Human rights and culture in international law

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It has been claimed that culture is central to man and that without it no rights are possible since it is the matrix from which all else must spring. Culture is the essence of being human. 1

Introduction

Regional and international conflicts defined as a so-called ‘clash of civilisations’, 2 civil conflicts from Central and South America, to former Yugoslavia, from the north Africa and the Middle East to Southeast Asia, 3 and discrimination against and persecution of vulnerable individuals within ethnic or religious communities, appear to indicate tensions between human rights and culture at all levels of society, from the global to the local, from the collective to the individual. Despite the growing cognisance of these cleavages, the international community rather than suppressing cultural, ethnic or religious differences, has actively promoted the importance of cultural diversity and religious tolerance for peace and stability and enjoyment of human rights generally. This chapter focusses on cultural diversity as a common good by exploring the relationship between culture and human rights in international law and its possible future development.

This emphasis on cultural diversity is encapsulated in a new humanism in which the protection of culture is increasingly conceptualised through the prism of human rights. 4 It is manifested in a push for the elaborating the definition and strengthening the implementation of cultural rights,

and access to cultural heritage as integral to the enjoyment of such rights. Yet, this connection between human rights and cultural heritage is a recent phenomenon, with the protection of human rights and cultural heritage being relative newcomers to the framers of international legal norms. Whilst certain human rights norms have their precursor in the minority protections of the nineteenth and early twentieth century, the first specialist human rights instrument of universal application was adopted in the mid-twentieth century, the Universal Declaration of Human Rights. In the intervening sixty plus years, cultural rights remained underdeveloped when compared to other human rights (civil and political, social and economic) contained in the International Bill of Rights. Similarly, the first initiative in modern international law to protect cultural property occurred in the late nineteenth century with the codification of the rules relating to armed conflict and belligerent occupation. The first, specialist multilateral legal instrument dedicated to the protection of cultural heritage at the international level was the 1954 Hague Convention. The state has figured large in both initiatives. Although the individual (as citizen and bearer of rights) and (national) culture have been integral to the modern state, human rights and culture (both universal and particular) are testing the boundaries of ongoing, positivist understandings of international law and centrality of the state within it.

If indeed ‘culture’ is what renders us ‘human’, then unsurprisingly the exponential expansion of our understanding of what is culture and culture heritage within international law in the last half century has been intimately connected to more nuanced and deeper interpretations of human rights norms. The diversity of engagement in international law-making since the end of the Second World War with the influx of new states from every region, augmented by the reemerging or emerging influence of minorities and indigenous peoples, has propelled this trend. Likewise, multidisciplinary research has revealed the transformative impact that engagement by these diverse groups (including those not based on ethnicity or religion, like women, children,

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8 Convention (IV) respecting the Laws and Customs of War on Land, and Annex, The Hague, 18 October 1907, in force 26 January 1910, (1907), 208 Parry’s CTS (1907) 77, (1908) 2 AJIL (supp.) 90.
disabled, sexual orientation) in local and regional struggles are having on the venacularisation of the human rights, whilst also highlighting the need to be vigilant against claims of culture which are used as a shield to hide from scrutiny human rights violations of vulnerable members of these groups.10

In seeking to highlight the transformative effects of culture and human rights in dissolving boundaries in international law which have often been barriers to its progressive development, I have divided this chapter into two parts. First, I examine the dominance of the state in the protection of cultural heritage and mid-century interpretations of cultural rights. Then, as a foil to the trenchant resilience of the state, I will consider the rise or re-emergence of non-state groups in the late twentieth and early twenty-first centuries and their dissolution of the pre-existing boundaries and accepted wisdoms in international law. It is suggested that rather than leaving international law and international society in a fragmented state, culture and human rights and their protection have not only exposed the shortcomings and instability of long-established principles, practices and personalities in international law, they are a common good which may serve to reformulate the values and aspirations which bind citizens with a state, individuals within international society.

**States, national cultures and international protection of cultural heritage**

A centralised, unified national culture has been a key component of national identity for the modern state. From its earliest manifestation, the modern state has sought to bind the persons within its territory, its citizens, together, not by chance but through design – an ‘imagined community’ – a national culture.11 The essence of the state, its collective identity reflected in a national culture, was often deliberately and systematically manufactured. The centralising, assimilating urge encompassed monuments and sites, cultural objects, and language – with effective control and standardisation of all aspects of culture being vitally important to reinforcing claims over national territorial boundaries, internally and externally. Since the nineteenth century, the ‘logic of possessive individualism’ that defines an individual by the


property she or he possesses, has been assigned to nation states.\textsuperscript{12} Within international society, these communities are viewed as ‘collective individuals’, imagined to be spatially and historical defined, homogenous within and autonomous from other states. Each state seeks to define itself through a unique cultural identity that is constituted by its undisputed possession of property. The assimilation and centralising policies which drove the realisation of national cultures commenced in Europe, spread to their colonial dominions worldwide by settler states, and reinforced again by new states following independence.

Even a cursory survey of the main treaties for the protection of cultural heritage at the international and regional levels betrays the centrality of the state, as the right-holder and primary bearer of international obligations. It is states which determine the final form of these treaties, including the nature of their obligations under them. Even after the treaty is finalised and adopted, it is the individual state which determines whether to ratify the instrument and become bound by its obligations. Even after ratification, it is clear that the culture and heritage which is being protected is overwhelming the national culture heritage, with the state party determining what shall come within the remit of its rights and obligations under the instrument’s framework (whether it be reporting, lists, etc). Enforcement procedures are generally triggered by the state in respect of violation of its rights in its self-defined national cultural property. Despite recently incremental developments in the field of international cultural heritage law, discussed below, this body of law remains defined by state interests and inter-state relations. Until recently, interpretations of cultural human rights largely augmented this focus on the national culture and its manifestations.

In this first part, by looking at national and multilateral arrangements for the legal protection of monuments and sites, cultural objects, and intangible heritage particularly language, I expose the on-going bias in favour of states’ conceptualisation of culture and cultural heritage. If states are an artifice, then is it logical and sustainable that protection of cultural property by international instruments be based upon notions of national culture and the rights of states? It will be my

contention that while it may be necessary to delegate the obligations (or the task) to states we must not delegate the purpose or rationale to them. If cultural diversity is a common good of humanity, then its protection for the benefit of all human beings should be driving rationale. However, because of the legacy and continuing dominance of states in international law-making, the purpose and the task for the protection of cultural heritage remains primarily with the state.

To examine this on-going dominance, I will consider three centralising, classifying and assimilating urges of the modern state which have indelibly shaped the legal protection of cultural heritage at the international level: inventories of monuments and sites, museums (and libraries) as storehouses of cultural artefacts, and dictionaries and the standardisation of language.

Monuments and sites

Monuments and sites because of their visual significance as markers on the national territory were the prime targets of this assimilationist urge to transform and incorporate them into the prevailing, official narrative propounded by the central power. For example, during the nineteenth century on the Indian subcontinent, functionaries of the British Empire and its Colonial Office in London set about ordering every minutia of its imperial dominion and subject peoples. A plethora of surveys, including the Archaeological Survey, entailed the collection and ordering of physical and documentary information. These initiatives to know and order the imperial subject were also aimed at redefining and reordering their societal relations and economies to neutralise any threat to the metropolitan power, a purpose which would prove beneficial for its successor. This organisational structure and related policies and practices were retained and reinforced following partition and Indian independence in 1948. Today, the Archaeological Survey of India (AIS) oversees the implementation of the Ancient Monuments and Archaeological Sites and Remains Act 1958 and Antiquities and Art Treasure Act 1972, which were introduced originally under British colonial rule but reconfigured post-independence

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for the protection of monuments and sites of ‘national’ importance.15 This persistent, centralising effort to collect, collate, and standardise by the central, metropolitan power (whether it be the empire or state) has met with resistance because of realities on the ground as thousands of residents and local businesses adjoining these sites become displaced.16 This preoccupation with the protection of tangible, cultural property was replicated domestically by states throughout the world from the early twentieth century.17 Consequently, it is predictable that this bias was reflected initial efforts to legally protect cultural heritage at the international level. The earliest codifications of the laws and customs of war consistently afforded special protection to cultural property and particularly monuments and sites, and buildings housing cultural objects, books, and artefacts. Dedicated provisions in the 1907 Hague IV Regulations were elaborated in the first specialist instrument on the protection of cultural heritage, the 1954 Hague Convention and First Protocol (and 1999 Second Hague Protocol).18 While the World Heritage Convention adopted in 1972, which was originally conceived as an instrument for the protection of monuments and sites, but covers both natural and cultural heritage sites.19 Both instruments require States Parties to prepare and maintain inventory of significant sites, though protection is not confined to sites inscribed on these lists.20 The importance of monuments and sites as zones of often violent contestations between states and within states over territory (and national imagining) is typified by a series of recent examples

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19 Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), 16 November 1972, in force 17 December 1975, 1037 UNTS 151.
20 Arts 11 and 12 WHC; and Art.11 HPII.
which engage both instruments. Including the shelling of the old town of Dubrovnik in 1999,\textsuperscript{21} destruction of the the Bamiyan Buddhas in 2001,\textsuperscript{22} the dispute between Thailand and Cambodia over the Temple of Preah Vihear,\textsuperscript{23} and most recently, the destruction of the mausoleums and ancient manuscripts in Timbuktu, Mali in 2012.\textsuperscript{24} Yet, as is explained below, the Hague Convention and World Heritage Convention whilst encapsulating the principle of subsidiarity are underpinned by the notions of solidarity and protection of a cultural heritage of humanity. For example, UNESCO Director-General referred to the mosques and mausolea of Timbuktu as ‘part of the indivisible heritage of humanity’.\textsuperscript{25} The international community’s response to cultural destruction, while often ineffectual, does underscore this basic premise: the universal significance of the monument or site beyond the state on whose territory it may be located.

\textbf{Cultural objects}

If the survey and listing of monuments and sites represents the centrifugal force of the state extending its reach over its territory, the collection and display of cultural objects in museums entailed the opposite gravitation pull – toward the metropolitan centre, the national capital. The public possession and display of significant movable cultural heritage in dedicated buildings has been deployed by the modern state in the formation and inculcation of a unified national identity. From the Louvre and \textit{Bibliotéque Nationale} in republican Paris to the British Library, British Museum and Public Records Office (now National Archives) in imperial London, this centralising, universalising and encyclopaedic drive to bring together under one roof and narrative of the nation (and empire) has been replicated as a means of collecting, collating,

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  \item \textsuperscript{21} Listed on the World Heritage List (1979) and perpetrators of the bombing being subject to violations of international criminal law and international humanitarian law: \textit{Prosecutor v Pavle Strugar}, Rule 98bis Motion, No.IT-01-42-T, Trial Chamber II, ICTY, 21 June 2004.
  \item \textsuperscript{22} The Cultural Landscape and Archaeological Remains of the Bamiyan Valley listed on the World Heritage List (2003) and their destruction led to the adoption of the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 17 October 2003, UNESCO Doc.32C/Resolution 39.
  \item \textsuperscript{23} Listed on the World Heritage List (2008) and subject of proceedings before the ICI: \textit{Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)} International Court of Justice, Judgment, 15 June 1962 and Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand), International Court of Justice, Order following Request for Provisional Measures, 18 July 2011.
  \item \textsuperscript{24} Listed on the World Heritage List (1988) and Office of Director-General, ‘Press Release: Director-General of UNESCO urges respect for the preservation of the World Heritage Site of Timbuktu’, 5 April 2012.
  \item \textsuperscript{25} Office of Director-General, ‘Press Release: Irina Bokova concerned about the growing threats to the cultural heritage in Mali’, 4 May 2012.
\end{itemize}
presenting and preserving cultural objects and artefacts worldwide. This privileging of the museum and library as storehouses of cultural objects was reflected in the 1907 Hague IV Regulations which affords protect to these buildings rather than the objects themselves. A bias toward cultural objects located in museums and collections, rather than archaeological sites, is also replicated in current treaties for the protection of movable heritage.

This centripetal drive was accompanied by a concomitant legislative initiative: antiquities laws, designed to facilitate state ownership of cultural materials and fill public collections. By the early twentieth century, many states had introduced domestic laws covering ownership of archaeological materials. Like monuments laws, the antiquities laws were often introduced by imperial power and retained by states following independence. Present day treaties covering movable heritage reflect the preoccupations and modes of protection contained in domestic laws.

Iraq’s efforts to protect movable cultural heritage located on its territory provides a prescient example of these twin threads: the national museum and antiquities legislation, and how they are often intimately entwined. Iraq adopted its own *Antiquities Law* in 1924 upon independence (the first independent Arab state in the League of Nations). It served to build the collections of the Baghdad Antiquities Museum, which its director, Gertrude Bell referred to as: ‘[A] real Museum, rather like the British Museum only a little smaller’.

The subsequent director of the retitled National Museum of Iraq, Sati al-Husri oversaw the introduction of a new *Antiquities Law* in 1936, which vested ownership of all antiquities in the Iraqi state and was only superseded in 2002. Public outcry, internationally and locally, followed the looting of the National Museum and other museums in major cities during the invasion of Iraq in 2003, with one local observing: ‘Our history was in the building. It was the soul of Iraq’.

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26 Arts 27 and 56, 1907 Hague IV Regulations. See also art.1(b), 1954 Hague Convention.


28 For example, George Hill, Treasure, 270, the director of the British Museum was involved in drafting the antiquities laws for Iraq, Palestine, and Cyprus, which were modelled on his reworking of the British law of treasure trove.


Resolution required UN Member States to prohibit the transfer and facilitate the return of cultural property illegally removed from ‘the Iraq National Museum, the National Library and other locations in Iraq’. During the occupation, the National Museum became a symbol of regaining of sovereignty and progress toward national reconstruction and reconciliation. Ironically, the on-going security threat has meant that the museum is rarely open to the public but its impact on the national and global public consciousness has led to its collections being made accessible virtually.

Perhaps because of its ability to be removed from the state’s territory, specialist international instruments covering cultural objects are distinctly more statist when compared to those covering immovable or intangible heritage. State interests in cultural property dominate the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention). Perhaps the most striking characteristic of the Convention is the centrality of the state. The final text is pervaded by the references to the ‘state’ and ‘national’ culture, laws, institutions, and enforcement mechanisms. It is the state that defines which cultural material is protected and implements the measures for its protection. The removal of the cultural material from the state’s territory triggers the Convention’s control and enforcement mechanisms. At this high point of decolonisation, newly independent States having inherited former colonial territorial boundaries also adopted metropolitan policies and practices to imagine their new dominion, including the establishment of national museums with supporting antiquities laws to instil a cohesive national identity.

The travaux préparatoires of the 1970 UNESCO Convention recognised the importance of the link between cultural heritage and collective cultural identity. Early drafts had defined the Convention’s purpose as controlling the illicit transfer of the cultural heritage of ‘peoples’, rather than ‘states’. Also, the preamble of the preliminary draft had provided that Article 27 of the

35 Arts.1, 5 and 14, 1970 UNESCO Convention.
36 Arts.3, 5(a), and 6, 1970 UNESCO Convention; and UNESCO Doc.SHC/MD/3, paras.10-13.
37 Anderson, Imagined, 178-185.
Universal Declaration of Human Rights (UDHR) concerning the right to participate in cultural life: ‘that it is incumbent upon States to protect the cultural property existing within their territory against the dangers from the illicit export and transfer of such property’. 38 Neither of these appeared in the final text of the Convention. As noted below, Article 27 UDHR was initially interpreted as the right to participate in national cultural life. 39 The subsequent Convention on Stolen or Illegally Exported Cultural Objects (1995 UNIDROIT Convention) provides greater recognition of interests of non-state groups in accessing cultural heritage, but nonetheless, remains largely focused on States’ interests. 40

Like the 1970 UNESCO Convention, the 1995 UNIDROIT Convention only applies to transfer of cultural objects across national boundaries. Like the UNESCO Convention, its rules delineate between cultural objects housed in museums and collections and those removed from archaeological sites, that is, between the ‘restitution’ of ‘stolen’ cultural objects, and the ‘return’ of ‘illegally exported cultural property’, that is, contrary to the export laws of the requesting Contracting Party. 41 Only Contracting Parties can bring claims for illegal exported objects, while private individuals can also bring claims for stolen cultural objects.

**Intangible heritage and language**

That which prefigures all these centralisation efforts of the modern state to instil loyalty and affinity with the new polity is language standardisation. 42 Its integral importance to this task reflects the long-standing resistance of states to any external interference in national cultural policies and the codification of protection for intangible heritage, especially languages, at the international level. The codification of the vernacular often preceded the secular, republican state (France) or was designed to promote unification of disparate states (Germany and Italy).

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38 UNESCO Doc.SHC/MD/3, paras.9 and 10.
40 24 June 1995, (1995) 34 ILM 1322. Drafted and negotiated shortly after the adoption of the draft Declaration on the Rights of Indigenous Peoples by the UN Working Group on Indigenous Populations and Declaration on the Rights of Minorities by the General Assembly, the UNIDROIT Convention at several junctures accommodates the communal interest in movable heritage held by ‘national, tribal, indigenous or other communities’: Preamble, para.3 and arts 3(8), 5(3)(d), and 7(2).
41 Article 1, and Chapter III and Chapter II respectively, UNIDROIT Convention.
42 Anderson, Imagined, 67-82.
Like the national list of monuments and museum housing the national collections which would follow it, the Académie Française was charged with standardising the French language and preparing an official dictionary, its own central repository. The proliferation of this drive was accelerated by the French Republic as it sought to inculcate the transition of its populace from subjects following the deposition of the monarchy to citizens, through the universalisation and standardisation of public education and the greater availability of books and newspapers to cater for the increasing literate public.43

Article 2 (Sovereignty) of the Constitution of the French Republic of 4 October 1958 provides first that: ‘The language of the Republic shall be French.’44 Less than a third of the French populace spoke French in the late nineteenth century. Today, of the twenty-six vernacular languages spoken in France, thirteen are listed as severely vulnerable (that is, while the grandparents’ generation or older speak the language, the parents may understand it but do not speak it among themselves or with their children).45 Added to this are kin states, or linguistic and ethnic communities which straddle France’s boundaries with neighbouring states, for example, the Basque, and migrants or descendants of migrants living in France speaking their own mother tongue.

Upon its ratification of the International Covenant on Civil and Political Rights (ICCPR), France provided that in respect of Article 27 covering minorities: ‘In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned’. France maintains that minorities do not exist in the State because its Constitution ensures equality before the law, without distinction as to origin, gender or religion. The Human Rights Committee (HRC), which oversees ICCPR’s implementation, noted that: ‘[T]he mere fact that equal rights are granted to all individuals and … are equal before the law does not preclude the existence in fact of minorities in a country, and

43 Ibid.
44 Language is followed by other intangible aspects of French national identity including the tricolor flag, La Marseillaise (anthem), the motto ‘Liberty, Equality, Fraternity’, and its governing principle, ‘government of the people, by the people and for the people.’
their entitlement …’. Nonetheless, each application brought under Article 27 against France has been ruled inadmissible.

The Lisbon Treaty, to which France is a party, incorporates the Charter of Fundamental Freedoms of the European Union, which under Article 22 provides that the Union shall respect cultural, religious and linguistic diversity. Subsequently, France introduced a constitutional amendment in Title XII (On territorial communities) which states that ‘Regional languages are part of France’s heritage’ (Article 75-1). The Conseil Constitutionnel has determined that this provision does not bestow an enforceable right or freedom. Furthermore, France is not a state party to the European Charter for Regional or Minority Languages, and the Conseil Constitutionnel has found that the Charter is contrary to Article 2 of the Constitution.

Yet, the French government (and Académie Française) has actively and strenuously advocated linguistic diversity beyond France’s borders to ensure the vitality, usage and prominence of the French language internationally. The negotiation and adoption of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005 Cultural Diversity Convention) provides a telling example of this strategy. The Convention was initially intended as a multilateral instrument for the protection of cultural rights but in its final form reads like ‘trade agreement’, reflecting the concerns of a coalition of French speaking countries. This bloc


effectively transformed it into a vehicle for the protection of French-language cultural goods (including books, film, and other media) in response to its fear that further trade liberalisation would increase the influx of foreign language cultural goods, particularly English-language products.\textsuperscript{55}

The 2005 Cultural Diversity Convention notes that while globalisation can facilitate interaction between cultures, it also constitutes a potential threat to cultural diversity.\textsuperscript{56} One of its objectives is the recognition of the ‘distinctive nature of cultural goods and services as vehicles of identity, values and meaning’ so that they are not treated as ordinary consumer goods.\textsuperscript{57} Nonetheless, the Convention draws significantly from international trade, intellectual property, and development law. This tone is reflected in the use of terms like ‘cultural goods and services’ and ‘expressions’, and provisions like Article 16, under international cooperation, which permits preferential treatment for developing countries.

The Convention acknowledges that ‘cultural diversity is the defining characteristic of humanity’, \textsuperscript{58} and that it can be sustained through the ‘constant exchange between cultures’ and ‘the right of access of all people to a rich and diversified range of cultural expression from all over the world.’\textsuperscript{59} Significantly, it recognises the fundamental right of groups, especially minorities and indigenous peoples, ‘to create, disseminate and distribute their cultural goods and services, including their traditional cultural expressions…’.\textsuperscript{60} Its third principle acknowledges the equal dignity and equal respect for these communities and their cultures. While no definition of ‘culture’ is contained in the Convention, it does note that it ‘takes diverse forms across time and space’ and recalls that ‘linguistic diversity is a fundamental element of cultural diversity’.\textsuperscript{61}

\textsuperscript{56} 19th recital, Preamble, Cultural Diversity Convention.
\textsuperscript{57} Art.1(g), Cultural Diversity Convention.
\textsuperscript{58} First recital, Preamble, Cultural Diversity Convention.
\textsuperscript{59} Art.2, Principle 7, Cultural Diversity Convention.
\textsuperscript{60} 15th recital, Preamble, Cultural Diversity Convention.
\textsuperscript{61} Seventh and 14th recitals, Preamble, Cultural Diversity Convention.
Nonetheless, the 2005 Cultural Diversity Convention repeatedly reaffirms ‘the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory’.\(^{62}\) However, it also reiterates that these rights are subject to human rights norms and the States Parties’ existing treaty obligations.\(^{63}\)

The adoption of the Convention for Safeguarding of the Intangible Cultural Heritage (Intangible Heritage Convention) in 2003 was propelled by similar concerns to those that drove the 2005 Convention.\(^{64}\) The UNESCO Director-General in his preliminary study observed that the Convention ‘should be effective in countering adverse impact of globalisation which threaten the survival of much intangible cultural heritage …. [which] helps to affirm cultural identity, promote creativity and enhance diversity worldwide’.\(^{65}\) This emphasis is replicated in the final text which provides that ‘globalization and social transformation’ while enabling increased intercultural dialogue, ‘also give[s] rise, as does the phenomenon of intolerance’ and to ‘grave threats’ to intangible heritage.\(^{66}\)

Article 2 of the Convention defines its *ratione materiae* to include: ‘the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups, and in some cases, individuals recognise as part of their cultural heritage’. Language is not protected per se, but only as a ‘vehicle’ for the intangible heritage. Intangible heritage will only attract protection if it is compatible the international human rights framework and does not foster intolerance and destruction of other cultures.\(^{67}\) One of the purposes of the Convention is to ensure respect for the intangible heritage of ‘communities, groups and individuals’ and states are obliged to seek the ‘participation’ of communities, groups and relevant non-governmental organisations.\(^{68}\)

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\(^{62}\) Arts 1(h), 2, 5(1) and 20.(2) Cultural Diversity Convention.

\(^{63}\) Arts 2(1) an 5(1) Cultural Diversity Convention.

\(^{64}\) 17 October 2003, in force 20 April 2006, 2368 *UNTS* 1.

\(^{65}\) Report on the Preliminary Study on the Advisability of Regulating Internationally, through a new Standard-Setting Instrument, the Protection of Traditional Culture and Folklore, UNESCO Doc.161 EX/15, para.4.

\(^{66}\) Fourth recital, Preamble, Intangible Heritage Convention.

\(^{67}\) UNESCO Doc.161 EX/15, Annex, p.3, para.11.

\(^{68}\) Art.11(b), Intangible Heritage Convention. Self-governing groups within states can accede to the convention in certain circumstances: Art.33.
Nonetheless, the role of the state remains central. Although adopted more than thirty years after the World Heritage Convention, the drafters of the Intangible Heritage Convention used a legal framework designed for immovable, tangible heritage as a template.\textsuperscript{69} Furthermore, the Convention explicitly does not affect the protection afforded by the World Heritage Convention nor intellectual property rights.\textsuperscript{70} Most significantly, the Intangible Heritage Convention also establishes lists.\textsuperscript{71} States Parties are required to maintain an updated inventory of their intangible heritage.\textsuperscript{72} Also, they nominate intangible heritage for inclusion on the Representative List of Intangible Cultural Heritage of Humanity and the List of Intangible Heritage in Need of Urgent Safeguarding inscribed by the Intangible Heritage Committee.\textsuperscript{73} A number of delegations, who unsuccessfully argued against the inclusion of lists, maintained that they create a hierarchy of cultures which is incompatible with intangible heritage and that excellence, uniqueness and typicality be emphasised.

The 2003 Intangible Heritage Convention represents a moment of transition reflected in its split approach. Its preamble and purposes indicate an awareness of the importance of culture and heritage to communities and individuals but the substantive components of the treaty continue to betray the continuing predominance of the state in respect of rights and obligations.

\textit{Right to participate in cultural life and national cultural policy}

From 1945 to 1989, minority protection was subsumed within the emerging international human rights discourse. Set against the Cold War and the threat of fragmentation precipitated by liberation movements, states privileged the need for national unity through integration policies. They argued that the universalisation of minority protection threatened their internal political, economic and social stability.\textsuperscript{74} Minority protection was confined to the realm of non-

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\item UNESCO Member States had deliberated, but decided against, the inclusion of intangible heritage in the 1972 World Heritage Convention: UNESCO Doc.30C/DR.84. Since 1977, the World Heritage Committee has progressively amended the Operational Guidelines (OG) to promote an integrated approach to cultural heritage with the increased the likelihood of intangible cultural heritage being protected on the World Heritage List.
\item Art.3 Intangible Heritage Convention.
\item Part IV, Intangible Heritage Convention.
\item Art.12, Intangible Heritage Convention.
\item Arts 16 and 17, Intangible Heritage Convention. In cases of extreme urgency the Committee may inscribe an item on the List in Need of Urgent Safeguarding ‘in consultation with the State Party concerned’.
\item See UN Doc.A/C.3/SR.162, 723.
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discrimination and human rights enjoyed by individuals.\textsuperscript{75} Any notion of cultural rights as being positive and collective was rejected in most international fora.

The right to participate in the cultural life of the community was incorporated into Article 27 UDHR and subsequently rearticulated in Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).\textsuperscript{76} This right has until recently been strictly limited to participation in the ‘national culture’ by the individual right holder. The \textit{travaux} of Article 27(1) UDHR reveals that the drafters were preoccupied with the participation and enjoyment by the wider population of culture manifestations confined ordinarily to a small élite. Culture was defined narrowly as ‘high’ culture including museums, libraries and theatres.\textsuperscript{77} While the UDHR is a non-binding declaration, this human right’s later inclusion in the ICESCR renders it legal binding on states parties. Also, the inclusion of Article 27 in the UDHR meant that this right was to be enjoyed by every human being and it was a right equal to and indivisible from all other rights contained in the Declaration.\textsuperscript{78}

UNESCO presented a preliminary draft article 15 which referred primarily to the preservation and development of tangible cultural heritage. However, it also required States Parties to ‘encourage[e] the free cultural development of racial and linguistic minorities’.\textsuperscript{79} The Committee of Experts called by UNESCO to elaborate upon this right observed that a distinction needed to be made ‘between different types of communities, to which any given individual may belong at one and the same… may run counter to, or at least differ considerably from, those of the national community…’.\textsuperscript{80} UNESCO’s recommendation to include the words: ‘to take part in the cultural life of the communities to which he belongs’, was eventually defeated.\textsuperscript{81} The focus of the international community clearly remained on the ‘national’ community.

\textsuperscript{75} Arts 2 and 7 UDHR.
\textsuperscript{76} GA Res.2200A(XXI), 16 December 1966, in force 3 January 1976.
\textsuperscript{77} YM Donders, \textit{Towards a Right to Cultural Identity?} (Antwerp, Intersentia, 2002) 139. See also R O’Keefe, The Right to Take Part in Cultural Life under Article 15 of the ICESCR (1998) \textit{ICLQ} 904.
\textsuperscript{78} UNESCO Doc.UNESCO/DG/188, 6 October 1952.
\textsuperscript{79} UN Doc.E/CN.4/541.
\textsuperscript{80} CUA/42, p.17.
\textsuperscript{81} UN Doc.A/C.3/SR.797, 178; and UN Doc.A.C.3/SR.799, 190-191.
Dissolving boundaries, competing identities: communities and individuals

Cultural, religious and linguistic groups are not defined by territorial boundaries. These communities exist within and across states. Despite the nationalist project of most modern states to create a singular, cohesive identity, this diversity remains. Equally, individuals invariably possess multiple identities which may traverse ethnic and religious groups but also gender, age, sexual orientation, etc. Our collective and individual awareness of these diverse allegiances as potential sources of creativity but also conflict has accelerated with modernity and with the latest wave of globalisation.

These forces have also destabilised the conceptualisation of the state in international law – exposing its artifice. As explained in the Part One, most (if not all) states have endeavoured to create and promote a unified, national cultural identity to fill (and legitimise its occupation of) its territory. The current multilateral agreements for the protection of cultural heritage are defined by this preoccupation. States (their rights and obligations) dominate not only the framework of these treaties, their design is reflective of a purpose and rationale which remains state focus and primarily designed to promote national cultural policies. It is not surprising that states have invariably adopted (and tailored) the preceding policies and practices of empires in pursuit of this task because it is a familiar task, the illusion of a singular, overarching dominant collective identity for a diverse populace.

The period from 1945 to 1989 during which the protection of minorities in international law was subsumed within the human rights framework, in particular, non-discrimination, due to the resistance particularly of settler states with indigenous population and fear of scrutiny of national assimilation policies was not the norm. The rise of the state in modern international law was accompanied by recognition of minority (cultural, religious or linguistic) protections. From the recognition of Poland in the 1919 Treaty of Versailles to the recognition of Kosovo in the 2008, the international community has repeatedly accompanied the recognition of statehood with guarantees for the diverse communities contained within its territory. These protections go beyond equal enjoyment of human rights and non-discrimination to ensuring the ongoing viability of these cultural, linguistic and religious differences.

Part Two is a foil to first part of this chapter. It highlights the collision between culture and human rights in contemporary international law with particular reference to access to cultural
heritage and the transformative affect the articulation of cultural diversity as a common good has had our accepted understanding of statehood. First, there is an examination of the reinterpretation of the right to cultural life (Article 15 ICESCR), then an analysis of the broader implication of the re-emergence of the right to one’s own culture (Article 27 ICCPR), and finally, the promotion of cultural diversity as a common good by the international community.

**Right to participate in cultural life redefined**

After 1945, cultural rights became human rights held by every individual human being. It was argued that non-discrimination and the effective realisation of human rights would ensure members of minorities in new and existing states would also have their rights protected, including their cultural rights. After 1989, this argument was no longer tenable as it became apparent that individual human rights alone could not operate as an effective shield against a state hostile to groups on its territory. Gradually, certain existing human rights, particularly cultural rights, were reinterpreted as having a ‘collective’ dimension and the question of special measures for protection of minorities re-emerged at the multilateral level.

The right to participate in cultural life has similarly undergone a metamorphosis, which complements the jurisprudence related to Article 27 ICCPR. I will only consider three elements pertinent to the present discussion: first, the shift from an emphasis on national culture to culture as a way of life of individual and groups, second, elaboration of access to cultural heritage as integral to cultural rights, and thirdly, the transformation of the understanding of culture and cultural heritage as cultural rights become vernacularised through their utilisation by communities worldwide, especially indigenous peoples.

A decade after the adoption of Article 15 ICESCR, a gradual reconfiguration of the boundaries of the right to take part in cultural life began which encompassed UNESCO’s original interpretation. The 1976 UNESCO Recommendation, which elaborates upon the right contained in Article 15 ICESCR, obliges state parties to ensure that minorities have ‘full opportunities for gaining access to and participating in the cultural life … in order to enrich [the relevant country] with their specific contributions, which safeguards their right to preserve their cultural identity.’

General Comment No.21 provides that ‘everyone’ covers a person as an individual, in

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association with others or within a community or group. The Committee for Economic, Social and Cultural Rights (CESCR), the body which monitors the implementation of this treaty obligation, requires States Parties to report on their efforts to ensure participation and access to cultural life by all parts of their population in particular children (especially of poor, migrant or refugee families), older persons, and persons with disabilities. CESCR has repeatedly linked specific reference measures addressing minorities and indigenous peoples to the promotion of cultural diversity generally. It also requires States Parties to report on initiatives to ‘promote awareness of the cultural heritage of ethnic, religious or linguistic minorities and of indigenous communities, and create favourable conditions for them to preserve, develop, express and disseminate their identity, history, culture, language, traditions and customs.’

The CESCR has confirmed that States Parties have both negative (non-interference with exercise of cultural practices and access to cultural ‘goods and services’) and positive (ensuring conditions for participation, facilitation and promotion of cultural life and access to and preservation of cultural heritage) obligations. The minimum core obligation is defined as: ‘The obligation to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice …’. This includes the immediate removal of hindrances to accessing one’s own culture or other cultures ‘without discrimination and without consideration for frontiers of any kind.’

Access to culture is further elaborated by the Committee as:

\[T\]he right of everyone – alone, in association with others or as a community – to know and understand his or her own culture and that of others... to follow a way of life

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83 General Comment No.21 Right of everyone to take part in cultural life, 21 December 2009, UN Doc. E/C.12/GC/21, para.9.
85 See General Discussion on the Right to Take Part in Cultural Life as recognised in Article 15 of the International Covenant on Economic, Social and Cultural Rights, UN Doc.E/1993/22, Chapter VII, para.205; Revised Guidelines, para.1(d).
86 UN Doc.E/C.12/2008/2 at 14, para.68.
87 General Comment No.21, para.6.
88 General Comment No.21, para.55 (emphasis added).
89 General Comment No.21, para.55(d).
associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities.\textsuperscript{90}

UN Independent Expert on Cultural Rights Farida Shaheed notes that:

\begin{quote}
Access to and enjoyment of cultural heritage as a human right is a necessary and complementary approach to the preservation/safeguard of cultural heritage. ... Accessing and enjoying cultural heritage is an important feature of being a member of a community, a citizen and, more widely, a member of society.\textsuperscript{91}
\end{quote}

The 1976 UNESCO Recommendation likewise provided that ‘access to culture’ means ‘concrete opportunities’ for ‘enjoying cultural values and cultural property’.\textsuperscript{92} The Human Rights Council has recalled that States Parties to the ICESCR must take measures ‘necessary for the conservation, development and diffusion of science and culture’, to fully realise rights under Article 15.\textsuperscript{93}

As with other human rights, the right entails a three pronged obligation for States Parties: the obligation to respect, the obligation to protect, and the obligation to fulfil. The obligation to respect includes access to one’s own cultural and linguistic heritage and that of others.\textsuperscript{94} General Comment No.21 notes ‘cultural heritage and diversity are interconnected’ in respect of the obligations to respect and protect this right.\textsuperscript{95} Consequently, States Parties are obliged to respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters,\textsuperscript{96} of all groups and communities especially those disadvantaged and marginalised, and the cultural production of indigenous peoples including their traditional knowledge and other forms of

\textsuperscript{90} General Comment No.21, para.15(b).
\textsuperscript{91} UN Doc.A/HRC/17/38, para.2.
\textsuperscript{92} Art.2(a), 1976 UNESCO Recommendation.
\textsuperscript{93} Fourth recital, Preamble, HRC Resolution 6/11 of 28 September 2007 Protection of Cultural Heritage as an important component of the promotion and protection of cultural rights, UN Doc.A/HRC/RES/6/11.
\textsuperscript{94} General Comment No.21, para.49(d).
\textsuperscript{95} General Comment No.21, para.50.
\textsuperscript{96} General Comment No.21, para.50(a). See also HRC Resolutions 6/1 of 27 September 2007, UN Doc.A/HRC/RES/6/1; and 6/11 of 28 September 2007, UN Doc.A/HRC/RES/6/11.
intangible heritage, lands and resources, by the state, private or transnational corporations. The State Party’s positive obligation to fulfil includes enabling cultural and linguistic minorities to exercise their right to association in order to exercise their cultural and linguistic rights; promoting respect for cultural heritage and cultural diversity through education and awareness-raising; and enacting appropriate legislation, programmes to preserve and restore cultural heritage and ensure access of all to ‘museums, libraries, cinemas and theatres and to cultural activities, services and events’. While the Committee notes that States Parties have a wide margin of discretion concerning the implementation of these obligations at the national level, they were encouraged bring their ‘valuable cultural resources’ within the reach of everyone.

The definition of culture has similarly broadened in the intervening decades, with a corresponding relegation of the earlier interpretation. The 1976 UNESCO Recommendation states that:

_Culture is not merely an accumulation of works and knowledge which an elite produces, collects and conserves in order to place it within reach of all; or that a people rich in its past and its heritage offers to others as a model which their own history has failed to provide them; that culture is not limited to access to works of art and the humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate._

This view was reiterated in the General Comment No.21 when it emphasised the need to move away from ‘the material aspects of culture (such as museums, libraries, theatres, cinemas, monuments and heritage sites)’ and embrace ‘proactive measures that also promote effective access by all to intangible cultural goods (such as language, knowledge and traditions)’.

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97 General Comment No.21, paras.50(b) and (c).
98 General Comment No.21, paras.52(c), 53 and 54.
99 General Comment No.21, para.68.
100 Fifth recital, Preamble, 1976 UNESCO Recommendation. See also Fifth recital, Preamble, Declaration of the Principles of International Cultural Co-operation, adopted by the UNESCO General Conference on 4 November 1966.
101 General Comment No.21, paras.68 and 70. The Independent Expert on Cultural Rights, UN Doc.A/HRC/17/38, para.4, has defined cultural heritage as including (but not limited to):

[T]angible heritage (e.g. sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value), intangible heritage (e.g. traditions, customs and practices, aesthetic and spiritual beliefs,
Accordingly, the CESCR reflecting developments in other fields of human rights and cultural heritage law, has endorsed an understanding of culture that not only covers its individual and collective dimension and accepts that it ‘reflects … the community’s way of life and thought’. The UNESCO Recommendation had also provided that the concept of culture be ‘broadened to include all forms of creativity and expression of groups or individuals, both in their ways of life and in their artistic activities’. The CESCR has noted that it: ‘Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.’

However, this transformation in the definition of culture entails an emphasis on its ‘living’ or evolving nature. The Independent Expert on Cultural Rights elaborates that it is a ‘dynamic concept’ which evolves over time as it is ‘transmitted from generation to generation’. The vernacularisation of human rights norms, especially cultural rights, by indigenous communities and minorities has a significant reflects this process. Whilst several UNESCO instruments have defined culture and cultural heritage, the definition espoused by indigenous peoples is differentiated by a number of key factors. Indigenous peoples embrace a holistic conceptualisation of culture which covers land, immovable and movable heritage, tangible and intangible elements. They emphasise the symbiotic relationship between these elements in

\[\text{vernacular or other languages, artistic expressions, folklore) and natural heritage (e.g. protected natural reserves, other protected biologically diverse areas, historic parks and gardens and cultural landscapes).}\]

\[\text{General Discussion on the Right to Take Part in Cultural Life as recognised in Article 15 of the International Covenant on Economic, Social and Cultural Rights, UN Doc.E/1993/22, Chapter VII, (‘General Discussion’), paras.204, 209, 210 and 213; and General Comment No.21, para.11.}\]

\[\text{Para.3(a), 1976 UNESCO Recommendation.}\]

\[\text{General Comment No.21, para.15.}\]

\[\text{UN Doc.A/HRC/17/38, para.5.}\]

\[\text{For a discussion of the inadequacy of definitions contained in existing UNESCO instruments, see UN Doc.E/CN.4/Sub.2/1991/34, paras.4ff. Recent UNESCO instruments have gone some way to accommodating a broader notion of culture and its manifestations: see Eighth and 15th recitals, Preamble and Art.4, Cultural Diversity Convention; Art.2, Intangible Heritage Convention; Arts 7 and 8, Universal Declaration on Cultural Diversity, 2 November 2001, UNESCO Doc.31C/Resolution 25, Annex I; (2002) 41 ILM 57.}\]


\[\text{Arts 11-13, 25, and 31 UNDRIP.}\]
sustaining and developing their collective identities. This symbiosis is combined with the central importance of land (and resources) to the maintenance and survival of indigenous cultures and identities. General Comment No.21 recognises this strong communal aspect of indigenous heritage and the integral nature of land and resources in respect of the right to participate in cultural life. This relationship between indigenous peoples and their traditional lands goes beyond proprietorship and is primarily defined by its ‘spiritual’ aspect. Another characteristic of indigenous culture and cultural heritage is that its protection within the relevant community is already governed by their own customs, laws and practices. Whilst customary law necessarily varies from community to community, it usually recognises the following inherent characteristics of indigenous heritage:

- it affirms that ownership and custodianship of indigenous heritage is usually collective or communal in character;
- that such ownership and custodianship over heritage is permanent and inalienable; and,
- it reinforces the intergenerational nature of custodianship and transmission of their cultures.

Customary law addresses vital characteristics of indigenous cultural heritage which make it inherently difficult (if not impossible) to be protected by existing international and national legal regimes covering cultural heritage. The Chairperson of the UN Working Group on Indigenous Populations suggested that the submission of indigenous cultural heritage into the purview of

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110 Tenth recital, Preamble, UNDRIP.
111 General Comment No.21, paras.36, 37 and 50(c).
113 Art.34, UNDRIP; and Principles 5 and 6, 2006 draft Guidelines.
114 Principle 5, 2000 revised draft Guidelines; and Principle 20, 2006 draft Guidelines.
116 Criteria (g), (n) and (q) and Principles 1, 11(a) and (b), 2006 draft Guidelines.
these laws has ‘the same effect on their identities, as the individualization of land ownership … that is, fragmentation into pieces, and the sale of the pieces, until nothing remains’.\textsuperscript{117}

**Right to enjoy one’s own culture**

Article 27 of the International Covenant on Civil and Political Rights is the right of ‘members of the minorities to enjoy their own culture, practice their own religion, and use their own language’.\textsuperscript{118} Whilst certain liberal theorists have argued for the importance of possessing a culture in order to exercise freedom of choice in the pursuit of civil and political rights as a citizen of a state,\textsuperscript{119} others have taken emphasised the significance of one’s own culture for individual identity and the enjoyment of all human rights.\textsuperscript{120} It is this latter interpretation of cultural rights through jurisprudence arising in respect of Article 15 ICESCR and Article 27 ICCPR which is gaining prominence in the early twenty-first century.

The Universal Declaration does not include a provision dedicated to minority protection. During deliberations of the draft Universal Declaration, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities and UN Secretary-General distinguished between non-discrimination provisions and a regime of minority protection.\textsuperscript{121} They noted that minority protection implied a permanent set of arrangements to protect the identity of the community by placing a positive obligation on the state to establish institutions for non-dominant groups to protect and develop their language, culture and religion.\textsuperscript{122} The Sub-Commission prepared a draft provision which was not included in the final text of the UDHR.\textsuperscript{123} A dedicated, binding ‘minority’ protection was only realised in 1966 with the adoption of article 27 ICCPR.

The large-scale human tragedy and instability caused by civil conflicts in the late twentieth century, led to a growing acceptance that dependence on the universal application of individual

\textsuperscript{117} UN Doc.E/CN.4/Sub.2/1993/28, para.32.
\textsuperscript{118} GA Res.2200A(XXI), 16 December 1966, in force 23 March 1976.
\textsuperscript{121} UN Doc.E/CN.4/Sub.2/8, (1947).
\textsuperscript{123} UN Doc.A/CN.4/AC.1/3.
human rights and non-discrimination alone failed to protect victims targeted because of their membership of an ethnic or religious community. In response, new instruments which incorporated cultural rights were finalised at the international and regional level to protect minorities and indigenous peoples. The most significant of these are the United Nations’ 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Minorities Declaration), and 2007 Declaration on the Rights of Indigenous Peoples.

Article 27 evolved from the UN General Assembly Resolution on Fate of Minorities adopted on the same day as the Universal Declaration. Its purpose is: ‘towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned….’ It is a right granted over and above other rights contained within the two International Covenants, including non-discrimination. Similarly, the 2005 commentary to the UN Declaration advises that it augments other international human rights instruments ‘by strengthening and clarifying those rights which make it possible for persons belonging to minorities to preserve and develop their group identity’. In its preamble, the Declaration notes that it is inspired rather than based on Article 27 ICCPR, and therefore, is not restricted by the provision. Yet, despite being riddled with provisos, since its inclusion in the ICCPR, Article 27 has played an important role in defining the cultural rights held by minorities and indigenous peoples in international law.

125 UNGA Res.217C(III), 10 December 1948, UN Doc.A/810.
126 General Comment No.23, UN Doc.HRI/GEN/1/Rev.1, 38, para.9.
127 General Comment No.23, paras.4, 5.1 and 9.
In an effort to limit the reach of the protection Article 27 afforded, several states insisted on the inclusion of the words: ‘In those states in which ethnic, religious or linguistic minorities exist.’ However, as the Permanent Court of International Justice observed, the existence of a minority is a question of fact not law. Likewise, in its General Comment No.23, HRC states that the existence of a minority within ‘a given state party does not depend upon a decision by that state party but requires to be established by objective criteria’.

The inclusion of the minority protection within the international human rights framework reinforced the presumption that the right-holder is an individual and not the group. Indeed, Article 27 refers to ‘persons belonging to such minorities’ and not ‘minorities’ per se. In addition, the complaint mechanism contained in the Optional Protocol to the ICCPR provides standing to states or individuals but not to ‘communities’. The concession to the collective aspect of minority rights came with the words ‘in community with other members of their group’. The HRC has repeatedly affirmed that the right of enjoyment of culture, practice of religion, or use of language can only be realised meaningfully when exercised ‘in a community’, that is as a group. General Comment No.23 states that Article 27 protects ‘individual rights’ but that the obligations owed by states are collective in nature. Likewise, the UN Declaration privileges individual rather than collective rights by referring to the rights of ‘persons belonging to minorities’. Nonetheless, it does provide a bridge between the individual right and its

133 See UN Doc.E/CN.4/Sub.2/384/Add.2, paras.125ff; and General Comment No.23, para.1.
134 Optional Protocol to the International Covenant on Civil and Political Rights, UNGA Res.2200A(XXI), 16 December 1966, in force 23 March 1976; 21 UN GAOR Supp.(No.16), p.59; UN Doc.A/6316 (1966); 999 UNTS 302; and (1967) 6 ILM 368. Nonetheless, the Committee has noted that ‘in principle, [there is] no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about the alleged breaches of their rights’: Howard v. Canada No.879/1999 Doc.CCPR/C/84/D/879/1999, para.8.3.
136 General Comment No.23, para.6.2.
137 Art.2, UN Minorities Declaration.
exercise in the collective context.\textsuperscript{138} While the rights are granted to individuals, the duties of states extend to minorities as groups.\textsuperscript{139} The commentary also stipulates that ‘the state cannot fully implement them without ensuring adequate conditions for the existence and identity of the group as a whole’.\textsuperscript{140}

The right contained in Article 27 is negatively conferred, with the addition of the words ‘shall not be denied the right’. However, General Comment No.23 provides that Article 27 imposes positive obligations on States Parties.\textsuperscript{141} In the UN Declaration, the cultural rights of the group are accommodated by the restatement of the wording of Article 27 ICCPR, but it does so as a positive rather than negative obligation.\textsuperscript{142} The commentary insists that the safeguarding and promotion of the identity of minorities and the effective realisation of their cultural rights will often require protective and proactive measures by the state.\textsuperscript{143} In addition, according to the Declaration, special measures designed to meet these obligations will not prima facie offend the principle of equality contained in the UDHR.\textsuperscript{144}

The UN Independent Expert on Cultural Rights notes that while Article 27 ICCPR does ‘not mention cultural heritage specifically, … people cannot enjoy culture without accessing and enjoying cultural heritage’.\textsuperscript{145} Unlike specialist instruments dealing with indigenous peoples, the UN Minorities Declaration primarily concentrates on access to measures for the protection of language. It provides that states should where possible provide ‘adequate opportunities to [persons belonging to minorities] to learn their mother tongue or to have instruction in their mother tongue’.\textsuperscript{146} The commentary notes that ‘language is among the most important carriers of group identity.’\textsuperscript{147}

\begin{flushleft}
\textsuperscript{138} Art.3, UN Minorities Declaration.\\
\textsuperscript{139} Art.1, UN Minorities Declaration; and UN Doc.E/CN.4/Sub.2/AC.5/2005/2, para.14.\\
\textsuperscript{140} UN Doc.E/CN.4/Sub.2/AC.5/2005/2, p.5, para.14.\\
\textsuperscript{141} General Comment No.23, paras.6.1, 6.2 and 9.\\
\textsuperscript{142} Art.2(1), UN Minorities Declaration.\\
\textsuperscript{143} UN Doc.E/CN.4/Sub.2/AC.5/2005/2, p.8, para.33.\\
\textsuperscript{144} Art.8(3), UN Minorities Declaration.\\
\textsuperscript{145} UN Doc.A/HRC/17/38, para.37.\\
\textsuperscript{146} Art.4(2), UN Minorities Declaration.\\
\textsuperscript{147} UN Doc.E/CN.4/Sub.2/AC.5/2005/2, para.59.
\end{flushleft}
Whilst indigenous peoples have consistently reject their categorisation as ‘minorities’ arguing that their plight is distinguishable because of differing historical circumstances, the articulation of cultural rights applicable to indigenous peoples in international instruments borrows heavily from article 27 ICCPR. In turn, its subsequent interpretation and elaboration by these communities provides a fuller understanding of access to cultural heritage pursuant to this right. The 2007 UN Declaration and ILO Convention No.169 of 1989 provide a glimpse into the reworking of cultural rights to reflect the concerns of indigenous peoples. In its preamble, ILO 169 recognises: ‘[T]he aspirations of these peoples to exercise control over their own institutions, ways of life … to maintain and develop their identities, languages and religions, within the framework of the states in which they live.’ ILO 169 acknowledges the collective right of indigenous and tribal peoples to preserve and develop their cultural identity.

The UN Declaration on the Rights of Indigenous Peoples specifically addresses the cultural rights of indigenous peoples. Originally contained in Part III entitled ‘cultural rights’, Articles 11 through 13 of the declaration corresponds to the typology of Article 27 ICCPR. Extrapolated to reflect the concerns of indigenous peoples:

- Article 11 covered enjoyment of culture including ‘right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature’;
- Article 12 concerns profession and practise of religion including ‘right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access to privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to repatriation of their human remains’; and
- Article 13 related to use of language which includes ‘the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures and to designate and retain their own names for communities, places and persons’.

148 Fifth recital, Preamble, ILO 169 (emphasis added).
149 See Fifth recital, Preamble, and Arts 2(2)(b) and (c), 4, 5, 7, 23, 26-31, ILO 169.
In addition, related provisions covering education, media, land, resources and cultural heritage reinforce these cultural rights and through the inclusion of terms like ‘control’ strengthen indigenous claims to autonomy in respect to cultural matters.\textsuperscript{150}

General Comment No.23 affirms that protection of rights pursuant to Article 27 ICCPR to ensure the survival and development of minority cultures is for the benefit of these communities and the entire society.\textsuperscript{151} The rationale for ensuring the continuation of the diverse cultural, religious and linguistic identities within and across states and the corresponding rejection of past national assimilation policies has been explicitly reiterated by the United Nations and related bodies.\textsuperscript{152} The commentary to the UN Minorities Declaration confirms that ‘elimination is illegal’ and ‘forced assimilation is unacceptable’. However it notes that a certain degree of integration is required to enable the state to ‘respect and ensure human rights to every person within its territory without discrimination’. The purpose of minority protection becomes ‘ensur[ing] that integration does not become unwanted assimilation or undermine the group identity of persons living on the territory of States’.\textsuperscript{153} It adds that to achieve this aim:

\begin{quote}
Minority group identity requires not only tolerance but a positive attitude towards cultural pluralism on the part of the State and the larger society. Not only acceptance but also respect for the distinctive characteristics and contribution of minorities to the life of the national society as a whole are required. \ldots\textsuperscript{154}
\end{quote}

The prohibition against forced assimilation encompasses the acts of the State and those of third parties. The Council of Europe’s Framework Convention on National Minorities contains a similar prohibition against ‘forced’ assimilation, whilst its explanatory report makes clear that ‘voluntary’ assimilation is not prohibited.\textsuperscript{155} It too acknowledges the potentially positive role of

\begin{itemize}
\item See arts 14-15(education), 16 (media), 26 (land), 31 (traditional knowledge) and 34 (customary law), UNDRIP.
\item General Comment No.23, para.9.
\item Art.1(1), UN Minorities Declaration.
\item UN Doc.E/CN.4/Sub.2/AC.5/2005/2, paras.28.
\end{itemize}
official integration policies for ‘social cohesion’ and promotion of ‘cultural diversity’, which is ‘a source and a factor, not of division, but of enrichment of each society’.156

These concerns are replicated explicitly in multilateral instruments covering indigenous peoples. The 2007 UN Declaration states that indigenous peoples have a right to ‘maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State’.157 It specifically provides that indigenous peoples and individuals have a right not to be subject to ‘forced assimilation or destruction of their culture’. Pursuant to this right, states should provide mechanisms to prevent and enable redress for forced assimilation and acts which deprive them of their cultural identity, dispossess them of their lands or resources, force population transfers, or propaganda which incites racial discrimination.158

The prohibition against assimilation is complemented by provisions covering self-identification and the individual right to exit the group. The UN Minorities Declaration provides under Article 3(2) that there shall be ‘no disadvantage … for any person belonging to a minority as a consequence of the exercise or non-exercise of rights set forth in the present Declaration’. The related commentary elaborates that this provision prohibits states from imposing an ethnic identity on individuals through sanctions against those that refuse to form part of that group as occurred during Apartheid in South Africa.159 The provision also applies at least ‘moral duties’ on ‘agencies of the minority group’, with States Parties obliged to prohibit minorities taking measures which impose rules on persons who do not wish to be part of the minority nor exercise their related rights.160 Similarly, General Comment No.21 defines it as a ‘freedom’. The CESCR has noted that: '[t]he decision by a person whether or not to exercise the right take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be

156 Ibid.
157 Art.5 UNDRIP.
158 Art.8 UNDRIP.
160 Ibid.
recognized, respected and protected on the basis of equality’. It has held that this was a right of special importance for indigenous peoples, individually and collectively.\textsuperscript{161}

In a similar vein, Article 9 UNDRIP provides that indigenous peoples and individuals have the right to belong to an indigenous community in accordance with the community’s traditions and customs. No discrimination is permissible in respect of the exercise of this right. Furthermore, under Article 33, indigenous peoples have a right to ‘determine their own identity or membership in accordance with their customs and traditions’. This does not impact upon the right in indigenous persons to obtain the citizenship of their relevant state. Yet, conflicts may arise between the collective and individual rights to self-identification. In Lovelace \textit{v.} Canada, HRC found the state in violation of Article 27 ICCPR because the relevant national legislation, \textit{Indian Act}, had stripped Ms Lovelace of her Indian status following her marriage to a non-Indian, which remained even after her relationship ended, and meant that she could not return to her tribal land. The respondent state conceded in its national report that the law ‘required serious reconsideration and reform’ not the least because of its discrimination between women and men. However the legislation was ‘designed to protect the Indian minority’ and it could only be amended in consultation with the community itself, which was divided on reform.\textsuperscript{162} The Committee acknowledged the ‘need to define the category of peoples entitled to live on a reserve, for such purposes as those explained by the Government regarding … preservation of the identity of its people’.\textsuperscript{163} However, it concluded that the denial of Ms Lovelace’s right to access her culture and language ‘in community with other members’ of her group was ‘reasonable or necessary’ in achieve the stated aim of the legislation.\textsuperscript{164}

Human rights instruments in which cultural rights are located reaffirm that they cannot violate existing human rights norms and fundamental freedoms.\textsuperscript{165} The commentary to the UN

\begin{footnotes}
\item[161] General Comment No.21, paras 6 and 7.
\item[163] Ibid., para.15.
\item[164] Ibid., paras. 15 and 17.
\item[165] For example, 18\textsuperscript{th} recital, Preamble, 1976 UNESCO Recommendation; Arts 4(2) and 8(2) UN Minorities Declaration; and Art.46(2) UNDRIP. See General Comment No.21, para.17, provides States are obliged to implement art.15 ICESCR together with other obligations under the covenant ‘in order to promote and protect the entire range of human rights guaranteed under international law’. Previously, the CESCR has reiterated that: ‘[N]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope’: General Comment No.21, para.18.
\end{footnotes}
Minorities Declaration noted that ‘cultural or religious practices which violated human rights law should be outlawed for everyone’, so that the qualification was of universal application, to minorities and the majority alike.\textsuperscript{166} Article 8(2) of the Declaration provides that agencies of the minority cannot interfere with the human rights of individual members of the group in order to preserve their collective identity. The CESCR has indicated a similar position in respect of article 15 ICESCR stating that: ‘[N]one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope’.\textsuperscript{167} It has found that States Parties shall be in violation of their obligations if they fail to take steps to combat harmful practices which are attributed to custom and tradition like ‘female genital mutilation and allegations of the practice of witchcraft’, which the Committee terms ‘barriers to the full exercise by the affected persons’ of their rights under this provision.\textsuperscript{168}

Likewise, recent cultural heritage instruments intended to protect and promote of cultural diversity invariably include a ‘saving’ provision. Provisions guaranteeing cultural diversity cannot be invoked as a justification for violation of human rights and fundamental freedoms protected by the international and regional human rights instruments.\textsuperscript{169} In \textit{Interights on behalf of Safi\'a Yakubu Husaini et al/Nigeria}, the African Commission on Human and Peoples’ Rights was asked to consider a complaint arising from operation of penal legislation and Sharia Courts in northern Nigeria.\textsuperscript{170} It was alleged that these laws ‘lowered the standards of fair trial’ including limiting the rights to legal representation to lawyers of the Muslim faith and installing the special Sharia Courts of Appeal as the last appellate body rather than the Nigerian Supreme Court. They were only applicable to persons of the Muslim faith. The complainant alleged that the discriminatory application of these laws and legal process to persons of one faith was a violation of Nigeria’s obligations concerning non-discrimination, fair trial and due process under the African Charter of Human and Peoples’ Rights.\textsuperscript{171}

\textsuperscript{166} UN Doc.E/CN.4/Sub.2/AC.5/2005/2, para.57.
\textsuperscript{167} General Comment No.21, paras.18 and 20.
\textsuperscript{168} General Comment No.21, para.64.
\textsuperscript{169} Art.4, Cultural Diversity Declaration; Art.2.1, Intangible Heritage Convention; and Art.2, Cultural Diversity Convention.
\textsuperscript{170} 269/03, Decision, ACHPR, 27 April 2005.
A margin of appreciation is given to the States Parties in the implementation of these guarantees depending on the circumstances prevailing in its territory. The CESCR in respect of Article 15 ICESCR has observed that a state may need to impose limitations on the right to participate in cultural life especially in respect of ‘negative’ practices which infringe other human rights.\(^\text{172}\)

These limitations must pursue a ‘legitimate aim’, be ‘compatible’ with the right and ‘strictly necessary for promotion of the general welfare in a democratic society’, and proportionate (that is, the least restrictive measures for attaining the ends).\(^\text{173}\) In respect of a similar qualification in the UN Minorities Declaration, its commentary provides that, whilst having consideration for the conditions within the particular state, the prohibitions shall be respect as long as they are ‘based on reasonable and objective grounds’.\(^\text{174}\) The CESCR has noted that states when adopting such measures must ensure protection for related rights, including the right to privacy, freedom of thought, conscience or religion, freedom of opinion and expression, to peaceful assembly and freedom of association.\(^\text{175}\) The on-going debate concerning HRC resolutions on Combating Defamation of Religions promoted by the Organisation of Islamic Conference and domestic blasphemy laws in states like Pakistan and Qatar illustrate the intersection between the rights of a group, in this case a religious group, and individual human rights like those listed by the Committee.\(^\text{176}\)

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\(^{172}\) UN Doc.E/C.12/GC/21, para.19.

\(^{173}\) Art.4 ICESCR. See also ECHR decisions including *Case of Dogru v. France*, application no.27058/05, Judgment (Merits), ECHR Chamber, 4 December 2008. Cf. *Case of Lautsi v. Italy*, application no.30814/06, Judgment (Merits), ECHR Grand Chamber, 18 March 2011.


\(^{175}\) UN Doc.E/C.12/GC/21, para.19.

except where they are designed to prevent incitement to war or ethnic or religious discrimination or hostility.\textsuperscript{177}

\textbf{Cultural diversity as a common good}

Evolving interpretations of cultural rights (article 15 ICESCR, article 27 ICCPR) in the closing decades of the twentieth century were often accompanied by the articulation of the importance of cultural diversity in various international fora and multilateral instruments. The UNESCO Declaration of Principles of International Cooperation adopted in 1966 provided that: ‘In their rich variety and diversity, and in their reciprocal influences they exert on one another, all cultures form part of the common heritage of all mankind.’\textsuperscript{178} By the beginning of the twenty-first century, several specialist multilateral declarations had been adopted on cultural diversity.\textsuperscript{179}

The 2001 UNESCO Universal Declaration on Cultural Diversity reiterates:

\begin{quote}
\textit{Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized an affirmed for the benefit of present and future generations.}\textsuperscript{180}
\end{quote}

Cultural diversity has been promoted as a common good for a range of reasons including its importance to peace and stability,\textsuperscript{181} progress and prosperity,\textsuperscript{182} and full realisation of human

\textsuperscript{177} General Comment No.34, 21 July 2011, para.48. See also Concluding Observation on the United Kingdom of Great Britain and Northern Ireland, 27 March 2000, CCPR/C/79/Add.119, para.15; and Concluding Observations on Kuwait, HRC, 27 July 2000, CCPR/CO/69/KWT, para.20.


\textsuperscript{179} Universal Declaration on Cultural Diversity, adopted by UNESCO General Conference, 2 November 2001; Declaration on Cultural Diversity, adopted by Council of Europe, Committee of Ministers, 7 December 2000; Charter for African Cultural Renaissance, adopted by African Union at Sixth Ordinary Session, 24 January 2006; and Declaration on ASEAN Unity in Cultural Diversity: Towards Strengthening ASEAN Community, adopted by the Ministers responsible for Culture and Arts of ASEAN Member States, 17 November 2011.

\textsuperscript{180} Art.1, 2001 UNESCO Declaration. See also Third recital, Preamble, UNDRIP; First recital, Preamble, CE Declaration; and Fifth recital, Preamble, and Art.5(1), 2006 African Charter. Cf. Third recital, Preamble, ASEAN Declaration.

\textsuperscript{181} Second recital, Preamble, 1966 UNESCO Declaration; Second recital, Preamble, 1976 UNESCO Recommendation; Second and seventh recitals, Preamble, 2001 UNESCO Declaration; Fifth recital, Preamble, 2006
rights and fundamental freedoms and a democratic society.\textsuperscript{183} These specialist instruments on cultural diversity have recognised the importance of protection and promotion of cultural rights for the realisation and maintenance of cultural diversity; and correspondingly, human rights instruments and bodies have acknowledged the importance of cultural diversity.\textsuperscript{184} These specialist instruments on cultural diversity have also underscored the importance of effective protection, promotion and access to cultural heritage.\textsuperscript{185} Given the emphasis of cultural diversity, it is not surprising that the milieu which has realised these instruments have also witnessed the adoption of the first specialist instruments for the protection of intangible heritage and that these treaties in turn explicitly affirm the importance of cultural diversity.\textsuperscript{186} However, the rationale and application of long-standing cultural heritage instruments on the protection of tangible heritage are also being revisited and reinterpreted.\textsuperscript{187} The trial of defendants involved in the shelling of the Old Town of Dubrovnik during the Yugoslav conflicts provides a telling example of this process as it relates to protection afforded by cultural heritage under the 1954 Hague Convention (and the 1972 World Heritage Convention). During their sentencing for war crimes against cultural property, the Trial Chamber of the ad hoc International Criminal Tribunal for the former Yugoslavia found that ‘this crime represents a violation of values especially protected by the international community’.\textsuperscript{188} In \textit{Jokić}, the Trial Chamber held that while ‘it is a

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\textsuperscript{182} Fifth recital, Preamble, 1966 UNESCO Declaration; Fourth recital, Preamble, 1976 UNESCO Recommendation; Sixth recital, Preamble, and art.3, 2001 UNESCO Declaration; CE Declaration generally; Fifth recital, Preamble, 2006 African Charter; Sixth recital, Preamble, and Part 3, ASEAN Declaration; Sixth and seventh recitals, Preamble, UN Minorities Declaration;

\textsuperscript{183} Third recital, Preamble, 1966 UNESCO Declaration; 23\textsuperscript{rd} recital, Preamble, 1976 UNESCO Recommendation; Fourth recital, Preamble and Arts 2 and 5, 2001 UNESCO Declaration; Fourth recital, Preamble, CE Declaration; and Paragraph 4, ASEAN Declaration; and Sixth and seventh recitals, Preamble, CE Framework Convention.

\textsuperscript{184} Arts 4 and 5, 2001 UNESCO Declaration; and art.5(1), 2006 African Charter; Third recital, Preamble, UNDRIP; and General Comment No.21, para.40.

\textsuperscript{185} Arts 6 and 7, 2001 UNESCO Declaration; Parts IV-V, African Charter; and art.5(2) ASEAN Declaration.

\textsuperscript{186} Second and sixth recitals, Preamble, Intangible Heritage Convention; and first and second recitals, Preamble, UNESCO Cultural Diversity Convention.

\textsuperscript{187} See for example the inclusion of cultural landscapes generally and associative cultural landscapes in particular within the operation of the World Heritage Convention. Inscription of the latter on the World Heritage List is determined because of its ‘powerful religious, artistic or cultural associations of the natural element rather than material cultural evidence’; WHC-92/CONF.002/12.

serious violation of international humanitarian law to attack civilian buildings, it is a crime of
even greater seriousness to direct an attack on an especially protected site’. 189 A site once
destroyed could not be returned to its original status. 190 It found that the attack on Dubrovnik was
exacerbated because it was a ‘living city’ and ‘the existence of the population was intimately
intertwined with its ancient heritage.’ 191 The 1954 Hague Convention’s rationale is contained at
the commencement of its preamble which states:

\[D]amge to cultural property belonging to any people whatsoever means damage to the
cultural heritage of all mankind, since each people makes its contribution to the culture
of the world.\] 192

For the first time in a multilateral instrument there is reference in the 1954 Hague Convention to
‘cultural heritage’ rather than ‘cultural property’. 193 It points to its intergenerational importance,
an aspect reaffirmed by a resolution adopted at the first meeting of the High Contacting Parties to
the Convention noted that ‘the purpose of the Convention … is to protect the cultural heritage of
all peoples for future generations.’ 194 The preamble also deliberately refers to ‘peoples’ rather
than ‘states’. The UNESCO Declaration concerning the Intentional Destruction of Cultural
Heritage was adopted in response to increased acts of deliberate destruction of cultural heritage,
including the Buddhas of Bamiyan in 2003. 195 It reiterates that ‘cultural heritage is an important
component of the cultural identity of communities, groups and individuals, and of social
cohesion, so that its intentional destruction may have adverse consequences on human dignity
and human rights’. 196

It is significant that Africa and Europe, two continents which have been riddled with violent
ethnic and religious conflict in recent decades, have adopted multilateral framework conventions

189 Ibid., para.53.
190 Ibid., para.52.
191 Ibid., para.51.
194 UNESCO Doc.CUA/120, para.22.
195 Declaration concerning the Intentional Destruction of Cultural Heritage, 17 October 2003, UNESCO
Doc.32C/Resolution 39.
196 Fifth and sixth recitals, Preamble, Intentional Destruction Declaration.
focusing on the promotion of cultural diversity and human rights, and heralding a reinterpretation of the protection of cultural heritage.\textsuperscript{197} The Charter for African Cultural Renaissance (2006 African Charter) adopted by the African Union in 2006,\textsuperscript{198} and the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) of 2005,\textsuperscript{199} together with 2000 ASEAN Declaration on Cultural Heritage,\textsuperscript{200} and the work of the UN Independent Expert on Cultural Rights concerning access to cultural heritage, have the potential to have a transformative impact on our understanding of cultural heritage and its legal protection at the multilateral level, from previous emphases on states and national cultures to human rights and cultural diversity.\textsuperscript{201} The intent is not to serve to promote unity within a state by bolstering protection of the national cultural identity. Instead, the purpose is a culture within society (regional, national, local) which fosters intercultural and intergenerational dialogue and understanding and respect for human rights.\textsuperscript{202} And this in turn is underpinned by an acknowledgement that this can only be achieved through multilateral cooperation.\textsuperscript{203} The Faro Convention recognises the ‘need to put people and human values at the centre of an enlarged and cross-disciplinary concept of cultural heritage’.\textsuperscript{204} The African Charter provides that: ‘all the cultures of the world are equally entitled to respect just as all individuals are equal as regards free access to culture.’\textsuperscript{205}

\textsuperscript{197} See for example, Explanatory Report for Council of Europe Framework Convention on the Value of Cultural Heritage for Society (CETS No.199).
\textsuperscript{199} Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention), 27 October 2005, ETS No.199. See also the Council of Europe, European Cultural Charter, adopted in Paris on 19 December 1954, ETS No.18.
\textsuperscript{200} ASEAN Declaration on Cultural Heritage, Bangkok, 25 July 2000.
\textsuperscript{201} Even though both are multilateral instruments intending to promote cooperation on their respective continents, Parts II and III, 1976 African Charter; and art.1, Faro Convention, reflect a statist approach to rights and obligations. Cf. 2000 ASEAN Declaration still has a strong state based approach, for example, Arts 1 and 2.
\textsuperscript{202} Fifth recital, Preamble, 2006 African Charter; and first and sixth recitals, Preamble, Faro Convention. See also art.2 UNESCO Diversity Declaration; and 11\textsuperscript{th} recital, Preamble, art.1, 2000 ASEAN Declaration; and General Comment No.21, para.50(a).
\textsuperscript{203} Eighth recital, Preamble, Faro Convention; sixth recital, Preamble, 2006 African Charter; and 10\textsuperscript{th} recital, Preamble, 2000 ASEAN Declaration.
\textsuperscript{204} Second recital, Preamble, Faro Convention. See also fourth recital, preamble, 2000 ASEAN Declaration.
\textsuperscript{205} Third recital, Preamble, 2006 African Charter.
The elaboration of two characteristics of these instruments will serve to highlight this distinctive human rights focused approach to the international protection of cultural heritage. First, states are no longer the primary holders of rights (and obligations). Instead, they are replaced by communities, groups and individuals. The Faro Convention recognises that the right to participate in cultural life includes rights to cultural heritage which entail individual and collective rights and responsibilities.\(^{206}\) It acknowledges that everyone, individually or collectively, has a right to benefit and contribute to cultural heritage, subject to restrictions necessary for a democratic society for the protection of public interest or the rights and freedoms of others. Conversely, they have an obligation, individually or collectively, to ‘respect the cultural heritage of others as much as their own heritage, and consequently the common heritage of Europe’. The 2006 African Charter similarly acknowledges the rights and obligations of non-states actors with references to ‘all citizens’, ‘minorities’, ‘peoples’, ‘nations’, ‘national and regional identities’, as well as ‘men and women’, ‘youth’, ‘elders and traditional leaders’, ‘marginalised and underprivileged communities’ and ‘artists’.\(^{207}\) Second, these instruments are intended to be read in conjunction with existing rights and obligations contained in international conventions and declarations for the protection of cultural heritage.\(^{208}\) Consequently, these existing treaty obligations are reinforced by a distinct human rights dimension. This is reflected in the integration of cultural heritage protection and promotion into aims including cultural diversity, ethics and dialogue between communities,\(^{209}\) and environment protection, sustainable use, and economic development,\(^{210}\) and processes including shared responsibility and public participation, access and democratic participation, and knowledge and information-sharing.\(^{211}\)

\(^{206}\) Arts 1 and 4, Faro Convention. See Arts 3, 8 and 14, 2000 ASEAN Declaration; and UN Doc.A/HRC/17/38, paras.61-63.

\(^{207}\) Arts 4 and 5 and Part III, 2006 African Charter.

\(^{208}\) See Second recital, Preamble, 2006 African Charter; and Seventh recital, Preamble, Faro Convention.

\(^{209}\) Art.7 Faro Convention. See also 11\(^{th}\), 12\(^{th}\) and 13\(^{th}\) recitals, Preamble, and arts 2, 6, and 7, 2000 ASEAN Declaration.

\(^{210}\) Arts 8, 9 and 10, Faro Convention; Parts II and III, 2006 African Charter; and Ninth recital, Preamble and Arts 8-14, 2000 ASEAN Declaration.

\(^{211}\) Section III, Faro Convention; Part III, 2006 African Charter; and Second recital, Preamble, 2000 ASEAN Declaration; and UN Doc.A/HRC/17/38, paras.64-72.
Conclusion

In the decades after the Second World War, states, especially newly independent states, relied heavily on effective national cultural policies to inculcate a unified, collective identity amongst its citizenry. In so doing, they borrowed from the centralising, standardising and assimilatory policies and practices of former metropolitan powers who had also sought to unify (and subdue) a diverse populace. It is not surprising then, that they strongly resisted any efforts within the international sphere which scrutinised and curbed assimilatory practices. Nor is it revelatory that international law protections for cultural heritage have long betrayed a bias for states and national cultures.

Yet, by the late twentieth century this emphasis was no longer sustainable as it became clear that ‘cultures have no fixed borders’. It became increasingly clear that the period from 1945 to 1989 which witnessed reliance on non-discrimination and civil and political human rights, and the underdevelopment of minority protections and cultural human rights, did not make ethnic and religious diversity disappear nor dampen the level of violent conflicts within and across states.

In the intervening period, the international community has become aware and acknowledged that cultural diversity must be addressed as source of peace and stability rather than a cause of civil strife. This recent development which has evolved through the prism of human rights discourse is distinct from earlier examples of minority protection and protection of cultural heritage in international law. Minority protections are part of and subject to general human rights protections. This has entailed an acknowledgement of the importance of communal identities (beyond the state) for individuals, reflected in the elaboration and reinterpretations of existing cultural human rights (including article 15 ICESCR, article 27 ICCPR). In turn, there is a reinforcement of the notion that all groups, not just states, must not infringe human rights and fundamental freedoms. These processes have been complemented by an evolution in the protection of cultural heritage by the international community with the distinct movement away from the dominance of national interests to its protection as a means of ensuring the contribution of each peoples. This shift is reflective of the increased recognition of cultural diversity as a common good for humanity generally which has entailed a broadening of our understanding of

\[212\] General Comment No.23, para.41.
cultural heritage and has the potential to reconfigure rights and obligations under existing multilateral instruments for the protection of cultural heritage going into the future.