



**Economic and Social
Council**

Distr.
GENERAL

E/C.12/40/9
9 May 2008

ENGLISH ONLY

COMMITTEE ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS
Fortieth session
Geneva, 28 April – 16 May 2008

DAY OF GENERAL DISCUSSION

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

Friday, 9 May 2008

The right to take part in cultural life*

Background paper submitted by Ms. Elissavet Stamatopoulou**

* Reproduced as submitted.

** The views expressed in the present document are those of the author and do not necessarily reflect those of the United Nations. Ms. Elissavet Stamatopoulou is the Chief of the Secretariat of the Permanent Forum on Indigenous Issues, Division for Social Policy and Development, United Nations Department of Economic and Social Affairs.

COMMITTEE ON ECONOMIC AND SOCIAL RIGHTS
DAY OF GENERAL DISCUSSION ON
THE RIGHT TO TAKE PART IN CULTURAL LIFE, ARTICLE 15(1)(a) OF THE
INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
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Paper submitted by
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INTRODUCTION

The complexity of cultural rights is many-fold and one of its aspects is that it has to do with people's sense of who they are, their self-determination and how they can express it and fulfill it in the public sphere.

The 2004 Human Development Report of the UN Development Programme (UNDP) was entitled Cultural Liberty in Today's Diverse World. The report gives figures that show the richness of the human tapestry, the human mobility but also the destructive trends around these. The world's nearly 200 countries are home to some 5000 ethnic groups. More than 150 countries have significant religious or ethnic minorities. Some 370 million indigenous peoples live in more than 70 countries representing more than 4000 languages. Out of the estimated 6000 plus languages spoken today, 90% may have become extinct or face extinction in the next 100 years. About 518 million people face restrictions on religion, language, ceremonies and appearance. There are about 175 million migrants in the world, and asylum seekers represent only 9% of all migrants, or 16 million. In sub-Saharan Africa, only 13% of children in primary school receive instruction in their mother tongue.

I would like to start with the element that may have triggered for many an interest in cultural rights. Issues of conflict catch the human imagination. From a human rights point of view, it is painful to have to evoke the dangers of ethnic conflict, so that policy makers pay attention to cultural rights. Ideally, we should care about the respect, protection and fulfillment of cultural rights because of their profound significance for human dignity. It is of course true that respect for minority and indigenous peoples' and other ethnic groups' cultural rights is also linked to conflict and peace. But whatever the motivation for paying attention to this neglected part of human rights, it is now welcome and long overdue.

But why are cultural rights as part of the human rights regime important in responding to so many issues today? First of all, cultural rights, are enshrined in some of the most-broadly ratified or accepted international human rights instruments, especially the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, as well as the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Declaration on the Rights of Persons

¹ Based on Elsa Stamatopoulou, Cultural Rights in International Law, 2007, Martinus Nijhoff Publishers, Leiden-Boston.

Belonging to National, Ethnic, Religious and Linguistic Minorities. Other treaties, global or regional, also proclaim cultural rights. States are therefore obliged under treaty commitments they have voluntarily made to respect, protect and fulfill cultural rights. They must take specific measures, legislative, administrative, judicial and other. 86% of states have ratified the six core human rights instruments, thus representing a legal universality of these instruments. The Declaration on the Rights of Indigenous Peoples just adopted by the General Assembly in September 2007 contains 46 articles, 17 of which are about cultural rights. This in turn means that the international human rights mechanisms of the UN or of regional organizations can monitor governments as to how they implement their treaty obligations and can adopt statements and recommendations for the respect of these rights. And it also means that the non-governmental organizations and other parts of civil society can cooperate with the international human rights bodies in the monitoring and promotion of cultural rights. The human rights regime, in other words, gives a concrete legal and policy framework to cultural rights and establishes mechanisms of monitoring and accountability and of possible international cooperation and assistance.

In this introduction to the right to take part in cultural life, I will make the case for taking cultural rights seriously. I will do three things:

First, I will briefly outline the content of cultural rights, what they are, what are their normative elements, so as to make even more vividly felt their political and ethical relevance. In this context, I will explain why cultural rights are especially crucial for the survival of indigenous peoples and for minorities.

Second, I will try to explain the reasons for the neglect of cultural rights over decades, many of which represent challenges still today.

And **third I** will give an overview of the political context and recent developments that are particularly relevant in terms of cultural rights.

1. THE CONTENT OF CULTURAL RIGHTS AND WHY ARE THEY PARTICULARLY IMPORTANT FOR INDIGENOUS PEOPLES AND MINORITIES

Need for definition in order to ensure legal enforceability

Under international law, five human rights are generally understood as cultural rights:

1. The right to education;
2. The right to participate in cultural life;
3. The right to enjoy the benefits of scientific progress and its applications;
4. The right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the person is the author, and
5. The freedom for scientific research and creative activity.

Considerable analytical work has already been done on the right to education, intellectual property rights and the other cultural rights mentioned above **except the right to participate in**

cultural life which is the broadest of them all. I should also add that, while intellectual property rights have been richly legislated internationally by now, they are viewed more within the context of international trade law. Unfortunately the latter has until now not managed to accommodate the protection of traditional knowledge and cultural heritage of indigenous peoples. The immense financial interests involved are described by some as among the major reasons.

While cultural rights are fundamental for every human being, why are they particularly important for indigenous peoples and minorities? These populations are often discriminated and marginalized and rendered vulnerable by the dominant society. In the midst of the economic, political, social and other adversities that they face, their culture becomes a source of pride and strength that allows them to continue struggling for a better life. The philosophy behind the human rights regime is to protect the most vulnerable, and this includes indigenous peoples and minorities, who have been rendered vulnerable by society. But cultural rights are also of great importance for other vulnerable groups, such as migrants, children, the poor, the gay community, persons with disabilities and others.

Finally, the individual, as the smallest unit and subject of cultural relations may interact with all surrounding cultures or sub-cultures, may develop multiple identities, may be the ultimate contesteer of her/his surroundings and may also conflict with other individuals or groups. Respect for each human being's dignity in terms of his/her identity and cultural self-definition and autonomy puts society and the state to the test. It is obvious that this intricate nexus of cultural relations can stir -- and reality shows that it does stir -- profound emotions that can have far-reaching political, economic and social reverberations as well as an impact on peace within a state and among states.

But before I proceed to analyze the normative content of the right to participate in cultural life, I must first discuss the complexity of the content and concept of culture, which has contributed the greatest difficulties in defining cultural rights.

The context and concept of culture

Cultural rights can only be understood within the context of culture and therefore the definition or at least an understanding of culture must be in place before we proceed to define cultural rights as human rights. Culture is inseparable from the quality of being human, from the sense of self-respect. Culture is therefore about human relations and thus constant cross-influencing, cross-fertilization, conflict and change are part of culture. In today's interlinked world, economic globalization, revolution in communications, massive people's migrations and other phenomena result in ever-increasing cultural contacts as well.

There are numerous definitions of culture. A definition or, more precisely, an understanding of culture that surfaces from the examination of literature, also supported by Asbjorn Eide, and the work of the UN bodies and that is useful for examining cultural rights is at three levels.

a) culture in its *material sense*, as product, as the accumulated material heritage of mankind, either as a whole or part of particular human groups, including but not limited to monuments and artifacts;

- b) culture as the *process* of artistic or scientific creation, i.e. the emphasis being placed on the process and on the *creator(s) of culture*; and
- c) culture in its anthropological sense, i.e. *culture as a way of life* or, in UNESCO's words, the "set of distinctive spiritual, material, intellectual and emotional features of society or a social group"; it encompasses "in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs".

Normative elements of cultural rights of the individual

The vagueness of the right to participate in cultural life has been one obstacle in attributing responsibility and accountability to the state. My analysis draws from six sources: the texts of international human rights instruments, the authoritative interpretation of relevant treaty provisions by the human rights treaty bodies in their General Comments, the case law of international courts, regional courts and of the Human Rights Committee, an exhaustive analysis of the practice of international human rights bodies and mechanisms, state practice and relevant academic literature.

I also want to pay tribute to the contribution of the late Cor Konate, the Senegalese member of the Committee on Economic, Social and Cultural Rights during its early years, who had a passion for cultural rights and whose work in the early 1990s is still little known and whose premature death has considerably delayed the Committee's focus on cultural rights.

Let me for now list the **six plus** normative elements of cultural rights:

- (1) *Non-discrimination and equality*.....
- (2) *Freedom from interference with the enjoyment of cultural life*
Freedom to create and contribute to culture.....
- (3) *Freedom to choose in what culture(s) and cultural life to*
Participate; the freedom to manifest one's own
culture.....
- (4) *Freedom of dissemination*.....
- (5) *Freedom to cooperate internationally*
- (6) *Right to participate in the definition, preparation and implementation of policies*
on culture.....
- (7) *Other elements connected to the right to participate*
in cultural life (inter-dependence of human rights: freedom of expression, freedom of
movement, right to work, freedom of religion, right to an adequate standard of
living....)

Normative elements of cultural rights regarding indigenous peoples and minorities

International human rights instruments and bodies have identified special characteristics of cultural rights pertaining to minorities and indigenous peoples in addition to those I mention above for individuals.

Special characteristics of cultural rights pertaining to minorities and indigenous peoples

These special characteristics of cultural rights pertaining to minorities and indigenous peoples and the corresponding state obligations can be described as follows:

Seven main special characteristics:

(1) The state and its agents have the obligation to respect the freedom of indigenous peoples and minorities, both individually and as groups, to freely participate in cultural life, to assert their cultural identity and to express themselves culturally in the way they choose, i.e. the authorities must not interfere with this freedom unless conditions under (b) below are present. The state, within the purview of the regular discharge of its police and justice functions must also protect such free participation in cultural life from others, i.e. prevent their violation by third parties, whether they are individuals, groups or corporations, domestic or foreign. The principles of non-discrimination and equality must guide the state's actions. The state must establish laws and policies regarding non-discrimination in the enjoyment of cultural rights. Equality will not amount to forced assimilation. Special positive measures by the state to secure advancement of minorities, i.e. affirmative action, are allowed. The positive actions of the state for the fulfillment of cultural rights, i.e. in terms of the provision of resources, subsidies etc., will be guided by the principle of non-discrimination. If the state does not have adequate resources to respond to its obligation to fulfill, it should explore the possibility of international development assistance.

(2) International norms prohibit the exercise of cultural practices that contravene internationally proclaimed human rights. Minority and indigenous peoples' rights are part of the human rights regime. States should thus adopt preventive and corrective policies and measures and promote awareness of such problems so that such practices can stop.

(3) Individuals living within groups are free to participate or not to participate in the cultural practices of the group and no negative consequences may ensue because of their choice. In other words, the cultural autonomy of the individual is guaranteed.

(4) The cultural rights of minorities and indigenous peoples as proclaimed in international instruments consist of: the right to education; the right to use their language in private life and various aspects of public life, such as before judicial authorities, and to identify themselves as well as place names; the right to establish their own schools; access to mother tongue education to every extent possible; access to the means of dissemination of culture, such as the media, museums, theatres etc., on the basis of non-discrimination; the right to practice their religion; the freedom to maintain relations with their kin beyond national borders; the right to participate in decisions affecting them through their own institutions; and the preservation of sacred sites, works of art and scientific knowledge (especially knowledge about nature), oral tradition, [human remains], i.e. both the tangible and the intangible objects that comprise a group's cultural heritage. In the case of indigenous peoples, special cultural rights also include, in addition to those applicable for minorities, the right to continue certain economic activities linked to the traditional use of land and natural resources.

(5) Minorities and indigenous peoples have the right to pursue their cultural development through their own institutions and via those they have the right to participate in the definition, preparation and implementation of cultural policies that concern them. The state must consult the groups concerned through democratic and transparent processes.

(6) The education of the larger society about cultural diversity and minority and indigenous cultures must be pursued by the state. The media and other institutions should play a special role in promoting such knowledge.

(7) Although cultural human rights have not always been called collective rights by international instruments, it is logically and morally impossible not to recognize the collective elements of cultural rights, when speaking of minorities and indigenous peoples. International instruments recognize that individuals belonging to national, ethnic, religious or linguistic minorities and indigenous peoples will enjoy their cultural rights, not only individually, but also as collectivities in community with other members of their group. Especially the UN Declaration on the Rights of Indigenous Peoples recognizes group cultural rights: 17 of the 46 articles are about cultural rights, cultural self-determination and cultural autonomy.

In closing this summary analysis, I suggest that from a public policy point of view, cultural rights offer in fact an alternative and a very often underutilized foundation for defending and extending group aspects of human rights and in particular a ground for possible resolution of conflicts over indigenous peoples' or minority rights that may not necessarily be resolved in terms of the right to self-determination. In other words, through cultural rights a good portion of the goals-not all – can be achieved that people seek in the right to self-determination, but without being perceived as threatening to states. Cultural rights are of profound significance both because they have to do with identity and because they are a means of attaining economic and political objectives. **The implementation of minority and indigenous peoples' cultural rights, far from being a soft agenda can also achieve, if taken seriously, transfer of resources to them from the dominant society and thus mend age-long injustice and discriminatory practices.**

2. WHY THE DIFFICULTY AND THE NEGLECT OF CULTURAL RIGHTS?

Although the text of international human rights instruments covers cultural rights, scant attention has been given to cultural rights by international bodies, including human rights bodies, with a few exceptions, especially the work done by the Human Rights Committee (under Article 27 of the ICCPR). Comprehensive research that we conducted of the work of the human rights treaty bodies, the mechanisms of the former Commission on Human Rights, the General Assembly, the Security Council, select UN field operations in the development and peace areas, demonstrates just that. Even the Commission on Human Rights adopted its first ever resolution on cultural rights in 2002, with little progress since, and one could say that generally the thrust of the resolution is more on interstate relations than the protection and fulfillment of cultural rights. How can the neglect for cultural rights be explained?

a) The prevalent attitude among many **human rights experts**, including international law specialists, has been to **avoid discussion of cultural rights** lest the lurking issue of cultural relativism appears, implicitly or explicitly, to undermine the delicate and fragile universality concept that has been painstakingly woven over the last five decades. Therefore, many feel it is better not to talk about cultural rights, but rather to take a low profile approach in order not to “provoke” the cultural relativists. But a formalistic and non-proactive approach is not enough either to dissipate cultural relativism or to promote implementation of cultural rights, which instead must be taken seriously and be discussed and analyzed as fully as the other human rights categories.

b) Another difficulty lies **in the definition** of cultural rights since they are obviously tied to the **concept of culture**, which is fluid and changing. UNESCO's definition of culture, which has followed the anthropological paradigm (namely culture as "a way of life"), while extremely useful within the context of UNESCO's work, is viewed by some as too vague to base actual rights and obligations on. Moreover, anything called a "human right" should not be frivolous, but of obvious fundamental value. The challenge of grappling with the definition of cultural rights has partially prevented promotion of these rights.

c) Cultural rights may even be considered by some as a **"luxury"**, as something that comes after "bread and water", as an item only for societies at a certain stage of development. Nobody could deny, by looking at human history throughout the centuries, that economic development generally goes with cultural development, culture represents the soul, the moral edifice, the self-definition and self-esteem of a person or a community without which life loses context and meaning. In that sense, cultural development is not a luxury but a tool for obtaining "bread and water".

d) **Political difficulties** at the international level are also part of the reason of silence. In an international diplomatic context, governments that are members of UN bodies may not necessarily want to speak of cultural rights in their own or other states unless they are ready to also talk of **cultural wrongs**, i.e. those customs and prejudices that in fact violate internationally proclaimed human rights. This is an issue approached cautiously by states. For example, it took from the 1950s to the late 1970s to get UN bodies to see that female genital mutilation is not only a health issue but a human rights issue as well.

e) One of the most significant difficulties in dealing with cultural rights is that these rights have evoked, for some governments, the **spectrum of group identities** and group rights that they fear could threaten the "nation" state and territorial integrity. The drafting history of Article 27 of the Universal Declaration of Human Rights is telling. Official state support of cultural rights has often taken the form of promoting for example seemingly innocent folklore while remaining silent or hostile to the promotion of minority languages in the education systems and the media. The other side of this coin is that governments may be wary of the threat that majorities may feel from the promotion of minority cultures which may lead to claims for collective rights. **Taking a holistic approach to cultural rights, in accordance with their normative elements as they have been developed to-date, will give plenty of policy responses to governments, if the political will is present.**

f) **Even as individual rights, cultural rights can be perceived as threatening to the state or the community.** One person's artistic creation outside the norm, outside the traditional culture of the community of which s/he is a member, borrowing elements of other cultures, can be seen as a threat that needs to be suppressed in various ways.

3. THE POLITICAL CONTEXT AND RECENT DEVELOPMENTS OF "WHY CULTURAL RIGHTS NOW?"

Globalization and polarization, the culturalization of political life and rhetoric, migration and racism, cultural relativism and identity politics, peace and security, the huge economic interests invested in current international intellectual property regimes and the “dialogue among civilizations” , the World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance and the post-September 11th era and the impact of terrorism on human rights, constitute the political chessboard on which cultural rights are played or neglected today.

This is taking place at a time of the most unprecedented mass movement of migrants and refugees around the globe which, together with new technologies and communications, bring cultures in contact at a speed that is tremendously challenging for people and societies to absorb without profound ramifications, sometimes in the form of racism, xenophobia and intolerance, limitations to human rights and outright conflict. In this dangerous crossroads respect for cultural freedom, identities and pluralism within a context of a democratic polity is more urgent than ever. To recognize cultural rights as legal rights is a bold statement and key to state action.

The World Conference Against Racism, Racial Discrimination, Xenophobia and related Intolerance that took place in Durban, South Africa, in 2001 gave a new impetus to the challenges of diversity of our time. The anti-racism agenda has become even more important after September 11th, especially as it provides a balance to the anti-terrorism agenda and is forward-looking and long-term. It is clear that now more than before the international community and especially the UN need to promote respect for cultural pluralism and it will be wise to do so in a visible way. Cultural rights are an indispensable component of policies of tolerance, diversity and pluralism. What is more, the international community and especially the UN must show leadership and *be visible doing so* in the international arena, advocating respect for cultural rights as human rights.

There is another reason for paying attention to cultural rights today and this is the culturalization of political life and rhetoric. Identity politics have been on the rise within states as well as internationally. This emerging” battle of the cultures”, as some may see it, is part of a more fundamental struggle- the struggle for identity, both personal and political. One reason for this increased assertiveness of identity is that globalization has accentuated local awareness, consciousness, sensitivity, sentiment and passion. We have seen a very clear sign of this at human rights debates at the UN after the end of the Cold War, especially in the form of cultural relativism. **One of the challenges in contemporary law and politics is how to ensure that the politicization of culture is a positive and not a negative development and that it results in the respect and not the denial of human rights.**

The drafting history of Article 27 of the Universal Declaration of Human Rights and of Article 15 of the International Covenant on Economic, Social and Cultural Rights

The drafting history of the Universal Declaration of Human Rights is revealing of the difficulties we still face today in dealing with cultural rights. It is indeed impressive that the core

debate on whether, apart from individual rights, the Declaration should also recognize group rights and minority rights in particular, took place within the context of article 27 of the Declaration dealing with cultural rights. This discussion was in turn connected with the fierce controversy, as to whether the Convention on the Prevention and Punishment of the Crime of Genocide which was being prepared simultaneously to the Universal Declaration, should also address “cultural genocide” besides “physical” or “biological” genocide.

Article 27 of the Universal Declaration states:

“1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

“2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

Yet Article 27 does not present a commitment to the respect of diversity and pluralism, since it assumed somehow that cultural participation will take place in the “one” culture of the “nation-state”. The question about the inclusion of rights for persons belonging to minorities did arise, as was to be expected in the very First Session of the Commission on Human Rights in 1948. In the mind of the drafters of the UDHR “protection of minorities” would normally “include both protection from discrimination and protection against assimilation” and in particular protection of ethnicity and language—since other elements of minorities were covered by other articles of the Declaration..

The text originally debated provided for the right of persons belonging to such ethnic, linguistic or religious minorities to **establish and maintain schools and cultural and religious institutions and to use their own language in the press, in public assembly and before the courts and other authorities of the state.**

The drama of the debate on cultural rights, which encompassed the debate on minority rights, had another angle as well. It was connected with the Convention on the Prevention and Punishment of the Crime of **Genocide** which was being drafted by the General Assembly Sixth Committee simultaneously with the Universal Declaration of Human Rights being drafted by the Third Committee. There was a proposal during the preparation of the Anti-Genocide Convention to include in the definition of genocide the intent to destroy, in whole or in part, **cultural groups**, along side “national, ethnical, racial or religious” groups, in other words to include “cultural genocide” along with “physical or biological” genocide. The proposed article 3 in the Genocide Convention read as follows:

“In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief such as: 1. **Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;** 2. **Destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the groups”.**

The proposal on cultural genocide in the context of drafting the Genocide Convention at the Sixth Committee of the General Assembly was finally put aside.

The final wording adopted by the General Assembly for Article 27 includes the prescriptive word *the* in the phrase “the right freely to participate in *the* cultural life of *the* community”, thus giving out a signal of limitation to this freedom and an assumption of a homogenous instead of a multicultural society. The International Covenant on Economic, Social and Cultural Rights improved on the wording by recognizing, in Article 15, “the right of everyone to take part in cultural life”. The International Covenant on Civil and Political Rights adopted eight years later, in 1966, is the most broadly ratified international instrument with binding nature to recognize, in Article 27, that persons belonging to ethnic, religious or linguistic minorities “shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language

The tumultuous history of Article 27 may well explain much of the silence on cultural rights over the decades, to the extent that the original reasons for resisting them for minorities and indigenous peoples still remain. But in today’s interconnected world of greater openness to democracy, avoiding the respect of cultural rights can only lead to frustrations in society and the instigation of conflict.

CONCLUSION

The international human rights instruments and the practice of international human rights bodies in terms of cultural rights may be elliptic, non-systematic, and occasionally unclear - in short, imperfect - but a careful examination of these places the elements of the right to participate in cultural life in relief.

In its intermittent attention to cultural rights, the UN human rights system has been striving to realize the double aspiration of combining rootedness with freedom. **Far from being a soft agenda, cultural rights have a real-world political strength. They make both moral and material claims and claims that have a reasonable chance of being satisfied. In the case of indigenous peoples, they stake out a zone in which it is possible for some quantity of power to change hands and for age-old injustices to be mended.**

For the sake of peaceful societies and peaceful relations among states, the vision of public policies should be away from sustaining, encouraging or creating myths of a cultural or “blood” purity of society, but rather focus on the re-shaping of national identities to include today’s pluricultural realities. Since we are now promoting awareness for preventive measures, it is likely that sooner rather than later politicians will have to deal with this issue boldly, and hopefully international organizations will be able to assist in those processes.

Similarly, human sustainable development will be possible in a culturally respectful and relevant policy environment that addresses people's cultural rights.

At the same time, crucial as cultural rights are in the preservation or building of peace and for development, they should not be viewed only in terms of their functionality vis a vis peace and development, but also, boldly, for their value as human rights, as part of our human dignity.

As we mark the 60th Anniversary of the Universal Declaration of Human Rights next year, I hope that public policies-international but especially national, will breath life into cultural rights, especially those of indigenous peoples—so that the international community can make the human rights regime truly universal.