64</sup> At the same time it should be kept in mind that power differences also exist within and between communities and that some individuals or groups may not have the same ability to participate as others. Effective participation also requires, therefore, attention to – and, potentially, special measures for – certain vulnerable groups, such as women, children, older persons, persons with disabilities, minorities, migrants, indigenous peoples, and persons living in poverty.<sup>65</sup>

### **5.8. *Limitations of rights and harmful cultural practices***

Cultural heritage can be a positive force for the strengthening of cultural identity of communities and individuals, but it can also have negative connotations. Cultural heritage can also reflect ‘the darker side of humanity’.<sup>66</sup> Here, human rights again play an important role, this time as a shield against cultural or traditional practices related to cultural heritage that are harmful for individuals or communities. The Universal Declaration on Cultural Diversity and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions clearly state that cultural rights or cultural diversity may not be invoked to infringe upon human rights nor to limit their scope.<sup>67</sup>

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<sup>62</sup> UN Human Rights Council, Report of the Independent Expert (n 3) 6, para 12.

<sup>63</sup> The obligation to consult the community involved, as it follows from International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 27 ICCPR, was confirmed in the jurisprudence of the Human Rights Committee; see *Angela Poma Poma* (n 457) 6, para 7. It is also included in the United Nations Declaration on the Rights of Indigenous Peoples (2 October 2007) A/RES/61/295, arts 28, 31.

<sup>64</sup> UNESCO, Operational Guidelines to the UNESCO World Cultural and Natural Heritage Convention (January 2008) WHC 08/01, para 64; UNESCO, Operational Directives of the UNESCO Convention on the Safeguarding of Intangible Cultural Heritage, para 79.

<sup>65</sup> These groups are also mentioned in Committee on Economic, Social and Cultural Rights, General Comment No 21 (n 26).

<sup>66</sup> UN Human Rights Council, Report of the Independent Expert (n 3) 5, para 8.

<sup>67</sup> UNESCO Declaration on Cultural Diversity’ (2 November 2001) art 4; Convention on the Promotion and Protection of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311, art 2(1).

The Convention on Intangible Cultural Heritage includes ‘social practices and rituals’ in its definition of intangible cultural heritage. These practices might be discriminatory or harmful to certain groups – for instance, women. The Convention therefore also includes in article 2(1) that

consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

The UN Declaration on the Rights of Indigenous Peoples reaffirms in article 34 that indigenous peoples have the right to promote, develop, and maintain their distinctive customs, spirituality, traditions, procedures, practices, and juridical systems or customs ‘in accordance with international human rights standards’. Article 4 of the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities also includes that people should be able to develop and express their culture, traditions, and customs, except where specific practices are in violation of national law and contrary to international standards.

Cultural practices are very diverse, which makes it impossible to make general statements about their acceptability in relation to human rights. The scope of their possible conflict with human rights depends on the particular context of the case. In general, cultural practices that are clearly in conflict with human dignity and international human rights norms cannot be justified with a plea for cultural (heritage) rights. While cultural communities have a certain amount of freedom to arrange their internal structure and institutions, they should always guarantee and respect the rights and freedoms of their members, including the right to take part in the decision-making processes that determine and develop the community’s cultural life, as well as the right and freedom to leave the community. They should also respect the rights of their members to participate in society at large – for example, through education, elections, and labour.<sup>68</sup>

It is clear that changes in cultural practices are most successful if they arise within the cultural community itself and are not imposed from outside. This, however, does not relieve states from the obligation to find ways to promote such changes. The UN Convention on the Elimination of All Forms of Discrimination against Women (1979) imposes upon states a concrete obligation to ‘modify the social and cultural patterns of conduct of men and women’ in order to eliminate ‘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’ (art 5(a)).

The ESCR Committee also identified that states should take measures to remedy structural forms of discrimination and to take measures to eliminate any form of prejudice against individuals and communities based on their cultural identity.<sup>69</sup> Furthermore, the Committee stated that a core

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<sup>68</sup> Donders, ‘Foundations of Collective Rights’ (n 56) 110–111.

<sup>69</sup> Committee on Economic, Social and Cultural Rights, General Comment No 21 (n 26) para 52.

part of the right to take part in cultural life is that everyone can engage in their own cultural practices while respecting human rights. It mentions in particular the rights to freedom of thought, belief, and religion, freedom of opinion and expression, the right to use the language of one's choice, freedom of association and assembly, and the right to education.<sup>70</sup>

While preferably all rights should be harmonized, it is also possible that rights related to cultural heritage can come into conflict with other rights. For example, the individual right to access to cultural heritage of an individual artist or performer can come in conflict with the collective right to access. Cultural communities may also have competing rights related to cultural heritage. There is also the possibility that rights related to cultural heritage clash with, for instance, property rights or the right to development. And one can also think of the rights of scientists to freely study cultural heritage that can be at odds with the right to access to cultural heritage.<sup>71</sup>

The situation where different human rights, or the rights of different persons or communities, can be potentially in conflict is not peculiar to cultural rights; many human rights are inherently capable of clashing in certain situations. These situations cannot be solved in practice by rejecting either one of these rights. Nor can one, a priori, privilege one right over the other. It calls for independent evaluation – for example, by independent supervisory bodies, such as courts and treaty bodies, to determine which right prevails over another in a particular situation.

At the same time, the enjoyment of human rights, including rights related to cultural heritage, can be limited by states – for instance, to protect the rights of others or more general public interests. These limitations are only justified if they are determined by law, serve a legitimate aim, and are necessary, proportionate and as unrestrictive as possible. Article 29(2) UDHR outlines this in general terms and most human rights treaties contain limitation clauses, either attached to a particular provision or as single provision covering the whole treaty.

An example of the latter is article 4 ICESCR, which states that states parties may subject the rights in the Covenant to limitations that are determined by law 'only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. The Committee on ESC Rights has stated that in case of limitations of the right to take part in cultural life, attention should also be paid to standards on limitations of closely related human rights, such as the rights to freedom of expression, religion, and assembly and the right to privacy.<sup>72</sup> These rights, included in – for instance – the ICCPR, can also be limited if such limitation measures fulfil the criteria of being provided by law, pursuing a legitimate aim, and being necessary in a democratic society.<sup>73</sup>

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<sup>70</sup> Ibid, para 55(c).

<sup>71</sup> Francioni, 'Culture, Heritage and Human Rights' (n 2) 4–5; Lixinski, *Intangible Cultural Heritage* (n 3) 170–172.

<sup>72</sup> Committee on Economic, Social and Cultural Rights, General Comment No 21 (n 26) para 19.

<sup>73</sup> See, for instance, arts 18(3), 19(3), 21 ICCPR.

In other words, rights of participation in, access to or enjoyment of cultural heritage may be limited by states – for example, to prevent the unlimited exercise of these rights seriously endangering the rights of others or of society as a whole. The state is required to balance the different interests in societies and monitoring bodies assess whether that balancing is properly done.

## **5. Concluding remarks**

The above shows that cultural heritage is increasingly seen in international law not merely as an important product or value in itself, but also in relation to the construction and preservation of cultural identities and, thereby, of the dignity of peoples, communities, and individuals. This development has enhanced the human rights dimension of cultural heritage, in particular for minorities and indigenous peoples. Several human rights, including the right to take part in cultural life, the right to enjoy culture, and the right to freedom of expression and assembly, confirm that protection and promotion of cultural heritage is part of human rights and can be considered a precondition for the enjoyment of several human rights norms. Linking cultural heritage with human rights reaffirms the importance of inclusion, participation, and development and aims at expanding people's choices and capabilities. States are obliged to respect, protect, promote, and fulfil human rights to cultural heritage, whereby the focus should be on the most disadvantaged and excluded in society, as their human rights are most widely denied or left unfulfilled. Human rights to cultural heritage imply that individuals and communities take active part in the whole process of identification, selection, recognition, interpretation, preservation, and development of cultural heritage, as well as in the process of developing and implementing cultural heritage policies, including conflict resolution in case of competing interests. Prior and informed consent is required before alterations to access to cultural heritage take place.

Human rights also provide a frame for cultural heritage to shield it from possible negative effects. As shown above, rights to cultural heritage cannot always be enjoyed without limitation. They cannot be invoked or interpreted in such a way as to justify the denial or violation of human rights and fundamental freedoms of others. Limitations to human rights, with respect for the principles of equality and non-discrimination, could safeguard rights to cultural heritage from being misused for the protection of cultural practices that infringe upon human rights. Only sites, objects, expressions, and knowledge that are deemed worth preserving for future generations and that are in line with human dignity and international human rights law should be considered part of cultural heritage rights.

Strengthening and maintaining the link between cultural heritage and human rights reflects and reaffirms cultural heritage as a value for human dignity and a shift from a sovereignty and

state-centric approach to a people's and peoples approach, focusing on a policy of respect and inclusion.