



## UvA-DARE (Digital Academic Repository)

### Human rights: eye for cultural diversity

Donders, Y.M.

**Publication date**

2012

**Document Version**

Final published version

[Link to publication](#)

**Citation for published version (APA):**

Donders, Y. M. (2012). *Human rights: eye for cultural diversity*. (Oratiereeks). Universiteit van Amsterdam. [http://www.oratiereeks.nl/upload/pdf/PDF-6449weboratie\\_Donders.pdf](http://www.oratiereeks.nl/upload/pdf/PDF-6449weboratie_Donders.pdf)

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

# Human Rights: Eye for Cultural Diversity

# Human Rights: Eye for Cultural Diversity

*Inaugural lecture*

delivered upon appointment to the chair of  
Professor of International Human Rights and Cultural Diversity  
at the University of Amsterdam  
on 29 June 2012

by

Yvonne M. Donders

This is inaugural lecture 435, published in this series of the University of Amsterdam.

Lay-out: JAPES, Amsterdam

© Universiteit van Amsterdam, 2012

All rights reserved. Without limiting the rights under copyright reserved above, no part of this book may be reproduced, stored in or introduced into a retrieval system, or transmitted, in any form or by any means (electronic, mechanical, photocopying, recording, or otherwise), without the written permission of both the copyright owner and the author of this book.

*Mevrouw de Rector Magnificus,  
Mijnheer de Decaan,  
Collega's, familie, vrienden en zeer gewaardeerde toehoorders'*

## **Donders' Law**



“...het moeilijker is te bepalen of hij grooter en vruchtbaarder was als onderzoeker, dan wel helderder en invloedrijker als leermeester, dan eindelijk medelijdender en hulprijker als geneesheer van dat orgaan, dat de poorten opent van het paradijs, omdat het de poort is der wijsheid en der liefde”<sup>2</sup>

This was said about Professor Franciscus Donders, the famous Professor Donders. A statute was erected in his honour in Utrecht, at the Janskerkhof, and portraits of him are displayed in the Academy Building of Utrecht University. Several academic institutions bear his name and there are Professor Donders

Streets in Amsterdam, Bennekom, Bussum, Haarlem, Nijmegen, Tilburg and Utrecht.

Professor Donders lived from 1818 to 1889. He was a Professor of Medicine and Physiology, and his main field of research was eye physiology. His specialisation in ophthalmology made him one of the most important Dutch physicians of his time. He developed the current distinction, explanation and treatment of eye disorders, as well as tests to detect colour-blindness.

What inspires me most in Professor Donders, apart from his name, is his dedication to science as well as to society. He used his academic talent to further science, but also to teach and to help people at all levels of society. This is the way I want to shape my academic role and it is one of the reasons why I work on human rights.

Therefore, today, we will look at human rights and cultural diversity through his lens, by applying “the law of Donders” to international human rights in a creative and liberal way. To put it simply, Donders’ law states that no matter how the eye turns or moves, the three-dimensional position of the eye is always the same because of a correction mechanism in the brain.<sup>3</sup> I hope to show you that the international human rights system, including its standards, norms and monitoring mechanisms, is the brain that ensures a steady multidimensional view, while allowing for the moves and turns that are necessary to accommodate cultural diversity.

## Human Rights and Cultural Diversity

In the coming years I will continue along a path that started with my PhD in Maastricht and led me via UNESCO’s Human Rights Division in Paris here, to the University of Amsterdam. My research has focused and will focus on the relationship and interaction between international human rights law and cultural diversity. This is a current topic, as is shown by the recent debates in The Netherlands on, for instance, the proposed ban on wearing facial coverage, or burqas, and the proposed ban on ritual slaughter without anaesthesia. Human rights and cultural diversity further concern issues such as whether a person should be permitted to speak Frysian instead of Dutch in court, whether double nationality implies an undesirable loyalty problem, or whether Sinterklaas should be acknowledged as intangible Dutch cultural heritage or be dismissed as a racist celebration. One can also think of issues such as to what extent states should facilitate and fund education in minority languages, to what extent non-formal marriage rituals should be recognised, how land rights for indigenous communities can be reconciled with the economic benefit of

mining and logging operations, and the wearing of religious symbols, such as headscarves, turbans and kippas in public schools.

All of these issues are crucial to many individuals and communities, because they are expressions of their culture and consequently their identity. And to the extent that those cultural identity elements are associated with human dignity, there is a link with human rights.

### *The Concept of Culture*

The analysis of cultural diversity clearly involves working with the concept of 'culture'. There are hundreds of definitions of 'culture', but a much used one is 'the set of distinctive spiritual, material, intellectual and emotional features of society or a social group,(...) [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.'<sup>4</sup>

Culture is a concept of which the dynamics and complexity do not easily translate into legal terms. Culture is not an inactive notion, but something that can develop and change over time. It is not static, but dynamic; it is not a *product*, but a *process*, which has no well-defined boundaries and is influenced by internal and external interactions. Culture can refer to many things, varying from cultural products, such as arts and literature, to the cultural process or culture as a way of life. Culture has an objective and a subjective dimension. The objective dimension is reflected in visible characteristics such as language, religion, or customs, while the subjective dimension is reflected in shared attitudes, ways of thinking, feeling and acting. In addition, culture has an individual and a collective dimension. Cultures are developed and shaped by communities. Individuals identify with several of these cultural communities – ethnicity, nation, family, religion, etc. – and in that way shape their personal cultural identity.<sup>5</sup>

In general, culture is considered to be important to human beings and to communities. Or, to put it in the words of the World Commission on Culture and Development: 'culture shapes all our thinking, imagining and behaviour. It is the transmission of behaviour as well as a dynamic source for change, creativity, freedom and the awakening of innovative opportunities. For groups and societies, culture is energy, inspiration and empowerment.'<sup>6</sup>

At the same time, culture is not an abstract or neutral concept: it is shaped by its instrumentalisation, in which negotiation, contestation and power structures play a role. Culture is not necessarily an intrinsically dignified concept. It may be a mechanism for exclusion and control. Culture may harm people or be oppressive to them and hinder their personal development. Some harmful

aspects of culture are reflected in cultural practices that are very questionable from a human rights perspective. Examples of such harmful practices, which often affect women, include female genital mutilation, widow cleansing and forced prostitution.

An important question therefore is who decides to what extent cultural diversity should be promoted and which cultural aspects should be protected? As cultures are dynamic, which interpretation of a certain culture, including a cultural practice or activity, should be accepted? These are not easy questions to answer. The broadness, complexity and sensitivity of the concept of culture are serious challenges in the integration of this concept into international human rights law.

### *Universalism and Cultural Relativism*

At an international level, many human rights treaties and declarations have been adopted and ratified by states. These instruments provide a framework of universal human rights norms to be implemented by states at a national and local level. At the same time, there are many differences between and within states and this cultural diversity is cherished as an important value for states, communities and individuals.

It is broadly agreed that human rights and cultural diversity have a mutually interdependent and beneficial relationship. In the Universal Declaration on Cultural Diversity, adopted by the Member States of UNESCO in 2001, it is stated that 'the defence of cultural diversity is...inseparable from respect for human dignity' and 'implies a commitment to human rights and fundamental freedoms'.<sup>7</sup> The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions states that 'cultural diversity can be protected and promoted only if human rights and fundamental freedoms...are guaranteed'.<sup>8</sup>

Human rights and cultural diversity have been discussed extensively in the context of the universalism and cultural relativism debate. This debate has been conducted from the very moment international human rights law was being formed and has been dealt with in great detail by many human rights scholars.<sup>9</sup> Its essence can be summed up as follows: supporters of the universality of human rights assert that every human being has certain human rights by virtue of being human. Consequently, all persons should equally enjoy human rights, because these rights are inalienable and meant to protect human dignity. Supporters of cultural relativism emphasise the empirical fact of immense cultural diversity in the world. Cultural relativists, accordingly, claim that there are no cross-cultural universal human values and that the variety of



cultures implies that human rights can and should be interpreted differently. In between, moderate forms of both theories exist.

Moving away from the deadlock between the universalism and cultural relativism, the idea has taken hold that respect for cultural diversity can very well be consistent with the notion of the universality of human rights. Cultural relativism, in the sense of asking for respect for cultural diversity, not of merely challenging the legitimacy of international human rights norms as such, and universality do not have to mutually exclude each other. The dichotomy can be overcome by making a distinction between formal universality and substantive universality, between universality of application and universality of implementation and between universality of the subjects (beneficiaries) and universality of the norms (content).

The idea that human rights should be universally enjoyed – by all persons on the basis of equality – is not very controversial. In general, formal universality, or the universality of the subjects of human rights, does not present any problems. No one will argue that some people in the world do not have human rights. International human rights instruments clearly endorse this universal approach. The Universal Declaration of Human Rights (UDHR)<sup>10</sup>, for example, not only refers to universality in its title, but also states in Article 1 that ‘all human beings are born free and equal in dignity and rights.’ The UDHR as well as the international human rights treaties speak of ‘everyone’, ‘all persons’ or ‘no one’, affirming that *all* human beings have these rights and freedoms, no matter where they were born or to which community they belong.

The universality of the normative *content* of human rights and the universality of the *implementation* of human rights are, however, subject of debate. In my view, the correct approach to this is that the universal value and application of human rights does not necessarily imply the *uniform implementation* of these rights. In other words, while human rights apply universally to everyone on the basis of their human dignity, the implementation of these rights does not have to be uniform.<sup>11</sup>

The Advisory Commission of the Ministry of Foreign Affairs speaks in this respect of the “universalisation” of human rights. By recognising diversity and allowing for cultural-specific implementations, ‘cultures and States might be more willing to embrace the universal appeal of the international human rights framework’.<sup>12</sup> Donnelly has called this the “relative universality of human rights” and he argues that ‘universal human rights, properly understood, leave considerable space for national, regional, cultural particularity and other forms of diversity and relativity’.<sup>13</sup> Brems speaks of “inclusive universality”, pleading for more openness to cultural differences and for the accommodation of some cultural claims in a flexible and dynamic human rights system.<sup>14</sup> An-

Na'im focuses on enhancing the universal legitimacy of human rights by internal cultural discourse and external cross-cultural dialogue.<sup>15</sup> Kinley argues that 'human rights are inherently pluralistic', even though international human rights law, with its system of obligations and instructions and its institutionalised dispute settlement regimes, may give an impression of rigidity.<sup>16</sup>

It is now broadly acknowledged that universal human rights do not have to be implemented in a uniform way, thereby leaving room for cultural diversity.

### *Cultural Diversity and Cultural Pluralism*

Cultural diversity is defined in article 2 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions as referring to 'the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.'<sup>17</sup>

Cultural diversity describes the factual situation of cultural differences existing between and within states. It is an umbrella notion that covers cultural diversity at different levels: *between* individual states, regions, communities and individuals, but also *within* states, regions and communities.

Cultural diversity should be distinguished from the related notion of cultural pluralism. The difference and the connection between cultural diversity and cultural pluralism are explained in the Universal Declaration on Cultural Diversity. Article 2 states that 'cultural pluralism gives policy expression to the reality of cultural diversity'. In other words, cultural diversity, also termed 'plurality', reflects the factual situation. Cultural pluralism refers to the way cultural diversity is appreciated and translated into laws and policies.

Cultural pluralism implies that cultural diversity is considered to be good, a desirable and socially and politically beneficial condition.<sup>18</sup> It implies that individuals and communities are given the opportunity to maintain their specific cultural identity, provided that it is consistent with the laws, policies and values of the wider society. Consequently, although cultural diversity is the term mainly used in relation to international human rights law, what is often meant is cultural pluralism.<sup>19</sup> Perhaps we should reconsider the title of my Chair...

Let us explore the scope of international human rights law for promoting and protecting cultural diversity, both at a global and at a regional level. For that purpose we will look at the human rights standard-setting by states, at the

human rights norms themselves and at the monitoring of human rights by international supervisory bodies. I will not be able to discuss all these dimensions at great length. I will therefore give examples that show the dynamic and flexible character of the international human rights system, including its standards, norms and monitoring mechanisms, which allows to have eye for cultural diversity, while at the same time ensuring a steady, balanced, multidimensional focus and view.

## International Human Rights Standard-Setting

States as sovereign entities and the main subjects of international law negotiate and draft treaties. They may decide for themselves whether they wish to become parties to international human rights treaties. The process of creating international human rights standards gives a state ample opportunity to defend or promote its cultural interests. Two possible ways of introducing cultural diversity in the standard-setting process are the formulation of so-called cultural reservations and the adoption of regional human rights treaties.

### *Cultural Reservations to Human Rights Treaties*

When a treaty is being adopted and signed, some states may feel that their specific interests are not sufficiently reflected or they may disagree with certain specific provisions. A state may choose not to become party to the treaty at all. Or, at the moment it ratifies a human rights treaty, it may, up to a certain point, decide *to what extent* it wishes to become party to this treaty. A state may submit an explicit notification that it does not consider itself to be bound to certain aspects or provisions of the treaty, without having to reject the treaty as a whole. This is done in the form of reservations, some of which may have a cultural justification.<sup>20</sup> A state may, for example, find a particular provision incompatible with certain cultural, religious or historical specificities or rules that are applicable in that state. Such 'cultural reservations' reflect cultural differences between and within states that the state party intends to keep.<sup>21</sup> As such, reservations may form 'a legitimate, perhaps even desirable, means of accounting for cultural, religious, or political value diversity across nations.'<sup>22</sup>

Reservations, especially those made to human rights treaties, are, however, controversial. Concern has been expressed that reservations, in particular those based on cultural arguments, would undermine the universality of human rights treaties.<sup>23</sup> As outlined above, universality and cultural diversity do not have to mutually exclude each other. However, if states, by making reser-

vations, express not to be bound by a certain norm, this norm is not applied universally to all beneficiaries. If these reservations relate to rights that are central to the treaty, this might undermine the effect of the treaty, which would be most problematic for the individuals and communities that are supposed to benefit from its human rights protection.

Human rights treaties are a special kind of multilateral treaties. Unlike other multilateral treaties, on for example trade or the law of the sea, human rights treaties have as main beneficiaries not so much states, but individuals and communities. The contractual dimension of human rights treaties, including the important element of reciprocity, is complemented by the moral, broader dimension of fulfilling certain legal obligations, not only towards the contractual counterparts, but also to third parties, namely individuals and communities.

The possibility of making of reservations is therefore limited. Reservations may, for instance, not go against the object and purpose of the treaty.<sup>24</sup> The object and purpose are, however, not easy to define, which makes it difficult to assess whether certain cultural reservations are compatible or not. Such assessment is primarily done by other states parties, which may object to reservations made by other states parties.<sup>25</sup> Also, international monitoring bodies supervising the treaties have involved themselves in assessing reservations.

To illustrate these issues, I will give you two examples of cultural reservations to the Convention on the Rights of the Child (CRC).<sup>26</sup> This is the international human rights treaty with the most states parties, 193, showing broad support for it. At the same time, it is one of the treaties with the most reservations: 57 states parties have made reservations.

When ratifying the CRC, Djibouti submitted the following reservation: 'the Government of Djibouti shall not consider itself bound by any provisions or articles that are incompatible with its religion and its traditional values.'<sup>27</sup>

This reservation is of a general nature and has a very broad scope. Similar reservations were made by other Islamic states, including Brunei Darussalam, Iran, Mauritania, Oman, Qatar, Saudi Arabia and the Syrian Arab Republic. These states do not categorically reject the provisions of the CRC, but they only consider themselves bound to them *insofar as* they do not conflict with their religion or Islamic law. A problem, however, is that these states have not specified the religious aspects or traditional values that may be incompatible with the CRC.

Several European states parties have objected to these reservations. Roughly, two types of arguments were used: 1) these reservations raised doubts on the commitment of the other state party, and 2) these reservations were considered to be incompatible with the object and purpose of the treaty. While states

parties did not express a general opinion on the compatibility of religious laws with the CRC, they indicated that the general references were too broad and vague, as they did not specify the possible conflict between these religious laws and the CRC.<sup>28</sup> This raises the question to what extent reservations based on Islamic law would be accepted by other states parties if they were more specific.

A large majority of states parties did not object to these cultural reservations. This does not necessarily mean that they agree with them. One reason for not making objections could be that states parties aim for an inclusive approach and prefer states to participate in the treaty, even with general or broad reservations, as this allows for international supervision. States may also consider objecting a politically unfriendly act. Moreover, objecting to a reservation does not have much practical effect. Because the reciprocity between contracting parties is less prominent in human rights treaties, objections by other states parties have mainly symbolic significance.<sup>29</sup> Most states parties that have objected to these reservations, have clearly indicated that their objection does not preclude the entry into force of the treaty between them.<sup>30</sup>

Another example of a cultural reservation, one which does not relate to religion, is the reservation made by Canada on article 21 concerning child adoption: 'the Government of Canada reserves the right not to apply the provisions of article 21 to the extent that they may be inconsistent with customary forms of care among aboriginal peoples in Canada.' It added the statement that 'in assessing what measures are appropriate to implement the rights recognized in the Convention for aboriginal children, due regard must be paid to not denying their right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language.'<sup>31</sup>

Canada explained that it considered it appropriate to enter this reservation, because Article 21(a), according to which adoption should be authorized only by competent authorities, might prevent custom adoption among certain indigenous communities, in which adoption took place within extended families, for example by the child's grandparents. Such a practice might be regarded as inconsistent with the strict terms of article 21(a).<sup>32</sup> None of the other states parties has objected to this reservation.

Apart from other states parties, which may have various reasons for objecting or not objecting, monitoring bodies play a crucial role in evaluating the use of reservations. Although they cannot formally object to a reservation, they have contributed to convince states parties to adjust or withdraw their reservations on a number of occasions. The supervisory body of the CRC, the Committee on the Rights of the Child, systematically pays attention to reservations

in its dialogue with States Parties under the periodic reporting procedure. It considers general and broad reservations to be contrary to the object and purpose of the Convention. The Committee thereby focuses on the possible lack of respect for and protection of the rights. It has urged the Islamic states, but also Canada, to specify, reconsider or withdraw their reservations. Interestingly, pressure on states has sometimes been successful. Djibouti and Qatar, for example, withdrew their general reservations in 2009.<sup>33</sup>

These examples show that states parties may make reservations to certain provisions in a human rights treaty with reference to their specific cultural or religious background. Reservations therefore may be a useful or even essential reflection of cultural pluralism. Such cultural reservations, however, must be formulated in concrete and specific terms. They must state which specific (parts of) provisions of the treaty the state party does not consider itself bound to and explain the cultural or religious reasons behind the reservation, which determine the scope, content and consequences of the reservation. Moreover, cultural reservations have to be able to pass the object and purpose test, to prevent them from going against the essential parts of the treaty or undermining the effect of the treaty as a whole. While some research has been conducted on cultural reservations, there remains a lot to be studied.

### *Regional Human Rights Treaties*

The adoption of regional human rights treaties presents another way of introducing cultural diversity at the level of international standard-setting. In addition to global treaties on human rights, several regional intergovernmental organisations have adopted regional human rights treaties. These regional treaties include, for example, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights.<sup>34</sup>

Regional human rights treaties are a valuable addition to global human rights treaties, precisely because they may echo cultural pluralism among regions and States. States and the United Nations have applauded the development of regional human rights standards and regional monitoring systems as reinforcing the universal standards.<sup>35</sup> There is a lot to say and to study about the interaction between the global and regional standards and monitoring mechanisms. Today I will by giving some examples briefly explain the role of regional human rights systems in accommodating cultural diversity.

It should be noted that the regional human rights treaties mirror the global ones to a large extent. A certain set of rights are common to all of them. At the same time, regional human rights treaties reflect the specific historical and

cultural context of that region and may therefore include norms that are not or differently included in global treaties. The African Charter on Human and Peoples' Rights, for instance, contains collective rights for peoples to development and to peace and security (Articles 19-24). The African Charter further includes, apart from rights, duties towards other human beings, family and society (Articles 27-29).<sup>36</sup> The American Convention also contains a provision on the responsibilities to family, community and mankind (Article 32).

As regards the categories of rights, in Europe and the Americas separate instruments were adopted for civil and political rights and for economic, social and cultural rights. The African Charter, however, incorporates all categories in a single instrument, reflecting that these rights are considered of equal value. Apart from the general human rights treaties, treaties were adopted on issues of specific relevance to a region, such as the American Convention on Violence Against Women<sup>37</sup>, the American Convention on Forced Disappearance of Persons<sup>38</sup> and the Protocol to the African Charter on the Rights of Women in Africa.<sup>39</sup> Europe does not have a specific treaty on women's rights, but it does have treaties that protect the rights of minorities.<sup>40</sup>

These short examples serve to show that regional treaties can be important tools for the promotion of cultural pluralism. The interrelation and interaction between regional human rights standards and their monitoring and global ones offer plenty of opportunities for further study.

## International Human Rights Norms

International human rights law contains many norms and provisions that directly or indirectly promote and protect cultural diversity. The two main avenues that I will explore here are that of equality and that of cultural rights.<sup>41</sup>

### *Diversity within Equality*

Respect for cultural diversity has always been part of the human rights discourse. However, in developing international human rights law, states at first mainly emphasised the principle of *equality*. Equality *between* them as sovereign states and equality as the basis for the enjoyment of rights by different individuals and communities *within* states. Although diversity was recognised as a fact, it was maintained that human rights should first and foremost promote and protect equality. This emphasis on equality formed the starting point for the UDHR. While several proposals concerning cultural diversity or

the special position of certain cultural communities, such as minorities and indigenous peoples, were discussed, no provision to that effect was included.<sup>42</sup>

During the drafting processes of the various human rights treaties adopted after the UDHR, cultural diversity was increasingly emphasised as a value to be respected and promoted. This was broadly done in two ways: by developing the equality concept, acknowledging that it also implies the right to be different, and by adopting specific rights promoting and protecting cultural diversity.

Firstly, it was recognised that respect for cultural differences can be fully in line with the principle of equality. Having equal rights is not the same as being treated equally. Indeed, equality and non-discrimination not only imply that equal situations should be treated equally, but also that unequal situations should be treated unequally. At the international level, it was understood that 'the enjoyment of rights and freedoms on an equal footing...does not mean identical treatment in every instance'.<sup>43</sup> Consequently, not all difference in treatment constitutes discrimination, as long as the criteria for differentiation are reasonable and objective and serve a legitimate aim.<sup>44</sup> Difference in treatment may also involve affirmative or positive action to remedy historical injustices, social discrimination or to create diversity and proportional group representation.<sup>45</sup>

One area where positive action may be needed to obtain factual equality is education. States may have to take special measures to promote girls, minority children, or disabled children to go to school. If needed, separate educational systems or institutions may even be permissible, as long as these do not lead to separate sets of standards for different groups.<sup>46</sup> At the European level, the ECtHR has argued that the right to education does not impose positive state action to establish or finance a particular type of education in a certain language. However, the right might impose positive obligations to ensure the *equal enjoyment* of the right to education, including measures to facilitate primary education in a certain language.<sup>47</sup>

### *Cultural Rights and the Cultural Dimension of Human Rights*

Apart from respect for diversity within the equality principle, many international human rights instruments include rights that specifically promote and protect cultural diversity. These rights are broadly classified as 'cultural rights'. Cultural rights are human rights that directly promote and protect cultural interests of individuals and communities and that are meant to advance their capacity to preserve, develop and change their cultural identity. As such they



truly echo the importance of cultural pluralism in international human rights law.<sup>48</sup>

Which rights are cultural rights? The categorisation of human rights, including cultural rights, is based on the titles of two international human rights treaties that were adopted in 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>49</sup> However, although cultural rights are mentioned in the title of the ICESCR, the text of this treaty does not make clear which provisions in the treaty belong to the category of cultural rights. In fact, none of the international legal instruments provides a definition of ‘cultural rights’ and consequently, different lists could be compiled of international legal provisions that could be labelled ‘cultural rights’.

There are several international human rights provisions that explicitly refer to ‘culture’. One example is the right of everyone to participate in cultural life, as laid down in Article 27 UDHR and Article 15(1)(a) ICESCR. Another example is the right of members of minorities to enjoy their own culture, practise their own religion and speak their own language, as laid down in Article 27 ICCPR. The scope, normative content and state obligations of these rights have evolved over the years. For instance, the right to take part in cultural life was originally aimed at making culture available and accessible to all people, whereby culture was considered in its narrow scope as referring to national culture and as equivalent to cultural material(s), such as arts and literature. Other aspects of a broader concept of culture, such as language, religion and education, were dealt with in separate provisions in the ICESCR and the ICCPR. Nowadays, it seems that the right to take part in cultural life is broader, incorporating a broad notion of culture, as well as a wide range of corresponding rights and positive and negative state obligations.<sup>50</sup> The dynamics and complexity of the right to take part in cultural life are reflected in the General Comment of the Committee on Economic, Social and Cultural Rights on this right. This General Comment became the longest general comment so far. Its 18 pages contain 76 paragraphs, outlining in detail what the right to take part in cultural life entails in terms of scope, normative content and state obligations and its relationship with other human rights.<sup>51</sup>

Apart from rights explicitly referring to culture, many human rights have a direct link with culture. It might be defensible to claim that almost every human right can be linked to culture. However, the rights with the most obvious link with culture are the right to self-determination, the rights to freedom of religion, freedom of expression and freedom of association and the right to education. It has, for instance, been recognised that artistic expressions such as novels, poems and paintings fall within the scope of freedom of expression<sup>52</sup>

and that the right to freedom of association also protects cultural organisations.<sup>53</sup>

Apart from rights explicitly or directly related to culture, it appears that many human rights have a strong *cultural dimension*. Although some human rights may at first glance have no direct link with culture, most of them have important cultural implications.

The right to health, for instance, may have important cultural connotations as far as certain treatments, the use of certain (traditional) medicines or the availability of male and female doctors is concerned. Culture also plays a decisive role in sexual and reproductive health, in which information and education are crucial. The Committee on Economic, Social and Cultural Rights has recognised that the right to health includes that 'all health facilities, goods and services must be...culturally appropriate, *i.e.*, respectful of the culture of individuals, minorities, peoples and communities.'<sup>54</sup> What does this mean in practice? Should the state offer language facilities in all public hospitals? Are women entitled to be treated by a female doctor upon request? Should minority women be allowed to bring a traditional midwife when giving birth to a child or drink coca tea while dilating? Most probably, individuals do not have such rights under international human rights law and states do not have such far-reaching positive obligations, but it cannot be precluded that states may have to find ways to accommodate certain cultural interests as part of the right to health.

Another example is the right to adequate food. The preparation and consumption of food have a clear cultural connotation. The importance of the cultural dimension of food is also shown by the fact that several food traditions, such as the French cuisine, the Mediterranean diet, and the traditional Mexican kitchen, have been recognised as intangible cultural heritage, which has to be promoted and protected by states.<sup>55</sup> The Committee on Economic, Social and Cultural Rights has stated that the guarantees concerning the right to food should be culturally appropriate and acceptable.<sup>56</sup> Here, also, states may have to find ways to accommodate cultural diversity, while at the same time balancing different interests. The issue of (non-anaesthetised) ritual slaughtering is illustrative in this respect.<sup>57</sup>

Civil and political rights may also have a cultural dimension. For instance, the right to a fair trial includes the right to be informed of the charges in a language that one can understand, as well as the right to free assistance of an interpreter if a person cannot understand or speak the language used in court and such translation needs to be adequate.<sup>58</sup> Specific ways of living related to culture, such as living in a caravan, which is the traditional way of living of gypsies, may fall within the scope of the right to respect for private life and

home.<sup>59</sup> Although states may not necessarily have positive obligations, they have to respect the cultural dimension of these rights and have to balance the different interests involved. The implementation of cultural rights and of the cultural dimension of rights, as well as the balancing of different interests necessitates further study.

Most cultural rights in international human rights instruments, just like other rights, are defined as individual rights.<sup>60</sup> These rights are, however, for the most part enjoyed in connection with other individuals or within the context of communities. Article 27 ICCPR, which guarantees the right of members of minorities to enjoy their culture, explicitly includes that persons can do so 'in community with other members of their group'. Other cultural rights, such as the individual right to take part in cultural life, do not contain a reference to their shared enjoyment, but it is clear that these rights are generally enjoyed together with other members of a cultural community. The rights to freedom of expression, association and religion also have a strong collective dimension. In other words, although international human rights law is individually oriented, it has a collective dimension which is important for the promotion and protection of cultures. The collective dimension of cultural rights is, however, not only supported but also criticised. The concern is that individual freedom may be repressed within the cultural community. This is why the collective dimension of human rights should in my view be supported only to the extent that individuals remain autonomous and free in developing their own cultural identity.<sup>61</sup>

Cultural rights, in particular the cultural dimension of rights, need further study and elaboration, in order to be better implemented and supervised.

## Monitoring Human Rights and Cultural Diversity

An important role in supervising the performance of states is played by national and international supervisory bodies. These bodies have various mechanisms at their disposal and use various techniques to define the boundaries within which international human rights law, including cultural rights and the cultural dimension of human rights, should be implemented. Cultural diversity at the level of monitoring is the next level that I would like to discuss.

As concluded earlier, universal human rights norms do not imply uniform implementation. International human rights law entails a 'culturally plural notion of implementation'.<sup>62</sup> At the level of the implementation of human rights norms, states have a certain freedom to interpret and apply the rights in the way that they think fits their national context best. States are allowed to take

national, cultural circumstances into account when they implement international human rights law, to accommodate cultural diversity *between* states, but also to balance different cultural interests *within* states.

This is because cultural rights cannot be enjoyed unlimitedly. The general framework of such limitations is outlined in Article 29(2) UDHR, in which it is stated that ‘in the exercise of his rights and freedoms, everyone shall be subject to only such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.’ These limitation clauses can be found in most human rights instruments. Sometimes they apply to the instrument as a whole, sometimes they are linked to a particular provision. These international human rights provisions therefore directly allow for diversification in implementation between states. States are allowed to limit the enjoyment of the right in question for reasons of morality, security, health, public order and the rights and freedoms of others. Cultural and religious particularities may well be part of these reasons.<sup>63</sup>

Giving states unlimited freedom to interpret and implement international human rights law in totally different ways, would, however, undermine the universal character and application of the norms and would lead to unacceptable differences in rights protection for different individuals and communities. Therefore, the states’ discretion in implementing international human rights law must be balanced by national and international supervision. At the international level, there are monitoring bodies of a judicial and a quasi-judicial character.

Supervision at the international level is performed by the UN treaty bodies<sup>64</sup> and at the regional level by the European Court of Human Rights, the Inter-American Commission and Court of Human Rights and the African Commission and Court of Human and Peoples’ Rights. They interpret the scope, normative content and state obligations of international human rights norms and assess the balancing of regional, national and local cultural interests with the universality of human rights.

International and regional supervisory bodies roughly have two means of supervision at their disposal: regular state reports and complaints procedures. The state reporting procedure mainly takes place within the UN system and entails that states parties have to regularly report on how they implement human rights treaties. The supervisory committees, composed of independent experts, enter into a dialogue with the states parties and provide them with recommendations on how to improve their performance. Some UN bodies as well as the regional human rights bodies also have an individual complaints

procedure, which means that individuals, after having exhausted the remedies at national level, can file a complaint against a state on an alleged violation of their rights. These procedures involve a broad variety of situations and cases in which cultural diversity may play a role.<sup>65</sup> Two practices developed by the international supervisory bodies that can serve as examples of how cultural diversity enters the monitoring procedures are the doctrine of the margin of appreciation and the assessment criteria of prior and informed consent and impact on the enjoyment of cultural rights.

### *Margin of Appreciation*

The margin of appreciation or margin of discretion refers to the room for manoeuvre national authorities have in fulfilling their obligations under international human rights law. It is most developed in the European context by the European Court of Human Rights. It builds on the idea that it should be left to the states parties to implement the rights and that the European Court should only intervene if it clearly finds that the state party has failed in that effort. The European Court expressed this position for the first time in the *Handyside* case, arguing that there is no uniform European conception of morals and that the view on this in states parties varies and may change. Therefore, the Court found that 'state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction.'<sup>66</sup>

The margin of appreciation doctrine is a means of judicial constraint and deference, of expressing the subsidiarity of the European Convention to national legislation and of demarcating the room left for national sovereignty vis-à-vis supranational control.<sup>67</sup> It is mainly used for assessing the limitations of rights by states, in situations where the Court finds itself less competent to determine whether a certain limitation is necessary in a democratic society and whether there is a pressing social need.

Some see the margin of appreciation doctrine as a danger to the universality of the norms.<sup>68</sup> Others, including myself, consider the margin of appreciation as a valuable means for supervisory bodies to allow states to diversify in the implementation of international norms.<sup>69</sup> This should, as is also emphasised by the institutions themselves, always go hand in hand with international supervision, to make sure that national implementation and supervision meet minimum standards. That the European Court sometimes uses the margin inconsistently is a matter of concern in this regard. Also, the supervisory bodies should ensure that the use of the margin of appreciation does not merely protect majority interests in a state.<sup>70</sup>

A lot of research has been done on the margin of appreciation in the context of the European Convention on Human Rights. Additional research could be done on the way the UN treaty bodies have explicitly or implicitly used the margin of appreciation doctrine.<sup>71</sup>

Interestingly, global and regional supervisory bodies may sometimes disagree and reach opposite conclusions in similar cases. This happened in two similar cases against France, one of which was brought before the UN Human Rights Committee (HRC) while the other was brought before the European Court of Human Rights (ECtHR).<sup>72</sup> Both cases concerned persons of Sikh origin living in France wearing a turban. They were forced to remove their turban for the purpose of taking a photo, in the ECtHR case for a driving licence and in the HRC case for a residence permit. The Sikhs refused, because taking off their turbans in their eyes was a rejection of their faith and made them feel deeply humiliated and degraded. Both the HRC and the ECtHR agreed that the requirement to appear bareheaded on identity photos interfered with these persons' rights to freedom of religion. France, however, justified this interference by referring to security and public order. The European Court accepted the French argument and found that this fell within the margin of appreciation of the state. It declared the case inadmissible. The HRC, however, found that France had not sufficiently explained why wearing a turban, which leaves the face clearly visible, would make it difficult to identify a person and how photos in which people appear bareheaded help to avert the risk of fraud or falsification of official documents. It therefore concluded that the right to freedom of religion had been violated.<sup>73</sup>

### *Participation and Impact Assessment*

Several international supervisory bodies have dealt with cases concerning cultural diversity issues and indigenous peoples. Interestingly, they have extended the scope of certain human rights norms to accommodate land rights. The HRC, as well as the regional institutions in Europe<sup>74</sup>, the Americas<sup>75</sup> and Africa<sup>76</sup> have acknowledged that land rights for indigenous peoples, which are not included in any of the global or regional human rights treaties, may fall within the scope of several human rights provisions, such as the right to life, the right to health and the right to enjoy culture, precisely because of the cultural dimension of land to indigenous peoples. In assessing whether an interference with these rights by the state amounts to a violation, the different institutions broadly apply two criteria: the involvement and consultation of the community concerned and the impact on the actual enjoyment of the rights.

Let me illustrate this by the caselaw of the HRC on Article 27 ICCPR. Regional institutions have done a similar assessment. The cases before the HRC broadly concerned indigenous peoples and their rights to land, which were interfered with by the state to promote economic development by granting permissions to companies for logging, mining, etc.<sup>77</sup> As a consequence, indigenous peoples were prevented from using the land for their traditional ways of hunting, fishing and reindeer and llama herding. The HRC has consistently argued that such traditional ways of living fall within the scope of ‘the enjoyment of culture’ as protected by Article 27. Interestingly, it has taken a dynamic approach on the concept of culture and argued that Article 27 ICCPR not only protects the *traditional* economic activities or means of livelihood of a community. The fact that, for example, technological innovations are used in these economic activities or that means are adapted to the modern way of life and technology, does not imply that Article 27 is no longer applicable.<sup>78</sup>

The cases further show that the HRC assesses the interference by the state according to two criteria: first, has the community effectively participated in the decision making process, taking into account that effective participation ‘requires not mere consultation, but the free, prior and informed consent of the members of the community.’ Second, are the measures taken proportional, in other words, do they not have such a negative impact on the culture of the community, that they endanger the very survival of the community and its members.<sup>79</sup> The impact and proportionality assessment show interesting similarities with the assessment of proportionality and the use of the margin of appreciation by the European Court of Human Rights.

The above shows that international monitoring bodies play a crucial role in assessing whether states have found a proper balance between universal norms and national implementation, including the accommodation of cultural diversity. More research could be done in the coming years on these issues, in particular on the UN treaty bodies, especially those with a relative short history of supervision, such as the Committee on Migrant Workers, or the ones with new individual complaint procedures, such as the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child.<sup>80</sup>

## Eye for Cultural Diversity but not Blind

Although international human rights law has eye for cultural diversity, it should not be blind to the challenges posed by cultural diversity. As stated above, culture may have negative effects as well. Culture can be used as a justification for harmful practices that are in conflict with or limit the enjoyment of

human rights. Cultural practices are very diverse, which makes it impossible to make general, abstract statements about their acceptability in relation to human rights. However, it should be emphasised that cultural practices that are clearly in conflict with international human rights law cannot be justified as a reflection of cultural diversity. Respect for cultural diversity cannot be an argument to systematically or grossly deny international human rights law. In other words, in order for cultural practices to be accepted, they should not be in conflict with the values underlying international human rights law: human dignity, integrity and equality. In the Universal Declaration on Cultural Diversity and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions it was clearly laid down that no one may invoke cultural diversity in order to infringe upon human rights as guaranteed by the UDHR and by international law, or to limit the scope thereof.<sup>81</sup>

It should be noted that harmful cultural practices are often formally prohibited by law. Even so, they may be practised, and sometimes even condoned by states. This also shows that law alone cannot solve all issues and cannot by itself change cultural practices. Changes in cultural practices are most successful if they arise within the cultural community itself and are not imposed from outside, by law or by the state. This does of course not relieve states from the responsibility to find ways to promote such changes.

Several treaties emphasise this role of the state in eradicating harmful cultural practices. The UN Convention on the Elimination of All Forms of Discrimination Against Women, for example, states in Article 5 that 'States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'<sup>82</sup> The CRC contains in Article 24(3) that 'States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.'<sup>83</sup>

Several treaty bodies have also emphasised the role of the state in abandoning cultural practices that are against human rights. The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) has adopted a specific recommendation on female circumcision, urging States to eradicate this practice harmful to the health of women.<sup>84</sup> In its General Comment on the equal enjoyment of rights, the HRC has also stated that 'States Parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all Covenant rights.'<sup>85</sup> It has also listed a number of harmful cultural practices as violations of human rights. It maintains that fe-



male infanticide, widow burning and dowry killings are violations of the right to life, that forced abortion, forced sterilisation and forced genital mutilation are violations of the right not to be subjected to inhumane and degrading treatment, and that forced male guardianship is a violation of the freedom of movement.<sup>86</sup>

UN treaty bodies further systematically encourage states to promote changes in harmful cultural practices in their dialogue with states under the periodic reporting procedure. Studies have shown that states during this dialogue often – at least formally – agree on the harmfulness or unacceptability of such practices, which is why they are prohibited by law. These states point out, however, that changing the deeply rooted cultural convictions of certain communities is difficult and requires time and patience. Formal legislation prohibiting harmful practices and culturally motivated violence is not sufficient to eliminate the practice altogether.<sup>87</sup>

What becomes clear is that the adoption of laws prohibiting harmful cultural practices may be necessary, but that it is not always the most effective way to get rid of them: education, awareness raising are other important elements in this regard. And sometimes a law can even be counterproductive, especially if it is itself in violation of human rights.

A good example of this, in my view, is the proposed ban on the wearing of facial coverage in public buildings, public transport and educational and health institutions in The Netherlands. Although other forms of facial coverage are also covered by this law, it is primarily aimed at women wearing full body and face coverage, popularly referred to as a burqa. The reason for the law is that a burqa or niqaab would be an obstacle to open communication and would not fit in a social order in which women have their own, equal position in public life. Furthermore, the law aims to protect women, because 'it cannot be excluded' that these women do not wear a face cover out of their own choice, but are forced to do so by their relatives or tradition.<sup>88</sup> Although it is admitted that this law implies a limitation of the right to freedom of religion, the government finds such limitation necessary and proportionate to achieve the aim of protecting public order, which includes open communication and equality between men and women.<sup>89</sup> It is also admitted that this law implies indirect discrimination on the basis of sex and religion, but the Dutch government finds a reasonable justification in the interest of a general norm allowing all to equally participate in public life.<sup>90</sup>

The Council of State rejected the law, as it did with earlier similar proposals. It concludes that the government aims to solve a principal problem with legal means and asks the crucial questions: is there a principle problem and can and should this problem be solved by this law? It answers both questions in the

negative. Its arguments, in a nutshell, are these: it cannot be assumed that women are forced to wear facial coverage; feelings of safety are mainly subjective and cannot be a basis for a general prohibition; and the limitation of the freedom of religion does not meet a pressing social need and is not proportionate to the aim pursued.<sup>91</sup> The government did not agree with the Council of State and has decided to send the law to the Lower House anyway. The Minister of the Interior will defend the law, even though after the fall of the Dutch government last April she stated that she would not shed a tear if the law would never pass.<sup>92</sup>

It will not come as a surprise that I agree with the Council of State. The most important argument is that this law is too much of an exercise for something of which it is not clear what the problem is. And if there is a problem, there are other, more appropriate ways to solve it. Let us first try to unveil the problem. Many premises are put forward in the law, but not all of them are proven by facts. Professor Moors of the University of Amsterdam has done a very interesting study on women wearing face coverage in The Netherlands.<sup>93</sup> I advise everyone to read this study, because it really is an eye-opener.

Moors firstly criticises the use of the term 'burqa'. In fact, hardly any woman in The Netherlands wears a burqa. The term burqa refers to the blue full body dress that is worn by women in, for instance, Afghanistan. Women in The Netherlands mostly wear a black, loose veil covering their faces.<sup>94</sup> Moors estimates from her study that around 100 women regularly wear a face veil and around 400 women do so occasionally.<sup>95</sup> This means that our 'problem' is caused by about 500 women. Moors further eliminates or nuances a lot of the prejudices surrounding the wearing of the face veil. She argues that a face veil could indeed be an obstacle to open communication and participation in society. However, women wearing face veils are not the only ones creating such obstacles. There are a number of other groups in society that do not want to participate in social life for religious or other reasons. And is communication with a woman wearing a face veil more difficult then, for instance, with a person whose face is fully covered with tattoos? Moreover, communication is full of means that are used without people actually seeing each other, such as telephone, email and social media.<sup>96</sup> Moors further argues that there is no causal relationship between the wearing of a face veil and the neglect or suppression of women. The women involved do not consider the veil as a symbol nor as a means of suppression. Most women indicate that they are not forced at all by their husbands or family members to wear the face veil. It is more the opposite, husbands and family members discourage or disapprove of it.<sup>97</sup> She concludes that the attention for the face veil is disproportionate and that there is no real social problem.<sup>98</sup>

I could not agree more. And I would like to add that even if there is a real problem, it is questionable whether a law prohibiting this practice would actually solve it. If women were really forced to wear a face veil, criminalising them is likely to have an adverse effect. If we really can say that women wear the face veil because they feel subordinate to men, it seems better to address this issue by dialogue and education than by forcing them to change their views by law. Cultures and identities are not static, change is possible and human rights can be instrumental in such change.

## Concluding Remarks

I have tried to show that the international human rights system, including standards, norms and supervisory mechanisms, allows for the flexibility to be receptive to cultural pluralism, between and among states, communities and individuals. Individuals and communities can use international human rights law to develop and maintain cultures and promote and protect their own cultural identity. States, while implementing international human rights law, have to balance different cultural interests. States' performance in this regard is monitored by national and international supervisory bodies.

At the same time, the flexibility of the international human rights system is not unlimited and not all expressions of cultural diversity are protected by international human rights law. There is no room for flexibility in cases of gross human rights violations. Accommodation of diversity cannot condone harmful cultural practices or the exclusion of certain categories of persons, such as women, from the enjoyment of human rights.

International human rights law and cultural diversity require mutual respect: the reception of cultural diversity can only take place in a context in which the cultural community involved shows respect for international human rights law. Cultural communities may have a certain amount of freedom to arrange their internal structure and institutions, but they should always guarantee and respect the rights and freedoms of their individual members, including, among other things, 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, e.g. through education, election processes and labour.<sup>99</sup>

To conclude: The international human rights system offers many entry points to accommodate and promote cultural diversity. The flexible character of international human rights law should not be seen as a sign of weakness,

but as an acknowledgement of the necessity to incorporate the large variety of situations of individuals, communities and states in a universal system. International human rights law provides many possibilities for individuals and communities to enjoy, maintain and develop their culture, which is so crucial for them to be able to live their lives in dignity.

Returning to Donders' law: the international human rights system serves as the brain that promotes a steady multidimensional focus, while allowing for the moves and turns that are necessary to accommodate cultural diversity at different levels and among different states, communities and individuals. However, just as the real brain is still largely a mystery to us, there is still a lot of research to be done in the area of human rights and cultural diversity. I hope, together with others within and outside this Faculty, to contribute to such research in the coming years.

## Notes

1. This constitutes an expanded version of my inaugural lecture spoken at 29 June 2012, with full citation references. The author would like to express her thanks to Janneke Gerards and Nicola Jägers for their valuable input and Celine Vossen for her help in collecting documents.
2. J. Molenschot, 'La morte di Francisco Cornelio Donders', *L'opinione, Giornale quotidiano*, 26 Marzo 1889, No. 84, in: B.J. Stokvis, 'Levensbericht F.C. Donders', in: *Jaarboek*, 1891, Amsterdam, pp. 1-35 at 25, made available by the digital library of the Royal Netherlands Academy of Arts and Sciences (KNAW).
3. Donders' Law: 'for any determinate position of the line of fixation with respect to the head, there corresponds a definite and invariable angle of torsion, independent of the volition of the observer and independent of the manner in which the line of fixation has been brought to the position in question', *Medical Encyclopedia*, 2012: <http://www.uu.nl/NL/universiteitsmuseum/collectie/humanegeneskunde/oogheelkunde/Pages/PhaenophthalmotroopvanDonders.aspx> (last accessed 1 June 2012)
4. *Universal Declaration on Cultural Diversity*, proclaimed by the General Conference of UNESCO, Paris, 2 November 2001, preamble.
5. Y.M. Donders, *Towards a Right to Cultural Identity?*, School of Human Rights Research Series, No. 15, Intersentia, Antwerp, 2002, pp. 29-32; W. Kymlicka, *Multicultural Citizenship – A Liberal Theory of Minority Rights*, Clarendon Press, Oxford, 1995, p. 83; B. Parekh, *Rethinking Multiculturalism – Cultural Diversity and Political Theory*, Macmillan Press, Basingstoke, 2000, pp. 143-144, 153.
6. World Commission on Culture and Development, *Our Creative Diversity*, UNESCO Publishing, Paris, 1995, p. 11.
7. *Universal Declaration on Cultural Diversity*, proclaimed by the General Conference of UNESCO, Paris, 2 November 2001, preamble.
8. *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted by the General Conference of UNESCO on 20 October 2005, entry into force on 18 March 2007, Article 2(1).
9. 'Statement on Human Rights', 49 *American Anthropologist* 539, 542, 1947, submitted to the UN Human Rights Commission drafting the Universal Declaration of Human Rights. See on universalism and cultural relativism, *inter alia*, J. Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, London, 1989, pp. 107-160; Douglas Lee Donoho, 'Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards', 27 *Stanford Journal on International Law*, 1990-1991, pp. 345-391; Fernand de Varennes, 'The Fallacies in the "Universalism versus Cultural Relativism" Debate in Human Rights Law', *Asia Pacific Journal on Human Rights and the Law* 1, 2006, pp. 67-84; Eibe Riedel, 'Universality of Human Rights and Cultural Pluralism', in: Ch. Starck (ed.): *Constitutionalism, Universalism and Democracy: A Comparative Analysis* (Studien und Materialien zur Verfassungsgerichtsbarkeit), Vol. 75, 1999, pp. 25-52; Ann-Belinda

- S. Preis, 'Human Rights as Cultural Practice: An Anthropological Critique', *Human Rights Quarterly*, Vol. 18 No. 2, 1996, pp. 286-315.
10. *Universal Declaration on Human Rights*, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.
  11. The European Court of Human Rights has adopted this approach by stating that, while the purpose of the European Convention on Human Rights was to lay down international standards, 'this does not mean that absolute uniformity is required'. See ECtHR, *Sunday Times v. United Kingdom*, Appl. No. 13166/87, decision of 26 November 1991, para. 61.
  12. Advisory Council on International Affairs, *Universality of Human Rights. Principles, Practice and Prospects*, Advice No. 63, The Hague, November 2008, p. 19.
  13. Jack Donnelly, 'The Relative Universality of Human Rights', *Human Rights Quarterly* 29, 2007, pp. 281-306, at 281 and 300.
  14. Eva Brems, 'Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam', *Human Rights Review*, Vol. 5, No. 3, April-June 2004, pp. 5-21, at 11-12; Eva Brems, 'Reconciling Universality and Diversity in International Human Rights Law', in: Andras Sajó (ed.), *Human Rights with Modesty: the Problem of Universalism*, Koninklijke Brill, 2004, pp. 213-230, at 223-225. Other authors agree that the international human rights system should be or is flexible enough to integrate cultural differences: Niels Petersen, 'International Law, Cultural Diversity and Democratic Rule: Beyond the Divide Between Universalism and Relativism', *Asian Journal of International Law*, 1, 2011, pp. 149-163, at 149-150; David Kinley, 'Bendable Rules: The Development Implications of Human Rights Pluralism', in: B. Tamanaha, C. Sage and M. Woolcock (eds.), *Legal Pluralism and Development – Scholars and Practitioners in Dialogue*, CUP, 2012, pp. 50-65. Other authors, however, also emphasise the need for a flexible and dynamic approach of cultures, see Preis, 1996, *supra* note 9, pp. 296-297; Brems in Sajó, 2004, pp. 226-227.
  15. Abdullahi Ahmed An-Na'Im (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, Pennsylvania, 1991, pp. 4-5.
  16. Kinley, 2012, *supra* note 14, pp. 50-51.
  17. *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted by the General Conference of UNESCO on 20 October 2005, entry into force on 18 March 2007.
  18. The European Court of Human Rights has maintained that pluralism is crucial for democratic societies. It has stated that 'the existence of minorities and different cultures in a country is a historical fact that a democratic society has to tolerate and even protect and support according to the principles of international law.' See ECtHR, *Sidiropoulos and others v. Greece*, Appl. No. 26695/95, 10 July 1998, paras. 41 and 44. It has furthermore stated that the State should not oppose possible tension between different communities by eliminating pluralism, but should ensure that different communities tolerate each other, see ECtHR, *Serif v. Greece*, Appl. No. 38178/97, 14 December 1999, paras. 39, 45, 50, 52-45. See, also ECtHR, *Kjeldsen, Busk, Madsen and Pedersen v. Denmark*, Appl. Nos. 5095/71; 5920/72 and 5926/92, 7 December 1976, para. 50, in which the Court confirmed that pluralism in education is crucial in a democratic society.

19. The term 'pluralism' is also used to describe differences in legal systems and procedures or in institutional structures between and within States. Here I focus on cultural pluralism in relation to the substantive aspects of international human rights law.
20. Research shows that these reservations often reflect the same issues as expressed during the drafting of the treaty. See J. Klabbers, 'On Human Rights Treaties, Contractual Conceptions and Reservations', in I. Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation*, 2004, pp. 149-182, at 182.
21. Seibert-Fohr, 'The Potentials of the Vienna Convention on the Law of Treaties with respect to Reservations to Human Rights Treaties', in I. Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation*, 2004, pp. 183-211, at 184.
22. Eric Neumayer, 'Qualified Ratification: explaining reservations to international human rights treaties', 36(2) *Journal of Legal Studies*, 2007, pp. 397-430 at 398.
23. *Ibidem*, p. 398; V. Pergantis, 'Reservations to Human Rights Treaties, Cultural Relativism and the Universal Protection of Human Rights', in K. Koufa (ed), *Multiculturalism and International Law*, 2007, pp. 429-464, at 433-434, 437, 447.
24. *Vienna Convention on the Law of Treaties*, United Nations, Treaty Series, vol. 1155, p. 331, done at Vienna on 23 May 1969, entry into force on 27 January 1980, article 19(c).
25. *Vienna Convention on the Law of Treaties*, article 20.
26. *Convention on the Rights of the Child*, United Nations, Treaty Series, vol. 1577, p. 3, done at New York, 20 November 1989, entry into force on 2 September 1990.
27. The texts of the reservations and objections were taken from the website of the UN Office of the High Commissioner for Human Rights [www.ohchr.org](http://www.ohchr.org) and the UN treaty collection database, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (last accessed on 1 June 2012).
28. See the objections by Austria, Denmark, Germany, Ireland, The Netherlands, Norway, Portugal and Sweden.
29. As the Human Rights Committee stated: 'because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant', see Human Rights Committee, *General Comment No. 24: 'Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant'*, Fifty-Second Session, 4 November 1994 (UN Doc. CCPR/C/21/Rev.1/Add.6) para.17. See, also, Christine Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women', in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out – Reservations and Objections to Human Rights Conventions*, 1997, pp. 64-84, at 76; L. Lijnzaad, *Reservations to UN Human Rights Treaties – Ratify or Ruin?*, Martinus Nijhoff Publishers, Dordrecht/Bostons/London, 1994, p. 105.

30. This is in line with Article 20(4)(b) of the Vienna Convention on the Law of Treaties.
31. The latter is also included in Article 30 of the Convention on the Rights of the Child.
32. Committee on the Rights of the Child, *Consideration of Reports of States Parties – Canada*, 30 May 1995, UN Doc. CRC/C/SR.214, para. 59.
33. Committee on the Rights of the Child, *Concluding Observations Canada*, 20 June 1995, UN Doc. CRC/C/15/Add.37, para. 18; *Concluding Observations Canada*, 27 October 2003, UN Doc. CRC/C/15/Add.215, para. 6; *Concluding Observations Djibouti*, 7 October 2008, UN Doc. CRC/C/DJI/CO/2, paras. 8-9; *Concluding Observations Qatar*, 14 October 2009, UN Doc. CRC/C/QAT/CO/2, paras. 9-10.
34. *African (Banjul) Charter on Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, entry into force on 21 October 1986; *American Convention on Human Rights (Pact of San José, Costa Rica)*, adopted on 22 November 1969, entry into force on 18 July 1978; *Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No. 005, adopted on 4 November 1950, entry into force on 3 September 1953.
35. UN World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 25 June 1993, para. 37, 31 ILM, 1993, 1661; UN Doc A/47/49, 1992, GA Res. 47/125, *Regional arrangements for the promotion and protection of human rights*, 47 U.N. GAOR Supp. (No. 49) p. 198. See, also, Christoph Schreuer, 'Regionalism v. Universalism', 6 *EJIL*, 1995, pp. 477-499, at 484.
36. On the issue of duties and collective rights in the African Charter as a reflection of African history and culture, see Makau Wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', *Virginia Journal of International Law*, Vol. 35, 1994-1995, pp. 339-380.
37. *The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (Convention of Belém do Pará), adopted on 9 June 1994; entry into force on 5 March 1995.
38. *The Inter-American Convention on Forced Disappearance of Persons*, adopted on 9 June 1994; entry into force on 28 March 1996.
39. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 *Afr. Hum. Rts. L.J.* 40, entry into force on 25 November 2005.
40. *Council of Europe Framework Convention for the Protection of National Minorities*, adopted on 1 February 1995, entry into force on 1 February 1998, CETS No. 157; *European Charter on Regional and Minority Languages*, adopted 5 November 1992, entry into force on 1 March 1998, CETS No. 148.
41. I focus on general international human rights instruments, not on the specific instruments adopted for certain peoples or communities, such as indigenous peoples or minorities. Such instruments, for example the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992) and the UN Declaration on the Rights of Indigenous Peoples (2007), contain several provisions recognising and valuing their specific cultural characteristics and giving them rights to preserve and promote them.



42. Donders, 2002, *supra* note 5, pp. 163-166.
43. Human Rights Committee, *General Comment No. 18, Non-Discrimination*, 10 November 1989, para. 8. The European Court of Human Rights has reaffirmed this in many cases, including the cases of *Thlimmenos v. Greece*, Appl. No. 34369/97, 6 April 2000, para. 44 and *D.H. and others v. the Czech Republic*, Appl. No. 57325/00, 7 February 2006, para. 44.
44. Legal doctrine generally distinguishes between differentiation, distinction and discrimination. Differentiation is difference in treatment that is lawful; distinction is a neutral term which is used when it has not yet been determined whether difference in treatment is lawful or not; and discrimination is difference in treatment that is arbitrary and unlawful. Consequently, only treatment that results in discrimination is prohibited. See M. Bossuyt, *Prevention of Discrimination – The Concept and Practice of Affirmative Action*, 17 June 2002, UN Doc. E/CN.4/Sub. 2/2002/21, para. 91, p. 20.
45. See, also, Article 1(4) of the *International Convention on the Elimination of Racial Discrimination*, adopted by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force on 4 January 1969: ‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.’ The Human Rights Committee has further stated that the principle of equality under Article 26 ICCPR may sometimes require States parties to take affirmative action to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the ICCPR. Human Rights Committee, *General Comment No. 18, Non-Discrimination*, 10 November 1989, para. 10.
46. Committee on Economic, Social and Cultural Rights, *General Comment No. 13, The Right to Education*, 8 December 1999, paras. 32-33.
47. ECtHR, *Belgian Linguistics case or Roger van de Berghe v. Belgium*, Application No. 2924/66, European Court of Human Rights, Decision of 23 July 1968, 11 YEHR, 1968, p. 412. See, also, the *Council of Europe Framework Convention for the Protection of National Minorities*, adopted on 1 February 1995, entry into force on 1 February 1998, CETS No. 157, Article 13 which includes that persons belonging to a national minority have the right to set up and manage their own private educational establishments, but that this shall not entail any financial obligation for states parties.
48. For a long time, it was argued that cultural rights were a neglected and underdeveloped category of human rights. The last decades, more interest is shown by academics, States and monitoring bodies. See, inter alia: Y.M. Donders, *Towards a Right to Cultural Identity?*, Antwerp: Intersentia, 2002; F. Francioni & M. Scheinin (eds.), *Cultural Human Rights*, Leiden: Martinus Nijhoff Publishers, 2008; S.A. Hansen, ‘The Right to Take Part in Cultural Life: Towards Defining Minimum Core Obligations Related to Article 15(1)(a) of the International Covenant on Economic, So-

- cial and Cultural Rights', in: A. Chapman & S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Antwerp: Intersentia, 2002, pp. 279-304; S. Marks, 'Defining Cultural Rights' in: M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjorn Eide*, Leiden: Martinus Nijhoff Publishers, 2003, pp. 293-324; P. Meyer-Bisch, (ed.), *Les Droits Culturels, une catégorie sous-développée de droits de l'homme, Actes du VIIIe Colloque interdisciplinaire sur les droits de l'homme*, Fribourg: Editions Universitaires, 1993; Laura Reidel, "What are Cultural Rights? Protecting Groups with Individual Rights", *Journal of Human Rights*, 9:1, 2010, pp. 65-80. See, also, the *Déclaration des droits culturels*, drafted by the Fribourg Group of experts and launched in Geneva on 8 May 2007, see (<http://www.unifr.ch/iiedh/fr/publications/declaration-de-fribourg>). An important development in the further elaboration of cultural rights is the mandate of the Special Rapporteur in the Field of Cultural Rights, which was extended in April 2012 by the Human Rights Council: UN Doc. A/HRC/RES/19/6, 3 April 2012.
49. *International Covenant on Civil and Political Rights*, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976; *International Covenant on Economic, Social and Cultural Rights*, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.
  50. Y.M. Donders, 'The legal framework of the right to take part in cultural life', in: Y. Donders & V. Volodin (eds.), *Human Rights in Education, Science and Culture: Legal Developments and Challenges*, Paris: UNESCO/Ashgate Publishing, December 2007, pp. 231-272.
  51. Committee on Economic, Social and Cultural Rights, *General Comment No. 21 on The Right of Everyone to Take Part in Cultural Life* (Article 15 para. 1(a) of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, 21 December 2009. The Council of Europe Parliamentary Assembly adopted a Recommendation on the right of everyone to take part in cultural life, Recommendation 1990, adopted by the Assembly on 24 January 2012 (4<sup>th</sup> sitting).
  52. ECtHR, *Müller and others v. Switzerland*, Appl. No. 10737/84, 24 May 1988; ECtHR, *Vereinigung Bildender Künstler v. Austria*, Appl. No. 68354/01, 25 January 2007; ECtHR, *Ulusoy and others v. Turkey*, Appl. No. 34797/03, 3 May 2007; ECtHR, *Kar and others v. Turkey*, Appl. No. 58756/00, 3 May 2007; ECtHR, *Ekin Association v. France*, Appl. No. 39288/98, 17 July 2001; ECtHR, *Akdas v. Turkey*, Appl. No. 41056/04, 16 February 2010.
  53. ECtHR, *Sidiropoulos and others v. Greece*, Appl. No. 26695/95, 10 July 1998; ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Appl. Nos. 29221/95 and 29225/95, 2 October 2001 and ECtHR, *Gorzelik and others v. Poland*, Appl. No. 44158/98, 20 December 2001.
  54. Committee on Economic, Social and Cultural Rights, *General Comment No. 14, The Right to the Highest Attainable Standard of Health (Article 12)*, 11 August 2000, para. 12c.
  55. These have been added to the list of intangible heritage in 2010 under the *Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted on 17 Octo-

- ber 2003, entered into force on 20 April 2006, UNESCO Doc. MISC/2003/CLT/CH/14. See: <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011>
56. Committee on Economic, Social and Cultural Rights, *General Comment No. 12, The Right to Adequate Food (Article 11)*, 12 May 1999, paras. 7, 8 and 11.
  57. ECtHR, *Chaàre Shalom ve Tsedek v. France*, Appl. No. 27417/95, 27 June 2000. In this case the European Court argued that ritual slaughtering falls within the scope of article 9 (freedom of religion) and that interferences have to be assessed by the limitation criteria of Article (2) ECHR.
  58. See Article 14 ICCPR and Article 6 ECHR and ECtHR, *Kamasinski v. Austria*, Appl. No. 9783/82, 19 December 1989, para. 74.
  59. ECtHR, *Buckley v. the United Kingdom*, Appl. No. 20348/92, 25 September 1996 and ECtHR, *Chapman v. the United Kingdom*, Appl. No. 27238/95, 18 January 2001.
  60. An important exception is the right to self-determination in Article 1 ICESCR and Article 1 ICCPR, which is defined as a right of peoples. The African Charter on Human and Peoples' Rights (1981) includes the collective right of peoples to cultural development (Article 22). The UN Declaration on the Rights of Indigenous Peoples (2007) includes collective rights to self-determination and cultural autonomy (Articles 3 and 4).
  61. Donders, 2002, *supra* note 5, pp. 103-105; Brems in Sajo, 2004, *supra* note 14, p. 229.
  62. Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.), *International Human Rights Law*, OUP, 2010, p. 132.
  63. According to Kinley, the limitation clauses were originally not meant to reflect or allow for cultural pluralism. They were included for political pragmatic reasons, to ensure that States kept their competence to curtail or suspend rights if necessary. However, they have always been used as a vehicle for protecting cultural differences. See Kinley, 2012, *supra* note 14, pp. 52-53.
  64. Monitoring is also performed by the Human Rights Council, for instance through the Universal Periodic Review Process, but as this is a political body, composed of states' representatives, it is not dealt with here.
  65. See, for an overview of the practice of the treaty bodies Michael Ado, 'Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights', *Human Rights Quarterly*, Vol. 32, No. 3, August 2010, pp. 601-664. An overview of cases for the European Court of Human Rights is given in Council of Europe, Research Division, *Cultural Rights in the Caselaw of the European Court of Human Rights*, January 2011; Eva Brems, 'Human Rights as a Framework for Negotiating/Protecting Cultural Differences – An Exploration of the Case-Law of the European Court of Human Rights', in: Marie-Claire Foblets, Jean-Francois Gaudreault-Desbiens and Alison Dundes Renteln (eds.), *Cultural Diversity and the Law – State Responses from Around the World*, Brussels, 2010, pp. 663-715. See, also, Yvonne M. Donders, 'Do Cultural Diversity and Human Rights make a Good Match?', *International Social Science Journal* 199, 2010, UNESCO, Blackwell Publishing, pp. 15-35.
  66. ECtHR, *Handyside v. the United Kingdom*, Appl. No. 5493/72, 12 December 1976, publications ECHR, Series A, Vol. 24, para. 49.
  67. Brems, 2010, *supra* note 14, pp. 686-687; Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', *European Law Journal*, Vol. 17, No. 1,

- January 2011, pp. 80-120, at p. 104; Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', *EJIL* Vol. 16 No. 5, 2005, pp. 907-940.
68. Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards', 31 *NYU Journal of International Law and Politics*, Vol. 31, 1998-1999, pp. 843-854 at pp. 843-844.
  69. Sweeney shows convincingly that cultural variations permitted by the use of the margin of appreciation do not amount to cultural relativism and do not undermine universality. See J.A. Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era', *ICLQ*, Vol. 54, 2005, pp. 459-474.
  70. Benvenisti, 1998-1999, *supra* note 68, pp. 848-853; Brems, 2010, *supra* note 14, pp. 691, 713.
  71. An example of the HRC explicitly using the margin of appreciation doctrine is the case of *Hertzberg and Others v. Finland*, Comm. No. 61/1979, 2 April 1982 (UN Doc. CCPR/C/15/D/61/1979), para. 10.3: 'public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the national authorities.' An example where the HRC explicitly stated not to apply the margin doctrine is the case of *Ilmari Lämsmäen et al. v. Finland*, Comm. No. 511/1992, 26 October 1994 (UN Doc. CCPR/C/52/D/511/1992), para. 9.4: 'A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27.' An example of a case in which the HRC did not explicitly apply the margin doctrine, but used a similar method is the case of *Mahuika et al v. New Zealand*, Comm. No. 547/1993, 27 October 2000 (UN Doc. CCPR/C/70/D/547/1993), paras. 9.10 and 9.11 in which the HRC elaborated on the national context in which the limitations were to be considered.
  72. Human Rights Committee, *Ranjit Singh v. France*, Communication No. 1876/2000, 27 September 2011 (UN Doc. CCPR/C/102/D/1876/2009); ECtHR, *Mann Singh v. France*, Appl. No. 24479/07, 27 November 2008, inadmissibility decision. See, also ECtHR, *Phull v. France*, Appl. No. 35753/03, 11 January 2005, inadmissibility decision (concerning security checks at airports).
  73. Human Rights Committee, *Ranjit Singh v. France*, Communication No. 1876/2000, 27 September 2011 (UN Doc. CCPR/C/102/D/1876/2009) para. 8.4.
  74. ECtHR, case of *G. and E. v. Norway*, Appl. Nos. 9278/81 and 9415/81, 3 October 1983.
  75. Inter-American Commission on Human Rights, *Yanomami Indians in Brazil*, Case No. 7615, Inter-American Commission Res. No. 12/85, 5 March 1985, concerning the protection of culture in relation to the right to health OAS Doc. OEA/Ser. L/V/II.66, doc. 10, rev. 1; Inter-American Court of Human Rights, *Mayagna (Sumo) Indigenous Community of Awas Tingi versus the Republic of Nicaragua*, Ser. C, Case No. 79, judgment of 31 August 2001, concerning the collective dimension of the right to property to be respected by States in accordance with indigenous customs.

76. The African Commission on Human and Peoples' Rights has for some time been hesitant to deal with indigenous peoples' rights, because it found the common use of the term 'indigenous peoples' not to be applicable to the African context, because it considered all Africans to be indigenous to Africa, being pre-colonial and original to the continent. It did, however, deal with indigenous land rights in the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya*, Communication 276/2003, decision adopted by the African Commission on Human and Peoples' Rights in May 2009 and endorsed by the African Union in January 2010. See, Kaeleboga N. Bojosi and George Mukundi Wachira, 'Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights', *African Human Rights Law Journal*, 6, 2006, pp. 382-406; Jeremie Gilbert, "'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights', *ICLQ* Vol. 60, January 2011, pp. 245-270.
77. *Ivan Kitok v. Sweden*, Comm. No. 197/1985, 27 July 1988 (UN Doc. CCPR/C/33/D/197/1985); *Ilmari Länsman et al. v. Finland*, Comm. No. 511/1992, 26 October 1994 (UN Doc. CCPR/C/52/D/511/1992); *Jouni E. Länsman et al. v. Finland*, Comm. No. 671/1995, 30 October 1996 (UN Doc. CCPR/C/58/D/671/1995); *Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, Comm. No. 779/1997, 24 October 2001 (UN Doc. CCPR/C/73/D/779/1997); *Angela Poma Poma v. Peru*, Comm. No. 1457/2006, 24 April 2009 (UN Doc. CCPR/C/95/D/1457/2006) .
78. *Ilmari Länsman et al. v. Finland*, Comm. No. 511/1992, 26 October 1994, para. 9.3.
79. *Angela Poma Poma v. Peru*, Comm. No. 1457/2006, 24 April 2009, para. 7.6.
80. The Optional Protocol to the ICESCR (UN Doc. A/RES/63/117) was adopted on 10 December 2008 and has 8 ratifications out of the 10 needed to enter into force. The Optional Protocol to the CRC (UN Doc. A/RES/66/138) was adopted on 19 December 2011 and has no ratifications yet. Ten ratifications are needed to enter into force.
81. *Universal Declaration on Cultural Diversity*, UNESCO, 2001, Article 4; *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, UNESCO, 2005, Article 2(1).
82. A similar provision can be found in Article 2(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005): 'States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men...with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes...' See, also, Rikki Holtmaat and Jonneke Naber, *Women's Human Rights and Culture-From Deadlock to Dialogue*, Intersentia, 2011, pp. 9-50.
83. Although 'traditional practices' are not defined, it becomes clear from the drafting documents that this provision was targeted against FGM. See Sonia Harris-Short, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural relativism and the UN Convention on the Rights of the Child', *Human Rights Quarterly*, Volume 25, No. 1, February 2003, pp. 130-181, at 136-137.

84. Committee on the Elimination of All Forms of Discrimination Against Women, *General Recommendation No. 14, Female Circumcision*, ninth session, 1990.
85. Human Rights Committee, *General Comment No. 28, Equality of Rights Between Men and Women (Article 3)*, 29 March 2000, UN Doc. CCPR/C/21/Rev.1/Add. 10, para. 5.
86. *Ibidem*, paras. 10, 16.
87. Harris-Short, 2003, *supra* note 83, pp. 140-145, p. 164; Ado, 2010, *supra* note 65, pp. 631-635.
88. Tweede Kamer der Staten-Generaal, Vergaderjaar 2011-2012, item 33 165 Instelling van een algemeen verbod op het dragen van gelaatsbedekkende kleding, nr. 3 Memorie van Toelichting, p. 2.
89. *Ibidem*, pp. 5-6.
90. *Ibidem*, p. 7.
91. Tweede Kamer der Staten-Generaal, Vergaderjaar 2011-2012, item 33 165 Instelling van een algemeen verbod op het dragen van gelaatsbedekkende kleding, nr. 4 Advies Raad van State en nader rapport, pp. 2-6.
92. NRC Handelsblad, *Spies verdedigt boerkaverbod niet langer, geen trek in PVV plan*, 2 May 2012; Volkskrant, *Spies wil ideeën PVV niet meer verdedigen, boerkaverbod in de prullenbak*, 2 May 2012. The Minister later denounced those remarks, arguing that she made them in her capacity as a candidate for the leadership of the Christian Democratic Party (CDA).
93. Prof. dr. Annelies Moors, *Gezichtssluiers. Draagsters en Debatten*, Amsterdam School for Social Science Research, 31 January 2009.
94. *Ibidem*, pp. 17-18.
95. *Ibidem*, p. 28.
96. *Ibidem*, pp. 23-24, 56.
97. *Ibidem*, pp. 38-39, 56.
98. *Ibidem*, p. 57.
99. Ado, 2010, *supra* note 65, pp. 624-625; Brems, 2004, *supra* note 14, p. 18; Brems in Sajo, 2004, *supra* note 14, pp. 227, 229; Donders, 2002, *supra* note 5, p. 338; Reidel, 2010, *supra* note 48, pp. 70-74, 78.

