

Minorities, Cultural Rights and the Protection of Intangible Cultural Heritage

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1 Introduction

The protection of intangible cultural heritage has often been regarded as the long neglected area of international cultural heritage law. Indeed, while international conventions for the protection of movable and immovable, tangible heritage have been operational for several decades, a specialist multilateral instrument covering intangible heritage was only finalised in 2003. Yet, the safeguarding of intangible cultural heritage has preoccupied international law for well over a century. I argued that the question of intangible cultural heritage in international law has influenced, and is influenced by, the protection of minorities and the articulation of cultural rights. Treaties covering these various areas contain similar rationales and objectives; disputes about the right holders and the nature of the rights; debate about obligations placed on States parties and the role of the international community; mechanisms of implementation; and the definition of 'culture'.

I examine the resurgent interest in minorities, cultural rights and the protection of intangible cultural heritage in international and European law. Their interconnectedness is reflected in their concomitant rise and decline during specific moments in modern international law. These moments are defined by the importance placed on cultural diversity in attaining stability and prosperity by the international community and States. The primary areas of investigation are:

- (1) the phases of minority protection in international law from the early twentieth century to the present, and its interplay with cultural diversity, cultural rights and intangible cultural heritage;
- (2) the legacy of these phases upon the current conceptualisation and promotion of cultural rights in international, and European, law; and
- (3) the transformative impact of the 2003 UNESCO International Convention on the Safeguarding of Intangible Cultural Heritage on long-held rationales and mechanisms for the protection of cultural heritage in international law.

I focus on Europe not because it alone has minorities within its borders. Rather, its haunting of European consciousness has consistently and significantly defined the development of international law in these areas. They are a central concern to current European integration and constitutional negotiations.

2 Cultural Diversity and Minority Protection

Minority protection incorporates some of the earliest articulations of cultural rights and the protection of intangible cultural property in international law. Although cultural diversity was encouraged by such treaty provisions, it was often not their explicit purpose. Instead, peace and progress have been the consistent rationales attached to the inclusion, or otherwise, of such provisions. Three discernible phases

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in the development of minority protection can be detected from the early twentieth century to the present day.

A *Inter-War Minority Protection*

From 1919 to 1945, there was a detailed, but flawed, articulation of minority protection. The Allied governments refused to concede the universal application of minority protection by including it in the Covenant of the League of Nations. Instead, it was included in peace treaties with specific Central and Eastern European States.¹ The issues addressed by these treaty provisions, and the Permanent Court of International Justice's (PCIJ) interpretation of them, continue to resonate to the present-day in multilateral instruments covering minorities, cultural diversity, cultural rights and intangible heritage.

Drawing from the guarantees afforded certain groups in various nineteenth century, the inter-war minority protection had two distinct components. The first arm covered the principle of non-discrimination, that is, members of the minority were as entitled to equal enjoyment of civil and political rights as other nationals.² Although these guarantees provided for the use of minority languages, the PCIJ found that their intended purpose was to 'prevent any unfavourable treatment, and not to grant a special regime of privileged treatment.' They were, it said, of 'a purely negative character in that they are confined to a prohibition of any discrimination.'³

The second arm of these international guarantees provided that minorities should enjoy the equal right 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 therein.'⁴ When it defined what constituted a minority for the purposes of these treaty provisions, the PCIJ made reference to the intangible elements of their cultural identity. It found that the relevant 'community' was:

*...united by ... a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another.*⁵

The relevant State was placed under a positive obligation to assist in the realisation of rights contained under this second arm. This interpretation was reinforced with the requirement that in territory where the minority made up 'considerable proportion of ... nationals' the State was required to provide instruction in the minority language in public education system; and an equitable share of public funds to the communities to realise these goals.⁶

The dual nature of minority guarantees made it difficult to define their ultimate purpose. Many assumed the guarantees were only a temporary measure and

¹ See C. A. Macartney, *National States and National Minorities*, (1968), 240ff; and P. Thornberry, *International Law and the Rights of Minorities* (1991) 41ff.

² *Rights of Minorities in Upper Silesia (Minority Schools)*, 1928 PCIJ Series A, No.15, 29.

³ *Ibid.*

⁴ Article 67, Section V, Treaty of Peace between the Allied and Associated Powers and Austria, St Germain-en-Laye, 10 September 1919, in force 8 November 1921.

⁵ *Advisory Opinion in the Greco-Bulgarian 'Communities'*, 1930 PCIJ Series B, No.17, 33.

⁶ Article 68, Section V, 1919 Treaty of St. Germain-en-Laye.

that the majority and minority would eventually tolerate each other (or the minority would effectively be assimilated), and so that the guarantees would no longer be necessary.⁷ It is clear the Allied governments did not intend to create 'imperium in imperio' or 'States within States' by granting national groups political autonomy.⁸ For this reason, they referred to "members of minorities" and not simply "minorities".⁹

However, the nature of the inter-war minority protections was such that it led several publicists to observe that it heralded the recognition in international law of legal personalities beyond States.¹⁰ The scheme was viewed as ensuring the perpetuation of the essence of the minority's cultural identity within the State but with its members being loyal fellow-citizens. In the *Minority Schools in Albania* case (1935), the PCIJ found that the two requirements of the minority guarantees could only effectively be realised by recognising that 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.*¹¹

These inter-war minority guarantees did provide rudimentary recognition of a right to self-determination in respect of cultural matters for certain groups. This early, but limited, encouragement of cultural diversity was motivated by the desire to attain progress through peace and stability.¹²

B Post-1945: Minorities and the Human Rights Framework

From 1945 to 1989, minority protection was subsumed within the emerging international human rights discourse. Set against the Cold War and the threat of fragmentation precipitated by liberation movements, States held fast to the need for national unity through integration policies. They argued that the universalisation of minority protection threatened their internal political, economic and social stability, as well as their prosperity. Minority protection was confined to the realm of non-discrimination and human rights enjoyed by individuals. Any notion of cultural rights as being positive and collective was rejected in most international fora. And the protection of intangible cultural heritage was quarantined to the realm of intellectual property regimes.

⁷ See Report of M. de Mello-Franco, 9 December 1925, *LNOJ*, 7th year (1926), 141.

⁸ See Calderwood, 'The Protection of Minorities by the League of Nations', 2 *Geneva Research Information Committee Special Studies* (1931) 17 at 21; and *LNOJ*, (1929) SS 73, 46.

⁹ Macartney, *supra* note 1 at 282-83.

¹⁰ See Kelly, 'National Minorities in International Law', 3 *Journal of International Law and Policy* (1973) 253 at 260; Kunz, 'The Present Status of International Law for the Protection of Minorities', 48 *AJIL* (1954) 548 at 552-558; Brownlie, *Principles of Public International Law* (1990) 60 and 62; and Vukas, 'International Protection of Minorities: Limits to Growth', 23 *Thesaurus Acroasium* (1999) 21 at 33.

¹¹ *Minority Schools in Albania*, 1935 PCIJ Series A/B, No.64, 17.

¹² *Ibid.* See Speech of US President Woodrow Wilson on 31 May 1919, in Macartney, *supra* note 1, at 232-33; and *Advisory Opinion in the Greco-Bulgarian 'Communities'*, at 19.

1 *UDHR and Article 27 ICCPR*

Under the League's successor, the United Nations, the protection of minorities fell within the human rights framework and specifically, the principle of non-discrimination.¹³ The Preamble of the UN Charter states that the peoples of the United Nations are determined 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person ...'.¹⁴ There is no mention of the second arm of the inter-war minority guarantees.

In the lead-up to the Universal Declaration of Human Rights (UDHR),¹⁵ 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.¹⁶ The latter option confronted the problem in a direct, positive manner, by stipulating the establishment of educational and cultural institutions for non-dominant groups. It implied a permanent set of arrangements to protect the culture, language and religion of the community. The UDHR does not include positive protection for minorities but does provide for the principle of non-discrimination.¹⁷

The first provision for the protection of minorities of universal application was finally realised with Article 27 of the United Nations' International Covenant on Civil and Political Rights (ICCPR).¹⁸ Despite its manifest limitations, this provision has played a vital role in various efforts to elaborate cultural rights and the protection of intangible cultural heritage in various multilateral initiatives in the decades that have followed.

The inclusion of the minority protection within the international human rights framework reinforced the assumption that the right holder is an individual and *not* a group.¹⁹ The Sub-Commission expressed preference for the phrase 'persons belonging to minorities' over the term 'minorities' alone, because individuals, unlike minorities, are a recognised subject of international law. Furthermore, the complaint mechanism contained in the Optional Protocol to the Covenant provides standing to States or individuals but not to 'communities'.²⁰ The concession to the collective aspect of minority rights came with the words 'in community with other members of their group'. The Human Rights Committee (HRC) has affirmed that the right of enjoyment of culture, practice of religion, or use of language can only be realised meaningfully when exercised 'in a community', that is as a group.²¹ General

¹³ The UN Secretariat found the League of Nations minorities protection were terminated following the Second World War: UN Doc.E/CN.4/367 (1950).

¹⁴ UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119.

¹⁵ GA Res.217A(III), 10 December 1948.

¹⁶ UN Doc.E/CN.4/Sub.2/8.

¹⁷ Arts.2 and 7, UDHR.

¹⁸ GA Res.2200A(XXI), 16 December 1966, in force 23 March 1976.

¹⁹ See UN Doc.E/CN.4/Sub.2/384/Add.2, paras.125ff; General Comment No.23, UN Doc.HRI/GEN/1/Rev.1, 38, para.1.

²⁰ Optional Protocol to the International Covenant on Civil and Political Rights, GA Res.2200A(XXI), 16 December 1966, in force 23 March 1976.

²¹ See *Kitok v. Sweden*, No.197/1985, UN Doc.A/43/40, p221 (1988); *Lubicon Lake Band (Bernard Ominayak) v. Canada*, No.167/1984, UN Doc.A/45/40, Pt.2, 1 (1990); and *Länsman v.*

Comment No.23 (The Rights of Minorities) states that Article 27 protects ‘individual rights’ but that the obligations owed by States are collective in nature.²²

The right contained in Article 27 is negatively conferred, with the addition of the words ‘shall not be denied the right’.²³ However, UN Special Rapporteur Francesco Capotorti rejected this narrow reading of this obligation. He argued that the principles of non-discrimination and protection of minorities were distinctive. He added that the protection of minorities, even if it was contained in the ICCPR, resembled the ‘economic and social’ rights that require a State to act proactively on behalf of the rights holders.²⁴ Capotorti categorically denounced assimilationist policies and stressed States’ responsibility to encourage and assist the cultural development of minorities.²⁵ General Comment No.23 also endorses the position that Article 27 imposes positive obligations of States parties.²⁶

Capotorti also suggested that ‘culture’ must be interpreted broadly to include customs, morals, traditions, rituals, types of housing, eating habits, as well as the arts, music, cultural organisations, literature and education.²⁷ General Comment No.23 similarly endorses a wide concept of culture including, for example, a particular way of life associated with the use of land resources, especially in relation to indigenous peoples.²⁸

2 *Article 15 ICESCR: Right to Participate in Cultural Life*

A more general 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).²⁹ While the UDHR is a non-binding declaration, this human right’s subsequent inclusion in the ICESCR renders it legal binding on States parties. UNESCO presented a preliminary draft Article 15 which referred primarily the preservation and development of tangible cultural heritage. However, it also required States parties to ‘encourage[e] the free cultural development of racial and linguistic minorities.’³⁰ An alternative, briefer draft Article submitted by UNESCO borrowed heavily from Article 27 UDHR.³¹

Finland, No.511/1922, UN Doc.CCPR/52/D/511/1992, and No.671/1995, UN Doc.CCPR/C/58/D/671/1995.

²² General Comment No.23, para.6.2.

²³ UN Doc.E/447, para.55; UN Doc.E/CN.4/Sub.2/351, 13-14; UN Doc.E/CN.4/Sub.2/SR.647, 158; UN Doc.E/CN.4/Sub.2/384/Add.2, paras.130ff.

²⁴ UN Doc.E/CN.4/Sub.2/384/Add.2, paras.130-36, 160-61; and UN Doc.E/CN.4/Sub.2/384/Add.5, paras.24-30. See General Comment No.23, paras.6.1 and 6.2.

²⁵ UN Doc.E/CN.4/Sub.2/384/Add.5, paras.22-23, 34, 39 and 41. See Art.1, UNESCO Declaration of the Principles of Cultural Co-operation, adopted 4 November 1966, UNESCO Doc.14C/Resolutions.

²⁶ General Comment No.23, paras.6.1, 6.2 and 9.

²⁷ UN Doc.E/CN.4/Sub.2/384/Rev.1, 99-100.

²⁸ General Comment No.23, para.7.

²⁹ GA Res.2200A(XXI), 16 December 1966, in force 3 January 1976.

³⁰ UN Doc.E/CN.4/541.

³¹ UN Doc.E/CN.4/541, Rev.1, 3.

While some States welcomed the broader interpretation of community contained in Article 15 ICESCR expounded by UNESCO; its recommendation to include the words: 'to take part in the cultural life of the communities to which he belongs', was eventually defeated.³² The focus of the international community clearly remained on the 'national' community. Developments in recent years have gradually shifted the emphasis toward UNESCO's original interpretation. The revised guidelines for State parties' reporting of their implementation of the Covenant, adopted in 1991 (Revised Guidelines), refer to 'the right of everyone to take part in the cultural life which he or she considers pertinent, and to manifest his or her own culture.'³³ States parties are required to provide information about the 'cultural heritage of national ethnic groups and minorities and of indigenous peoples' and mankind's cultural heritage.'³⁴ The UN Committee on Economic, Social and Cultural Rights (Committee) sees the provision as guaranteeing minority and indigenous peoples the freedom to practise,³⁵ and promote awareness of their cultures.³⁶

Konaté, a member of the Committee, suggested that the right to participate in cultural life includes the right to access culture, to enjoy the benefits and demand its protection and to contribute freely to its development. He maintains that the right to access culture includes the right to choose a culture and implies equal opportunities and non-discrimination.³⁷ Under the ICESCR, States parties are under an obligation to take steps to achieve progressively the full realisation of the rights recognised in the Covenant.³⁸

The *travaux préparatoires* of Article 27(1) UDHR reveals that the drafters were preoccupied with the participation and enjoyment by the wider population of culture manifestations confined ordinarily to a small élite. Culture was defined narrowly as 'high' culture including museums, libraries and theatres.³⁹ UNESCO's preparatory documents for Article 15 ICESCR embraced 'folk arts, folklore and popular traditions in literature, religion, mythology, philosophy, architecture and the visual arts, music and dancing, drama, crafts, etc.'⁴⁰ The Revised Guidelines do not provide a definition of culture per se. However, the Committee has endorsed a broader understanding of culture that includes its individual and collective dimension and accepts that it 'reflects ... the community's way of life and thought.'⁴¹

³² UN Doc.A/C.3/SR.797, 178; and UN Doc.A.C.3/SR.799, 190-191.

³³ Revised Guidelines regarding the Form and Contents of Reports to be submitted by State Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, UN Doc.E/C.12/1991/1. See also Art.4(f), Recommendation on the Right on Participation in Cultural Life Adopted on 26 November 1976 by the General Conference of UNESCO, 19th session, Nairobi.

³⁴ *Ibid.*

³⁵ General Discussion on the Right to Take Part in Cultural Life as recognised in Article 15 of the International Covenant on Economic, Social and Cultural Rights, UN Doc.E/1993/22, Chapter VII, ('General Discussion'), para.205; and Revised Guidelines, para.1(d).

³⁶ See UN Doc.E/1992/23, para.153, 162; and E/1997/22, para.302.

³⁷ UN Doc.E/C.12/1992/WP.4, 5-8,

³⁸ See O'Keefe, 'The "Right to Take Part in Cultural Life" under Article 15 of the ICESCR', 47 *ICLQ* (1998) 904 at 905; and Alston and Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *HRQ* (1987) 156 at 185.

³⁹ See Y. M. Donders, *Towards a Right to Cultural Identity?* (2002), 139.

⁴⁰ UNESCO Doc.CUA/42, 9-10.

⁴¹ General Discussion, paras.204, 209, 210 and 213.

C After 1989: Revisiting Minority Protection

The limitations heralded by the UDHR were gradually addressed by the international, and European, community in the shadow of renewed inter-ethnic and religious conflict in Europe during the 1990s. The close of the Cold War and the tandem disintegration and emergence of various states were accompanied by renewed concern for the protection of minorities in international law. The protection afforded these groups includes non-discrimination in respect of civil and political rights and the right to preserve and develop their cultural identity through enumerated cultural rights. Today, the international community, including regional organisations like the European Union, are slowly accepting that the promotion and protection of cultural diversity is essential to sustainable development.

1 1992 UN Minorities Declaration

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Declaration on Minorities) was finally adopted in 1992.⁴² In its Preamble, it states that it is inspired rather than based on Article 27 ICCPR, and therefore not restricted by this provision.⁴³ The declaration reaffirms the principle of non-discrimination.⁴⁴ Article 2 draws upon rights articulated in Article 27 ICCPR (restated as a positive right); Article 15 ICESCR; and inter-war guarantees concerning the establishment of institutions for the promotion of culture, religion and language. Under Article 4(2), the relevant State must create favourable conditions to enable members of a minority to 'express their characteristics' and 'develop their culture, language, religion, traditions and customs' where they do not violate national or international law.

Like the earliest manifestations of the minority protections, the 1992 UN Declaration on Minorities states that the protection of minorities is the concern of the international community and it 'contribute[s] to the political and social stability of States in which they live.'⁴⁵ Tolerance is also promoted through self-knowledge and awareness of the broader community by the minority members and education of the public at large of the cultural and other contributions of the minority to the State (Article (4)).

The UN Declaration does not explicitly recognise the right of minorities to self-determination; however, it does refer to other international instruments which include the right of self-determination. Nonetheless, the declaration on its face provides support for the argument that minorities have a right to internal self-determination – particularly in respect of cultural and economic development (Articles 2(3) and (4), and 5). It also states that nothing in it can be construed as 'permitting any activity contrary to ... sovereign equality, territorial integrity and political independence of States' (Article 8(4)).

2 1994 CE Framework Convention for National Minorities

The Organisation for Security and Cooperation in Europe (OSCE) (previously the Conference on Security and Co-operation in Europe) has concerned itself with

⁴² UNGA Res.47/135, 18 December 1992.

⁴³ Fourth recital, Preamble, UN Minorities Declaration.

⁴⁴ First and third recitals, Preamble and Arts 2(1), 3 and 4(1), UN Minorities Declaration.

⁴⁵ Fifth and seventh recitals, Preamble, 1992 UN Minorities Declaration.

minority issues since the 1970s.⁴⁶ OSCE standards have broken new ground and influenced UN and Council of Europe work in the area. The 1989 Vienna Concluding Document requires participating States to ensure equal treatment of all its citizens⁴⁷ They are called upon to ensure that minorities on their territory can 'maintain and develop their own culture in all its aspects, including language, literature and religion; and that they can preserve their cultural and historical monuments and objects.'⁴⁸ It recognises collective rights and the need to provide different treatment for minorities so they can preserve their identity. The Copenhagen Document enunciates a broad statement on minority rights which 'remains unmatched' and encompasses participation rights, the relations between official and minority languages, the prohibition of forced assimilation, maintenance of organisations and associations, and membership of the group.⁴⁹ It states that their observance of these obligations is an 'essential factor for peace, justice, stability and democracy in the participating States.'⁵⁰

The European Union (EU) does not have a legally-binding instrument covering minority rights. However, it does have a growing body of treaty references to cultural and education, and European cultural and linguistic diversity.⁵¹ Under Article 151 (ex Article 128) of the Treaty establishing the European Community (EC Treaty), the Community is required to contribute to the flowering of the cultures of member States, while respecting their national and regional diversity alongside the promotion of the 'common cultural heritage [of the member States]' (para.1).⁵² In addition, it is required to take cultural aspects into account in its actions under other provisions of the EC Treaty with a view to 'respect[ing] and promot[ing] the diversity of its cultures' (para.4). The Community's role is restricted by the principle of subsidiarity and it is confined to supporting and supplementing the action of member States in the area. While Article 13 (ex Article 6a) enables the Council, under certain circumstances, to take appropriate action to combat discrimination based on racial, ethnic origin or religious grounds. However, in the *Bickel and Franz case*, the European Court of Justice (ECJ) minimised minority rights to the general Community interest.⁵³ Although EU institutions have addressed issues pertinent to minorities,

⁴⁶ See Ghebali, 'La CSCE et la question des minorités nationales', in A. Liebich and A. Regler (eds), *L'Europe Centrale et ses Minorités: vers une solution Européenne?* (1993) 51-72; and Helgesen, 'Protecting Minorities in the Conference on Security and Cooperation in Europe (CSCE)', in A. Rosas and J. Heglesen (eds), *The Strength of Diversity*, (1992) 159-86.

⁴⁷ CSCE, Concluding Document of the Vienna Meeting, 17 January 1989.

⁴⁸ *Ibid.*, para.59.

⁴⁹ CSCE, Document for the Copenhagen Meeting of the Conference on the Human Dimension, June 1990, paras.32 and 33. See P. Thornberry and M. A. Martín Estébanez, *Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe*, (2004) 17; and Martín Estébanez, 'Minority Protection and the Organisation for Security and Cooperation in Europe', in P. Cumper and S. Wheatley, *Minority Rights in the New Europe*, (1999), pp.33-34.

⁵⁰ *Ibid.*, at para.30.

⁵¹ See De Witte, 'Politics versus Law in the EU's approach to Ethnic Minorities', *European University Institute Working Paper*, No.4, (2000).

⁵² Treaty establishing the European Community (consolidated version 1997) of 10 November 1997, OJ 1997, C 340.

⁵³ Case C-274/96, *Criminal Proceedings against Bickel*, [1998] ECR I-7637.

there is yet no comprehensive internal policy.⁵⁴ By contrast, the Union has developed significant policies on minorities in its external relations particularly with potential new member states.⁵⁵ The Copenhagen Criteria for Membership adopted by the European Council in 1993 requires candidate countries to show that they have established respect and protection for minorities.⁵⁶

The Council of Europe’s European Convention on Human Rights and Fundamental Freedoms (ECHR) is the first legally-binding multilateral human rights agreement.⁵⁷ The Convention does not refer to the cultural rights, of minorities or generally; but it does prohibit discrimination on various grounds (Article 14).⁵⁸ Concern for the protection of the cultural rights of minorities increased with the accession of States from Central and Eastern Europe to the Council of Europe in the late 1980s and early 1990s. The first initiative was the European Charter for Regional or Minority Languages.⁵⁹ Its Preamble states that the protection of regional and minority languages contributes to the ‘maintenance and development of Europe’s cultural wealth and traditions’ and to the ‘building of a Europe based on the principles of democracy and cultural diversity within the framework of national sovereignty and territorial integrity.’⁶⁰ States have been reluctant to sign the Charter despite the limited nature of its obligations.

The Framework Convention for the Protection of National Minorities (FCNM), adopted by the Council of Europe on November 1994, is the first binding multilateral instrument dealing exclusively with minority protection.⁶¹ However, it has several deficiencies: it is a statement of principles rather than enforceable rights; and its implementation is monitored by a political body, the Committee of Ministers. Most European States remain reticent about the adoption of legally binding minority guarantees, fearing claims for cultural autonomy which would eventually lead to secession claims.⁶² However, the *travaux* tend to support an interpretation of a positive obligation.⁶³ Furthermore, it recognises that the protection of national minorities is an integral part of the international human rights framework and requires international cooperation (Article 1).

⁵⁴ See Resolution on Linguistic and Cultural Minorities in the European Community, EP Resolution of February 1994, OJ 1994, C 61, 110; and De Witte, ‘The European Communities and its Minorities’, in C. Brölmann *et al* (eds), *Peoples and Minorities in International Law*, (1993), 167.

⁵⁵ See Brandtner and Rosas, ‘Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice’, 9 *EJIL* (1998) 468.

⁵⁶ See Nowak, The Copenhagen Political Criteria for Accession to the EU, in Alston *et al*, (eds), *The EU and Human Rights*, (1999), 687 at 691-92.

⁵⁷ Rome, 4 November 1950, in force 3 September 1953.

⁵⁸ The European Social Charter, 18 October 1961, in force 26 February 1965, also does not cover cultural rights nor does it contain a non-discrimination provision; and European Cultural Convention focuses on national and European cultures and not those of non-state groups or individuals, 19 December 1954, in force 5 May 1955. Cf. Art.17, African [Banjul] Charter on Human and Peoples’ Rights, adopted 27 June 1981, in force 21 October 1986; and Art.XIII, American Declaration of the Rights and Duties of Man, OAS Res.XXX of 1948.

⁵⁹ 5 November 1992, in force 1 March 1998.

⁶⁰ Second and sixth recital, Preamble, European Charter for Regional and Minority Languages.

⁶¹ 1 February 1995, in force 1 February 1998.

⁶² See Klebes, ‘The Council of Europe’s Framework Convention for the Protection of National Minorities’ 16 *HRLJ* (1995) 92; and Vukas, *supra* note 10 at 29.

⁶³ CE Doc.CAHMIN(94)28, September 1994, 28; and Donders, *supra* note 39 at 257.

Article 5(1) FCNM resembles Article 4(2) of the UN Declaration but it refers to 'persons belonging to national minorities' rather than 'minorities' *simpliciter*. The explanatory report elaborates that this provision does not imply 'that all ethnic, cultural, linguistic or religious differences necessarily lead to the creation of national minorities.'⁶⁴ There was an explicit rejection of the recognition of collective rights.⁶⁵ Furthermore, each person has the right to choose to be a member of the minority (Article 3(1)); and 'individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity.'⁶⁶

3 1993 Draft UN Declaration on the Rights of Indigenous Peoples

The EU's Commission against Racism and Intolerance and the Council of Europe's Committee of Ministers recognises the existence of indigenous peoples in Europe and discrimination against them.⁶⁷ Indeed, several European States with indigenous populations like Denmark and Norway are signatories to international instruments covering indigenous peoples; and have been the subject of complaints to the HRC in respect of Article 27 ICCPR.

In its preamble, the International Labour Organisation Convention (No.169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries recognises:

*[T]he aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.*⁶⁸

Unlike the 1992 UN Minorities Declaration, ILO 169 acknowledges the collective right of indigenous and tribal peoples to preserve and develop their cultural identity.⁶⁹ Its recognition of collective rights of indigenous peoples, even though highly qualified, is significant because it remains the only multilateral treaty to date to do so. With the ongoing delay in the finalisation of the draft UN Declaration on Indigenous Peoples, ILO 169 has become 'the reference for many indigenous peoples, States and intergovernmental organizations.'⁷⁰

The UN Working Group on Indigenous Populations (WGIP) agreed on the final text of the draft UN Declaration on the Rights of Indigenous Peoples (draft UN Declaration) in 1993.⁷¹ The draft declaration is being considered presently by a

⁶⁴ Council of Europe, Framework Convention for the Protection of Minorities and Explanatory Report, (1994), H(94) 10.

⁶⁵ Art.3(2), FCNM; and Explanatory Report, *ibid.* at 201, para.13 and CE Doc.CAHMIN(94)5, January 1994, 3.

⁶⁶ Explanatory Report, *ibid.* at para.35.

⁶⁷ See Development Council Resolution of 30 November 1998 on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States, 13461/98; and Political Declaration adopted by the Ministers of the Member States of the Council of Europe at its concluding session: EUROCONF (2000) 1 final, 13 October 2000, p.4.

⁶⁸ Fifth recital, Preamble, ILO 169, 27 June 1989, in force 5 September 1991.

⁶⁹ See Arts.2(2)(b) and (c), 4, 5, 7, 23, 26-31, ILO 169.

⁷⁰ Report of the Secretary-General on the Preliminary Review by the Coordinator of the International Decade of the World's Indigenous Peoples on the Activities of the United Nations System in Relation to the Decade, 24 June 2004, UN Doc.E/2004/82, para.65.

⁷¹ Approved 26 August 1994, UN Doc.E/CN.4/Sub.2/Res/1994/56; and 34 *ILM* (1995) 541.

working group established by the Commission on Human Rights (CHRWG).⁷² However, if and when this document is adopted, it will be a non-binding declaration.

The cultural rights of indigenous peoples as defined by the draft UN Declaration are contained in Articles 12 to 14, Part III, which seeks to confer positive and collective rights. Part III echoes, and tailors to indigenous concerns, the right articulated in Article 27 ICCPR. Furthermore each article reflects indigenous peoples' holistic understanding of culture as combining land, tangible and intangible heritage. Article 12 pertaining to the right of indigenous peoples to 'maintain, protection and develop the past, present and future manifestations of their cultures' including 'archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.'⁷³ They, and some States, charged that Article 12 must not be subject to domestic laws or third party rights because they require international protection against the policies and practices of States and transnational corporations.⁷⁴ By comparison, there has been broader and consistent support during the CHRWG sessions for Article 13 covering the right of indigenous peoples to profess and practice their religion.⁷⁵ Article 14 elaborates upon the right to use one's own language contained in Article 27 ICCPR. It provides that indigenous peoples have the right to 'revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.' The CHRWG chairperson has noted that there is a 'broad consensus' this article.⁷⁶

3 Cultural Rights and Cultural Diversity

The elaboration of cultural rights to be enjoyed by minorities has a lengthy history in international law, which is firmly tied to ensuring the preservation and development of the cultural identity of particular groups. Accordingly, the conceptualisation and promotion of cultural rights is influenced heavily by the fluctuating phases of minority protection. As noted above, since the end of the Cold War, several international and regional instruments covering cultural diversity, minorities and indigenous peoples have expanded and refined the parameters of cultural rights in international law. Yet, cultural rights are 'neglected', especially in comparison to non-discrimination in respect of civil and political rights.⁷⁷ Any clash between the universality of human rights and the diversity of cultures continues, for the most part, to be resolved in favour of individual enjoyment of established human rights. Cultural rights remain largely defined by the parameters set out in Article 27.

⁷² CHR Res.1995/32, UN Doc.E/1995/23, 110; and Sub-Comm. Res.1994/45, 26 August 1994.

⁷³ See P. Thornberry, *Indigenous Peoples and Human Rights*, (2002), 25-26, 370-76.

⁷⁴ See UN Doc.E/CN.4/2002/98, Annex 2, 30.

⁷⁵ See S. Pritchard, *Setting International Standards: An Analysis of the UN Declaration on the Rights of Indigenous Peoples and the First Six Sessions of the Commission on Human Rights Working Group*, (3rd edn, 2001), 131-32.

⁷⁶ UN Doc.E/CN.4/1997/102, para.45.

⁷⁷ Symonides, 'Cultural Rights: New Dimensions and Challenges', 23 *Thesaurus Acroasium* (1999) 138 at 143. See Art.5 (1)(c), UNESCO Convention against Discrimination in Education, 14 December 1960, in force 22 May 1962, was the first instrument to refer to cultural rights of persons belonging to minorities.

A *Cultural Rights*

1 *Additional Draft Protocol to the ECHR in the Cultural Field*

Following its work on the Framework Convention on National Minorities, the ad hoc Committee for the Protection of National Minorities (CAHMIN) commenced drafting an additional protocol for the ECHR aimed at guaranteeing individual rights in the cultural field. The Council of Europe Committee of Ministers had instructed CAHMIN to prepare a protocol which: (1) guaranteed 'individual' rights, not exclusively for persons belonging to the national minorities, even though it would have special relevance for them; (2) the rights would be in the 'cultural field'; and (3) the rights in the protocol should be fundamental rights and precisely defined as to be justiciable in court.⁷⁸

CAHMIN considered several rights which were not included in the final text of the additional draft protocol. First, the right to cultural identity was rejected because it was considered too vague to be justiciable. Further, it was argued that the expressions of cultural identity were already protected by the ECHR.⁷⁹ Its proponents maintained that its inclusion was of important symbolic value because the cultural identity of many communities and individuals was threatened by intolerance and discrimination.⁸⁰ Opponents suggested that recognition of this right would encourage instability within societies.⁸¹ Second, the right to choose to belong to a group was rejected because the definition of 'cultural community' was vague and was covered adequately by Article 11 (association) ECHR.⁸² Third, the right to participate in cultural activities was dropped on the pretext that it was already sufficiently covered by Articles 8 (family life), 9 (religion) and 10 (expression) ECHR.⁸³ Fourth, no agreement could be reached on the articulation and inclusion of education rights.⁸⁴ Fifth, the right to access information was not viewed as relevant to the cultural field. Sixth, the right to intellectual property was also not included because it was considered too complex to be justiciable.⁸⁵ The right to establish cultural and educational institutions was viewed as placing a positive obligation on States requiring them to expend financial resources and already covered by Articles 9 and 11 of the ECHR.⁸⁶

Finally, the protection of cultural and scientific heritage, including access and use, protection and conservation was rejected because it was viewed as a positive

⁷⁸ CE Doc.CAHMIN (95) 22 Add., November 1995, 4, paras.8-10; and CE Doc.CAHMIN (94) 33, November 1994, 3.

⁷⁹ CE Doc.CAHMIN (95) 9, February/March 1995, 5; CE Doc.CAHMIN (95) 21, September 1995, 5 and 10; and CE Doc.CAHMIN (95) 22, November 1995, 4.

⁸⁰ CE Doc.CAHMIN (94) 33, November 1994, 4-5; CE Doc.CAHMIN (94) 35, December 1994, p.11; CE Doc. CAHMIN (95) 16, May 1995, 6; and CE Doc.CAHMIN (95) 21, September 1995, 5.

⁸¹ CE Doc.CAHMIN (94) 35, December 1994, 11.

⁸² CE Doc.CAHMIN (94) 35, December 1994, 5; and CE Doc.CAHMIN (95) 9, February/March 1995, 6. See Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, in force 3 September 1953.

⁸³ CE Doc.CAHMIN (95) 21, September 1995, 4.

⁸⁴ CE Doc.CAHMIN (94) 35, December 1994, 8.

⁸⁵ CE Doc.CAHMIN (94) 35, December 1994, 9-10.

⁸⁶ CE Doc.CAHMIN (94) 35, 7-8.

right with implied financial obligations for States.⁸⁷ CAHMIN noted that cultural heritage included not only monuments and public records but also immaterial elements such as living memory. Some experts argued that the protection of cultural heritage was more properly covered by UNESCO instruments and did not readily fall within the scope of the ECHR as new individual rights.⁸⁸

By late 1995, CAHMIN had formulated the additional draft protocol to the ECHR in the Cultural Field which contained four articles. First, the right to a name was included despite arguments that it was already covered by Article 8 ECHR and that it was not necessarily a cultural right.⁸⁹ Second, the 'freedom' (rather than the 'right') to use the language of one's choice; however, it did not cover relations between an individual and public authorities, nor the right to be taught in one's own language. Fourth, the right to learn the language of one's choice would not burden States with a positive obligation.⁹⁰ And finally, the right to establish cultural and education institutions did not extend to a positive obligation on States to provide resources.⁹¹ Work on the additional draft protocol was suspended indefinitely in early January 1996 by the Committee of Ministers.

2 UNESCO and Cultural Rights

During this same period, the World Commission on Culture and Development presented its report, 'Our Creative Diversity' to the UNESCO General Conference and UN General Assembly.⁹² It recommended that the International Law Commission (ILC) at the instruction of the UN General Assembly draft a list of cultural rights which are not currently protected by treaty law. Further, based on the list, an International Code of Conduct on Culture be developed and the ILC examine the feasibility of the establishment of an International Office of the Ombudsperson for Cultural Rights. The office would handle individual and group complaints and negotiate a peaceful settlement with the relevant State. Finally, it suggested the examination of the viability of establishing a court, as part of the International Criminal Court, which would deal with criminal prosecutions of violations of cultural rights.⁹³ While most UNESCO Member States responded favourably to the drawing up of a list of cultural rights there was near universal criticism of the remaining recommendations. They suggested there was a need to implement effectively the existing human rights rather than articulating fresh ones.⁹⁴ As a follow-up to these recommendations UNESCO commissioned a report on cultural rights articulated in existing international instruments.⁹⁵ However, a working group which was to

⁸⁷ CE Doc.CAHMIN (95) 22 Add., January 1996, 31.

⁸⁸ See CE Doc.CAHMIN (95) 16, May 1995, 4.

⁸⁹ CE Doc.CAHMIN (95) 21, September 1995, 6.

⁹⁰ CE Doc.CAHMIN (94) 33, November 1994, 7; CoE Doc. CAHMIN (95) 9, February/March 1995, 8-9; CE Doc.CAHMIN (95) 16, May 1995, 9-12; and CE Doc.CAHMIN (95) 21, September 1995, 7.

⁹¹ CE Doc.CAHMIN (94) 35, December 1994, 7-8; and CE Doc.CAHMIN (95) 9, February/March 1995, 10; and CE Doc.CAHMIN (95) 21, September 1995, 10.

⁹² World Commission on Culture and Development, *Our Cultural Diversity*, (1995).

⁹³ *Ibid.*, at 281-284.

⁹⁴ See Donders, *supra* note 39 at 132.

⁹⁵ B. Leander, Preliminary List of Cultural Rights, (1996).

examine the list and determine which rights needed further development was never established.

The so-called Fribourg Group had prepared a report on cultural rights for CAHMIN. After the suspension of CAHMIN work, the Group continued to develop a draft declaration on cultural rights to facilitate UNESCO's effort in the area.⁹⁶ Its aim was to consolidate existing cultural rights and clarify the fundamental cultural dimension of all human rights rather than articulate new human rights.⁹⁷ Although the Fribourg Group's draft declaration on cultural rights was presented to the UNESCO General Conference in 1996 and it was never formally adopted by Member States, who once again resisted the collective rights approach of the draft. Nonetheless, its work did contribute to the realisation of the UNESCO Universal Declaration on Cultural Diversity.

B Cultural Diversity

1 2001 UNESCO Universal Declaration on Cultural Diversity

At the UNESCO General Conference in November 2001, the Member States adopted the Universal Declaration on Cultural Diversity.⁹⁸ It followed several UNESCO initiatives which considered the importance of culture, cultural policy, cultural rights in the context of challenges created by globalisation, pluralism and diversity.⁹⁹ The preliminary draft convention's definition of culture had been inspired by the Fribourg and the Mondiacult Declarations.¹⁰⁰ It had described culture as 'the whole complex of distinctive spiritual, material, intellectual, and emotional features that characterise a society or social group' including 'not only the arts and letters, but also modes of life, ways of living together, the fundamental rights of the human being, value systems, traditions and belief.' Furthermore, it notes that these are closely linked with 'cultural diversity, peace and development'.¹⁰¹ It recognises that cultural diversity implies a commitment to the human rights of disadvantaged or discriminated groups including minorities. These rights included free access to the expression of their own and other group's cultures; and participation in the cultural life of the society as a whole (Articles 1 and 2).

The fields of priority set out in the preliminary draft declaration included preservation and transmission of the heritage; linguistic diversity; creativity, creation and the cultural industries; and education and training. In respect of preservation and transmission of the heritage, draft Article 6(a) stated:

⁹⁶ See Donders, *supra* note 39 at 76-79.

⁹⁷ Third recital, Preamble, Draft Declaration of Cultural Rights, Groupe de Fribourg in cooperation with UNESCO, the Council of Europe, and Swiss National Commission, at <http://www.unifr.ch/iiedh/langues/english/DC/decl_dc.html> (viewed January 2005).

⁹⁸ 2 November 2001, UNESCO Doc.31C/Res.25, Annex I.

⁹⁹ Including the Conference on Cultural Policies in Mexico (1982), the 'Our Creative Diversity' Report (1995), the Power of Culture Conference in Amsterdam (1996), the Conference on Cultural Policies for Development Conference in Stockholm (1998), and the two World Culture Reports (1998 and 2000).

¹⁰⁰ See Declaration of the World Conference on Cultural Policies, Mexico, 1982, UNESCO Doc.CLT/MD/1; Final Report of the World Conference on Cultural Policies, Extract from the Report of Commission II, UNESCO Doc.CLT-83/CONF.216/5, Annex 1, paras.8-15, and Annex 2, Recommendations 51-56.

¹⁰¹ UNESCO Doc.161 EX/12, Annex, 3.

Just as preservation of the natural heritage and biodiversity are vital for the future of the human race and the planet, so it is also indispensable to preserve the cultural heritage in all its forms, in particular the oral and intangible cultural heritage, in order to enhance, enrich and transmit to future generations the diversity of forms of cultural expression, traditions and ways of life.

The remainder of this draft Article made special reference of protecting and respecting the traditional knowledge of indigenous peoples and combating the illicit traffic of cultural property, particularly from developing countries. Members States, which included the Group of Fifteen (EU Member States), broadly agreed with the need for a declaration on cultural diversity and UNESCO's role in promoting it.¹⁰²

The final text adopted by UNESCO Member States embraces cultural diversity in the context of the human rights framework. It refers to the instruments making up the existing international human rights framework, in particular Article 27 of the UDHR and Articles 13 and 15 of the ICESCR, and states that all human rights, including cultural rights are 'universal, indivisible and interdependent' (Article 5). The final text is very different from the preliminary draft. Nonetheless, the definition of culture remains largely intact.¹⁰³ The preambular recitals also refer to provisions relating to cultural diversity and cultural rights in existing UNESCO instruments, including the 1989 Recommendation on Safeguarding Traditional Culture and Folklore. It noted that the fostering of cultural diversity, tolerance and dialogue 'are among the best guarantees of international peace and security.'¹⁰⁴ The provision relating to cultural heritage was significantly shortened. Article 7 reads:

Creation draws on the roots of cultural traditions, but flourishes in contact with other cultures. For this reason, heritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures.

The remaining elements of the preliminary draft were dropped into the Main Lines of an Action Plan.¹⁰⁵ Some States, like the Netherlands and the United Kingdom, have indicated that they support the declaration but not the main lines of action which call on Member States to take concrete steps.¹⁰⁶

2 2000 CE Declaration on Cultural Diversity

Within the European context, while regional organisations have promoted the need for a multilateral instrument in the area, their work on cultural diversity has highlighted the contradictions between trade liberalisation and cultural policy. The Council of Europe Committee of Ministers adopted the Declaration on Cultural Diversity on 7 December 2000, which was the first document of its type.¹⁰⁷ The

¹⁰² UNESCO Doc.161 EX/INF.19, pp.2-3.

¹⁰³ It is noted that the definition is in line with the conclusions of the 1982 Mondiacult, *supra* note 100; and 1998 Stockholm conferences: UNESCO Doc.CLT-98/Conf.210/4, Rev.2.

¹⁰⁴ Fourth, fifth and seventh recitals, Preamble, UNESCO Declaration on Cultural Diversity.

¹⁰⁵ Main Lines of an Action Plan for the Implementation of the UNESCO Universal Declaration on Cultural Diversity, Points 13 and 14, *supra* note 103.

¹⁰⁶ Donders, *supra* note 39 at 137.

¹⁰⁷ Declaration of the Committee of Ministers on Cultural Diversity, adopted 7 December 2000, CDMM(2000) 44.

preamble recognises that the development of new information technologies, globalisation and evolving multilateral trade policies have an impact on cultural diversity.¹⁰⁸ It defines sustainable development in relation to cultural diversity and:

*...assumes that technological and other developments, which occur to meet the needs of the present, will not compromise the ability of future generations to meet their needs with respect to the production, provision and exchange of culturally diverse services, products and practices.*¹⁰⁹

The declaration reflects the broader European concern about the impact of trade liberalisation and globalisation on cultural and audiovisual production and diversity. This concern is replicated in the work of the European Union at the regional and international level. The EU has lobbied for the retention of Article XX(f) of the General Agreement on Tariffs and Trade concerning trade in cultural goods and permitting measures related to national treasures of artistic, historic and archaeological value; and shaping the draft UNESCO International Convention on the Protection of Diversity of Cultural Content and Artistic Expression.

C Draft UNESCO Convention on the Protection of the Diversity of Cultural Content and Artistic Expression

The first main line of action articulated under the UNESCO Universal Declaration on Cultural Diversity was the 'consideration of the advisability of an international legal instrument on cultural diversity.'¹¹⁰ The preliminary study assessing the desirability of the instrument noted that the Universal Declaration 'demonstrated that the debate between advocates of cultural goods and services and the champions of human rights could be transcended, the two approaches being complementary.'¹¹¹ The Action Plan also recommended that further work be undertaken toward understanding and facilitating 'the content of cultural rights as an integral part of human rights.'¹¹² The preliminary study counselled that 'the wisdom of a specific instrument on cultural rights was under debate' and 'the prospect of seeing one was remote.'¹¹³ In its subsequent deliberations on this point, the Executive Board rejected the possibility of a new comprehensive instrument on cultural rights. It opted instead for a convention on the protection of the diversity of cultural contents and artistic expressions.¹¹⁴

Deliberation on the preliminary draft of a convention on the protection of the diversity of cultural content and artistic expression commenced in mid-2004 and it is anticipated the convention shall be adopted by the UNESCO General Conference in 2005.¹¹⁵ Like preceding minority provisions, the preliminary draft convention acknowledges that cultural diversity is 'indispensable for peace and security at the

¹⁰⁸ Second recital, Preamble, CE Declaration on Cultural Diversity.

¹⁰⁹ Art.1.3, CE Declaration on Cultural Diversity.

¹¹⁰ Point 1, Main Lines of an Action Plan for the Implementation of the UNESCO Universal Declaration on Cultural Diversity, *supra* note 103.

¹¹¹ UNESCO Doc.166 EX/28, 2-3, para.11.

¹¹² Point 4, Main Lines of an Action Plan for the Implementation of the UNESCO Universal Declaration on Cultural Diversity, *supra* note 103.

¹¹³ UNESCO Doc.166 EX/28, 5, para.20.

¹¹⁴ UNESCO Doc.32C/52, 18 July 2003, Appendix 3.

¹¹⁵ UNESCO Doc.CLT/CPD/2004/CONF-201/2, July 2004.

national and international levels.'¹¹⁶ It holds that diversity can be achieved through the 'constant exchange between cultures' and 'the right of access of all people to a rich and diversified range of cultural expression from all over the world.'¹¹⁷ Significantly, it recognises the fundamental right of groups, especially minorities and indigenous peoples, 'to create, disseminate and distribute their cultural goods and services, including their traditional cultural expressions, to have access to ... for their own development.'¹¹⁸ Its fourth principle acknowledges the equal dignity and equal respect for these communities and their cultures.¹¹⁹ Culture is defined as 'the set of distinctive spiritual, material, intellectual and emotional features of society or a social group' including 'art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.'¹²⁰ All definitions of culture have disappeared from the current draft.

The current draft of the convention, under Article 7, requires States parties to create an environment, with due respect for the special needs of women and certain groups, 'including persons belonging to minorities and indigenous peoples', that encourages 'individuals' and 'groups' to create, disseminate and have access to their cultural expressions.¹²¹ Significantly, Article 8 provides for a system of protecting 'cultural expressions' on the territory of a State party that is 'at risk of extinction, or under serious threat.'¹²² In early 2005, an additional draft provision was inserted covering international cooperation in circumstances covered by Article 8, which referred to 'cultural actors facing discrimination, marginalisation or exclusion such as persons belonging to minorities and indigenous persons.'¹²³ The current draft deletes these words and only stipulates: 'developing countries.' In addition, the present draft has reinforced recognition of the sovereignty of States to adopt and implement policies within their territory.¹²⁴ Nonetheless, they are required to seek to participation of civil society when doing so (Article 10).

The EU has negotiated on behalf of all 25 member States in respect of this convention. Reflecting the concerns of European Union and Council of Europe, the preliminary draft convention recognises that 'cultural goods and services' have an economic and cultural nature; and as culture is 'one of the mainsprings of development' these dual characteristics are equally important.¹²⁵ The draft draws significantly from international trade, intellectual property, development and environmental law. This tone is reflected in the use of terms like 'cultural goods and services' and 'expressions', rather than 'cultural heritage', which is characteristic of

¹¹⁶ Third recital, Preamble, Preliminary Draft Convention.

¹¹⁷ Fifth recital, Preamble, and Principle 3, Preliminary Draft Convention.

¹¹⁸ Eighth recital, Preamble, Preliminary Draft Convention.

¹¹⁹ See Art.4(f), 1976 UNESCO Recommendation on the Right on Participation in Cultural Life.

¹²⁰ Article 4(1), Preliminary Draft Convention.

¹²¹ Preliminary Report of the Director-General, UNESCO Doc.CLT/CPD/2005/CONF.203.6-Add, 29 April 2005, Appendix 2: Consolidated Text prepared by the Chairperson of the Intergovernmental Meeting, p.11.

¹²² It is modelled on similar schemes provided by the Convention concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, in force 17 December 1975; and Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003.

¹²³ Preliminary Report of the Director-General, *supra* note 121 at 32.

¹²⁴ Consolidated Text, *supra* note 121 at 7 and 13.

¹²⁵ Sixth recital, Preamble and Principle 5, Preliminary Draft Convention.

contemporary multilateral instruments in the area of international cultural heritage law. The danger of relying on these other areas of international law is the over-emphasis on the property character of culture and its manifestations. Indeed, one of the convention's objectives is the recognition of the 'distinctive nature of cultural goods and services as vehicles of identity, values and meaning' which means that they must not be treated as ordinary consumer goods.¹²⁶

The preliminary draft convention notes that while globalisation can facilitate interaction between cultures, it also constitutes a potential threat to cultural diversity.¹²⁷ The draft taps into developments in other areas of international law, beyond international cultural heritage law, to address its objectives and the unique nature of 'cultural goods and services'. For example, it draws on international trade law in Article 17, under international cooperation, by providing for preferential treatment for developing countries. International environmental and development law are clearly influential in the new draft Articles 13 and 14 pertaining to cooperation and the integration of culture in sustainable development.¹²⁸ The draft reaffirms that cultural diversity is the common heritage of mankind,¹²⁹ and 'a mainspring of sustainable development ... as vital for humankind as biological diversity is for living organisms.'¹³⁰

4 Protection of Intangible Cultural Heritage

Prohibition against the destruction, theft or illicit use of monuments and cultural objects in international law has developed appreciably over the last 150 years. By contrast, the protection of intangible cultural heritage per se is a work in progress. As noted, the earliest minority protection provisions centred on intangible cultural heritage including language, cultural and religious practices. League of Nations' agencies commenced studies concerning the protection of folklore that were suspended because of the onset of war. A specialist, multilateral instrument was not realised until October 2003, with the adoption by the UNESCO General Conference of the International Convention on the Safeguarding of Intangible Cultural Heritage.

With few exceptions, international protection of tangible cultural heritage, like monuments and cultural objects is motivated by the preservation of the common heritage of humankind and its importance to the international community and states, rather than a particular community or group. Although various forms of expression and knowledge have attracted international protection since the late-1800s, intellectual property law is designed to protect the proprietary rights and economic interests of individuals (human or corporate). Indigenous peoples, minority groups, and UNESCO, have campaigned for a review and reform of the existing intellectual property regime.

¹²⁶ Art.1(b), and sixth recital, Preamble, Preliminary Draft Convention, *ibid.*

¹²⁷ Eleventh recital, Preamble, Preliminary Draft Convention, *ibid.*

¹²⁸ Consolidated Text, *supra* note 121 at 12-13.

¹²⁹ See Art.1(3), 1966 UNESCO Declaration of the Principles of Cultural Co-operation; Art.4(f), 1976 UNESCO Recommendation on the Right on Participation in Cultural Life; Art.3(1)(b), Fribourg Declaration, *supra* note 97; and Art.1, UNESCO Declaration on Cultural Diversity .

¹³⁰ Second recital, Preamble, Preliminary Draft Convention. See Art.1, UNESCO Declaration on Cultural Diversity.

A *Folklore and Intellectual Property Regimes*

1 *Copyright and folklore*

The earliest efforts to provide international legal protection for 'folklore' (as intangible cultural heritage was known) arose as an extension of existing copyright regimes. The ongoing and escalating exploitation of intangible heritage led developing countries, for whom such heritage represented a significant component of their economies and cultural heritage, to lobby for a revision of the existing intellectual property regimes (IPRs). Developed countries on the other hand, argued that such knowledge belonged to the public domain and resisted any extension of the protection afforded by classic IPRs. Article 1 of the Universal Copyright Convention (1952) provided indirect coverage by enabling protection via national legislation. The 1967 diplomatic conference for the revision of the Berne Convention for the Protection of Literary and Artistic Works held in Stockholm added a new article which provides guidelines for the protection of folklore. Article 15(4)(a) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention allows the State to designate a competent authority to represent an author, whose identity is unknown but is assumed to be a national, to protect and enforce his or her rights in Union countries.¹³¹ The provision does not deal directly with folklore despite the original remit of the Working Group.

2 *UNESCO and WIPO: Folklore as Intellectual Property*

UNESCO's normative work on intangible heritage commenced in 1973 and was triggered by a Bolivian proposal that a protocol be annexed to the Universal Copyright Convention to protect folklore. In 1978, following a joint study on the cultural aspects of protecting folklore and the application of intellectual property law UNESCO and World Intellectual Property Organisation (WIPO) formally agreed to divide the work. UNESCO examined the safeguarding of folklore from an interdisciplinary perspective; and the WIPO focussed on the intellectual property angle relating to traditional knowledge (including 'expressions of folklore').¹³² It eventually led to the adoption by WIPO and UNESCO of the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit and Other Prejudicial Actions;¹³³ and UNESCO's 1989 Recommendation on the Safeguarding of Traditional Cultural and Folklore adopted by UNESCO General Conference on 15 November 1989.

The Intergovernmental Copyright Committee of the Universal Copyright Convention viewed the Model Law as a first step in creating a *sui generis* system of intellectual property regime covering folklore. Its definition of 'folklore' refers to 'expressions' and 'productions' rather than 'works' as is the case under classic IPR. It

¹³¹ Convention for the Protection of Literary and Artistic Works, 9 September 1886, 4 May 1896, revised 13 November 1908, 20 March 1914, revised June 1928, 26 June 1948, 14 July 1967, and 24 July 1971; and amended 2 October 1979, at <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html> (viewed January 2005).

¹³² Blake, 'Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage: Elements for Consideration' (2002), UNESCO Doc.CLT-2001/WS/8.Rev, 19; and Possibility of Establishing an International Instrument for Protection of Folklore, UNESCO Doc.B/EC/IX/11-IGC/XR.1.15.

¹³³ See Blake, *ibid.* at 20-22; and WIPO, 'The Protection of Folklore: The Attempts at International Level', at <<http://itt.nissat.tripod.com/itt9903/folklore.htm>> (viewed January 2005).

covers only 'artistic' and not traditional beliefs of scientific knowledge. Such 'artistic' heritage need not be put into permanent form and includes expressions which are verbal, musical or actions of the human body. It encompasses elements of artistic heritage created and maintained by a community or individuals reflecting the community's expectations.

UNESCO and WIPO also jointly developed a draft treaty for the protection of expressions of folklore against illicit exploitation and other prejudicial actions, which was never formally adopted by either organisation.¹³⁴ The draft was rejected by developed countries because of the inclusion of collective rights to heritage; the low importance of intangible heritage at the time; and the perceived difficulties in protecting cultural heritage of importance to more than one state. Instead, UNESCO focussed on encouraging States to develop national legislation based on the Model Law.

B UNESCO and Intangible Heritage

1 1989 Recommendation on Safeguarding the Traditional Culture and Folklore

The 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore (1989 UNESCO Recommendation) was the first multilateral instrument to cover exclusively intangible cultural heritage (referred as 'traditional cultural and folklore').¹³⁵ Although persistent concerns were raised during the sixteen years it took to finalise, there was no dissenting votes or abstentions at its adoption.¹³⁶ Sherkin notes that its realisation was driven by Central and Eastern European States which strove to raise the importance of popular ethnic culture; and developing countries concerned with the ongoing loss and exploitation of their intangible heritage.¹³⁷

The narrowness of the definition of intangible heritage as 'folklore' contained in the 1989 UNESCO Recommendation was criticised leading-up to its adoption and escalated during its subsequent reassessment. However, and significantly, it refers to the importance of folklore to the cultural identity of individuals and groups; it acknowledges 'traditional' societies as the creators; and emphasises the human mode of transmission. The preamble notes folklore's 'economic, cultural and political importance; its role in the history of the people; and its place in contemporary culture'; thereby, acknowledging the need to protect the cultural community from which it originates.¹³⁸ In addition, it states that folklore is 'an integral part of the

¹³⁴ UNESCO and WIPO, 'Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1984, at <<http://www.copyrightnote.org/statute/cc0014.html>> (viewed January 2005).

¹³⁵ Adopted by the UNESCO General Conference at its 25th session, Paris, 15 November 1989.

¹³⁶ See Report of Special Committee of Governmental Experts to Prepare a Draft Recommendation to Member States, UNESCO Doc.25C/33, Annex II.

¹³⁷ Sherkin, 'A Historical Study on the Preparation of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore', at <<http://www.folklife.si.edu/resources/Unesco/sherkin.htm>> (viewed January 2005), 7-8.

¹³⁸ Second recital, Preamble, 1989 UNESCO Recommendation.

cultural heritage and living culture', and has an intimate relationship to the social and cultural context in which it is created and maintained.¹³⁹

Nonetheless, the definition and Recommendation as a whole were criticised because it conveyed an 'outmoded definition' of folklore as 'static' or 'fixed'.¹⁴⁰ Next, the definition failed to emphasize the importance of individuals and groups in the creation and maintenance of the folklore. Further, it refers only to the 'products' of the intangible heritage and not the social, cultural and intellectual context of its creation. And also, there was no reference to indigenous peoples.¹⁴¹

Another major criticism of the 1989 UNESCO Recommendation was that it places too much emphasis on 'safeguarding' the interests of third-parties like scientific researchers and governmental officials at the expense of 'the persons who actually produce the folklore.'¹⁴² It does make occasional references to the 'group' for whom and by whom folklore should be safeguarded; and 'tradition-bearers'.

The third area of concern coalesced around the 1989 UNESCO Recommendation failure to require prior and informed consent from the traditional owners for use or exploitation.¹⁴³ This situation is exacerbated by the instrument's underlying assumption that folklore should be widely circulated to foster awareness of its value. Reflecting work undertaken by the UN Working Group on Indigenous Peoples, Blake recommended that privacy of informants of folklore (Article F(b)(i)) be extended to guarantee the secrecy of folklore that is traditionally confidential for spiritual or cultural reasons.¹⁴⁴

Finally, to this list can be added, what has been termed a 'conceptual difficulty' in categorising intangible heritage as a 'universal heritage' because of its importance to the cultural identity of a specific group or community.¹⁴⁵ Blake warned of the need to avoid the potentially damaging implications of the term 'common heritage of mankind' as used in its wider sense in international law.¹⁴⁶ Indigenous representatives have taken issue with the categorisation of their cultural heritage as the 'common heritage of mankind' because concerns that it condones its further exploitation and 'colonisation'.¹⁴⁷

¹³⁹ Third recital, Preamble, 1989 UNESCO Recommendation.

¹⁴⁰ UNESCO Doc.25C/33, Annex II, para.17.

¹⁴¹ *Ibid.* at para.36.

¹⁴² Para.A, 1989 UNESCO Recommendation; and UNESCO Doc.25C/33, Annex II, para.23 (West Germany); and para.35 (France).

¹⁴³ Weiner, 'Protection of Folklore: A Political and Legal Challenge' 18 *International Review of Industrial Property and Copyright Law* (1987) 57-92; and D. Posey and G. Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, (1996).

¹⁴⁴ Blake, *supra* note 132 at 37.

¹⁴⁵ Blake, *supra* note 132 at 12; First recital, Preamble, 1989 UNESCO Recommendation; and Prott, 'International Standards for Cultural Heritage', in UNESCO, *World Culture Report*, (1998), 228. The recital was formulated at France's behest: UNESCO Doc.25C/33, Annex II, para.28.

¹⁴⁶ Blake, *supra* note 132 at 12. See Frigo, 'Cultural Property v Cultural Heritage: A 'Battle of Concepts' in International Law? 86(854) *IRRC* (2004) 367 at 377.

¹⁴⁷ See Roht-Arriaza, 'Of Seeds and Shamans: The Appropriation of Scientific and Technical Knowledge of Indigenous and Local Communities', in B. Ziff and P. Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (1997) 929-930; and Blake, 'On Defining the Cultural Heritage' 49 *ICLQ* (2000) 61 at 69-71.

The 1989 Recommendation was ripe for reassessment by the time of the UNESCO and Smithsonian Institute conference in 1999 ('Washington conference').¹⁴⁸ The delegates highlighted the weaknesses in its definition, scope and approach to protection of intangible heritage.¹⁴⁹ Non-European delegations in particular counselled against the use of the word 'folklore' because it was developed in a European context and used by anthropologists in respect of cultures in the developing world.¹⁵⁰ Following the conference, a draft resolution was submitted to the 30th General Conference of UNESCO calling for a study on the feasibility of a normative instrument for safeguarding traditional culture and folklore.¹⁵¹ European States maintained that cultural diversity was endangered by the concentration of cultural resources at the global level. Also, they promoted the formulation of initiatives covering the heritage of vulnerable groups, like minorities, whose cultures were valuable to the whole of humanity.¹⁵² The preservation of cultural diversity has been guiding principle of UNESCO's work since its establishment in 1949 and the elaboration of an instrument for the protection of intangible heritage was increasingly perceived as fundamental to this task.¹⁵³

2 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage

The UNESCO Director-General in his preliminary study for a convention on intangible heritage defined its objective in terms similar to those propelling the preliminary draft convention on the protection of diversity. He stated:

*A new instrument should be effective in countering adverse impact of globalisation which threaten the survival of much intangible cultural heritage, particularly that of indigenous and minority people. This heritage helps to affirm cultural identity, promote creativity and enhance diversity worldwide.*¹⁵⁴

He recorded that many States and groups had conveyed that they found the term 'folklore' inappropriate and 'demeaning.'¹⁵⁵ He proposed that the definition of 'intangible cultural heritage' developed by the international experts' meeting in Turin in 2001 be used as a starting point. The Turin definition emphasised the importance of promoting the protection of intangible cultural heritage because of internal factors,

¹⁴⁸ A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Co-operation, at <<http://www.folklife.si.edu/resources/UNESCO>> (viewed January 2005).

¹⁴⁹ Report on the Preliminary Study on the Advisability of Regulating Internationally, through a new Standard-Setting Instrument, the Protection of Traditional Culture and Folklore, UNESCO Doc.161 EX/15, para.4.

¹⁵⁰ Tora, 'Report on the Pacific Regional Seminar', at <<http://www.folklife.si.edu/resources/Unesco/tora.htm>> (viewed January 2005).

¹⁵¹ UNESCO Doc.30C/DR.84.

¹⁵² Seeger, 'Summary Report on the Regional Seminars', at <<http://www.folklife.si.edu/resources/Unesco/seeger.htm>> (viewed January 2005), 3.

¹⁵³ Prott, *supra* note 145 at 222. See 1998 UNESCO Programme of 'Masterpieces of the Oral and Intangible Heritage', developed under the umbrella of the 1989 UNESCO Recommendation: see UNESCO Doc.CL/3553, Annex.

¹⁵⁴ UNESCO Doc.161 EX/15, para.22.

¹⁵⁵ UNESCO Doc.161 EX/15, para.25.

chiefly its importance to creating and maintaining group's identity; and external factors, including human rights and intercultural dialogue.¹⁵⁶

Under Article 2 of the Convention on the Safeguarding of Intangible Cultural Heritage (CSICH), 'intangible cultural heritage' includes:

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

Asia Pacific States delegations and indigenous representatives had long stressed the importance and interrelation between the tangible and intangible, movable and immovable elements of cultural heritage. Indeed, the Turin meeting had recommended that the intangible heritage of indigenous peoples be protected in keeping with their holistic understanding of culture.¹⁵⁷ The definition also includes its suggestion that it only include intangible heritage which has 'stood the test of time', reflected in the phrase: 'transmission from generation to generation.'¹⁵⁸ Article 2 also includes the Turin recommendation that the safeguarding of intangible cultural heritage be subject to the international human rights framework and not be used to foster intolerance and destruction of other culture heritages.¹⁵⁹

The 2003 CSICH uses the 1972 World Heritage Convention as a template for an alternative rationale and mechanism for the protection of intangible (and tangible) cultural heritage in international law.¹⁶⁰ Rather than being guided by the imperatives of international intellectual property and trade law, it is placed within the human rights rubric and recognises the importance of intangible cultural heritage to cultural diversity and, in turn, sustainable development.¹⁶¹

Importantly, the 1972 WHC covers natural and cultural heritage of 'outstanding universal value'; while the 2003 CSICH does not have this limitation. The proposed Operational Guidelines indicate that such property is so exceptional that it transcends national boundaries and to be a common importance to present and future generations of all humanity.¹⁶² The proposed OG underline the value of

¹⁵⁶ See Progress Report on the Preparation of an International Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO Doc.164 EX/19, paras.6 and 26; Final Communiqué, 3rd Round Table of Ministers of Culture, 17 September 2002, para.2; and Action Plan by International Round Table, Piedmont, UNESCO Doc.161 EX/15, Annex, p.1, para.7.

¹⁵⁷ See UN Doc.E/CN.4/Sub.2/1993/28, paras.21ff ('Study'); UN Doc.E/CN.4/Sub.2/1995/26, Annex, ('Principles and Guidelines') 11 and 12; and UN Doc.E/CN.4/Sub.2/2000/26, Annex 1, ('2000 Principles and Guidelines'); and T. Janke, *Our Culture Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights*, (1998).

¹⁵⁸ UNESCO Doc.CLT-2002/CONF.203/5, p.3, para.C.

¹⁵⁹ UNESCO Doc.161 EX/15, Annex, p. 3, para.11.

¹⁶⁰ UNESCO Member States had deliberated, but finally decided against, the inclusion of intangible heritage in the 1972 World Heritage Convention: UNESCO Doc.30C/DR.84; and Prott, *supra* note 145 at 7. The World Heritage Committee has progressively amended the Operational Guidelines ('OG') since 1977 to promote an integrated approach to cultural heritage: Cultural criteria C (vi) and (v), Operational Guidelines, Provisional Revision, UNESCO Doc.WHC.02/2, para.24(a). The 2004 proposed OG increased the likelihood of intangible cultural heritage being inscribed on the World Heritage List: Decision 6 EXT.COM 51: and Revision of Operational Guidelines, UNESCO Doc.WHC-03/27COM, Annex 3, para.10(iii).

¹⁶¹ Cf. Art.3(b), 2003 CSICH.

¹⁶² UNESCO Doc.WHC-03/27COM/10, para.I.C.3.

cultural heritage can be determined by international comparison, but under the 2003 CSICH it is identified by its value as representative for the relevant community. The cultural heritage protected by the 2003 convention is created and maintained by 'communities', 'groups' and sometimes 'individuals'.¹⁶³ For this reason, several delegations strongly, but unsuccessfully, resisted incorporation of lists under the 2003 CSICH. They argued that it created a hierarchy of cultures which is incompatible with the nature of oral heritage and that excellence, uniqueness and typicality should instead be emphasised.

Nonetheless, the importance of safeguarding intangible cultural heritage for cultural diversity drove the realisation of the instrument and its emphasis on international cooperation (Part IV). It acknowledges that the 'local', 'national' and 'international' levels need to be involved in the raising of awareness and appreciation.¹⁶⁴ The role of the States continues to be significant but they are obliged to seek the 'participation' of communities, groups and relevant non-governmental organisations (Article 11(b)). Also, self-governing groups within states can accede to the convention in certain circumstances (Article 33).

The 1972 WHC and 2003 CSICH were drafted with the protection of differing types of heritage in mind and this is reflected in their scope. The drafters of the 2003 CSICH agreed that the specificity of the intangible cultural heritage meant that the 1972 WHC 'should be taken more as a source of inspiration than as a model.'¹⁶⁵ The 2004 Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage recognises that the protection of intangible cultural heritage is as important as tangible and natural heritage and the international community must work to protect it in its own right.¹⁶⁶ It also acknowledges that the intangible and tangible elements of the heritage of groups can be interdependent. Consequently, it holds that where it is appropriate and possible their safeguarding should be approached in an integrated fashion which is 'consistent and mutually beneficial and reinforcing.'¹⁶⁷

5 Conclusion

The realisation of a legally-binding specialist convention on the safeguarding of intangible cultural heritage has had a lengthy gestation period in international law. However, as I have sought to establish any investigation of its protection cannot exclusively be confined to international cultural heritage law. Instead, intangible cultural heritage, and its protection, has 'converged and diverged' with multiple branches of international law, in particular the areas of minorities (and indigenous peoples) and cultural rights. Importantly, this convergence has facilitated a growing appreciation and acceptance of the holistic nature of culture and its manifestations. By extension, it also highlights the need for an integrated, effective approach to its

¹⁶³ Sixth recital, Preamble, and Art.2(1), 2003 CSICH.

¹⁶⁴ UNESCO Doc.CLT-2002/CONF.203/5, paras.9 and 10.

¹⁶⁵ Report of the First Session of the Intergovernmental Meeting of Experts, Paris, 27 September 2002, UNESCO Doc.CLT-2002/CONF.203/5, para.7. See International Meeting of Experts, Intangible Cultural Heritage: Priority Domains for an International Convention, UNESCO Doc.164 EX/19, Annex, para.3.

¹⁶⁶ UNESCO Doc.WHC-04/7 EXT.COM/INF.9, Annex I. See World Heritage Committee, 28th Session in 2004: Decision 20 COM 12.

¹⁶⁷ *Ibid.* at paras.9 and 11.

protection amongst the multifarious existing legal instruments. This work must be guided by the objective which has steered successive initiatives covering the minorities, cultural rights and intangible heritage over the last century: peace, stability and prosperity.