Liberty, Equality, Diversity: States, Cultures and International Law

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1. Introduction

Territorial boundaries of present-day states rarely accord with the cultural affiliations of their inhabitants. International boundaries demarcate vertically the physical and political realm of the state. Despite the oft-concerted assimilationist policies and practices of national authorities, they have been unable to weaken (or have inadvertently strengthened) the horizontal, relational ties which bind cultural and religious groups.\(^1\) It is at the interface of international borders that there is usually heightened confrontation and contestation between the political and cultural, vertical and horizontal understandings of space. Despite the efforts of early twentieth century statesmen to square territorial boundaries with cultural groupings, there was a realization that this task could (and should) never been fully implemented. Instead, international law, and more specifically human rights law, has been deployed in achieving a workable equilibrium for that which cannot be realized as a reality on the ground.

This chapter explores how culture is addressed by contemporary international law, with particular reference to human rights law norms. With the rise of the modern, secular state in Europe, human rights have largely remained a vehicle for defining relations between the state and individuals. Civil and political rights which dominated the first articulations of human rights underpinned the new vertical demarcations of the state, its realm and its citizens. Yet, concomitantly, the international community recognized and afforded protection (to varying degrees and with increasing consistency) to the multiple, existing and persistent relations between individuals arising from religious, cultural and linguistic affiliation which run horizontally across the newly imposed ties of citizenship. The ensuing battleground is one of the rise of the modern state accompanied by human rights and the ongoing plight to achieve a workable and sustainable resolution between existing and newly evolving understandings of common identities – ‘the We between the I and the All’ – from the religious to the secular, the national to multicultural, and back again.\(^2\) Human rights law has been pivotal in defining conflicting rights claims between groups, individuals and the state in which they are located.

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In examining how contemporary human rights law has been challenged by and adapted to the stresses and strains of relations between states and their inhabitants over claims of culture, I adopt a structure which is a riff on the national motto of an archetypal secular state: liberty, equality, diversity. The first part covering freedom focuses on the rise of the modern state and its conscious reimagining of ties with its citizens through the promotion of tolerance and a secular, national identity. The shift is explored through the prisms of the freedom of religion, the right to participate in (national) cultural life, and the limitations on freedom of expression including prohibition of hate speech and domestic blasphemy laws. The second part on equality centres on the relationship between the state, the group and its individuals by moving beyond the strictures of tolerance to the fostering of non-discrimination not only in respect of civil and political rights but cultural rights also. This transformation of the right to a culture to the right to one’s own culture is examined through the right to self-identification, non-discrimination, and minority protections and cultural rights in international law. The third and final part concentrates on the embrace of cultural diversity by the international community as a common good. The promotion of diversity is examined at the state level through the implementation of cultural pluralism, at the international level through the sanctioning of voluntary isolation and secession of groups, and at the group level, through the protection of individual human rights and equality.

2. Liberty

Conceptions of fundamental freedoms have been intrinsic to legal and political theoretical understandings of the relationship between the modern state and its inhabitants since the emergence of the secular state from the ashes of relentless civil and continental religious fratricide in Europe. Sectarianism is not the exclusive preserve of this region and the responses to it carry resonance for those experiencing conflicts beyond its boundaries. This first part explores three notions of freedom: the separation of church and state and the recognition of religious freedom; the relationship between the right to participate in cultural life and national culture; and finally, balancing freedoms, and the right to freedom of expression, hate speech and blasphemy laws. These freedoms and the limitations attached to their enjoyment illustrate the strictures of toleration as means of calibrating relations between the majority and minority within a state.  

A. The Right to Freedom of Religion or Beliefs

The matrix which defines the contours and limits of the right to freedom of religion or beliefs serves as an important template for international law responses to the right to culture. The corollaries, and overlap, between cultural and religious ties have been made in human rights law, particularly in respect of minorities. Not least because balancing the interests of minorities and majorities, the distinction between the public and private spheres, and the promotion of tolerance and pluralism, continue to be grappled with by democratic societies.

The reconfiguration of relations between church and state and between the state and individuals defined the peace settlement which ended the Thirty Years War across continental Europe. The Treaty of Westphalia of 1648, often viewed as the starting point of modern international law, recognized state sovereignty and national self-determination, which enabled sovereigns to decide the religious affiliation of their states. Conversely, for communities which were effectively rendered religious minorities as a result of the peace settlement, the treaties recognized the right of freedom of religion in the private and equal rights in public life regardless of religious affiliation.

On the back of these guarantees at the supranational level, the movement towards separation of church and state and religious tolerance gained momentum at the national level, that is, within states. As people redefined their relations with each other and the state, these evolving constitutional arrangements formally enumerated individual rights which included the right to freedom of religion. For example, the English Bill of Rights of 1689 and related legislation represented both an assertion of national self-determination through its reaffirmation of the Church of England as the official church and tolerance of other Protestant groups (but not the Catholic Church), and early articulation of individual rights defining relations between the sovereign and subjects. John Locke, in his Letters Concerning Toleration (1689-92), argued that the pursuit of religious uniformity rather than tolerating diversity created greater social unrest and obtaining religious uniformity through violence was not desirable. Drawing on these developments, the French and US drafters of their respective bills of rights also promoted religious tolerance and recognized the right to freedom of religion. The Déclaration des droits de l’homme et du citoyen adopted on 26

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4 Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies (Treaty of Münster), 24 October 1648, 1 CTS 271, Arts XLIX (‘the Liberty of the Exercise of Religion…’) and XXVIII (‘… who shall demand it, shall have the free Exercise of their Religion, as well in publick Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose…’).

5 J. Locke, Locke on Toleration, R. Vernon (ed.) (Cambridge, 2010).
August 1789 provides in Article 10: ‘No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.’ The French drew inspiration from the writings and advocacy of Voltaire on religious tolerance and the separation of church and state. In his 1763 essay *A Treatise on Toleration*, Voltaire wrote by way of analogy:

[Y]ou know that each province of Italy has their own dialect, and that people do not speak at Venice or Bergamo the same way they speak at Florence. The Academy of Crusca near Florence has fixed the language; its dictionary is a rule which one dare not depart from …. [B]ut do you believe that the consul of the Academy … could in conscience cut the tongues out of all the Venetians and all the Bergamese who persist in speaking their dialect?6

In September 1789, the First Amendment to the US Constitution proposed by Congress provided that the state would ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof’ and tied to this guarantee was freedom of speech, the press, and peaceful assembly.’ As explained below, present-day formulations of the right to freedom of religion or beliefs in international human rights law owe much to these early supernational and national examples.

While there had been several earlier attempts to guarantee religious freedom to minorities, it was not formulated as a universally applicable right in international law until the adoption of several international and regional human rights instruments after the Second World War. The Universal Declaration of Human Rights (UDHR),7 in Article 18, provides that

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.


[V]ous savez que chaque province d’Italie a son jargon, et qu’on ne parle point à Venise et à Bergame comme à Florence. L’Académie de la Crusca a fixé la langue; son dictionnaire est une règle dont on ne doit pas s’écarter … mais croyez-vous que le consul de l’Académie … auraient pu en conscience faire couper la langue à tous les Vénitiens et à tous les Bergamasques qui auraient persisté dans leur patois?

Like the Treaty of Westphalia, the UDHR recognizes the private and public, individual and communal dimensions of this right. This right was translated into binding form by Article 18 of the International Covenant on Civil and Political Rights (ICCPR). As well as replicating Article 18 UDHR, the ICCPR also provides that individuals shall be free from coercion in making such a choice, that the right to manifest one’s religion or beliefs is subject only to those limits ‘prescribed by law and … necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others’, and right of parents or legal guardians of children to ‘ensure the religious and moral education of their children in conformity with their own convictions.’ As explained below, each of these elements is relevant not only to religious affiliation but cultural affiliation.

The UN Human Rights Committee (HRC), which monitors the implementation of the ICCPR, has noted in its General Comment on Article 18 that the protection afforded by ‘right to freedom of thought, conscience and religions (which includes the freedom to hold beliefs)’, known as forum internum, extends to holding ‘theistic, non-theistic, atheistic beliefs, and the right not to profess any belief or religion.’ However, the European Court of Human Rights (ECtHR) has indicated the protection only covers ‘views that attain a certain level of cogency, seriousness, cohesion, and importance.’ The HRC describes the right as ‘far-reaching and profound’ and it cannot be derogated from, even during states of emergency. No limitation is permitted on freedom of thought, conscience or the freedom to hold or adopt a religion or belief. Like the right to hold an opinion without interference, this freedom it protected unconditionally. This is reinforced by Article 18 UDHR stipulating that the right includes the freedom to change one’s religion or belief. This wording is weaker in Article 18 ICCPR, which provides only for ‘freedom to have or to adopt’, modified in response to Muslim states objections that their domestic, religious based, laws prohibit

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9 HRC, General Comment No. 22: The right to freedom of thought, conscience and religion (Art.18), 30 July 1993, UN Doc CCPR/C/21/Rev.1/Add.4, para. 2.

conversion from Islam. Nonetheless, the Committee has confirmed the ‘freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief.’

The African Commission on Human and Peoples’ Rights has found that persecution of non-Muslim communities to force their conversion to Islam is a violation of the African Charter. The prohibition of coercion, inserted in respect to state action but also motivated by fear of proselytizing, extends not only to physical force or penal sanctions but encompasses ‘policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment’ and the holding of public office. Further to this, the Human Rights Committee has found that ‘measures restricting eligibility for government services to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths’ is contrary to non-discrimination and equal treatment under the International Covenant.

The right to manifest one’s belief or religion is held ‘either individually or in community with others and in public or private.’ The European Court has affirmed that this collective aspect of the right is a crucial component of the guarantee and drawn a link

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12 HRC, General Comment No. 22, para.5.
13 Amnesty International and Others v. Sudan, ACHPR, Comm. Nos. 48/90, 50/91, 52/91, 89/93, not dated, paras.74 and 76; and Free Legal Assistance Group and Others v. Zaire, ACHPR, Comm. Nos. 25/89, 47/90, 56/91, 100/93, not dated, para. 45.
15 HRC, General Comment No. 22, para. 9. See also para. 10.
16 The HRC has stated, in General Comment No. 22, para. 4, that this right to manifest includes:
The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.

See also Art. 6, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res. 36/55, 25 November 1981, UN Doc A/36/68.
between the right to freedom of religion or beliefs (Article 9) and freedom of association (Article 11 ECHR). It held that:

The right to manifest one’s religion collectively, presupposes that believers may associate freely, without arbitrary interference from the State. The autonomy of religious communities is in fact indispensable to pluralism in a democratic society and is thus an issue at the very heart of the protection afforded by Article 9.

Further, the Court noted that a group’s fundamental activities can only be carried out if it possesses legal personality, which would enable it to legally protect the community, its members and property. By the same token, the European Court has also stressed that the right is enjoyed not only in public with those who share one’s religion or beliefs, but also in alone and in private.

By contrast to forum internum, the right to manifest one’s religion or beliefs can be subject to limitations under defined circumstances, which are stricter and narrower than those set down for other human rights. The European Court has noted that this is because the right is:

[O]ne of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and


18 Metropolitan Church of Bessarabia and Ors v. Moldova, ECHR (2001) Appl. No. 45701/99, judgment of 13 December 2001, para.18. See also Free Legal Assistance Group v. Zaire, ACHPR, Comm. Nos. 25/89, 47/90, 56/91, 100/93, October 1995, para. 4, which held that the right includes assembling for the purpose of the religion or beliefs and establishing places of worship for this purpose.

19 Ibid. In Metropolitan Church of Bessarabia and Ors v. Moldova, the religious community, having been refused registration and legal personality, was unable to bring legal proceedings to protect its assets which were crucial for conducting services and other aspects of worship: see paras. 105 and 129.


21 Art. 18(3) ICCPR; Art. 9(2) ECHR; Art. 12(3) ACHR; and Art. 8 ACHPR. See Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, ACHPR, Comm. No. 276/03, 4 February 2010, para.173: ‘The African Commission is of the view that the limitations placed on the State’s duties to protect rights should be viewed in light of the underlying sentiments of the African Charter.’
the unconcerned. The pluralism indissoluble for a democratic society, which has been dearly won over centuries, depends on it.\textsuperscript{22} Any limitations must be prescribed by law and be necessary for the protection of ‘public safety, order, health or morals, or the fundamental freedoms of others’.\textsuperscript{23} Purposes beyond this, like national security, are not permissible. The limitations can only be applied for the purposes set down in law and must be directly related and proportionate to the specific purpose. They must not be imposed for a discriminatory purpose nor applied discriminatorily.\textsuperscript{24} The European Court has paid special concern to the impact of restrictions in a diverse society and in particular minorities within it. Consequently, it has found in determining whether a restriction on religious worship or observance is proportionate to a legitimate aim, it would examine it with ‘very strict scrutiny’ and when considering the margin of appreciation it would ‘have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society.’\textsuperscript{25} In \textit{Serif v. Greece}, the Court held that ‘[t]he role of the authorities … is not to remove the cause of the tensions by eliminating pluralism, but to ensure that the competing groups tolerate each other.’\textsuperscript{26}

The restriction on the manifestation of religion or beliefs based on public order and the rights of others came under the spotlight in a series of cases before the European Court of Human Rights concerning the wearing of headscarves by Muslim women in the public education system in states promoting secularism. In \textit{Şahin v. Turkey},\textsuperscript{27} a medical student at an Istanbul university, and \textit{Dogru v France},\textsuperscript{28} an 11-year old student in a French state secondary school, alleged violations of their rights to manifest their religion under Article 9 ECHR. In \textit{Dogru}, the Court affirmed again that:

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\textsuperscript{22} \textit{Kokkinakis v. Greece}, supra note 20, para. 31.
\textsuperscript{23} The Human Rights Committee has stated, in \textit{General Comment No. 22}, para.8, in respect of limitations grounded on public morals that ‘the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.’
\textsuperscript{24} \textit{HRCttee, General Comment No. 22}, para. 8.
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In a democratic society, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected. It has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs and that it requires the State to ensure mutual tolerance between opposing groups. Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals which are justified in order to maintain and promote the ideals and values of a democratic society.29

The Court found that the banning of the headscarf and the subsequent expulsion of the student was a prima facie restriction on the exercise of the right to freedom of religion.

The respondent state would be in violation of the Convention if the restriction did not come within the requirements laid down in the Convention, that is, it was prescribed by law, directed towards one or more of the legitimate aims set down in Article 9 ECHR and was ‘necessary in a democratic society’ to achieve these aims.30 The Court had held earlier in Şahin that the provision does not ‘protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in a manner governed by a religious belief.’31 Accordingly, in Dogru it found that France could limit the wearing of a headscarf because of the margin of appreciation left to member states to negotiate the relations between church and state which underpin religious freedom.32 It found that the ensuing interference to the freedom arising from the policy of secularism was ‘justified as a matter of principle and proportionate’ to this aim and therefore permitted under the Convention.33

29 Ibid., para. 48. See also Şahin v. Turkey, supra note 27, paras. 106 and 107.
31 Şahin v. Turkey, supra note 27, paras. 105 and 212.
The distinction between the private and public sphere is further enlivened in respect of the right to freedom of religion or belief in respect of the ‘freedom’ of parents and legal guardians ‘to ensure the religious and moral education of their children in conformity with their own convictions’ (Article 18(4) ICCPR). This right is reinforced by the wording of the right to education in Article 26(3) UDHR (‘parents have a prior right to choose the kind of education that shall be given to their children’) and Article 2 Protocol 1 ECHR (‘[T]he State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions’). The HRC has stated that public school curricula may provide instruction in the general history of religions and ethics provided ‘it is given in a neutral and objective way.’ It added that public education which includes instruction in a particular religion or belief will contravene Article 18(4) ICCPR unless non-discriminatory exemptions or alternatives are in place to accommodate the wishes of parents or legal guardians.

In Lautsi and Others v. Italy, the European Court considered an application brought by a mother whose children attended a public school in which crucifixes were affixed in the classroom and who argued that this was contrary to her beliefs, those she wished to impart to her children, and the principle of secularism adopted by the respondent state. The Grand Chamber held that Article 8 ECHR and Article 2 Protocol No.1:

[Did] not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum.

See also Art.26(3) UDHR; Art.13(3) ICESCR; concerning parental choice concerning children’s education and specifically in respect of religious instruction: Protocol 1, Art. 2, ECHR and Art. 12(4) ACHR. This issue has also engages to right to privacy and family life. In Case ‘Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium’ v. Belgium, ECHR (1968) Series A, No. 6, Appl. No. 1474/62, judgment of 23 July 1968, at 7, the Court found that the decision by the parents to send their children to a French-language school because it was not available in their district did not constitute an interference with right to family life, in effect affirming that the state may determine the official languages which are used in instruction in public schools. However, Judge Maridakis noted: ‘Private and family life would be violated if the authorities intervened to force a person to shape that life in a way that departed from his traditions and thus from the spirit that by virtue of blood ties predominate in relations between parents and their children and between members of the same family in general.’ However, he found that this had not occurred in this case.


HRC, General Comment No. 22, para.6.

On the other hand, as its aim is to safeguard the possibility of pluralism in education, it requires the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. That is the limit that the States must not exceed.\(^{38}\)

The Court found that this fell within the state’s margin of appreciation even though the crucifix was a symbol of majoritarian religion of the country, it come to represent a tradition of democracy and tolerance and it was this tradition and meaning being promoted by the respondent state.\(^{39}\) Despite the prominent display, the Court found that the respondent was neutral. There was insufficient evidence of indoctrination because it was deemed a ‘passive’ symbol (unlike the wearing of a headscarf by a teacher), and there was nothing to suggest the authorities were intolerant of students who professed another religion, or no religion, or held non-religious philosophical views.\(^{40}\) The applicant mother was not prevented from guiding her children pursuant to her own philosophical convictions.\(^{41}\) Indeed, the European Court and Commission have repeatedly indicated that if an individual can take action to circumvent the limitation of his or her right to freedom of religion or beliefs, no interference to the right exists, and the respondent does not need to justify the restriction.\(^{42}\)

**B. Right to Participate in (National) Cultural Life**

The unravelling of horizontal ties based on religious facilitation with the rise of the modern, secular state left a vacuum which had to be filled. In order to ensure their stability and viability, deliberate strategies by states were adopted to fill this void through the creation of

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39 Lautsi and Others v. Italy, supra note 37, paras. 67 and 68.


41 Lautsi and Others v. Italy, supra note 37, para. 75. See also Concurring Opinion of Judge Rozakis (with Judge Vajic) finding that ‘the duties of the State have largely shifted from concerns of the parents to concerns of the society at large, thus reducing the extent of the parents’ ability to determine, outside the home, the kind of education that their children receive.’

42 Eweida and Ors v. United Kingdom, supra note 10, para. 83.
‘imagined communities’ bounded by manufactured affiliations based on a national cultural identity.\textsuperscript{43} The secular state utilized new technologies (such as the printing press) and systems of knowledge to demarcate and systematize its domain, its territory, its populace. Standardization brought with it a single national language promoted through books, newspapers and public education. Census and maps had a similar influence on the notion of nationality and flattened or eradicated existing spatial and physical conceptions of communities based on religion, ethnicity, culture or language. The processes involved in the manufacture of a unified national identity worked not only to replace the void at the supranational level left with the demise of the church, it also worked to concertedly and deliberately remove the diverse, competing ties at the subnational level. These were all to be assimilated into the national cultural identity in order that individuals were able to fully realize their rights as citizens.

It is not surprising then that when it was first articulated, the right to participate in cultural life was resolutely defined by participation in the \textit{national} cultural life and designed to foster relations between the state and its citizens. 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{44} 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 reveal 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{45} While the UDHR is a non-binding declaration, this human right’s later inclusion in the ICESCR renders it legally binding on states parties. Also, the inclusion of Article 27 in the UDHR meant that the 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{46}

However, UNESCO had presented a preliminary draft Article 15 which required states parties to ‘encourage[e] the free cultural development of racial and linguistic

\textsuperscript{44} GA Res. 2200A(XXI), 16 December 1966, entered into force 3 January 1976.
\textsuperscript{46} UNESCO Doc UNESCO/DG/188, 6 October 1952.
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 [time] … [and which] may run counter to, or at least differ considerably from, those of the national community’. UNESCO’s recommendation to include the words ‘to take part in the cultural life of the communities to which he belongs’, was eventually defeated. The focus of the international community remained resolutely on the ‘national’ community until the late twentieth century.

This interpretation of the right to culture – that is national culture – reinforced the position of some liberal theorists who promote the right to a culture and not necessarily the right to one’s own culture on the basis that cultural context is crucial to enable an individual to exercise free choice. As the United Nations Development Programme noted:

Cultural liberty is about expanding individual choices, not about preserving values and practices as an end in itself with blind allegiance to tradition. Culture is not a frozen set of values and practices. It is constantly recreated as people question, adapt and redefine their values and practices to changing realities and exchange of ideas…. Those making demands for cultural accommodation should also abide by democratic principles and the objectives of human freedom and human rights.

This rationale for the right to culture impacts significantly upon implementation and its relationship to other human rights. In essence, for some liberal theorists, it is only within a cultural context that we are able to fully assess and choose between available life choices, and the right to culture is a mechanism by which individuals can realize freedom of expression, thought, assembly, and association. Consequently, such a rationale protects the right to a cultural affiliation but does not seek to afford protection to a particular culture; it does not view the granting of privileges to minority cultures in the face of possible assimilation of the majority culture as necessary. This interpretation is examined with reference to the right to

47 UN Doc E/CN.4/541.
freedom of expression, a right which has been linked to the right to freedom of religion or beliefs and the right to culture since their earliest formulations.

C. Freedom of Expression, Hate Speech and Blasphemy Laws

Freedom of expression has been described as a cornerstone of a democratic society. The African Commission on Human and Peoples’ Rights has stated that this right is ‘vital to an individual’s personal development, his political consciousness and participation in the conduct of public affairs in his country.’ The European Court of Human Rights has held that it ‘constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment.’ Although freedom of expression is viewed as a fundamental right attached to individuals, it carries little meaning unless there is recognition of a communal or collective context. Therefore, it is also considered critical for cultural (or religious) minorities. For example, the right to freedom of expression was recognized as such in the interwar minority treaties which protected communities in newly created states in Central and Eastern Europe. This right was universalized with its inclusion as Article 19 UDHR, which provides for the imparting and receiving of information and ideas without interference and across territorial boundaries. This latter extension is significant for minorities straddling frontiers or removed from their kin-state. However, human rights bodies have been reluctant to sanction it as a guarantee for the use of one’s mother language in public spaces. The Human Rights Committee has confirmed that while a state party is permitted to choose an official national language, it cannot restrict the use of other languages in the private sphere. The European Court in an application concerning the education of children in Turkish-controlled northern Cyprus which had been regulated by specialist international agreements incorporating guarantees for mother tongue tuition, found that education led in the Turkish or English languages did not fulfil the

56 See, for example, Art. 7 Treaty of Peace of St Germain-en-Laye, 10 September 1919, entered into force 8 November 1921, BFSP 112, at 317; 14 (supp.) AJIL (1920) 1 at 77, provided: ‘No restriction shall be imposed on the free use by any Czecho-Slovak national of any language in private intercourse, in commerce, in religion, in the press or publication of any kind, or at public meetings.’
57 See Art.19 UDHR; Art.19 ICCPR; Art.10 ECHR; Art.9 ACHPR; and Art.13 ACHR.
‘legitimate wish educate their children in accordance with their cultural and ethnic
tradition.’ But this is a rare example. Generally speaking, human rights bodies have been
reluctant to endorse the extension of the right to freedom of expression to encompass the
guaranteed protection of the use of mother tongue languages in public places.

As was shown in respect of the right to freedom of religion or beliefs, freedoms
guaranteed under human rights law are not without limitations, both those contained within
the definition of the human right itself and those imposed by courts called upon to balance
competing rights and freedoms. The right to freedom of expression is also circumscribed. As was
shown in respect of the right to freedom of religion or beliefs, freedoms

However, how these restrictions are interpreted and these conflicts resolved, points to the
nature of the right and what it is designed to protect. The European Court has found that the

is applicable not only to ‘information’ or ‘ideas’ that are favourably received or
regarded as inoffensive or as a matter of indifference, but also to those that offend,
shock or disturb the State or any sector of the population. Such are the demands of

Nevertheless, as a result of interreligious strife and its impact on peace and stability, even this
broad interpretation of tolerance has its limitation, and the human rights instruments
explicitly prohibit so-called hate speech. Article 20 ICCPR provides that religious
expressions or activities which promote religious hatred or incite religious intolerance must
be prohibited by law by states parties. The Human Rights Committee has indicated that a
state of emergency cannot be used as a justification by a state party for engaging in actions


60  See Art. 19(3) ICCPR; Art. 10(2) ECHR; and Art. 13(2) ACHR.
61  *Handyside v. United Kingdom*, ECHR (1976) Series A, No. 24 para.49. Also in *Arslan v. Turkey*,
*supra* note 55 at para. 44: ‘it is applicable not only to “information” or “ideas” that are favourably received or
regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the
demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.’
63  See HRC General Comment No. 22, para.7; and HRCttee, *General Comment No.11: Prohibition of
Propaganda for War and inciting National, Racial or Religious Hatred* (Art.20), 29 September 1983, para. 19;
and Article 13(5) ACHPR.
contrary to Article 20. The provision is considered by the Committee to fall within the limitations prescribed by Article 19 on freedom of expression, but as *lex specialis*. It requires states parties to prohibit by law such speech and acts as being contrary to public policy and to ‘provide an appropriate sanction in case of violation.’ The HRC has found hate speech by individuals to be contrary to the right to freedom of expression and dismissed complaints contesting the criminalization of persons who have denied the Holocaust as a historical event, as well as concerning the prohibition of using telephone messages to disseminate anti-Semitic views. Similarly, the European Court of Human Rights, in *Hizb Ut-Tahrir and Others v. Germany*, dismissed an application concerning the prohibition of an Islamic association which promoted the overthrow of non-Islamic governments and found that the ECHR did not protect acts which were designed to destroy rights and freedoms set down in the Convention. The Committee on the Elimination of Racial Discrimination has stated that the prohibition of hate speech protects non-citizens.

As detailed in Part Three below, general and specialist human rights instruments which enunciate cultural rights reaffirm that such rights cannot be used to justify violations of other human rights norms and fundamental freedoms. The Committee on Economic, Social and Cultural Rights (CESCR) 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. 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’,

64 HRC, General Comment No.29: States of Emergency (Art. 14), 31 August 2001, UN Doc CCPR/C/21/Rev.1/Add.11, para.13(e).
65 HRC, General Comment No.11.
68 CERD, General Recommendation No.30: Discrimination against Non-Citizens, 1 October 1994, paras. 11 and 12.
69 UN Doc E/C.12/GC/21, para.19.
and proportionate (that is, the least restrictive measures for attainning the ends).\textsuperscript{70} The CESCR has noted that states adopting such measures must also consider other rights related to participation in cultural life including the right to privacy, freedom of thought, conscience or religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association.\textsuperscript{71} Conversely, the Human Rights Committee has indicated that any restriction on freedom of expression is a ‘serious curtailment of human rights’ and therefore must be provided for by law; however, it is incompatible with the ICCPR that the restriction be sanctioned by ‘traditional, religious or other such customary law.’\textsuperscript{72}

The provisos to the right to freedom of expression contained in Articles 19(3) and 20 ICCPR cannot be used by a state party to justify blasphemy laws or prohibition of displays which are viewed as disrespectful of a religion or belief. The ongoing debate around Human Rights Council resolutions on Combating Defamation of Religions promoted by the Organization of Islamic Conference and domestic blasphemy laws encapsulate this intersection between the rights of a group, in this case a religious group, and individual fundamental freedoms.\textsuperscript{73} The Human Rights Committee has observed that such prohibitions and blasphemy laws are incompatible with the ICCPR except where they are designed to prevent incitement to war or ethnic or religious discrimination or hostility.\textsuperscript{74} It has indicated that such laws cannot be used to discriminate for or against a religion or its adherents or between believers or non-believers, nor can it be a vehicle for preventing or punishing ‘criticism of religious leaders or commentary on religious doctrine and tenets of faith.’\textsuperscript{75}

\textsuperscript{70} Art. 4 ICESCR.
\textsuperscript{71} UN Doc E/C.12/GC/21, para.19.
\textsuperscript{72} HRC, \textit{General Comment No. 34}, para.24.
\textsuperscript{73} HRC resolutions 2000/84, 26 April 2000 (Defamation of religions) to the latest 22/L.40, 22 March 2013 (Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief); Report of the UN High Commissioner for Human Rights on the implementation of Human Rights Council resolution 10/22 entitled ‘Combating defamation of religions’, 11 January 2010, UN Doc A/HRC/2010; and HRC, \textit{Ahmad and Abdol-Hamid v Denmark}, 1 April 2008, Decision on admissibility, UN Doc CCPR/C/92/D/1487/2006.
\textsuperscript{75} \textit{General Comment No. 34}, para.48.
3. Equality

The bills of rights which accompanied the rise of modern secular states and human rights which define contemporary international law are headlined by the principle of equality. The 1789 *Déclaration des droit de l’homme* commences in Article 1 with: ‘Men are born and remain free and equal in rights.’ The US Declaration of Independence of 1776 likewise provides that ‘all men are created equal’ and that they are endowed with inalienable rights, among them liberty. Inspired by these documents, the Universal Declaration of Human Rights adopted by the international community in 1948 commences with the words: ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’

These various pronouncements reflect this continual deliberation in political and legal thought since the Enlightenment concerning the link between equality and freedom, the tensions arising between them, and their possible resolution.

Part Two examines how the promotion of liberty and nondiscrimination on grounds of race, religion, culture, or language extended and moved beyond conceptions of tolerance and the emphasis on civil and political rights in the public sphere. Strict equality not only permits minorities to establish and control their own institutions but means that public institutions and spaces are to be enjoyed by all individuals and are no longer confined to the majority. This Part concentrates on the relationship between the state, the group and individual members of the group. Its structure follows the formulation of guarantees provided in the interwar minority treaties, a framework which has undergone a revival in the post-cold war period. First, there is an overview of the concept of self-identification and the role of the state and group in determining its membership. Then, there is an exploration of the role of non-discrimination in the protection of minorities through an exploration of caselaw on education and minority children from the interwar period to the present day. Finally, I return to the right to participate in cultural life as it is presently being interpreted, how this harmonizes

76 First recital, Preamble, UDHR.
77 Raz, supra note 3, at 158.
78 Art. 29(1)(c) Convention on the Rights of the Child (CRC), 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3, provides ‘the aim of education of the child is: the development of respect for the child’s parents, his or her own cultural identity, languages and values, for the national values of the country in which the child is living, the country from which he or she may have originate, and for the civilizations different from his or her own.’ See also Committee on the Rights of the Child, *General Comment No. 11, Indigenous Children and their Rights under the Convention*, 12 February 2009, para. 56.
with the revived minority rights regime, and the promotion of the right to participate in one’s own culture.

A. Group Affiliation and Self-Identification

The relationship between the state, the cultural (religious, or linguistic) group and its individual members in law has raised ‘starting gate’ issues since the first formulations of minority guarantees in international law in the early twentieth century. As these guarantees often arose with the recognition of new states or the reconfiguration of the territorial boundaries of existing states, the international community enabled some individuals to choose their nationality. This had the twin effect of permitting individuals to determine which state they wished to belong to, but also ensured that they were not rendered stateless and would be afforded the rights and protections of citizenship. Whilst the right to hold and change one’s nationality is contained in Article 15 UDHR, subsequent international and regional human rights instruments are either silent or more qualified. Nationality and citizenship remains a starting gate issue as it is clear that certain human rights (particularly certain civil and political rights and guarantees of equality before the law) are quarantined to nationals; however, human rights bodies have indicated repeatedly that cultural rights can be enjoyed by non-nationals and nationals, alike.

The relationship between the state and the religious, cultural or linguistic communities is likewise tempered by the question of who defines the group. Although there have been repeated attempts to define what constitutes a minority in international law, there is no agreed legal definition. However, international tribunals have emphasized that the existence of a

79 Arts. 3 to 6, Treaty between the Principal Allied and Associated Powers and Poland, 28 June 1919, 225 CTS 412 (Peace Treaty with Poland) were the first such provisions and they became the model of subsequent minority protections imposed on other states seeking recognition or entry into the League of Nations.


81 CERD, General Recommendation No. 30, para. 37 (‘Take the necessary measures to prevent practices that deny non-citizens their cultural identity, such as legal or de facto requirements that non-citizens change their name in order to obtain citizenship, and to take measures to enable non-citizens to preserve and develop their culture’); and Human Rights Committee, General Comment No.23: Rights of Minorities (Art. 27), UN Doc HRI/GEN/1/Rev.1, 38 (1994), para. 5.2. Cf. Advisory Opinion on the Acquisition of Polish Nationality, 1923 PCIJ Series B, No. 7, at 15ff; and Framework Convention on National Minorities (FCNM), 1 February 1995, entered into force 1 February 1998, ETS 157.

82 See Greco-Bulgarian ‘Communities’ case, 1930 PCIJ Series B, No.17, at 21; and Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Study of the Rights of
minority is determined by ‘fact not law’, and it is not a state or states who determine whether they exist or not within their territory. Yet, in an effort to limit the reach of the protection of Article 27 ICCPR, several states during its drafting insisted on the inclusion of the words ‘in those states in which ethnic, religious or linguistic minorities exist.’

Similarly, when ratifying the International Covenant, France attached a ‘declaration’ concerning Article 27 in which it maintained that minorities did not exist in the state because its constitution ensures equality before the law, without distinction as to origin, gender or religion. However, like the Permanent Court of International Justice (PCIJ) before it, the Human Rights Committee does not accept that France does not have minorities on its territory.

[T]he mere fact that equal rights are granted to all individuals and that all individuals are equal before the law does not preclude the existence in fact of minorities in a country, and their entitlement to the enjoyment of their culture, the practice of their religion or the use of their language in community with other members of their group.

Accordingly, in its General Comment No.23 (Article 27 ICCPR), the Committee provides 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.’ Likewise, the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries provides that self-identification is the fundamental criterion for establishing the existence of an indigenous people, with no need for official state recognition. To permit states to define or determine

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83 Rights of Minorities in Upper Silesia (Minority Schools), 1928 PCIJ Series A, No.15, 18, at 29.
84 See UN Doc.A/C.3/SR.1104, para. 23.
the existence of a minority or indigenous community would effectively render such legal protection illusory.

This jurisprudence in respect of the right to nationality and existence of a minority group is complemented by rights pertaining to self-identification by the individual to the group and by the group of the individual. 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 provision also applies at least ‘moral duties’ on ‘agencies of the minority group’, with states parties obliged to prohibit minorities from taking measures which impose rules on persons who do not wish to be part of the minority nor exercise their related rights.

Similarly, General Comment No. 21 defines it as a ‘freedom’ and it is in effect the ultimate freedom which attaches to an individual, that is, the right to exit the group. The CESC R 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 recognized, respected and protected on the basis of equality.’

The Human Rights Committee has held that this was a right of special importance for indigenous peoples, individually and collectively. It is augmented by Article 9 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which provides that indigenous peoples and individuals have the right to belong to an indigenous community in accordance with the community’s traditions and customs. Discrimination is not permitted in respect of the exercise of this right. Also, 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 of indigenous persons to obtain the citizenship of their relevant state.

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89 Its commentary states 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: UN Doc E/CN.4/Sub.2/AC.5/2005/2, para. 54.
90 Ibid.
92 CESC R General Comment No. 21, para. 7. See also CERD, General Recommendation No. 8: Identification of a particular racial or ethnic group, Art. 1, 22 August 1990 (self-identification of the individual); and CERD, General Recommendation No. 27: Discrimination against Roma, 16 August 2000, para. 3 (‘To respect the wishes of Roma as to the designation they want to be given and the group to which they want to belong’).
Yet, conflicts may arise between the collective and individual rights to self-identification. In *Lovelace v. Canada*, the Human Rights Committee found the state in violation of Article 27 ICCPR because the relevant national legislation had stripped the complainant of her Indian status following her marriage to a non-Indian, which continued even after the relationship ended, and meant that she was prevented from returning to her tribal land. The Committee accepted the ‘need to define the category of peoples entitled to live on a reserve, for such purposes as … preservation of the identity of its people.’94 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 not ‘reasonable or necessary’ in order to achieve this aim.95

**B. Non-discrimination**

Provisions at the international level covering minorities have at the very least included guarantees of non-discrimination relating to equality in law and equality in fact. The framework established by interwar minority treaties contained these two understandings of equality. The principle of equality in law and non-discrimination as to civil and political rights is explored with reference to education of minority children. The principle of equality in fact and non-discrimination as to cultural rights specifically will be detailed in the subsequent section covering Article 15 ICESCR and Article 27 ICCPR.

As noted above, the Treaty of Westphalia guaranteed to religious minorities that they would enjoy equal rights to public life regardless of their religious affiliation. This guarantee of non-discrimination and equality in law was extended to cover religious, cultural and linguistic groups in the interwar minority treaties. The protection was universalized in the second half of the 20th century with its inclusion in the UDHR and rendered binding with the ICCPR and specialist instruments like the Convention on the Elimination of All Forms of Racial Discrimination (CERD).96 Applying the principle of non-discrimination, members of the minority as nationals of the relevant state were entitled to equality before the law and enjoyment of same civil and political rights as other nationals, without distinction as to race,

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94 *Lovelace v. Canada*, supra note 87, para. 15.
95 *Ibid.*, paras. 15 and 17.
language or religion.\textsuperscript{97} The PCIJ found the intended purpose of this arm of the minority provisions was to ‘ensure that nationals belonging to racial, religious or linguistic minorities [were] placed in every respect on a footing of perfect equality with other nationals of the State’.\textsuperscript{98} Furthermore, it held that these provisions were designed to ‘prevent any unfavourable treatment, and not to grant a special regime of privileged treatment’; consequently they were of ‘a purely negative character in that they were confined to a prohibition of any discrimination.’\textsuperscript{99}

However, the interwar minority guarantees also provided that these communities should enjoy equal rights ‘both in law and in fact’ to establish, control and manage their own charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely without interference by the national authorities, ‘provided that the interest of public order [was] safeguarded.’\textsuperscript{100} When interpreting this provision in the \textit{Minority Schools in Albania} case, the Permanent Court observed that its purpose was ‘to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.’\textsuperscript{101} In this case, Albania had argued that it had met its obligations under the minority provision when it ordered the closure of all private schools and the attendance of children at public schools because the arrangement applied to all children in the state. In rejecting the respondent state’s arguments, the Court held:

Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.

\begin{footnotes}
\footnotetext[97]{\textit{Rights of Minorities in Upper Silesia (Minority Schools)}, supra note 83, at 18. See also Articles 2, 7 and 8, Peace Treaty with Poland, \textit{supra} note 79; and \textit{Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory}, 1932 PCIJ Series A/B, No. 44, at 28 and 39.}
\footnotetext[98]{\textit{Rights of Minorities in Upper Silesia (Minority Schools)}, supra note 83, at 17.}
\footnotetext[99]{\textit{Ibid.}}
\footnotetext[100]{Article 9, Peace Treaty with Poland, \textit{supra} note 79. See also CERD, \textit{General Recommendation No.32: The Meaning and Scope of Special Measures in the International Covenant on the Elimination of All Forms of Racial Discrimination}, 24 September 2009, UN Doc CERD/C/GC/32, para. 6: ‘The Convention is based on the principles of the dignity and equality of all human beings. The principle of equality underpinned by the Convention combines formal equality before the law with equal protection of the law, with substantive or de facto equality in the enjoyment and exercise of human rights as the aim to be achieved by the faithful implementation of its principles.’}
\footnotetext[101]{\textit{Minority Schools in Albania}, 1935 PCIJ Series A/B, No. 64, 4, at 17.}
\end{footnotes}
It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact …. The equality between members of the majority and of the minority must be an effective, genuine equality …

Accordingly, the Court found that the institutions listed were ‘indispensable’ in ensuring that the minority enjoyed equal treatment to the majority ‘not only in law but also in fact.’ It observed that the schools’ closure and replacement with government institutions removed this equal treatment because it ‘deprive[d] the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State.’ It concluded that rather than creating a special privilege for the minority, the guarantee was designed to make sure the majority was not privileged when compared to the minority.

Therefore, the respondent state was under a positive obligation to ensure the realization of these rights. In territories where the minority made up a ‘considerable proportion of … nationals’, it was required to provide instruction in the minority language in the public education system and an equitable share of public funds to the communities to realize these goals.

The ultimate purpose of the interwar minority guarantees was the subject of considerable contemporary debate. On the one hand, it was clear that the drafters did not intend to create ‘states within states’ by granting national groups political autonomy but to prohibit discrimination between citizens on the basis of their religion, language or race. For this reason, they referred throughout to ‘members of minorities’ and not simply ‘minorities’.

This position was adopted by the dissenting judges in Minority Schools in Albania, who insisted that the Court interpret the provision according to existing precedents. They observed that the travaux préparatoires did not indicate any intention on the part of the drafters to provide ‘an unconditional right to the minority to maintain institutions and schools’; rather the object was to prohibit ‘discrimination, i.e. differential discrimination’.

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102 Ibid., at 18-21.
103 Ibid.
104 Ibid., at 22. See also Greco-Bulgarian ‘Communities’, 1930 PCIJ Series B, No.17, at 33.
106 Ibid.
107 Minority Schools in Albania, supra note 101, at 32 (Sir C. Hurst, Count Rostworowski and M. Negulesco).
treatment’ and recognize ‘a right for the minority equal to that enjoyed by the majority.’

Conversely, the majority found the framework was designed to protect the minority’s cultural identity within the state but with its members ‘living peaceably alongside that population and co-operating amicably with it.’

They observed that twin arms of the minority guarantees were directed toward the same purpose.

> [I]ndeed [they were] closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.

As Calderwood pointed out, the interwar minority treaties ‘if they [did] not establish the minorities as collectives, confer[ed] rights that [could] only be enjoyed by individuals acting together’. They were adopted to ensure these communities’ cultural autonomy in the shadow of the dominant culture.

Under the League’s successor, the United Nations, the protection of minorities would take on the interpretation of minority judgment in *Minority Schools in Albania*, as it fell within the human rights framework and almost exclusively, initially, under the principle of non-discrimination. A stated purpose of the new international body was ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.’ In the lead-up to the UDHR, 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. The latter option confronted the problem in a direct, positive manner, by stipulating the establishment of educational and cultural institutions for non-dominant groups, and implied a permanent set of arrangements to protect the culture, language and

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110 *Ibid.*.
112 See *Greco-Bulgarian ‘Communities’, supra* note 104.
113 Art. 1, Charter of the United Nations, 26 June 1945, entered into force 24 October 1945, UNCTIO XV, 335; amendments by GA Resolutions in UNTS 557.
religion of the community. The Sub-Commission prepared a draft provision which largely replicated the interwar minority guarantees, but would have been of universal application. The draft provision was not included in the final text of the UDHR.

The Universal Declaration does not contain explicit protection for minorities but does provide for the principle of non-discrimination. During its negotiation, states with significant migrant and indigenous populations championed individual human rights over the revival of minority guarantees. They argued that the equal and effective realization of human rights norms for individuals would safeguard the identity of the members of minority groups. In addition, they maintained that cultural rights in the form of collective rights could threaten the unity and the stability of their existing, national structures. In response to such arguments, Hersch Lauterpacht recalled the reasoning of the Permanent Court. He countered that the cultural unity of the state must not trump the rights of minorities and thereby deny the equality intended by the principle of non-discrimination, which they championed.

Yet, non-discrimination has played an important role in circumstances where the state segregated groups on the grounds of race, language or religion. The application of the principle of non-discrimination in respect of racial segregation of public education was address by the US Supreme Court in Brown v. Board of Education of Topeka, Shawnee County et al. The case involved a class action brought by coloured children in Kansas, South Carolina, Virginia, and Delaware who sought but were denied admission to public schools attended by white children because of laws permitting or requiring segregation. The lower courts had found that there was equality between coloured and white schools in respect

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116 UN Doc A/CN.4/AC.1/3.
117 Arts. 2 and 7 UDHR.
118 See UN Doc A/C.3/SR.162, 723.
of the tangible aspects of ‘buildings, curricula, qualifications, and salaries of teachers.’ However, Chief Justice Warren observed that:

We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws. Today, education is perhaps the most important function of state and local governments. … It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child in cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.\(^{123}\)

The Supreme Court found that racial segregation in public education had a detrimental effect on coloured children, that is ‘greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group’, and which adversely effects the child’s motivation to learn.\(^{124}\) It concluded that state-mandated ‘separate educational facilities are inherently unequal’ and unconstitutional.\(^{125}\)

The principles enunciated by the US Supreme Court were reaffirmed and extended by the European Court of Human Rights, half a century later, in a case involving indirect discrimination. *D.H. and Others v. The Czech Republic* involved the disproportionate enrolment of Roma children in schools for children with special needs including intellectual disabilities.\(^{126}\) Evidence provided by the applicants shows that despite various legislative and policy changes to integrate Roma children into the ordinary school system in the last two decades, half of Roma children in the Czech Republic attended a special school, where they represented 70% of the enrolments. The applicants argued that this disproportionate representation of Roma children amounted to de facto or indirect discrimination and violated Articles 3 and 14 ECHR and Article 2 of Protocol No .1.

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\(^{124}\) *Ibid*.

\(^{125}\) *Ibid*.

In its judgment, the Grand Chamber noted that the ‘vulnerable’ plight of the Roma meant that ‘special consideration’ must be given to their different ways of life and needs in regulatory frameworks and decisionmaking processes.\textsuperscript{127} It added that

there could be said to be an emerging international consensus among the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, \textit{not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community}.\textsuperscript{128}

The Court noted that although the relevant Czech legislation was neutral on its face, the question arose whether its application disproportionately and adversely impacted upon Roma children, that is, it was indirect discrimination.\textsuperscript{129}

The Grand Chamber held that difference in treatment would be discriminatory if ‘it has no objective and reasonable justification’ and where it is based on race, colour, or ethnic origin ‘the notion of objective and reasonable justification must be interpreted as strictly as possible.’\textsuperscript{130} It accepted the assessment of independent bodies that the placement of Roma children in these schools was driven by ‘real or perceived language and cultural differences’ between the Roma and the majority.\textsuperscript{131} Also, it found that because of the fundamental importance of the prohibition of racial discrimination, even if there had been a waiver through parental consent, it was not permitted because it circumvented ‘an important public interest.’\textsuperscript{132} The Court found that the placement of Roma children in these special schools further ‘isolated’ them ‘from the wider population’, adding:

\textsuperscript{127} \textit{Ibid.}, para. 181. This special vulnerability of the Roma, including in the field of education, has been recognized by other human rights bodies, including the Committee on the Elimination of Racial Discrimination: CERD, \textit{General Recommendation No.27: Discrimination against Roma}, 16 August 2000, paras. 17-26. At para.18 it states: ‘To prevent and avoid as much as possible the segregation of Roma students, while keeping open the possibility for bilingual or mother-tongue tuition; to this end, to endeavour to raise the quality of education in all schools and the level of achievement in schools by the minority community, to recruit school personnel from among members of the Roma communities and to promote intercultural education.’

\textsuperscript{128} \textit{D.H. and Others v. The Czech Republic}, supra note 126, para. 181 (emphasis added).

\textsuperscript{129} \textit{Ibid.}, para. 189. It found that once the applicant has established a rebuttable presumption that the impact of the practice or policy is discriminatory, the burden of proof shifts to the respondent state to show that it is not discriminatory. It observed that without this shift in the burden of proof, it would be ‘extremely difficult in practice’ for an applicant to make out indirect discrimination.

\textsuperscript{130} \textit{Ibid.}, para. 196.

\textsuperscript{131} \textit{Ibid.}, para. 200.

\textsuperscript{132} \textit{Ibid.}, para. 204.
They received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population.\(^{133}\)

The Court held that the respondent state had violated Article 14 ECHR and Article 2 of Protocol No. 1.

In late 2012, the US Supreme Court in *Fisher v. University of Texas at Austin* was asked to consider the constitutionality of remedial measures designed to redress the legacy of racial segregation in public education in Texas.\(^{134}\) International human rights law, and US domestic law, permit special measures introduced for the ‘sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection’ as long as it is aimed at protecting their human rights, it does not lead to separate rights for different racial groups, and the measures do not continue after their purpose is fulfilled.\(^{135}\) A number of arguments were raised in support of special or remedial measures for the effective realization of equality. First, special measures are necessary to ameliorate and reverse disparities in the protection and enjoyment of human rights and fundamental freedoms between particular groups and individuals. While inequality and vulnerability may be the ongoing effect of historic discriminatory practices like racial segregation, this is not required. The focus, as in *Brown*, is on present-day and potential future inequality.\(^{136}\) Neutral laws, policies and programmes are inadequate to the task as they are blind to (or worse, freeze) inequalities.\(^{137}\) The Committee on the Elimination of Racial Discrimination has indicated that

\(^{133}\) Ibid., para. 207.

\(^{134}\) As at April 2013, the Court had not delivered its Opinion.

\(^{135}\) Arts. 1(4) and 2(2) CERD. See CERD, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, 24 September 2009, para.16-18. This appraisal should be conducted on the basis of accurate data, disaggregated by among other things ‘cultural status’ (Art.2(2) CERD) and the participation of the group in the social and economic development of the country. Also, the measures must be designed and implemented only with the prior consultation and active participation of the affected group. The US Supreme Court’s factors permitting race to be considered in government funded remedial programs, include (1) a past history of de jure segregation; (2) whether the race-conscious initiative ameliorates the negative impact of the discrimination; (3) whether the harm from the discrimination remains when the policy is operational; and (4) whether the initiative imposes quotes for admission of minorities: Brief of Amici Curiae National Association for the Advancement of Colored People et al in support of Respondents in *Fisher v. University of Texas at Austin et al*, Docket No.11-345, 13 August 2012, at 24.

\(^{136}\) CERD, *General Recommendation No. 32*, para. 22.

\(^{137}\) Data provided by the NAACP showed a significant decrease in the enrolment of African American and Hispanic students following the application of racially neutral admissions policies: NAACP Amicus Brief, *supra* note 135, at 3.
‘[t]o treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same.’\textsuperscript{138} The Committee added that the principle of non-discrimination requires that the characteristics of groups be taken into consideration.\textsuperscript{139} It has observed that special measures are not an exception to the principle of non-discrimination, but ‘integral’ to the elimination of inequality.\textsuperscript{140} The National Association for the Advancement of Colored People (NAACP), the organization which led the class actions for desegregation of public education, observed:

What the Petition seeks to deny African American and other racial minorities is an admission system that is ‘designed to consider each applicant as an individual.’ … Under her position, every applicant would be ‘holistically’ considered except African Americans and other racial minorities, whose personal essays would have to be censored (or self-censored) to remove any mention of experience of race.… [G]ranting the Petitioner’s request would deny individuals who had overcome racial adversity the opportunity to demonstrate important accomplishments. Other students, for whom race presented no obstacle, would effectively have an unfair advantage. Many racial minority applicants have pulled themselves up by their bootstraps, and the Court should reject [the] Petitioner’s attempt to take away their boots.\textsuperscript{141}

Second, Article 29(1)(d) of the Convention on the Rights of the Child (CRC) stipulates that education should prepare every child for ‘responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.’\textsuperscript{142} In \textit{Grutter v. Bollinger}, the

\textsuperscript{138} CERD, General Recommendation No. 32, para. 8.

\textsuperscript{139} \textit{Ibid.} Art.1(4) CERD requires that the measures not lead to ‘the maintenance of separate rights for different racial groups’, which was designed to prevent justifications for state-sanctioned segregation or practices under Apartheid: \textit{ibid.}, para. 26. See also CERD, General Recommendation No. 14: Definition of discrimination, 22 March 1993, para. 2; and CERD, General Recommendation No. 30, para. 4: that differential treatment will ‘constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the [CERD], are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.’

\textsuperscript{140} CERD, General Recommendation No. 32, para. 20.

\textsuperscript{141} NAACP Amicus Brief, \textit{supra} note 135, at 33-34.

\textsuperscript{142} See CRC, General Comment No. 1, Article 29(1): The Aims of Education, 17 April 2001, UN Doc CRC/GC/2001/1, para.1: ‘The aims [of education] are: the holistic development of the full potential of the child including development of respect for human rights, an enhanced sense of identity and affiliation, and his or her socialization and interaction with others, and with the environment’. See also Benhabib, ‘Deliberative Democracy and Multicultural Dilemmas’, in S. Benhabib, \textit{The Claims of Culture: Equality and Diversity in the Global Era} (2002) 105, at 123.
US Supreme Court found that a university may embrace the educational benefits of diversity (including ethnic and racial diversity) as central to its educational mission for all students and thereby seek to ensure a diverse student population. Finally, in its amicus brief in *Fisher*, the Anti-Defamation League observed that ‘[e]mbracing diversity and promoting a fully integrated society is crucial not only to the struggle to defeat discrimination, but also the continued vitality of our Nation and our society.’ The Committee on the Rights of the Child, when advocating special measures for the education of indigenous children, stated that it contributes to their individual and collective development and participation in the broader society, in particular, it strengthens children’s ability to ‘exercise their civil rights in order to influence political policy processes for the improved protection of human rights.’ The purpose of non-discrimination is to enable the effective participation of all individuals and realize their role as citizens in a democratic society.

Whilst special measures can attach to a group or an individual, international human rights bodies have indicated that such remedial, non-permanent measures are distinct from specific, permanent human rights recognized by the international community to ensure the existence and identity of groups like minorities and indigenous peoples, and must be treated as such by states parties in their law and practice.

**C. Right to Participate in the Cultural Life of One’s Own Culture**

A universal, binding minority protection regime was only realized in 1966 with the adoption of Article 27 ICCPR. It articulates the right of ‘members of the minorities to enjoy their own culture, practice their own religion, and use their own language.’ The provision revives the interwar minority protection framework in order to afford permanent, specific human rights to certain groups and their individual members. Some liberal theorists have emphasized the significance of one’s own culture for the enjoyment of all human rights including civil and

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145 CRC, General Comment No.11: Indigenous children and their rights under the Convention, UN Doc CRC/C/GC/11, 12 February 2009, paras. 57 and 60.
146 CERD, General Recommendation No. 32, paras. 15 and 26.
political rights.\textsuperscript{148} It is this interpretation of Article 27 ICCPR and reinterpretation of Article 15 ICESCR which is dominant in the early 21st century.

It was only after the large-scale human tragedy and instability caused by civil conflicts in the late 20th century, that there emerged growing acceptance that dependence on the universal application of individual human rights and non-discrimination alone failed to protect victims targeted because of their membership of an ethnic or religious community. So for example, Article 22, Chapter III (Equality) of the Charter of Fundamental Rights of the European Union stipulates that ‘[t]he Union shall respect cultural, religious and linguistic diversity.’\textsuperscript{149} In addition, new specialist, international instruments which incorporated cultural rights with a collective dimension and promoted cultural diversity were finalized at the international and regional level to protect minorities and indigenous peoples. The most significant of these are the 1992 UN Minorities Declaration, and 2007 Declaration on the Rights of Indigenous Peoples. These instruments go beyond civil and political rights by encompassing recognition of the worth of all cultures.\textsuperscript{150} This latter theme is expanded in Part 3 below.

Article 27 ICCPR evolved from the UN General Assembly Resolution on the Fate of Minorities adopted on the same day as the Universal Declaration.\textsuperscript{151} Its purpose is ‘towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned’.\textsuperscript{152} This right is granted over and above other rights contained in the two International Covenants, including non-discrimination.\textsuperscript{153} The UN Minorities Declaration similarly 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.’\textsuperscript{154} Since its inclusion in the International Covenant, in spite of its various qualifications, Article 27 has played an


\textsuperscript{149} See also second and fourth recitals, Preamble, UNDRIP.

\textsuperscript{150} See Taylor, \textit{supra} note 148, at 68.

\textsuperscript{151} GA Res. 217C (III), 10 December 1948, UN Doc A/810.

\textsuperscript{152} HRC, \textit{General Comment No. 23}, para. 9.

\textsuperscript{153} HRC\textit{General Comment No. 23}, paras. 4, 5.1 and 9.

important role in defining cultural rights held by minorities and indigenous peoples in international law.

The Human Rights Committee, which oversees the implementation of the Article 27, has underscored its collective aspect. The inclusion of this minority protection within the international human rights framework reinforces the presumption that the rightholder is an individual, rather than the group.\textsuperscript{155} Indeed, Article 27 refers to ‘persons belonging to such minorities’ and not ‘minorities’ per se. In addition, the ICCPR’s complaint mechanism provides standing to states or individuals only.\textsuperscript{156} However, the concession to the collective aspect of minority rights comes with the words ‘in community with other members of their group’ contained in Article 27. The HRC has repeatedly affirmed that the right can only be realized meaningfully when exercised ‘in a community’, that is as a group.\textsuperscript{157} \textit{General Comment No. 23} notes that Article 27 protects ‘individual rights’, but that the obligations owed by states are collective in nature.\textsuperscript{158} This interpretation accords with the UN Minorities Declaration,\textsuperscript{159} whose commentary stipulates that ‘the state cannot fully implement them without ensuring adequate conditions for the existence and identity of the group as a whole.’\textsuperscript{160}

The right contained in Article 27 ICCPR is negatively conferred, with the addition of the words ‘shall not be denied the right.’ However, \textit{General Comment No. 23} provides that it also imposes positive obligations on states parties.\textsuperscript{161} In the UN Declaration, the cultural rights of the group are accommodated by the restatement of the wording of Article 27, but it does so as a positive rather than negative obligation.\textsuperscript{162} The commentary insists that the

\begin{itemize}
\item \textsuperscript{155}See UN Doc. E/CN.4/Sub.2/384/Add.2, paras. 125ff; and HRC, \textit{General Comment No. 23}, para. 1.
\item \textsuperscript{156}Optional Protocol to the International Covenant on Civil and Political Rights, UNGA Res.2200A (XXI), 16 December 1966, in force 23 March 1976, 999 UNTS 302. 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’. HRC, \textit{Howard v. Canada}, Comm. No.879/1999, 26 July 2005, UN Doc CCPR/C/84/D/879/1999, para.8.3.
\item \textsuperscript{158}HRC, \textit{General Comment No. 23}, para. 6.2.
\item \textsuperscript{160}\textit{Ibid.}, para.14.
\item \textsuperscript{161}HRC, \textit{General Comment No. 23}, paras. 6.1, 6.2 and 9.
\item \textsuperscript{162}Art. 2(1) UN Minorities Declaration.
\end{itemize}
safeguarding and promotion of the identity of minorities and the effective realization of their cultural rights will often require protective and proactive measures by the state.\textsuperscript{163} In addition, according to the Declaration, proactive measures designed to meet these obligations will not prima facie offend the principle of equality contained in the UDHR.\textsuperscript{164}

Through its shift in emphasis from national culture to culture as a way of life of individuals and groups, the right to participate in cultural life under Article 15 ICESCR has undergone a metamorphosis which complements the jurisprudence of Article 27 ICCPR. However, importantly Article 15 ICESCR includes and goes beyond the right to participate in one’s own culture to encompass the national culture, the cultures of others, and the dialogue between cultures. The 1976 UNESCO Recommendation on the Right to Participate in Cultural Life, which elaborates upon the right, 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.’\textsuperscript{165} However, the Committee for Economic, Social and Cultural Rights (CESCR), in respect of Article 15 ICESCR, has adopted an expansive interpretation of the rightholder and culture, as

\textit{The 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 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{166}

Similarly, access to cultural heritage has been defined as ‘an important feature of being a member of a community, a citizen and, more widely, a member of society.’\textsuperscript{167}

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

\textsuperscript{163} UN Doc. E/CN.4/Sub.2/AC.5/2005/2, at 8, para. 33.

\textsuperscript{164} Art. 8(3) UN Minorities Declaration.


\textsuperscript{166} CESCR, \textit{General Comment No.21.}, para.15(b) (emphasis added). See also Art.2(a), 1976 UNESCO Recommendation.

\textsuperscript{167} UN Doc. A/HRC/17/38, para. 2. See also HRC Res. 6/11 Protection of Cultural Heritage as an important component of the promotion and protection of cultural rights, 28 September 2007, UN Doc. A/HRC/RES/6/11.
(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 ‘[t]he 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 ‘frontiers of any kind.’ The Committee requires states parties to report on initiatives to promote awareness of the cultural heritage of indigenous peoples and minorities and establish ‘favourable conditions for them to preserve, develop, express and disseminate their identity, history, culture, language, traditions and customs.’

The recalibration of the right to participation in cultural life (Article 15 ICESCR) to harmonize, rather than potentially conflict, with the right to enjoy one’s own culture (Article 27 ICCPR) has transformed interpretations of culture and cultural rights in international law through their vernacularization in the claims by indigenous peoples and minorities. The findings of the African Commission of Human and Peoples’ Rights in Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, which brings together self-identification, the right to religious freedom, and the right to culture, illustrates these changes. The Endorois alleged various violations of the African Charter following their removal from ancestral lands by the respondent state to establish a game reserve. The Commission observed that action went to the core of indigenous rights, namely, ‘the right to preserve one’s identity through identification with ancestral lands, cultural patterns, social institutions and religious systems.’

The respondent state challenged the very categorization of the Endorois as an ‘indigenous people’ to whom specific, permanent rights attach. The African Commission noted that while the terms ‘peoples’ and ‘indigenous’ had eluded definition in international law, the African regional human rights regime specifically encompasses collective rights and

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168 CESCR, General Comment No. 21, para. 6.
169 Ibid., para. 55 (emphasis added).
170 Ibid., para. 55(d).
172 Centre for Minority Rights Development and Anor v. Kenya, supra note 21.
173 Ibid., para. 157.
recognizes that indigenous peoples are distinguished by the link between people, their land and culture and their self-identification as a distinct community.\textsuperscript{174} It acknowledged that self-identification by indigenous individuals and acceptance by the community is vital.\textsuperscript{175} The African Commission observed that even though they continued to be excluded and discriminated by the dominant culture, indigenous peoples remain determined to preserve, develop and transmit their ancestral lands and cultural identity to future generations. It added that their continued existence as a ‘peoples’ was tied to their ability to determine ‘their own fate’ and live according to ‘their own cultural patterns, social institutions and religious systems.’\textsuperscript{176} Who could assert communal rights on behalf of the group was to be resolved by the Endorois in accordance with their laws and customs and not by the respondent state.\textsuperscript{177} The Commission agreed that the Endorois considered ‘themselves to be a distinct people, sharing a common history, culture and religion’ and therefore constituted a ‘people’, and were entitled to the protection of their collective rights under the African Charter.\textsuperscript{178}

The African Commission accepted that the Endorois culture, religion and ways of life are ‘intimately intertwined with their ancestral lands’ and without access to them, they were unable to fully exercise their cultural and religious rights.\textsuperscript{179} In respect of Article 8 (right to freedom of religion), the Commission found that the community’s spiritual beliefs and practices constituted a religion under the African Charter and that their continuing inability to access their ancestral lands ‘rendered it virtually impossible for the community to maintain religious practices central to their culture and religion.’\textsuperscript{180} Also, the restriction of the Endorois’ enjoyment of this human right was not justifiable on grounds of economic development or ecological protection.\textsuperscript{181}


\textsuperscript{176} \textit{Ibid.}

\textsuperscript{177} \textit{Centre for Minority Rights Development and Anor v. Kenya, supra} note 21, para. 162.

\textsuperscript{178} \textit{Ibid.}

\textsuperscript{179} \textit{Ibid.}, para.156.

\textsuperscript{180} \textit{Ibid.}, paras. 170 and 173. See Art. 26, UNDRIP; CESC\textsuperscript{R}, General Comment No. 21, para.49(d); Art. 13(1) ILO 169; and \textit{Case of the Mayagna (Sumo) Awas Tigni Community v. Nicaragua, I/ACtHR} (2001) Series C, No. 79, para.149.

\textsuperscript{181} \textit{Centre for Minority Rights Development and Anor v. Kenya, supra} note 21, para. 173.
The complainants also alleged that the removal of the Endorois from their ancestral lands violated the community’s cultural rights through the systematic restriction of access to cultural sites and seriously damages their pastoralist way of life.\(^{182}\) Article 17(2) and (3) ACHPR respectively provide that ‘[e]very individual may freely take part in the cultural life of his community’ and ‘[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.’ The Commission confirmed that this right entails negative and positive obligations, that is, ‘the protecting of human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity’.\(^{183}\) Its interpretation of the twin dimensions of the provision, its individual rightholder and the collective nature of the obligations owed by the state party to the community, accords with those of the UN human rights bodies.\(^{184}\) Like other international and regional human rights bodies, the African Commission recognized that indigenous peoples embrace a holistic conceptualization of culture which covers land, immovable and movable heritage, tangible and intangible elements.\(^{185}\) Also, indigenous peoples emphasize the symbiotic relationship between these elements in sustaining and developing their collective identities.\(^{186}\) UNDRIP recognizes the central importance of land (and resources) to the maintenance and survival of indigenous cultures and identities.\(^{187}\) Echoing the Permanent Court, the African Commission found that the removal of the Endorois from their ancestral lands meant ‘the very essence of the [community’s] right to culture [had] been denied, rendering the right, to all intents and purposes, illusory.’\(^{188}\)

The African Commission found that under Article 17 ACHPR, a state party is under a duty to ‘tolerate’ diversity and implement positive measures to protect the identity of ‘groups different from those of the majority/dominant group’ including ‘creating spaces for dominant

\(^{182}\) Ibid., para. 239.
\(^{183}\) Ibid., para. 241.
\(^{184}\) Ibid.
\(^{185}\) Arts. 11-13, 25, and 31 UNDRIP.
\(^{187}\) 10th recital, Preamble, UNDRIP. The CESCR also recognizes 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: General Comment No. 21, paras. 36, 37 and 50(c).
\(^{188}\) Centre for Minority Rights Development and Anor v. Kenya, supra note 21, para. 251.
and indigenous cultures to co-exist. Positive measures were necessary to protect the cultural rights of vulnerable groups like the Endorois against the persistent effects of historic and current policies and practices of exclusion, exploitation, discrimination, forced assimilation, and direct violence and persecution. Also, they are of significance to the broader society as they are designed to promote cultural identity as ‘a factor of mutual appreciation among individuals, groups, nations and regions.’

The formulation of the Endorois’ claim to encompass the violation of an archetypal liberal right – the right to property (Article 14 ACHPR) – is the site of vernacularization of a human right to accommodate indigenous peoples’ worldview and the contestation between the communal right to property and the classical liberal formulation of the right to private property. Drawing on the jurisprudence of the Inter-American and European human rights courts, the Commission acknowledged that the rights and interests of indigenous communities in their ancestral lands constituted ‘property’ under the African Charter. There is a growing awareness in international and regional human rights fora that the relationship between indigenous peoples and their traditional lands goes beyond proprietorship and is primarily defined by its ‘spiritual’ aspect. Another characteristic of this relationship is that its protection within the relevant community is already governed by their own customs, laws and practices. While customary law necessarily varies from community to community, it usually recognizes the following inherent characteristics: it affirms that ownership and custodianship of ancestral lands and culture heritage is usually collective or communal in character; that such ownership and custodianship is permanent and inalienable; and it reinforces the intergenerational nature of custodianship and transmission of their cultures. The Inter-American Court of Human Rights, when deciding on similar claims, has noted that human rights law’s ‘dynamic evolution has had a positive

189 Ibid., para. 246.
191 Centre for Minority Rights Development and Anor v. Kenya, supra note 21, para. 187.
192 Art. 26 UNDRIP; CESCR, General Comment No. 21, para.49(d); Art. 13(1) ILO 169; Mayagna (Sumo) Awas Tigni Community v. Nicaragua, supra note 180, para. 149; and Yakye Axa Indigenous Community v. Paraguay, I/ACtHR (2005) Series C, No. 125, para. 131.
193 Centre for Minority Rights Development and Anor v. Kenya, supra note 21, para. 152. See also Art. 34 UNDRIP.
impact on international law in affirming and building up the latter’s faculty for regulating
relations between States and the human beings within their respective jurisdictions.\textsuperscript{196} The
African Commission and the Inter-American Court have recognized that the right to property
under their respective human rights instruments must recognize and protect collective aspects
of indigenous peoples’ relationship with their ancestral lands and its significance for their
worldview, religion and cultural identity.\textsuperscript{197} The Inter-American Court has found that to
ignore the right of indigenous communities to their ancestral lands affects their right to
cultural identity and ‘to the very survival of the indigenous community and their
members.’\textsuperscript{198} In balancing the private right to property of the state or landowners against the
communal right to property of indigenous peoples, the African Commission found that the
ongoing dispossession of the Endorois from their ancestral lands threatened their cultural
survival and therefore tip the proportionality argument in their favour in international law.\textsuperscript{199}
Similarly, the Inter-American Court has found that restriction of the former may be necessary
to realize the ‘collective objective of preserving cultural identities in a democratic and
pluralist society.’\textsuperscript{200}

The Human Rights Committee has likewise affirmed that protection of rights under
Article 27 ICCPR promotes the survival and development of minority cultures for the benefit
of these communities and the entire society.\textsuperscript{201} This 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{202} 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

\textsuperscript{196} Centre for Minority Rights Development and Anor v. Kenya, supra note 21, paras. 154-156; and Yakye Axa Indigenous Community v. Paraguay, supra note 192, para. 128.
\textsuperscript{197} Yakye Axa Indigenous Community v. Paraguay, supra note 192, paras. 134-137.
\textsuperscript{198} Ibid., para. 147.
\textsuperscript{199} Centre for Minority Rights Development and Anor v. Kenya, supra note 21, paras. 204 and 235.
\textsuperscript{200} Yakye Axa Indigenous Community v. Paraguay, supra note 192, para. 148.
\textsuperscript{201} HRC, General Comment No. 23, para. 9.
\textsuperscript{202} Art. 1(1), UN Minorities Declaration. Art. 5(2) Council of Europe FCNM contains a similar prohibition against ‘forced’ assimilation, while its explanatory report makes clear that ‘voluntary’ assimilation is not prohibited: Council of Europe, Framework Convention for the Protection of Minorities and Explanatory Report, November 1994, H(94)10, paras. 42-46.
human rights to every person within its territory without discrimination.\footnote{203} 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.’\footnote{204} It counsels that to achieve this aim, ‘minority group identity’ acceptance must go beyond ‘tolerance’ and attract ‘a positive attitude towards cultural pluralism’, that is not just acceptance but ‘respect for the distinctive characteristics and contributions of minorities to the life of the national society as a whole are required’ by the state and wider society.\footnote{205} The prohibition against forced assimilation encompasses the acts of the state and those of third parties. These concerns are replicated explicitly in multilateral instruments covering indigenous peoples. UNDRIP 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.’\footnote{206} 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.\footnote{207}

This negative obligation concerning respect for the worth of all cultures is augmented in early 21st century by specialist multilateral instruments covering cultural diversity designed to protect and promote the flourishing of cultures.

4. Diversity

The evolving interpretations of minority protection (Article 27 ICCPR) and the right to participate in cultural life (Article 15 ICESCR) in the final decades of the 20th century were accompanied by a reaffirmation of the importance of cultural diversity in various multilateral instruments. The justification for the protection and promotion of diversity goes beyond

\footnote{203}{UN Doc E/CN.4/Sub.2/AC.5/2005/2, para. 21. The CE FCNM also acknowledges the potentially positive role of 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’: \textit{ibid}.}
\footnote{204}{\textit{Ibid}.}
\footnote{205}{UN Doc E/CN.4/Sub.2/AC.5/2005/2, para. 28.}
\footnote{206}{Art. 5 UNDRIP.}
\footnote{207}{Art. 8 UNDRIP.}
equality based arguments to its installation as a common good of humanity. This rationale is contained in instruments adopted in the wake of the Second World War, like the General Assembly Resolution on the Crime of Genocide and the Convention for the Protection of Cultural Property during Armed Conflict, which reference the cultural contribution of all peoples to humanity.\textsuperscript{208} It is reiterated in the UNESCO Declaration of Principles of International Cooperation adopted in 1966 which provides that ‘[i]n 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{209} By the beginning of the 21st century, several specialist international and regional declarations had been adopted on cultural diversity which replicate this stance.\textsuperscript{210} Chief among them, the 2001 UNESCO Universal Declaration on Cultural Diversity provides:

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 and affirmed for the benefit of present and future generations.\textsuperscript{211}

Cultural diversity has been promoted as a common good for a range of reasons including its importance to peace and stability,\textsuperscript{212} progress and prosperity,\textsuperscript{213} and full realization of human

\textsuperscript{208} First recital, Preamble, Resolution on the Crime of Genocide, GA Res. 96 (I), 11 December 1946. It states that genocide ‘shocked the conscience of mankind [and] resulted in great losses to humanity in the form of cultural and other contributions represented by these groups’; second recital, Preamble, Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), 14 May 1954, entered into force 7 August 1956, 249 UNTS 240, states: ‘[D]amage to the 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.’


\textsuperscript{211} 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{212} Second recital, Preamble, 1966 UNESCO Declaration; second recital, Preamble, 1976 UNESCO Recommendation; second and seventh recitals, Preamble, 2001 UNESCO Declaration; Fifth recital, Preamble,
rights and fundamental freedoms and a democratic society. These aims in turn impact upon how it is realized on the ground.

This third and final Part examines how the protection and promotion of diversity is shaping our understandings of rightholders and duty bearers and notions of participation and consensus building in democratic societies. These issues are initially explored in respect of the implementation of cultural diversity through policies of cultural pluralism at the national level; then, the application of cultural pluralism by the international community through voluntary isolation and secession of groups is considered; and finally, diversity within groups themselves through human rights protections is explained with specific reference to women’s rights and claims to culture.

A. Cultural Pluralism

Cultural diversity does not mean cultural balkanization, where groups and their cultures are immunized from interaction and evolution, which would lead to potentially greater civil strife and violence. Rather, there is a recognition that cultural diversity and the continuing cultural contributions of communities and individuals is only possible by fostering an environment of inclusion, participation and open and effective dialogue to facilitate a society of shared, core values. Increasingly, legal and political theorists argue that equality and democracy cannot be effectively realized by focusing on civil and political rights and the public sphere alone. Instead, they maintain that there is a need to acknowledge the cultural sphere, and the varied and dynamic identities and allegiances of groups and individuals, and civil society broadly, the interactions and communications taking place beyond the formal, official state fora. Cultural pluralism is the vehicle by which cultural diversity is implemented and realized on the ground. The UNESCO Cultural Diversity Declaration describes it as

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213 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; and sixth and seventh recitals, Preamble, UN Minorities Declaration.

214 Third recital, Preamble, 1966 UNESCO Declaration; 23rd recital, Preamble, 1976 UNESCO Recommendation; fourth recital, Preamble and Arts. 2 and 5 2001 UNESCO Declaration; CE Declaration generally; fifth recital, Preamble, 2006 African Charter; sixth recital, Preamble, and Part 3, ASEAN Declaration; and sixth and seventh recitals, Preamble, CE FCNM. Likewise, human rights instruments and bodies have acknowledged the importance of cultural diversity: Arts. 4 and 5, 2001 UNESCO Declaration; Art.5(1) 2006 African Charter; third recital, Preamble, UNDRIP; and CESCIR, General Comment No. 21, para.40.

215 See Benhabib, supra note 142, at 129-130; Taylor, supra note 148, at 62; and Raz, supra note 3, at 171.
‘indissoluble from a democratic framework’ because it fosters cultural exchange and ‘the creative capacities that sustain public life.’

Africa and Europe, two continents which have been riddled with violent ethnic and religious conflict in recent decades, have adopted multilateral framework conventions focusing on the promotion of cultural diversity and human rights. The Charter for African Cultural Renaissance adopted by the African Union in 2006, and the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) of 2005, shift from emphases on states and national cultures to human rights and cultural diversity. The intent is not 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. This is augmented by the recognition that this can only be achieved through multilateral cooperation. Two characteristics of these instruments exemplify this human rights focused approach to the international protection of cultural diversity. First, states are no longer the primary holders of rights (and obligations). Instead, they are replaced by communities, groups and individuals. The Faro Convention recognizes that the right to participate in cultural life entails individual and collective rights and responsibilities, subject to restrictions necessary for a democratic society for the protection of public interest or the rights and freedoms of others. The 2006 African Charter similarly acknowledges the rights and obligations of non-state actors. Second, and related to this

216 Art. 2 2001 UNESCO Declaration.
219 Even though both are multilateral instruments intending to promote cooperation on their respective continents. Parts II and III, 1976 African Charter; Art. 1, Faro Convention. The 2000 ASEAN Declaration still has a strong state based approach, for example, Arts. 1 and 2.
220 Fifth recital, Preamble, 2006 African Charter; and first and sixth recitals, Preamble, Faro Convention. See also Art. 2 UNESCO Diversity Declaration; and 11th recital, Preamble, Art. 1, 2000 ASEAN Declaration; and CESCR, General Comment No. 21, para. 50(a).
221 Eighth recital, Preamble, Faro Convention; sixth recital, Preamble, 2006 African Charter; and 10th recital, Preamble, 2000 ASEAN Declaration.
222 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.
development, is the promotion of participation, inclusion, dialogue and consensus not only as between the state and its citizens in the public space, but between communities, groups and individuals in civil society. The UNESCO Cultural Diversity Declaration’s Main Lines of Action provide for ‘facilitating, in diversified societies, the inclusion and participation of persons and groups from varied cultural backgrounds.’ The African Charter has the stated objective of promoting ‘freedom of expression and cultural democracy, which is inseparable from social and political democracy.’ The Faro Convention provides that it is the responsibility of public authorities and competent bodies: to encourage critical reflection on the representation of cultures while respecting diverse interpretations; to establish conciliation mechanisms to equitably resolve contradictory values between groups; to develop understandings of cultural heritage which facilitate peaceful coexistence and promote trust and mutual understanding; and integrate these processes into educational mechanisms.

The Bouchard-Taylor Commission was established in Québec in 2007 in response to escalating public discontent concerning accommodation of minority cultural practices. The events leading up to the Commission were not dissimilar to those discussed earlier in respect of France and Italy concerning religious symbols and practices in public places. In this case, the circumstances were heightened because of the Québécois’ existing anxieties as a minority within predominantly English-speaking Canada. In their recommendations, Bouchard and Taylor deliberately went beyond the narrow legal confines of reasonable accommodation to examine the issues more broadly from a social and economic dimension. Therefore, rather than pursuing harmonization through a legal route, they advocated a citizen path which is informal, reliant on negotiation and compromise, and which leads to adjustment and satisfaction for all parties. For this reason, they observed that the institution of French as the common public language facilitated a framework within society for dialogue but also afforded security for the Québécois within the Canadian state. More broadly, the norms of ‘common public culture’ which included integration, intercultural relations and open secularism needed to be fully and officially defined by the government. They observed that the transplantation of France’s strict secularism into Quebec’s public schools was

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225 Art. 3(b) 2006 African Charter.
226 Art. 7 Faro Convention.
incompatible with the province’s principle of neutrality on religion. They maintained that integration in a diverse society was not achieved by suppressing identities but ‘through the exchange between citizens who thus learn to get to know each other.’\textsuperscript{228} Applying these principles in the context of Québec, cultural accommodation would not circumvent core values like gender equality, would not prohibit the wearing of religious symbols or dress in public schools or other public spaces, the display of the crucifix in the parliament or the saying of prayers during parliamentary or council sessions would be prohibited, and while dedicated prayer rooms were not mandatory for state buildings, space could be made available when rooms were temporarily unused.\textsuperscript{229} Bouchard and Taylor conclude that any efforts toward ‘a common future’ between diverse communities would fail if social and economic disparities remain entrenched, if there was a misconception that ‘pluriethnicity’ was ‘so many juxtaposed separate groups perceived as individual islets’, and if there was suppression of freedom of religious expression because of anxieties due to past religious oppression.\textsuperscript{230}

\section*{B. Voluntary Isolation and Secession}

It is a measure of the importance placed on culture, identity, and the preservation of cultural diversity by contemporary international society that it acknowledges that cultural accommodation may necessitate sanctioning (in very defined and rare circumstances) the voluntary isolation from the dominant culture and society within an existing state or the secession of a group from an existing state.

The extreme vulnerability of indigenous peoples in voluntary isolation and initial contact has been recognized by regional and international human rights bodies.\textsuperscript{231} These diverse communities share common characteristics, including a highly interdependent relationship with the environment in which they live and develop their cultures; they are ‘extremely vulnerable’ because of the lack of familiarity with the dominant culture; and are at

\begin{itemize}
\item \textsuperscript{228} Ibid., at 46.
\item \textsuperscript{229} Ibid., at 20. See Margalit and Halbertal, supra note 52, at 506.
\item \textsuperscript{230} Bouchard and Taylor, supra note 227, at 21.
\item \textsuperscript{231} People in isolation are defined as indigenous peoples or subgroups who live in remote areas, do not have regular contact with the majority population, and for whom ‘isolation is not a voluntary choice but a survival strategy’, while indigenous people in initial contact have recent, intermittent contact with the majority population but never become completely aware of its ‘patterns and codes of relationships’. Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial Contact of the Amazon Basin and El Chaco, Report prepared by the Secretariat, 30 June 2009, UN Doc A/HRC/EMRIP/2009/6, para. 7.
\end{itemize}
‘high risk of extinction’ because encroachments onto their lands adversely impact their ways of life and ability to preserve their cultures. The case of Yakye Axa Indigenous Community v. Paraguay involved an indigenous community which had traditionally lived in the Paraguayan Chaco and whose removal from their traditional, communal lands, it was alleged, violated their ‘right to life, the right to ethnic identity, the right to culture and to recreate it, the right to survive as an integrated indigenous Community.’ The Inter-American Court of Human Rights found that ‘possession of their traditional territory is indelibly recorded in their historical memory, and their relationship with the land is such that severing that tie entails the risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity.’ The Court found that the respondent state was under a duty to take positive measures towards realization of a right to a decent life for persons who are ‘vulnerable and at risk’. It framed the question it needed to address thus:

[W]hether the State generated conditions that worsened the difficulties of access to a decent life for the members … and whether, in that context, it took appropriate positive measures to fulfil that obligation, taking into account the especially vulnerable situation in which they were placed, given their different manner of life (different worldview systems than those of Western culture, including their close relationship with the land) and their life aspirations, both individual and collective, in the light of the existing international corpus juris regarding the special protection required by the members of indigenous communities …

In their dissenting opinion, Judges Cançado Trindade and Ventura Robles went further, finding that the removal of the community from their ancestral lands and ongoing marginalization caused the deaths of several of its members. They observed that ‘[c]ultural identity has historical roots, and under the circumstances of the instant case … it [was] tied to ancestral lands. We must emphasize that cultural identity is a component or is attached to the

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234 Ibid., para. 162.
235 Ibid., para. 163.
236 Separate Dissenting Opinion of Judges A.A. Cançado Trindade and M.E. Ventura Robles, in Yakye Axa Indigenous Community v. Paraguay, supra note 192, paras. 6-12.
right to life *lato sensu*; thus, if cultural identity suffers, the very right to life of the members of said indigenous community also inevitably suffers.*\(^{238}\)

In 2009, the UN Office of the High Commissioner for Human Rights (OHCHR), in consultation and collaboration with representative groups, prepared draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial Contact of the Amazon Basin and El Chaco, which sets out the obligations of states and the international community.*\(^{239}\) States have an obligation to protect the individual and collective rights of indigenous peoples within their territory, especially those that are extremely vulnerable and are at ‘high risk of becoming victims of large-scale aggression that ultimately amounts to genocide.’*\(^{240}\) The international community is also required to ensure the adoption and effective implementation of protective measures to guarantee the protection of these peoples’ human rights because of their situation of extreme vulnerability and ‘fulfil its role and responsibility of guaranteeing that the planet’s cultural diversity is protected, as this diversity represents a valuable public good for humanity.’*\(^{241}\) In order to respect the principle of no contact, these communities can only be identified through collaboration with other indigenous peoples that have been contacted and local, regional or national organizations they may have established, and universities and non-governmental organizations working directly on their protection.*\(^{242}\)

While indigenous peoples in voluntary isolation and initial contact enjoy the full suite of human rights, the OHCHR guidelines identify three overarching and interrelated rights, namely: (1) the right to self-determination – that their decision to live in isolation be respected is described as the ‘highest expression of this right’ as it guarantees respect for their traditional ways of life; (2) the right to territory – recognizes their dependence on their environment to maintain their ways of life and develop their culture; and (3) the right to culture – that they are able to exercise their cultural rights to guarantee their cultural survival.*\(^{243}\) The rights of indigenous peoples in initial contact, like all indigenous peoples, includes the right to participate or be consulted and the right to free, prior and informed

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\(^{238}\) *Yakye Axa Indigenous Community v. Paraguay*, *supra* note 192, para. 18.

\(^{239}\) *Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial Contact of the Amazon Basin and El Chaco*, *supra* note 231. The Spanish version was adopted in May 2012.


consent, which has been recognized by international instruments and regional human right bodies.\(^{244}\) Consultation and consensus must accord with the indigenous community’s ‘own mechanism of consultation, values, customs and customary law’; and it is the community, and not the state, that determines who shall represent them during consultations.\(^{245}\) Indigenous peoples in voluntary isolation exercise this right by not participating and not providing their consent to encroachments onto their lands.\(^{246}\) Consent is a mandatory requirement where proposed actions involve the permanent dislocation of communities from their traditional lands, exploitation of natural resources necessary for their subsistence, or the disposal of hazardous materials on their lands. This is an additional safeguard for the rights of indigenous peoples given the direct connection to the right to life and right to cultural identity.\(^{247}\) It is especially critical for communities in voluntary isolation or initial contact where obtaining consent by force or coercion could amount to ‘serious violations of their human rights, including the crime of genocide.’\(^{248}\) The guidelines encourage the establishment of permanent mechanisms for dialogue among all actors, including all levels of government, indigenous peoples’ organizations and non-governmental organizations, involved in the implementation of specific protective measures.\(^{249}\)

The continuing negotiations concerning the secession of Kosovo from Serbia provide a possible example of the rare circumstances in which the international community will permit recognition of a new state where there has been failure to negotiate between religious or cultural communities. While the international community has persistently denied that the right to external self-determination extends to minorities, the 2005 commentary to the UN Minorities Declaration indicates that they may exercise the right to self-determination as


\(^{246}\) UN Doc A/HRC/EMRIP/2009/6, para. 68.


\(^{248}\) UN Doc A/HRC/EMRIP/2009/6, para. 75.

\(^{249}\) Ibid., para.83. As at May 2013, the Rapporteur on the Rights of Indigenous Peoples at the Inter-American Commission on Human Rights is gathering information from state parties concerning their legal and policy practices concerning indigenous peoples in voluntary isolation and initial contact to develop recommendations in accordance with international human rights law.
secession ‘if participation is denied to a minority and its members.’ This view arises from an interpretation of the so-called ‘safeguard’ clause contained in the 1970 UN Friendly Relations Declaration which reaffirms the applicability of territorial integrity or political unity of states ‘conducting themselves in compliance with the principle of equal rights and self-determination of peoples … and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.’ In the Quebec Secession case, the Canadian Supreme Court also considered that this safeguard clause may justify the exercise of external self-determination or secession ‘when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.’

The international recognition of Kosovo’s independence proposed by the UN Special Envoy following the failure to reach a negotiated settlement between Serb and Kosovar representatives can be interpreted as a response to a blockage as described by the Canadian Supreme Court. In his separate opinion to the International Court of Justice’s Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo, Judge Cançado Trindade observed that

States exist for human beings and not vice-versa. Contemporary international law is no longer indifferent to the fate of the population …. The advent of international organizations, transcending the old inter-State dimension, has helped to put an end to … [i]his distortion [which] led States to regard themselves as final repositories of

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human freedom, and to treat individuals as a means rather than as ends in themselves, with all the disastrous consequences which ensued therefrom.\textsuperscript{254}

When making this observation, Judge Cançado Trindade implied that the safeguards applied to the new state of Kosovo, as it did to the state from which it sought to secede. Accordingly, in its declaration of independence, the Kosovo Assembly indicated its acceptance of the obligations proposed by the Special Envoy, particularly those concerning ‘the rights of Communities and their members.’\textsuperscript{255} In addition to promoting equality, it agreed to refrain from assimilationist policies,\textsuperscript{256} and to implement positive measures conducive for minority communities and their members ‘to preserve, protect and develop their identities.’\textsuperscript{257} It accepted it had ‘a special duty to ensure effective protection of the sites and monuments’ of all communities, and promoting their heritages as ‘an integral part of the heritage of Kosovo.’\textsuperscript{258} The explicit purpose of these guarantees is the promotion of ‘a spirit of tolerance, dialogue and [to] support reconciliation between the Communities.’\textsuperscript{259}

\textbf{C. Human Rights, Individuals and the Group}

Groups and communities, including minorities and indigenous peoples, like states have members with multiple, varying, and dynamic identities, which traverse ethnic and religious affiliations and gender, age, sexual orientation etc.\textsuperscript{260} International and regional instruments make clear that neither the state nor groups can invoke culture or religion to derogate from

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\item\textsuperscript{254} \textit{Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,} ICJ Reports (2010) 403, advisory opinion of 22 July 2010, separate opinion of Judge Cançado Trindade, para. 239. Despite the submissions of various states in support of this broader interpretation of when the right to self-determination triggers the exercise of secession in international law, the ICJ failed to address this issue.
\item\textsuperscript{255} Kosovo’s Declaration of Independence on 17 February 2008, in Introductory Note, Dossier 192, \textit{Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,} supra note 254; and UN Doc S/2007/168, Annex II. Several states recognizing Kosovo’s statehood made specific reference to this undertaking. See United States: Letter President G.W. Bush, 18 February 2008; France: Statement Minister B. Kouchner, 18 February 2010; and United Kingdom: Statement Prime Minister G. Brown, 18 February 2008.
\item\textsuperscript{256} UN Doc S/2007/168, Annex II, Art.2(6).
\item\textsuperscript{257} \textit{Ibid.,} Art. 2(1). The implementation of the rights and privileges afforded the Serbian Orthodox Church, its clergy and affiliates, activities and property is overseen by an international monitor: Annex V.
\item\textsuperscript{258} UN Doc. S/2007/168, Annex II, Art. 2(5).
\item\textsuperscript{259} UN Doc. S/2007/168, Annex V, Art. 2(1). See \textit{Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,} Separate Opinion of Judge Cançado Trindade, supra note 254, para. 238.
\end{itemize}
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human rights norms, including principles of non-discrimination and equality, which represent core values of the international community. The UN Special Rapporteur on Cultural Rights has stated: ‘Cultural diversity is not to be confused with cultural relativism.’261 The UNESCO Cultural Diversity Declaration explicitly provides that promotion and protection of cultural diversity cannot be used to justify violations of existing human rights norms.262 Likewise, human rights instruments stipulate that the exercise and enjoyment of cultural rights cannot violate others’ human rights.263 The commentary to the UN Minorities Declaration noted that ‘cultural or religious practices which violated human rights law should be outlawed for everyone’, so that the qualification is of universal application, to minorities and the majority alike.264 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 in respect of the right to participate in cultural life (Article 15 ICESCR) that ‘no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope’.265 The Committee has found that it is mandatory for states parties to ensure equality between men and women in respect of the right to participate in cultural life by eliminating ‘institutional and legal obstacles as well as those based on negative practices, including those attributed to customs and traditions.’266 Yet, as Yvonne Donders meticulously details in this volume, reservation after reservation made by state parties to the Convention on the Elimination of Discrimination against Women (CEDAW) invokes culture and religious practices to circumscribe or deny the human rights of women.

Recent UN reports have been especially alert to the negative effect that claims to culture and religion have on the protection and promotion of women’s human rights. The

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262 Art. 4 2001 UNESCO Declaration. See also sixth recital, Preamble, CE Declaration; and first recital, Preamble, 2006 African Charter. The ASEAN Declaration is silent on this point.
263 For example, 18th recital, Preamble, 1976 UNESCO Recommendation; Arts. 4(2) and 8(2) UN Minorities Declaration; Art. 22 CE FCNM; Art. 46(2) UNDRIP; and Art. 4 Pretoria Declaration on Economic, Social and Cultural Rights in Africa, adopted by the African Commission on Human and Peoples’ Rights, meeting at its 36th ordinary session on 17 September 2004, ACHPR/Res. 73(XXXVI)04. See CESCR, General Comment No. 21, para. 17, which provides that 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’.
265 CESCR, General Comment No. 21, paras.18 and 20.
266 CESCR, General Comment No. 21, para. 21.
Special Rapporteur on Violence against Women (VAW) noted in 2012 that gender related killings within the family or community, or perpetrated or sanctioned by the state, and justified on cultural grounds was increasing, with the perpetrators rarely being held criminally accountable.\footnote{Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, R. Manjoo: Gender-related killing of women, 23 May 2012, UN Doc A/HRC/20.16. See also Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, R. Coomaraswamy: Cultural Practices in the family that are violent toward women, 31 January 2002, UN Doc E/CN.4/2002/83; and Report of Special Rapporteur on Freedom of Religion and Belief, Étude sur la liberté de religion ou de conviction et la condition de la femme au regard de religion et des traditions, UN Doc E/CN.4/2002/73/Add.2.} For example, in \textit{INTERIGHTS on behalf of Safia Yakubu Husaini and Others v. Nigeria}, the African Commission was asked to consider a complaint by Ms Hasaini who was sentenced to death by stoning for adultery following the application of Sharia law by special Sharia Courts in northern Nigeria.\footnote{ACHPR, Comm. No. 269/03, Decision, 27 April 2005.} Sharia law was only applicable to persons of the Muslim faith and it attached the death penalty to offences which did not attract this form of punishment under the Penal Code for Northern Nigeria, which cover the rest of the population. 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. However, the impact of the discrimination arising because of religious affiliation was compounded because of her gender.\footnote{See UN Doc A/67/287, paras. 52 and 53; and Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Y. Ertürk: Intersection between culture and violence against women, 17 January 2007, UN Doc A/HRC/4/34, para. 61.} Human rights bodies are increasingly cognizant of the need for vigilance in respect of vulnerable groups within minorities. The Human Rights Committee in its General Comments covering Article 27 (Minorities) and Article 3 (Equality between men and women) has stipulated that minority cultural rights do not authorize the violation of the right to equal enjoyment by women of any rights under the ICCPR, by a state, group or individual.\footnote{HRC, General Comment No. 28: Equality of Rights between Men and Women (Art. 3), UN Doc A/55/40, annex VI, para. 32.}

The Special Rapporteur on VAW, Yakin Ertürk, has emphasized the need to debunk myths that present cultures as ‘static and immutable’, ‘homogeneous and monolithic’, and ‘apolitical and detached from the prevailing power relations’, and resulting in individuals monopolizing the right to speak on behalf of a cultural or religious community.\footnote{UN Doc A/HRC/4/34, paras. 57-63.} She has observed that universally agreed values, including the principle that no custom or tradition...
can be used to justify violence against women, can only be upheld through ‘cultural negotiation’ where ‘positive cultural elements are emphasized, while the oppressive element in cultural-based discourses are demystified.’\textsuperscript{272} The UN Special Rapporteur on Cultural Rights, Farida Shaheed, has noted that as ‘freedom to participate in cultural life stands at the very core of liberty’, such cultural negotiations can only effectively be realized when women enjoy the freedom to participate fully.\textsuperscript{273}

Like those of states, the members of a group have human rights and fundamental freedoms recognized in international law. And like states, groups which thwart the full and effective participation of all their members diminish their own legitimacy, and those members who systematically violate human rights in its name are responsible in law.

5. Conclusion

The motto of the French Republic took some time to come to a consensus. The first two catch cries of ‘liberté’ and ‘égalité’ were enunciated immediately and remained consistent. The third in the triumvirate, ‘fraternité’ – with its allusions to community rather than the individual – proved less secure. Yet, other republics have embraced similarly communitarian themed mottoes. Until 1955, the United States utilized ‘\textit{E pluribus unum}’ (‘Out of many, one’). The present-day Republic of South Africa has ‘Unity in diversity’, as does the European Union (‘\textit{In varietate concordia}’ or ‘\textit{Unité dans la diversité}’). All contain within them the kernel of drawing together diverse populaces into a community.

Achieving this community through law remains an incremental process, defined and recalibrated continually since the 17th century through the elaboration of civil and political rights in national laws and human rights in international law. Liberty and the promotion of tolerance permitted members of minorities to participate in public life and enjoy related freedoms of beliefs, expression, assembly, and association as long they did not interfere with the freedoms of others or offend public morals. The pursuit of equality meant that non-discrimination moved beyond equal enjoyment of civil and political rights by all individuals to cultural (and social and economic) rights and allocation of public resources to ensure that individuals are able to sustain and foster their own cultural identity in community with others.


when it is distinguishable from the national or majoritarian culture. The protection and promotion of cultural diversity by the international community as a common good recognizes the evolving, diverse and plural identities held by groups and individuals alike. But there is also recognition that diversity can only be sustained in an environment which enables all to participate and engage in dialogue in the formulation and promotion of a society of common, core values (like human rights, racial equality, gender equality) and in which majority and minority cultures can coexist. These processes and the core values which they bring forth are as fundamentally applicable to cultural (and religious) groups and indigenous peoples, as they are to states and the international community.