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CULTURAL RIGHTS

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SUMMARY

While cultural rights have long been neglected in human rights theory and practice, they are attracting growing attention today. This chapter examines the sources of this category of rights in international human rights law, describes their evolution, and highlights the major debates their interpretation has given rise to. It discusses more specifically the content and meaning of the right to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, and the rights of authors and inventors to the protection of their moral and material interests.

1 INTRODUCTION

A certain degree of fuzziness surrounds the notion of cultural rights. The source of the problem lies with the concept of culture itself. In the course of its history, the term ‘culture’ has been endowed with different meanings, each of which continues to coexist today.¹ First, at the time of the Enlightenment, that is, in the seventeenth and eighteenth centuries, the term culture began to be used in France in a metaphorical sense to mean the *cultivation of the mind* as well as the result of intellectual development, namely the knowledge of a person who is well versed in arts, letters, and science. During the nineteenth century, in an era of rising nationalism, the German term *Kultur* came to mean the intellectual and moral achievements of a whole nation. This new definition progressively permeated other languages. While in the earlier understanding, culture was seen as an individual characteristic of universal relevance—the culture one could acquire was supposed to be common to the whole of mankind—this newer conception of culture was a collective phenomenon associated with a particular group. Yet, in both cases, the notion referred to a distinct set of social activities: it only included intellectual, artistic, or moral expressions, in other words ‘the life of the mind’, to the exclusion of material or technical aspects of social life. A third usage of the term emerged in the late nineteenth century in the nascent field of anthropology. Culture, in this context, was redefined as encompassing *all* manifestations

¹ See Beneton, *Histoire de mots: Culture et civilisation* (Presses de la fondation nationale des sciences politiques, 1975).

of the social life of a given population.² This last understanding of the term spread during the twentieth century in common language. Thus conceived, culture became synonymous with the specific *way of life* of a community.

This plurality of meanings of the concept of culture presents a persistent challenge for the conceptualization of cultural rights.³ The difficulty involved in defining the subject matter of this category of rights partly explains the often-noted fact that cultural rights have long been neglected.⁴ But other factors have also contributed to this neglect. Culture is often seen as a luxury compared to more 'classic' human rights issues, such as the right to life or freedom from torture. Besides, the idea of recognizing a *right to culture* in the anthropological sense has been viewed by many as entailing the risk of legitimizing cultural practices that conflict with particular human rights, such as female genital mutilation.⁵ Attitudes, however, seem to be changing. Since 2000, cultural rights have attracted increasing attention from human rights experts and international bodies. The decision of the UN Human Rights Council in 2009 to appoint an independent expert in the field of cultural rights is a sign of this rising interest.⁶

Among the UN treaties dealing with human rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR) is the only one to refer to *cultural rights* in its title. It is generally considered that cultural rights under the ICESCR include the right to education (Articles 13 and 14) and the rights spelled out in Article 15. The latter provision is inspired by Article 27 of the Universal Declaration of Human Rights (UDHR) which lays down that everyone has 'the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits' as well as 'the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' Building upon this provision, Article 15(1) ICESCR recognizes three different rights: the right (1) to take part in cultural life; (2) to enjoy the benefits of scientific progress and its applications; and (23) to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he or she is the author. Article 15(2) to (4) provides additional clarifications as to what these rights require from states parties:

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

² The British anthropologist Edward B Tylor is widely considered as the first author to propose this new definition of culture in *Primitive Culture* (John Murray, 1871).

³ McGoldrick, 'Culture, Cultures, and Cultural Rights' in Baderin and McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP, 2007) 447.

⁴ Symonides, 'Cultural Rights: A Neglected Category of Human Rights' (1998) 158 *International Social Science J* 559; McGoldrick (2007), 447.

⁵ Stamatopoulou, *Cultural Rights in International Law. Article 27 of the Universal Declaration of Human Rights and Beyond* (Martinus Nijhoff, 2007) 4–6.

⁶ HR Council Res 10/23 (26 March 2009). In 2012, the Council conferred to the mandate holder the status of Special Rapporteur in the field of cultural rights: HR Council Res 19/6 (16 March 2012). For an overview of the work carried out during the first ten years of this mandate, see Cultural Rights: Tenth Anniversary Report, A/HRC/40/53 (17 January 2019). See also Beider and Porsdam (eds), *Negotiating Cultural Rights: Issues at Stake, Challenges and Recommendations* (Edward Elgar, 2017).

Echoing this provision, the specialized UN human rights conventions—the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (Article 5(e)(iv)); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (Article 13(c)); the Convention on the Rights of the Child (CRC) (Article 31(2)); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) (Article 43(1)(g)); and the Convention on the Rights of Persons with Disabilities (CPRD) (Article 30(1))—prohibit discrimination against specific categories of people in the enjoyment of the right to cultural life. At the regional level, the right to take part in the cultural or artistic life of the community is recognized in the American Declaration of the Rights and Duties of Man (Article 13), which preceded the UDHR, as well as in Article 14 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. It is also proclaimed in the African Charter on Human and Peoples' Rights (Article 17(2)),⁷ as well as in the ASEAN Human Rights Declaration (Article 32). By contrast, the European Convention on Human Rights (ECHR) contains no similar provision, while the Revised European Social Charter only mentions an obligation for states to take measures to enable persons with disabilities to access cultural activities (Article 15(3)) and elderly persons to play an active part in cultural life (Article 23). The Inter-American Convention on Protecting the Human Rights of Older Persons guarantees more generally 'the right to culture' (Article 21).

In addition, in the human rights literature, it has become increasingly common to speak of *cultural rights* when referring to the special rights recognized to minorities and indigenous peoples in order to enable them to preserve their distinct identity.⁸ International instruments relating to these groups, like Article 27 of the International Covenant on Civil and Political Rights (ICCPR), the ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries, or the Council of Europe Framework Convention on the Protection of National Minorities, do not explicitly label the rights they lay down as *cultural rights*. Yet, they contain numerous references to the notions of *culture*, *cultural identity*, or *cultural practices*. In particular, Article 27 ICCPR recognizes the right of persons belonging to minorities 'to enjoy their own culture'. The European Charter for Regional or Minority Languages includes an obligation for states to recognize the regional or minority languages 'as an expression of cultural wealth' (Article 7(1)(a)).⁹ The evolution of the understanding of the right to take part in cultural life under Article 15 ICESCR has provided further support for this usage of the phrase *cultural rights*.

Since the right to education and the rights of minorities and indigenous peoples are dealt with in other chapters of this book,¹⁰ this chapter focuses on the rights recognized in Article 27 UDHR and Article 15 ICESCR. One notion is central to these provisions, that of 'cultural life'. Section 2 traces the evolution of the interpretation of this concept. The three sections that follow analyse the content and scope of the three rights protected in these two articles: the right to take part in cultural life (Section 3), the right to science (Section 4), and the right of authors and inventors to the protection of their moral and material interests (Section 5).

⁷ See also African Charter on the Rights and Welfare of the Child, Art 12; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, Art 17.

⁸ eg Stamatopoulou (2007); Francioni and Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff, 2008); Eide, 'Cultural Rights as Individual Human Rights' in Eide, Krause, and Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff, 2001) 289.

⁹ See Mancini and de Witte, 'Language Rights as Cultural Rights: A European Perspective' in Francioni and Scheinin (2008) 247.

¹⁰ See Chapters 12 and 18.

2 WHAT IS 'CULTURAL LIFE'?

The *travaux préparatoires* of the UDHR indicate that for its framers, the notion of 'cultural life' appearing in Article 27 meant intellectual and artistic activities.¹¹ More precisely, it was 'high culture' that they had in mind, that is, the traditional canons of literature, music, art, and so on.¹² The provision was primarily aimed at recognizing the right of the masses to access lofty cultural resources, which had so far been the privilege of an elite.¹³

With time, however, the interpretation of the term 'cultural life' used in Article 27 UDHR and Article 15 ICESCR has undergone a double evolution. First, the notion has been extended beyond *high culture* to include *popular* or *mass culture*. Second, it has been progressively acknowledged that the concept not only refers to the idea of culture as intellectual and artistic expressions (culture as the *life of the mind*) but also covers culture in an anthropological sense (culture as a *way of life*).

2.1 FROM HIGH CULTURE TO POPULAR CULTURE

The work of the United Nations Educational, Scientific and Cultural Organization (UNESCO) had an important influence on the evolution of the interpretation of 'culture' and 'cultural life' in the context of UN human rights instruments. Departing from the vision of the UDHR drafters, the UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, states that 'culture is not merely an accumulation of works and knowledge which an élite produces, collects and conserves in order to place it within the reach of all'.¹⁴ Rather, it includes 'all forms of creativity and expression of groups or individuals'.¹⁵ Thus:

by participation in cultural life is meant the concrete opportunities guaranteed for all groups or individuals to express themselves freely, to communicate, act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and the cultural progress of society.¹⁶

This text clearly asserts that cultural life is not restricted to high culture but also extends to non-elitist cultural expressions. This broader approach to cultural life was taken up by the Committee on Economic, Social and Cultural Rights. In the Revised Guidelines regarding the reports to be submitted by states under the ICESCR, adopted in 1991, the right to take part in cultural life is described as 'the right of everyone to take part in the cultural life *which he or she considers pertinent*', including popular forms of culture such as cinema and traditional arts and crafts.¹⁷ Under the current Guidelines, drafted in 2008, states are requested to provide information on the measures taken to promote popular participation in, and access to, concerts, theatre, cinema, and sport events, as well as information technologies such as the internet.¹⁸

¹¹ Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 1999) 217–19.

¹² O'Keefe, 'The Right to Take Part in Cultural Life under Article 15 of the ICESCR' (1998) 47 *ICLQ* 904, 905.

¹³ O'Keefe (1998) 906; Donders, *Towards a Right to Cultural Identity?* (Intersentia, 2002) 141.

¹⁴ (1976), Preamble, 5th recital, subpara (c).

¹⁵ Para 3(a).

¹⁶ Art 2(b). See also UNESCO Universal Declaration on Cultural Diversity (2001).

¹⁷ Revised Guidelines regarding the form and contents of reports to be submitted by states parties under Arts 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, E/1991/23, 88 at 108 (emphasis added); O'Keefe (1998) 913–14.

¹⁸ Revised Guidelines on treaty-specific documents to be submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/2008/2, para 67.

2.2 FROM CULTURE AS THE LIFE OF THE MIND TO CULTURE AS A WAY OF LIFE

The second transformation affecting the concept of cultural life was more profound. The inclusion of popular cultural expressions within the notion of cultural life did not modify its basic nature: cultural life was still conceived as a specific sphere of activities within society, relating to creativity, imagination, and artistic or intellectual endeavours. By contrast, the endorsement of an anthropological conception of culture entailed a considerable expansion of its scope: this latter notion of culture basically embraces the whole way of life of a social group. It can encompass *any* social activity or expression that is specific to a given population: from art, language, or religion to techniques, economic activities, customs, laws, conception of the family, and so on. At the same time, the anthropological approach to culture focuses on traits which are *specific* to a given community. The right to culture in this latter sense becomes the right to one's *own* culture. It overlaps with minority protection and indigenous peoples' rights.

UNESCO had a leading role in this evolution. As early as 1982, the Mexico City Declaration on Cultural Policies defined culture as 'the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group', including 'not only the arts and letters, but also modes of life, the fundamental rights of the human beings, value systems, traditions and beliefs'.¹⁹ The UNESCO Universal Declaration on Cultural Diversity embraces the same conception of culture.²⁰ A similar approach was progressively endorsed by the Committee on Economic, Social and Cultural Rights. During a day of general discussion on the right to take part in cultural life, organized by the Committee in 1992, various members declared that 'culture meant a way of life' and that taking part in cultural life 'embraced all the activities of the individual'.²¹ The Committee's General Comment 21 on the right of everyone to take part in cultural life, adopted in 2009, confirms this evolution. Culture is described in it as 'encompassing all manifestations of human existence'.²² For the purpose of Article 15 ICESCR, it includes:

inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.²³

This expansion of the concept of cultural life, while encouraged by many authors,²⁴ has been criticized by some.²⁵ Critics argue that the definition proposed in the General Comment is so broad that it is very difficult to identify specific individual entitlements and state obligations. Some also fear that the emphasis now put in the context of Article 15 ICESCR on the protection of minorities and indigenous peoples, two subjects already

¹⁹ (2001), para 6. See also *Our Creative Diversity: Report of the World Commission on Culture and Development* (UNESCO, 1995).

²⁰ Preamble, para 5. ²¹ E/1993/22, para 213.

²² E/C.12/GC/21 (21 December 2009), para 11.

²³ CESCR, General Comment 21, para 13.

²⁴ eg Stamatopoulou (2007); Eide (2001); Stavenhagen, 'Cultural Rights: A Social Science Perspective' in Eide, Krause, and Rosas (2001) 85.

²⁵ McGoldrick (2007) 450–1; Romainville, *Le droit à la culture, une réalité juridique: Le droit de participer à la vie culturelle en droit constitutionnel et international* (Bruylant, 2014) 355–70.

covered by more specialized international instruments, risks reinforcing the traditional neglect affecting what initially was the main objective of this provision: promoting access to and the participation of everyone, including the most disadvantaged, to culture in its artistic and intellectual sense.²⁶ This expansive approach, however, has been endorsed recently by the Inter-American Court of Human Rights (IACtHR). In *Indigenous communities of the Lhaka Honhat Association (Our Land) v Argentina*, the Court found that practices that detrimentally impacted indigenous communities' traditional lifestyle, such as illegal logging, livestock raising, and overgrazing in their territory, resulted in a violation of their right to take part in cultural life.²⁷

3 THE RIGHT TO TAKE PART IN CULTURAL LIFE

The Committee on Economic, Social and Cultural Rights has endeavoured to clarify the content, scope, and implications of the right to take part in cultural life protected by Article 15(1)(a) ICESCR in its General Comment 21. In line with the evolution described in Section 2, it attempts to do this on the basis of what can be termed a 'bi-dimensional' conception of culture, as meaning *both* the life of the mind and particular ways of life.

3.1 THE NORMATIVE CONTENT OF THE RIGHT TO TAKE PART IN CULTURAL LIFE

General Comment 21 distinguishes between three main components of the right to take part in cultural life.²⁸ First, *participation* in cultural life means the right to freely choose one's identity and engage in one's own cultural practices, as well as to express oneself in the language of one's choice. Second, *access* to cultural life covers the right to know one's own culture and that of others through education and information, the right 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 the right to benefit from the cultural heritage and creations of others. Finally, *contribution* to cultural life refers to the right to be involved in creating the spiritual, material, intellectual, and emotional expressions of the community. This is supported by the right to take part in the elaboration and implementation of policies that have an impact on cultural rights.

The Committee on Economic, Social and Cultural Rights has applied the tripartite distinction—*respect*, *protect*, and *fulfil*²⁹—to specify the corresponding obligations of states parties to the right to take part in cultural life. The obligation to *respect* requires states to refrain from interfering with the enjoyment of the right.³⁰ This entails a duty to guarantee various rights and freedoms inherent in the right to participate in culture: the right to freely choose one's own cultural identity; the freedom to create, which implies the abolition of censorship of cultural and artistic activities; freedom of expression in the language of one's choice; the right to access one's own cultural heritage and that of others; and the right to take part freely in decision-making processes that may have an impact on cultural rights. Freedom to create is explicitly protected in Article 15(3) ICESCR, under which states must undertake 'to respect the freedom indispensable for scientific research and creative activity.' It can, moreover, be seen as a particular application of the right to freedom of expression.³¹ The European Court of Human Rights has indeed acknowledged

²⁶ Romainville (2014).

²⁷ IACtHR Series C No 400 (6 February 2020) para 289.

²⁸ CESCR, General Comment 21, para 15.

²⁹ See Chapter 7.

³⁰ CESCR, General Comment 21, para 49.

³¹ See Chapter 11.

that freedom of expression under the ECHR covers freedom of artistic expression,³² as well as academic freedom.³³

To meet their *obligation to protect*, states must take measures to prevent non-state actors from interfering in the exercise of the right. In addition, the Committee has linked four further sets of concerns to this obligation to protect.

First, states must protect cultural heritage in all its forms at all times, whether in time of war or peace and in the case of natural disasters.³⁴ This echoes the numerous international treaties dealing with the preservation of cultural heritage.³⁵ To be sure, these other treaties are not human rights instruments: their object is to secure the protection of cultural heritage, not to confer rights to individuals. Yet, given that cultural heritage—whether tangible, intangible, or natural—includes resources that are indispensable to allow individuals to enjoy their cultural rights, its preservation is of major importance to make these rights effective.³⁶ It was initially in the context of armed conflicts that an international regime of protection was established.³⁷ Later on, other instruments have been adopted to organize the international protection of cultural heritage in time of peace.³⁸ Relevant instruments have also been adopted at the European level in the Council of Europe, notably the Framework Convention on the Value of Cultural Heritage for Society. According to the UN Special Rapporteur in the field of cultural rights, the prohibition of acts of deliberate destruction of cultural heritage of major value for humanity, whether in time of war or peace, has now reached the level of customary international law.³⁹

A second aspect of the obligation to protect is the protection of cultural heritage of all groups and communities in economic development and environmental policies. The General Comment insists that ‘particular attention should be paid to the adverse consequences of globalization, undue privatization of goods and services and deregulation on the right to participate in cultural life.’⁴⁰ It is often observed that economic globalization tends to favour cultural products and models of wealthier countries, resulting in the standardization of culture and marginalization of cultural expressions of poorer or smaller countries. The World Trade Organization (WTO) and international trade agreements concluded under its auspices have been criticized for undermining the ability of governments to maintain policies aimed at sustaining national cultural industries and creation.⁴¹ This fear prompted the adoption

³² *Müller and others v Switzerland* (1991) 13 EHRR 212, para 27. See also *Dickinson v Turkey*, App no 25200/11, Judgment of 2 February 2021, paras 43, 54, and 55.

³³ *Sorguç v Turkey*, App no 17089/03, Judgment of 23 June 2009, para 35. See more generally ECtHR, *Cultural Rights in the Case-law of the European Court of Human Rights* (Council of Europe, 2011). See also CFREU, Art 13, which recognizes artistic and academic freedom.

³⁴ CESCR, General Comment 21, para 50(a).

³⁵ It can also be related to the duty incumbent upon states under ICESCR, Art 15(2) to take the necessary steps to ensure, inter alia, the conservation of culture.

³⁶ See Report of the independent expert in the field of cultural rights, A/HRC/17/38 (21 March 2011); Francioni, ‘Culture, Heritage and Human Rights: An Introduction’ in Francioni and Scheinin (2008), 1.

³⁷ Hague Conventions of 1899, Art 56, and 1907, Art 56; Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Art 53; Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Art 16; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Art 4; Rome Statute of the International Criminal Court, Art 8(2).

³⁸ See eg Convention concerning the Protection of the World Cultural and Natural Heritage, Convention on the Protection of the Underwater Cultural Heritage, and Convention for the Safeguarding of Intangible Cultural Heritage, all concluded under the framework of UNESCO.

³⁹ Report of the Special Rapporteur in the field of cultural rights, A/71/317 (9 August 2016) para 24. See also the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage.

⁴⁰ CESCR, General Comment 21, para 50(b).

⁴¹ Morijn, ‘The Place of Cultural Rights in the WTO System’ in Francioni and Scheinin (2008) 285; Voon, *Cultural Products and the World Trade Organization* (CUP, 2007).

of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which aims 'to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning' (Article 1(g)). Crucially, states parties 'reaffirm their sovereign rights to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions' (Article 5(1)). The Committee on Economic, Social and Cultural Rights' preoccupation, however, goes beyond the protection of states' national cultures in international trade: the General Comment stresses the need to protect, in particular, the cultural heritage of 'the most disadvantaged and marginalized individuals and groups' in economic development.⁴² It thereby suggests that the protection of the right to take part in cultural life requires intervention by the state to regulate culture-related economic activities and support certain forms of cultural production with a view to ensuring that all groups and individuals, within their population, are able to maintain the cultural heritage they cherish.

A third dimension of the obligation to protect the right to take part in cultural life lies with the duty to defend the cultural productions of indigenous peoples, notably their traditional knowledge, natural medicines, folklore, and rituals. This includes protecting their lands and resources from illegal or unjust exploitation by state entities and private companies.⁴³ The IACtHR has established that when dealing with major development or investment plans that may have a profound impact on the traditional territory of an indigenous people, states must not only carry out prior consultation with this people, but also obtain their free, prior, and informed consent, in accordance with their traditions and customs.⁴⁴ This principle has also been endorsed by the Human Rights Committee in the context of Article 27 ICCPR.⁴⁵ The IACtHR, moreover, has established that failure of a state to prevent groups of individuals from engaging in activities that are harmful to the traditional way of life of indigenous communities, like illegal logging, livestock raising, and overgrazing in the territory of those communities, entails a violation not only of their right to a healthy environment, adequate food, and water but also of their right to take part in cultural life.⁴⁶

Finally, the Committee on Economic, Social and Cultural Rights also mentions, as part of the obligation to protect, the duty to prohibit discrimination based on cultural identity and incitement to discrimination, hostility, or violence on the basis of national, racial, or religious features.⁴⁷

The *obligation to fulfil* entails a duty for states to take appropriate legislative, administrative, budgetary, judicial, and other measures necessary for the full realization of the right. This level of obligation includes an obligation to *facilitate* and *promote* the right as well as, in some circumstances, to *provide* conditions under which the right can be enjoyed:

- To *facilitate* the exercise of the right to participate in cultural life, states should establish and support public cultural institutions, develop adequate policies for the protection of cultural diversity, and grant assistance to individuals or organizations engaged in creative and scientific activities (artists, cultural associations, science academies, and so on). They should also support minorities and other communities in their efforts to preserve their culture.⁴⁸

⁴² CESCR, General Comment 21, para 50(b).

⁴³ CESCR, General Comment 21, para 50(c).

⁴⁴ *Case of the Saramaka People v Suriname*, IACtHR Series C No 172 (28 November 2007) para 137. In *Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Series C No 245 (27 June 2012), the Court asserted that states' obligation to carry out prior consultation with indigenous communities on the exploitation of natural resources in their territory is a general principle of international law (para 164).

⁴⁵ HRC, General Comment 23, HRI/GEN/1/Rev.9 (Vol I) 207, para 7; *Angela Poma Poma v Peru*, CCPR/C/95/D/1457/2006 (27 March 2009) para 7.6.

⁴⁶ *Indigenous Communities of the Lhaka Honhat Association*, para 289.

⁴⁷ CESCR, General Comment 21, para 50(d).

⁴⁸ CESCR, General Comment 21, para 52.

- The obligation to *promote* requires states to ensure appropriate education and public awareness concerning the right to take part in cultural life, particularly in rural and deprived urban areas, as well as in relation to minorities and indigenous peoples.⁴⁹
- Finally, states must *provide* individuals with the means necessary for the enjoyment of the right when, for reasons outside their control, they are unable to realize this right by themselves. The Committee ranks in this category the duty to preserve and restore cultural heritage; the duty to include cultural education, including history, literature, music, and teaching of other culture, in school curricula; and the obligation to guarantee access for all, including disadvantaged groups, to cultural institutions (museums, libraries, cinemas, theatres, etc) and activities. Effective mechanisms should, moreover, be established to allow persons, individually, in association with others, or within a group, to participate effectively in decision-making processes.⁵⁰ The IACtHR has especially insisted on the duty of states to carry out prior consultation with indigenous communities on the exploitation of natural resources in their territory. It considers this obligation to be a general principle of international law.⁵¹

Among these elements, the Committee on Economic, Social and Cultural Rights identifies ‘core obligations’, that is, minimum essential levels of the right which all states must implement immediately, by contrast with other obligations that may be achieved progressively, depending on available resources. States must at least create and promote an environment within which people can participate in the culture of their choice. This entails the immediately applicable obligations to guarantee non-discrimination and gender equality in the enjoyment of the right to take part in cultural life; to respect the right of everyone to identify or not identify with one or more communities; to respect and protect the right of everyone to engage in their own cultural practices, while respecting human rights; to eliminate barriers or obstacles to people’s access to their own culture or other cultures; and to allow and encourage the participation of members of minorities, indigenous peoples, or other communities in the design and implementation of laws and policies affecting them.⁵²

3.2 GROUPS REQUIRING SPECIAL ATTENTION

For different reasons, certain groups require particular attention in the implementation of the right to take part in cultural life.

First of all, for some categories of people, special measures are needed to enable them to effectively access the cultural resources, activities, and infrastructures necessary for the enjoyment of this right. In the case of *persons with disabilities*, Article 30 CRPD requires steps to be taken to ensure access to cultural materials; television programmes, films, theatre, and other activities; and cultural infrastructures, such as theatres, museums, cinemas, libraries, tourist services, and, as far as possible, monuments and sites of national cultural importance. Moreover, their specific cultural and linguistic identity, including sign language, should be recognized.⁵³ The Committee on Economic, Social and Cultural Rights

⁴⁹ CESCR, General Comment 21, para 53.

⁵⁰ CESCR, General Comment 21, para 54.

⁵¹ *Kichwa Indigenous People of Sarayaku*, para 164. The HRC has inferred from ICCPR, Art 27 a duty for states to take measures to ensure effective participation of indigenous peoples in decisions affecting their right to maintain a particular way of life associated with the use of land resources. See General Comment 23, para 7; *Angela Poma Poma*.

⁵² CESCR, General Comment 21, para 55.

⁵³ CESCR, General Comment 21, paras 30–1.

also emphasizes the need to pay particular attention to the promotion of cultural rights of *older persons*. It refers to the 1982 Vienna International Plan of Action on Aging, which encourages governments to support programmes aimed at providing these persons with easier physical access to cultural institutions and calls for the development of programmes featuring older persons as teachers and transmitters of knowledge, culture, and spiritual values.⁵⁴ Additionally, the Committee expresses concern at the situation of *persons living in poverty* and urges states parties to take concrete measures to bring culture within the reach of all and ensure the full exercise of the right to enjoy and take part in cultural life by persons living in poverty.⁵⁵

Minorities, indigenous peoples, and migrants are in a specific situation from the viewpoint of the right to take part in cultural life because they have a cultural heritage that differs from that of the majority. Accordingly, they are at risk of being subject to assimilation policies by the authorities. The Committee on Economic, Social and Cultural Rights insists that minorities should have the right to take part in the cultural life of the society at large as well as to conserve, promote, and develop their own culture.⁵⁶ In line with Article 31 ICRMW, it notes that the protection of cultural identities, language, religion, and folklore of migrants should receive particular attention.⁵⁷ In relation to indigenous peoples, the Committee considers that Article 15(1) ICESCR requires measures to be taken to protect their right to own, develop, control, and use their communal lands and resources as well as to act collectively to maintain and develop their cultural heritage, traditional knowledge, and cultural expressions.⁵⁸

Finally, *women and children* must also be given special consideration. The Committee on Economic, Social and Cultural Rights highlights the duty of states to eliminate institutional and legal obstacles as well as those based on customs and traditions that prevent women from participating fully in cultural life, science, education, and research.⁵⁹ As for children, they 'play a fundamental role as the bearers and transmitters of cultural values from generation to generation.'⁶⁰ The right to take part in cultural life in their case is closely linked to the right to education. States should ensure that education is culturally appropriate, which means that it should enable children to develop their cultural identity and to learn about the culture of their own communities as well as of others.⁶¹ Accordingly, school curricula for all children should respect the cultural specificities of minorities and indigenous peoples and incorporate their history, knowledge, cultural values, and aspirations.⁶²

3.3 LIMITATIONS TO THE RIGHT

As with the other rights set out in the ICESCR, the right to take part in cultural life is not absolute. It may be subject to limitations. Such restrictions must, however, respect certain conditions: they must be determined by law, compatible with the nature of the right, and strictly necessary for the promotion of the general welfare in a democratic society.⁶³

⁵⁴ CESCR, General Comment 21, para 28. See also Inter-American Convention on Protecting the Human Rights of Older Persons, Art 21; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, Art 17; European Social Charter, Art 23.

⁵⁵ CESCR, General Comment 21, paras 38–9.

⁵⁶ CESCR, General Comment 21, para 32.

⁵⁷ CESCR, General Comment 21, para 34.

⁵⁸ CESCR, General Comment 21, paras 36–7.

⁵⁹ CESCR, General Comment 21, para 25. See also CEDAW, Art 2(f).

⁶⁰ CESCR, General Comment 21, para 26. See also CRC, Art 31(2); African Charter on the Rights and Welfare of the Child, Art 12.

⁶¹ CESCR, General Comment 21, para 26.

⁶² CESCR, General Comment 21, para 27.

⁶³ ICESCR, Art 4. See CESCR, General Comment 21, para 19. See also Chapter 7.

Of special concern here are cultural practices that conflict with certain human rights. The extension of the notion of 'cultural life' to culture in the anthropological sense has made this problem especially salient. Various practices anchored in cultural traditions are in tension with some human rights, in particular women's rights. The Committee on Economic, Social and Cultural Rights has emphasized in this regard that limitations to the right to take part in cultural life may be necessary to counter 'negative practices, including those attributed to customs and traditions, that infringe upon other human rights.'⁶⁴ In fact, the Committee has gone even further and asserted that taking steps to combat customary or traditional practices harmful to the well-being of persons, such as female genital mutilation, are in fact *required* by the right to take part in cultural life. Failing to do so constitutes a violation of this right insofar as such practices constitute barriers to the full exercise of the right by the affected persons.⁶⁵

Interestingly, in some contexts, conflicts may arise between different aspects of the right to take part in cultural life. For instance, artistic freedom may in principle be limited by the prohibition of incitement to discrimination, hostility, and violence against an ethnic or religious group. Yet, evaluating whether a novel, song, or other work of art constitutes such form of incitement may raise arduous questions. As recognized by the European Court of Human Rights, it is important to take into account the particular nature of artistic expression, which can take metaphorical or satiric forms.⁶⁶ One must also be mindful of the risk that state authorities instrumentalize the accusation of incitement to hostility or violence to justify censorship of artistic creations that touch upon sensitive issues. In some states, in the name of combating incitement to religious hatred or protection of religious feelings of believers, penal sanctions are imposed on artists who mock or criticize religious doctrines.⁶⁷ But it is in the nature of art to challenge conventions, moral codes, and traditions. Artistic freedom must include the right to create works that 'offend, shock or disturb the State or any sector of the population', to use a famous quotation of the European Court of Human Rights.⁶⁸ This discussion reveals a potential tension between the two approaches to culture now brought together in the interpretation of the right to take part in cultural life. Artistic freedom, which pertains to culture understood as artistic and intellectual activities, has a distinctly individualist character: it includes the freedom of individual artists to question, subvert, or contest dominant social norms and identities. By contrast, the right to enjoy one's own culture in the anthropological sense has a communitarian and somewhat conservative connotation: it is primarily the right to preserve a community's traditions and way of life inherited from the past. Finding the right balance between these two dimensions of the right to take part in cultural life may not always be easy.

⁶⁴ CESCR, General Comment 21, para 19.

⁶⁵ CESCR, General Comment 21, para 64.

⁶⁶ See *Dickinson v Turkey*, para 54.

⁶⁷ The European Court has admitted that the protection of 'the right of citizens not to be insulted in their religious feelings' can constitute a legitimate aim for the purposes of ECHR, Art 10(2) (limitations to free speech): *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34, para 48. In its later case law, it has, however, also recognized that a religious group must tolerate the denial by others of their religious beliefs and even the propagation of doctrines hostile to their faith, as long as it does not amount to incitement to religious hatred: *Tagiyev and Huseynov v Azerbaijan*, App no 13274/08, Judgment of 5 December 2019, para 44; *Klein v Slovakia* (2010) 50 EHRR 15; *Tatlav v Turkey*, App no 50692/99, Judgment of 2 May 1996.

⁶⁸ *Handyside v UK* (1979–80) 1 EHRR 737, para 49.

4 THE RIGHT TO SCIENCE

The right of everyone ‘to enjoy the benefits of scientific progress and its applications’, protected in Article 15(1)(b) ICESCR, has long been overlooked by human rights advocates and institutions.⁶⁹ Yet it was rediscovered in the 1990s in the context of the controversies generated by the expansion of the international intellectual property regime.⁷⁰ Many argued that this latter development restricted the ability of the general public, and especially the most disadvantaged, to benefit from scientific advancements, with a detrimental impact on the enjoyment of various rights (see Section 5). Against this background, the right provided for in Article 15(1)(b) started to attract more attention. Between 2007 and 2009, three expert meetings were convened by UNESCO, with the collaboration of academic institutions, resulting in the 2009 Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, which attempts to clarify the normative content of this right. The UN Special Rapporteur in the field of cultural rights published a report on the subject in 2012.⁷¹ Building on these efforts, the Committee on Economic, Social and Cultural Rights adopted a General Comment on this right in 2020.⁷²

4.1 ESSENTIAL ELEMENTS OF THE RIGHT

The General Comment from the Committee on Economic, Social and Cultural Rights usefully clarifies the content of the ‘right to science’, which has long been viewed as vague and obscure. This right encompasses not only a right to *receive* the benefits of the applications of scientific progress, but also to *participate* in scientific progress.⁷³ These two dimensions translate into five essential elements.

First, states must ensure the *availability* of science, which entails taking steps for its conservation, its development, and its dissemination as required under Article 15(2) ICESCR. This implies securing adequate funding and policies to foster scientific research, disseminate scientific knowledge (including by promoting open science and open-source publication of research), and make its applications and benefits available, especially to vulnerable and marginalized groups. Particular emphasis is put on scientific education which should be adequately financed.⁷⁴

Second, states are required to secure the *accessibility* of scientific progress and its applications to all persons, without discrimination. This means ensuring that everyone has equal access to the applications of science, particularly when they are instrumental for the enjoyment of other economic, social, and cultural rights, like vaccinations (see Section 5); that information relating to the risks and benefits of science and technology is accessible to all; and that everyone has the opportunity to participate in and benefit from scientific

⁶⁹ Chapman, ‘Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications’ (2009) 8 *Journal of HR* 1; Besson, ‘Introduction’ (2015) 4 *European JHR* 403.

⁷⁰ Plomer, ‘The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science’ (2013) 35 *HRQ* 143, 144.

⁷¹ The right to enjoy the benefits of scientific progress and its applications, A/HRC/20/26 (14 May 2012). In 2013, the High Commissioner for Human Rights organized a seminar aimed at improving the conceptual clarity of this right (A/HRC/26/19).

⁷² CESCR, General Comment 25, E/C.12.GC.25 (30 April 2020).

⁷³ CESCR, General Comment 25, para 11.

⁷⁴ CESCR, General Comment 25, paras 16, 27, 37, 46–7, and 49.

⁷⁵ CESCR, General Comment 25, paras 17 and 25–7. States are under an immediate obligation to eliminate all forms of discrimination in the enjoyment of this right (para 25).

progress without discrimination.⁷⁵ To this latter end, states must adopt measures and policies to eliminate barriers that hinder the access of women, persons with disabilities, and persons living in poverty to quality scientific education and careers. In relation to women, the Committee adds that temporary special measures such as quotas might be necessary.⁷⁶

Third, states should protect the *quality* of scientific creation and applications, taking into account the most advanced, up-to-date, and verifiable science according to the standards generally accepted by the scientific community. This includes regulation and certification that may be necessary to ensure the ethical development of science and the protection of people participating in research or tests. Importantly, states should guarantee that these persons have given their free, prior, and informed consent.⁷⁷

Fourth, states should ensure the *acceptability* of the right to science. This requires the incorporation of ethical standards into scientific research, such as the standards proposed in the UNESCO Universal Declaration on Bioethics and Human Rights. Furthermore, efforts need to be made to ensure that science is explained and its applications disseminated in such a way as to facilitate their acceptance in different cultural and social contexts, without jeopardizing their integrity and quality.⁷⁸

Fifth, the right to science entails the protection of academic freedom. This includes the freedom to seek, receive, and impart scientific information as well as the freedom to develop international collaboration among scientists.⁷⁹ The Committee also identifies a duty for states to refrain from 'disinformation, disparagement or deliberate misinformation intended to erode citizen understanding of and respect for science and scientific research.'⁸⁰

A theme that pervades the General Comment as a whole is that special efforts should be made to combat persistent inequalities in the enjoyment of this right and ensure that advantaged and vulnerable groups—in particular, people living in poverty, women, persons with disabilities, and indigenous peoples—are able to both contribute to and benefit from scientific progress. States should use the maximum of their available resources to overcome the hurdles that any person may face to benefit from new technologies or other forms of scientific advancements.⁸¹

4.2 LINKAGES WITH OTHER RIGHTS

The right under Article 15(1)(b) is an essential tool for the realization of other economic, social, and cultural rights, especially the right to food and the right to health.⁸²

In relation to the right to food, the Committee on Economic, Social and Cultural Rights has introduced in General Comment 25 a cautious critique of the impact of certain scientific developments. While recognizing that technological advancements have increased agricultural productivity, contributing to reduction of famine, the Committee acknowledges the environmental impacts of certain technologies associated with the Green Revolution and the risks entailed by an increased dependence on technology providers. Hence, the Committee stresses the need to interpret the right to science in accordance with the right of peasants and others working in rural areas to choose which technologies suit them best, as acknowledged

⁷⁶ CESCR, General Comment 25, paras 31, 35, and 37.

⁷⁷ CESCR, General Comment 25, paras 18 and 43. See also paras 33, 35, and 40 (regarding the special protection of specific groups).

⁷⁸ CESCR, General Comment paras 25, 19, and 47.

⁷⁹ CESCR, General Comment 25, paras 13, 20, 24, 42, and 46. See also ICESCR, Art 15(3) and (4).

⁸⁰ CESCR, General Comment 25, paras 24 and 42.

⁸¹ CESCR, General Comment 25, paras 24 and 47.

⁸² The Venice Statement highlights other rights for the realization of which access to scientific innovations may be important, namely the right to an adequate standard of living, education, and water (para 12(d)).

in Article 15(4) of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas.⁸³ States should also take measures to ensure that agricultural research integrates the needs of peasants and other people working in rural areas.⁸⁴

Regarding the right to health, states must 'promote scientific research, through financial support or other incentives, to create new medical applications and make them accessible and affordable to everyone', including the most vulnerable. The Committee, however, notes the difficulties stemming in this regard from intellectual property regimes and insists that the latter should not be applied to the detriment of the right to health.⁸⁵

4.3 RIGHT TO SCIENCE AND INTELLECTUAL PROPERTY

More generally, the Committee on Economic, Social and Cultural Rights has observed in its General Comment 25 that intellectual property has an ambivalent relationship with the right to science. While it can enhance the development of science and technology through economic incentives for innovations, it can negatively affect scientific advancement and access to its benefits in at least three ways: (1) it can create distortions in the funding of scientific research as private funders might support only research projects that are profitable; (2) it may hinder the sharing of information on scientific research and access to scientific publication; and (3) it may pose significant (financial) obstacles to access by low-income persons or developing countries to the benefits of scientific progress, notably in the field of health. Hence, states should take specific measures to foster the positive impact of intellectual property on the right to science, while at the same time avoiding its possible negative effects on the enjoyment of economic, social, and cultural rights.⁸⁶ This points towards a wider debate, which is at the core of current discussions on Article 15(1)(c) ICESCR, that of the relationship between intellectual property and human rights law.

5 THE RIGHTS OF AUTHORS AND INVENTORS

While the right to take part in cultural life and the right to science concern the whole population, the third right recognized in Article 15 ICESCR concerns a specific category of persons, namely scientists, writers, and artists. Similar to Article 27(2) UDHR, Article 15(1)(c) ICESCR provides that everyone has the right to 'the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' The insertion of this clause in the UDHR generated vociferous debates during the drafting process. Introduced at the insistence of the French delegation, Article 27(2) was strongly opposed by several delegations, including those of the UK and the US, who contested that intellectual property was a basic human right. Chile pointed out the potential conflict between the protection of intellectual work and freedom of access to literary, artistic, or scientific output. Nevertheless, a majority of states voted in favour of this right.⁸⁷

⁸³ GA Res 73/165 (17 December 2018), Annex. See CESCR, General Comment 25, para 64. On the relation between the right to food and development of scientific and technological knowledge, see ICESCR, Art 11(2)(a).

⁸⁴ CESCR, General Comment 25, para 65.

⁸⁵ CESCR, General Comment 25, paras 67, 69, and 70; see also ICESCR, Art 12(2)(d).

⁸⁶ CESCR, General Comment 25, paras 60–2.

⁸⁷ Morsink (1999) 219–22; Plomer (2013) 171–5.

5.1 HUMAN RIGHTS AND INTELLECTUAL PROPERTY

A crucial question raised by the right under Article 15(1)(c) ICESCR is that of its relationship with intellectual property law, which has been developed largely outside the human rights framework, through domestic legislation, bilateral agreements, and multilateral treaties.⁸⁸ Broadly stated, this body of law aims to safeguard the producers of intellectual goods or services by granting them certain time-limited rights that allow them to prohibit or authorize the use of those productions by others and to draw financial reward from such use.⁸⁹ Whereas *copyright* relates to literary and artistic creations (such as books, music, paintings, or films) and technology-based works like computer programs and electronic databases, *industrial property* covers the protection of inventions through patents, as well as trademark and industrial design protection. Importantly, a patent holder may benefit from a right of exclusion: once a patent has been granted in a certain country, the patentee can exclude others from making, using, or selling the protected invention in that country.⁹⁰ In all national systems, however, there are some exceptions and limitations to intellectual property rights.

While human rights and intellectual property rights have long developed in relative isolation from each other, this changed radically with the adoption of the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement by the WTO in 1994. TRIPS had the effect of imposing high minimum standards of intellectual property on all WTO member states, including on developing countries where copyright and patent laws were, at that time, absent or very limited. This generated intense criticism. It was observed that strict intellectual property models were likely to significantly disadvantage less developed countries by increasing the costs of development, in a context where industrialized countries hold the overwhelming majority of the patents registered worldwide. Furthermore, it was realized that intellectual property norms could hamper the achievement of various human rights, in particular the rights to health and to food.⁹¹ A number of UN human rights institutions expressed serious concerns about this development. In 2000, the Sub-Commission on the Promotion and Protection of Human Rights adopted Resolution 2000/7 on 'Intellectual Property Rights and Human Rights', stating that 'actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realisation of economic, social and cultural rights'.⁹² The following year, the UN High Commissioner for Human Rights drafted a report on the impact of TRIPS on human rights, focusing on the right to health.⁹³ Also in 2001, the Committee on Economic, Social and Cultural Rights adopted a statement on 'Human rights and intellectual property'.⁹⁴ All these documents insisted on the primacy of human rights obligations over TRIPS and called upon states to ensure that intellectual property regulations correspond with international human rights law.

⁸⁸ eg Paris Convention for the Protection of Industrial Property (1883, last revised 1967); Berne Convention for the Protection of Literary and Artistic Works (1886, last revised 1971); and International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961).

⁸⁹ World Intellectual Property Organization (WIPO), *Introduction to Intellectual Property: Theory and Practice* (Kluwer, 1997) 3.

⁹⁰ WIPO, *Understanding Industrial Property*, WIPO Publication No 895(E), 7–8.

⁹¹ Chapman, 'The Human Rights Implications of Intellectual Property Protection' (2002) 5 *Journal of International Economic Law* 861; Cullet, 'Human Rights and Intellectual Property Protection in the TRIPS Era' (2007) 29 *HRQ* 404; Plomer (2013); Helfer and Austin, *Human Rights and Intellectual Property: Mapping the Global Interference* (CUP, 2011).

⁹² E/CN.4/Sub.2/2000/7 (17 August 2000).

⁹³ The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Report of the High Commissioner, E/CN.4/Sub.2/2001/13 (27 June 2001).

⁹⁴ E/C.12/2001/15 (14 December 2001).

The tensions between intellectual property rules and human rights are especially acute in the case of the right to health. The standard justification for the intellectual property system is that it creates an incentive for innovation, including in the pharmaceutical field. Yet, because it links innovation to commercial motivation, the system of intellectual property entails that research is directed first and foremost towards 'profitable' diseases, namely diseases that are prevalent in rich countries, where the return is likely to be the greatest.⁹⁵

Additionally, whereas affordability of medicines is a central component of the right to health, medical patents result in higher prices for drugs, which restrict access for the poor. The problem became particularly salient in relation to the HIV/AIDS pandemic that predominantly affects the populations of developing countries. More recently, in the context of the COVID-19 pandemic, the grossly unequal global distribution of vaccines to the detriment of developing and low-income countries, due in large part to the effects of intellectual property regimes, has reignited this debate. The Committee on Economic, Social and Cultural Rights declared that access to a safe and effective vaccine against COVID-19 is an essential component of both the right to health and the right to enjoy the benefits of scientific progress and its applications. States are thus under an obligation to take all necessary measures to prevent intellectual property and patent legal regimes from impeding access to such vaccines.⁹⁶

The impact of intellectual property on the right to food has also become a source of major concern. In order to encourage innovation in agriculture, intellectual property has been extended to new plant varieties in the form of patents and plant breeders' rights. As a result, a few agricultural corporations have acquired virtual monopolies on the genome of important crops, enabling them to set prices at levels far exceeding actual costs. In consequence, poor farmers experience difficulties in accessing seeds and production resources. This situation, moreover, can lead to higher prices for food, making it less affordable for the poorest.⁹⁷

Another crucial debate concerns the protection of traditional knowledge (relating to medicine, agriculture, etc) and artistic creations of indigenous communities. These intellectual goods rarely qualify for intellectual property protection because they are usually considered by the community to belong to the whole group, whereas intellectual property rules presuppose a single owner. Accordingly, such knowledge and creations are considered to be part of the public domain, which makes them available for exploitation and appropriation by third parties. This leads to a situation called 'biopiracy', 'whereby traditional knowledge is expropriated and patented by outsiders without the indigenous sources receiving any benefit'.⁹⁸ In an effort to counter this phenomenon, Article 31(1) of the UN Declaration on the Rights of Indigenous Peoples recognizes the right of indigenous peoples 'to maintain, control, protect and develop their intellectual property over [their] cultural heritage, traditional knowledge, and traditional expressions'.

5.2 THE CONTENT AND LIMITATIONS OF THE RIGHT UNDER ARTICLE 15(1)(C) ICESCR

Against the backdrop of these controversies, in 2005 the Committee on Economic, Social and Cultural Rights issued a General Comment on the right protected in Article 15(1) (c). At the outset, the Committee asserts that this right 'does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international

⁹⁵ Report of the High Commissioner (2001), para 38.

⁹⁶ E/C.12/2021/1 (23 April 2021), paras 3 and 7–13. See Chapter 32.

⁹⁷ De Schutter (2011). ⁹⁸ Chapman (2002) 872–3.

agreements.⁹⁹ The right to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he or she is the author is a *human right*, which derives from the inherent dignity and worth of all persons, while intellectual property rights are first and foremost *means* by which states seek to advance societal interests, namely to 'provide incentive for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.'¹⁰⁰ The right under Article 15(1)(c) is essentially aimed at safeguarding the personal link between authors and their creations and allowing them to enjoy an adequate standard of living, whereas intellectual property regimes 'primarily protect business and corporate interests and investments.'¹⁰¹ Ultimately, 'intellectual property is a social product with a social function.'¹⁰²

The Committee thus distinguishes the right under Article 15(1)(c) from intellectual property rights.¹⁰³ Yet the approach developed in the General Comment denotes a conceptual framework that 'is still largely influenced by existing intellectual property rights frameworks.'¹⁰⁴ According to the Committee, the 'moral interests' referred to in the provision include the right of authors to be recognized as the creators of their intellectual productions and to object to any distortion, mutilation, or modification which would be prejudicial to their honour and reputation.¹⁰⁵ The protection of 'material interests' is meant to allow authors to enjoy an adequate standard of living.¹⁰⁶ Among the obligations imposed on states lies the duty to 'prevent the unauthorized use of scientific, literary and artistic productions that are easily accessible or reproducible through modern communication and reproduction technologies.' This may be achieved 'by establishing systems of collective administration of authors' rights or by adopting legislation requiring users to inform authors of any use made of their productions and to remunerate them adequately.'¹⁰⁷

Furthermore, the Committee asserts that states should take action to effectively protect the interests of indigenous peoples in relation to their intellectual productions, which are often expressions of their cultural heritage and traditional knowledge.¹⁰⁸ As seen already, a similar obligation has also been derived by the Committee from the right to take part in cultural life, which in its view entails a duty to defend the cultural productions of indigenous peoples, including their traditional knowledge and natural medicines, against unjust exploitation by state entities or private companies.¹⁰⁹

The rights of authors, scientists, and inventors can be subject to limitations provided they are compatible with the essential aims of the right, namely protecting their personal

⁹⁹ CESCR, General Comment 17, HRI/GEN/1/Rev.9 (Vol I) 123, para 2. By contrast with ICESCR, Art 15(1)(c), CFREU, Art 17(2) explicitly protects intellectual property.

¹⁰⁰ CESCR, General Comment 17, para 1.

¹⁰¹ CESCR, General Comment 17, para 2.

¹⁰² CESCR, General Comment 17, para 35.

¹⁰³ The UN Special Rapporteur in the field of cultural rights has taken a similar approach: see Copyright policy and the right to science and culture, A/HRC/28/57 (24 December 2014), paras 26–9 and Patent policy and the right to science and culture, A/70/279 (4 August 2015). For a critical discussion of these reports, see Macmillan, 'Copyright Policy and the Right to Science and Culture' in Beider and Porsdam (2017) 181; and Käll, 'Patent Policy and the Right to Science and Culture' in Beider and Porsdam (2017) 199.

¹⁰⁴ Cullet (2007) 422.

¹⁰⁵ CESCR, General Comment 17, para 13.

¹⁰⁶ CESCR, General Comment 17, para 15.

¹⁰⁷ CESCR, General Comment 17, para 31.

¹⁰⁸ CESCR, General Comment 17, para 32.

¹⁰⁹ CESCR, General Comment 21, para 50(c). The Committee has also inferred from the right to science an obligation for states to protect indigenous peoples' traditional knowledge, including through a special intellectual property regime (General Comment 25, para 39).

link with their creation and allowing them to enjoy an adequate standard of living.¹¹⁰ Significantly, the Committee calls for an adequate balance to be struck between state obligations under Article 15(1)(c) and under the other provisions of the Covenant:

In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration. States parties should therefore ensure that their legal or other regimes for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant.¹¹¹

In particular, states parties 'have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education.'¹¹²

Importantly, the Committee insists that the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which one is the author is intrinsically linked to the other rights recognized in Article 15, the right of everyone to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, as well as the right to artistic and academic freedom. The relationship between these rights 'is at the same time mutually reinforcing and reciprocally limitative'.¹¹³ The Committee thereby calls for a holistic interpretation of Article 15 ICESCR, implying the search for a fair equilibrium between the rights of authors and inventors to the protection of their private interests and the right of the public to access culture and science.

6 CONCLUSION

The cultural rights recognized in Article 27 UDHR and Article 15 ICESCR have traditionally been neglected in human rights theory and practice. Today, however, these rights are attracting growing attention. They prove to be particularly relevant to some crucial debates of our time, such as how to protect local cultures in the face of economic globalization; how to safeguard indigenous peoples', minorities', and migrants' rights to preserve their cultural heritage; how to ensure access for all to essential scientific advancements; or how to prevent intellectual property rules from hindering the enjoyment of human rights. Nonetheless, many interpretive questions remain. Two issues in particular are likely to continue to generate discussions in the years to come. One is how to develop an effective protection of cultural life given the very broad conception that has been endorsed by the Committee on Economic, Social and Cultural Rights, as including both culture as intellectual and artistic expressions and culture in the anthropological sense. A second critical question is how to find the right balance between the different components of Article 15 ICESCR, in particular the right of authors and inventors to the protection of their interests, on the one hand, and, on the other hand, the right of everyone to access culture and science.

¹¹⁰ CESCR, General Comment 17, para 23.

¹¹¹ CESCR, General Comment 17, para 35.

¹¹² CESCR, General Comment 17, para 35.

¹¹³ CESCR, General Comment 17, para 4.

FURTHER READING

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- VRDOLJAK (ed), *The Cultural Dimension of Human Rights* (Oxford University Press, 2013).

USEFUL WEBSITES

UN Committee on Economic, Social and Cultural Rights: <<http://www2.ohchr.org/english/bodies/cescr/>>

Day of General Discussion on 'The right to take part in cultural life', UN Committee on Economic, Social and Cultural Rights, 9 May 2008 (including background papers from experts): <<http://www.ohchr.org/EN/HRBodies/CESCR/Pages/DiscussionMay2008.aspx>>

Day of General Discussion on 'The right to enjoy the benefits of scientific progress', UN Committee on Economic, Social and Cultural Rights, 9 October 2018 (including background papers from experts): <<https://www.ohchr.org/EN/HRBodies/CESCR/Pages/Discussion2018.aspx>>

UN Special Rapporteur in the field of cultural rights: <<http://www.ohchr.org/EN/Issues/CulturalRights/Pages/SRCulturalRightsIndex.aspx>>

QUESTIONS FOR REFLECTION

1. Is there a common thread that unites the different rights recognized in Article 15 ICESCR or should they be considered as different rights artificially grouped together?
2. The understanding of 'cultural life' within the meaning of Article 15(1) ICESCR has evolved from initially referring to intellectual and artistic expression to also include the protection of a specific way of life. Do you think this evolution strengthens or undermines the right to take part in cultural life?
3. How should cultural practices that contradict certain human rights, in particular women's rights, be analysed from the viewpoint of cultural rights?
4. Compared to the other rights recognized in the ICESCR, what is the added value of the right of everyone to enjoy the benefits of scientific progress and its applications?
5. To what extent can the right of authors and inventors to the protection of their moral and material interests under Article 15(1)(c) ICESCR be distinguished from intellectual property regimes?