

WHY ARE ONLY INDIGENOUS PEOPLES INTERNATIONALLY ENTITLED
TO A SPECIFIC RIGHT TO THEIR OWN CULTURE?

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Good afternoon and thanks to everybody. Thanks for your invitation. Thanks for your attendance. Thanks for giving me this opportunity to share ideas with all of you about human rights, about the particular human rights of indigenous peoples. As you surely know, only one year and few months ago, on September 13, 2007, the United Nations General Assembly adopted a new human rights instrument, the Declaration on the Rights of Indigenous Peoples. After this adoption of the Declaration, one may wonder why there are human rights only for a particular kind of people. Aren't human rights the rights of everybody, of every human being, with no discrimination whatsoever? This is actually the question that I will try to address in my presentation here. I will focus on the right to one's own culture as a particular right which indigenous peoples are entitled to.

Let me start with a brief philosophical or rather anthropological reflection on the value of human cultures in the plural. It is pretty simple. All of us –all human beings– have become socialized in a particular culture, one of the many cultures that exist in the world. Moreover, we all become individual beings through a particular culture. All of us –all human beings– develop into individual persons through the culture in which we are born and brought up. Amongst all mammal species, with the sole exception perhaps of marsupials, humans are the most defenceless and dependent creatures at birth.

Nevertheless, compared with all the other species, we are also born with the greatest potential for empowerment and independence, for being individuals in our own right. We are not born with this capacity, we only gain it through the specific culture which enables us to individuate and socialize. Through this process we expand our capacities and achieve independence, we can even adopt other cultures or even choose among several in the planning and development of our lives. If we do this out of our own free will and not under pressure or obligation, the specific culture in which we have individuated and socialized always constitutes the background for further personal development. This is the outstanding value of culture, of all human cultures.

In European languages, the word *culture* has a twofold meaning. A second, different meaning is the one that prevails in these languages as well as in the human rights international law. This other meaning of culture refers to something that one can acquire through education and effort. It is a notion of cultures that serves to distinguish people who have accessed to a learned or trained status. According to this notion, culture could be something that lofty people would have and grass-root people wouldn't.

There is however a more essential notion of culture, according to which there are no cultured or uncultured people, there is no civilized or uncivilized humanity. Civilizations are after all cultures among cultures, cultures that deem themselves to be superior or exclusive through having spread at the expense of other cultures.

As a matter of fact, in current legal talk, the right to culture refers to the less basic meaning of additional abilities and skills acquired through formal education and deliberate training. According to this meaning, the right to culture covers a wide variety of objects which ranges from creative artefacts to technical utilities. This is usually the way that the right to access to culture and its rewards is considered. However, this approach is meaningless when we refer to culture as the basis and means for the individuation and socialization of human beings. This primary definition of culture means something not just more fundamental but also more generalized. By our birth and upbringing we have all acquired at least one culture, which has created us as individuals and empowered us as persons.

With this introduction –a mere reminder of pure anthropological evidence, I guess– we might assume that the right to culture in its basic and general sense must take precedence over all human rights. It can of course be argued, instead, that the first human right is the right to life. No question about this. Yet the right to life must be the right not just to one's plain physical existence but to a human life in conditions of dignity, which ought to include the right to one's own culture, precisely.

If the right to life is reduced to the strictest meaning of physical existence, it does not take precedence since it is then an intransitive principle, a principle with no consequence for other rights. The right to life by itself does not demand a polity grounded on further rights. It may even be argued that an authoritarian or theocratic regime which offers no guarantee of human rights may more effectively protect physical

existence. We can only have polities founded on human rights if we include in the right to life the requirement of a dignity which includes respect towards everybody's cultures.

This right to one's own culture adds something in constructive terms. In accordance with it, the legal system must first and foremost afford human beings peaceful enjoyment of the culture in which they individuate and socialize so that they are not forced to adopt another in detriment to that which is theirs by upbringing or option. Consequently, human groups with their own culture must enjoy the due recognition and the necessary conditions for that culture to prosper in peace among other cultures and develop in a suitable environment of social autonomy or even self-government.

This implies that the right to one's own culture is not only an individual right, but has also a collective dimension. The group must have right to the maintenance and development of its culture, to enjoy the entitlement and the means to collective, not just individual peaceful existence. The right to culture thus serves to identify not only individual subjects entitled to rights but also collective subjects entitled to powers. If the individuals' right to her or his culture is the first founding right, social cultures should have the potential to become distinct political communities, thus including the collective right to the establishment of some kind of polity by themselves and in relation to others.

This is not, however, the current conception of human rights in international law. International law does not register the right to one's own culture in its dual dimension, both as either the basic right of the individual and as the collective entitlement of cultural communities. Consider the development of the international human rights instruments since the 1948 Universal Declaration. There is no mention of the right to one's own culture as a common right, a right belonging to everybody. Instead, the right to culture affirmed in the Universal Declaration is the right to acquired abilities along with the right to individual cultural appropriation, which is secondary from the viewpoint of the more essential right to one's own culture, both on an individual and a collective basis.

Note the relevant section of the Universal Declaration of Human Rights: "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. 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” (Art. 27). In the context of the Universal Declaration, the phrasing “cultural life of the community”, a cultural life to which one is supposed to get access in order to participate, does not cover the basic culture that everybody has by birth and upbringing.

The right to one’s own culture as a universal right is not to be found either in the major international instruments regarding human rights, the 1966 Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights. The latter sticks to the path traced by the Universal Declaration of Human Rights: “The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author” (Art. 15.1).

To be sure, rights are affirmed in the international human rights corpus, but note that they come last. The legal literature usually describes a process of historical emergence of human rights, in terms of generations, that endorses a hierarchy among them. Individual personal rights would come first, followed by collective political and social rights, and cultural rights taking the third and last place. This is the sequence kept by the Universal Declaration and the Covenants on Civil, Political, Economic, Social, and *Cultural* Rights.

The right to culture is conceived as a last generation right because it is seen as referring to culture in the sense of skills and products, not the one regarding human individuation and socialization. So the problem is not simply one of relegation, but of substitution. The right to culture as affirmed in international instruments may indeed substitute the primary right to one’s own culture. This is actually what happens if the political, religious, or social actors that should secure the right to culture, including the State, do not belong to the same basic culture of the individual and, furthermore, do not respect it.

If the State is in tune or even identifies with a culture which is not the individual’s by birth and upbringing, it may actually violate the basic right to one’s own culture. Presumed fulfilment of a right (the right to culture as acquired abilities through education) may actually disregard and even violate a core human right (the right to one’s own culture). In multicultural environments, this violation is the outcome of compulsory State policies aimed at citizenship-making.

The issue of citizenship-building was present before the United Nations at the time in which the Universal Declaration was drafted. In fact, it was discussed through the debates of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which was approved by the United Nations General Assembly just one day before the adoption of the Universal Declaration. This Convention affirms that genocide involves any “intent to destroy, in whole or in part, a national, ethnical, racial or religious group” not only directly by means of mass killing but also by indirect methods such as “forcibly transferring children of the group to another group” or also through other policies “causing serious (...) mental harm to members of the group” (Art. 2). If the forcible transferring of children or these other policies have a genocidal effect it is not because people die, but because the distinctive culture of a group can be wiped out. It appears that the very existence of a community depends on its culture.

According to the Universal Declaration of Human Rights, and under the parallel Genocide Convention, what constituted genocide when applied to children could be legitimate in the case of adults. So to speak, cultural genocide was then allowed as far as it was perpetrated against grown-up people rather than children.

This can also be noted in the following provision of the Covenant on Economic, Social and Cultural Rights: “Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all” (Art. 14). Nothing is said about the content of “compulsory education” in State Party’s “metropolitan territory or territories under its jurisdiction, still including colonial territories. No caveat is made on behalf of the people possessing cultures different from the dominant one.

States can and usually do identify with a culture that is not shared by all their citizenry, or still less, by all the people living within their borders, including colonial territories. States could perfectly impose their own culture as a way of achieving citizenship integration or preparation for it, and thereby as a requirement for the enjoyment and guarantee of human rights. Citizenship-making could have the same effect as the abduction of children in terms of the elimination of culture. Cultural genocide was actually allowed.

This was the way in which international human rights law was initially formulated regarding cultural rights. On an international scale, fortunately, human rights have significantly developed in this realm. Let's now focus on these developments.

As we all know, the two International Human Rights Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights, since they were adopted in 1966 or rather when they entered into force in 1976, have represented the most relevant development and consolidation of international human rights law. Yet they are not restricted to developing and consolidating the provisions and assumptions established by the Universal Declaration of Human Rights. The Conventions did not only consolidate the provisions and assumptions established by the Universal Declaration. They introduced a number of innovations, one or two of them vital momentous for the right to one's own culture.

One of these innovations is the inclusion of the right to self-determination as a human right and as the first one in the list of human rights. This is the right contained in the Article 1 common to the two Human Rights Covenants: "All peoples have the right of self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

In fact, this right had been affirmed by the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, as the founding principle of an international decolonisation policy. According to the 1960 Declaration; "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation" (Art. 1); "All peoples have the right of self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (Art. 2, the first one with the Human Rights Covenants). The affirmation of the right to self-determination freed the progress of human rights law from many obstacles.

The change for a specific right to one's own culture appears in 1966 with the Covenant on Civil and Political Rights. It is interesting to note that the right is affirmed as part of the list of civil and political rights, and not as part of the economic, social and *cultural* rights. It doesn't appear in the Convention on Economic, Social and Cultural Rights. This is not misplacement, but rather a rectification in the assumptions of the

Universal Declaration in this regard. The change lies in an Article which really paves the way for a new subject in the international development of human rights until that time. Here it is: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language” (Art. 27).

This Article, the Article 27 of the Covenant on Civil and Political Rights, affirms the right to one’s own culture as a primary right only for those belonging to what are generically described as minorities. In the organization chart of the United Nations, *minority* was until then a category used to identify a subsidiary body (the former Sub-Commission on Prevention of Discrimination and Protection of Minorities, which in 2000 was re-named as Sub-Commission for the Promotion and Protection of Human Rights that has been succeeded by the Human Rights Council Advisory Committee). It was not until 1966 that the category of *minority* appeared in the international human rights law proper.

In its new function in the context of human rights law, the term *minority* replaced the more dignified name of *community* which appears in the Universal Declaration as the suitable environment for the free development of individual personality (Art. 29.1: “Everyone has duties to the community in which alone the free and full development of his personality is possible”). Note that the reference in the Universal Declaration is to duties, not to the right to one’s own community. This wasn’t even implied. Only Article 27 of the Covenant on Civil and Political Rights affirms the right to community, but just for “people belonging to minorities”, not for everybody. Thus, in human rights law, *minority* substitute *community* regarding to people not belonging to States’ or dominant cultures.

Article 27 of the Covenant on Civil and Political Rights does recognize the cultural life of the communities called minorities, though only as an individual right enjoyed by persons belonging to the community. This individuals’ right to a minority culture has played a ground-breaking effect at the very heart of the United Nations. For instance, in the specific context of indigenous peoples, the Human Rights Committee, the international body responsible for the supervision of the Covenant on Civil and Political Rights, have interpreted Article 27 in a way that extends the object of the right

to one's own culture to a material terrain, that of lands and resources, necessary for the practice "in community" of immaterial practices such as language and religion.

There are further signs pointing to the strengthening of the right to one's own culture. In 1989, the International Convention on the Rights of the Child grants children and adolescents the same rights as adults. This is an important development because the 1959 Declaration of the Rights of the Child did not do so. The 1989 Convention refers to the rights of persons belonging to a minority in the following terms: "In those States in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language" (Art. 30). The case of indigenous people stands out in its own right, differentiating from minority rule, as concerns the right to one's own culture. The Committee on the Rights of the Child, the supervisory body of this Convention, has given a particular attention to indigenous children's right to their own culture thus reinforcing this recognition.

Another sign has appeared through the debates of the 1992 Declaration of the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities. This Declaration explicitly develops Article 27 of the Covenant on Civil and Political Rights, the one referring to the right to one's own culture. Yet, as a matter of fact, it is not a great step forward. In contrast to all that was proposed and debated during the drafting process, the suggestions emanating from the jurisprudence of the Human Rights Committee and from the Convention on the Rights of the Child were not taken up. Thus, though there is a reference to peoples in the preamble –to indigenous peoples to be sure– the 1992 Declaration neither made a difference between the so-called minorities and indigenous peoples, nor added the material dimension of culture to the right to one's own culture.

Indigenous individuals and groups voiced their dissatisfaction with being reduced to minorities through Article 27 of the Covenant on Civil and Political Rights. They argued that their rights should be covered instead by another Article of the same international instrument, the Article shared with the Covenant on Economic, Social and Cultural Rights, Article 1 of both Human Rights Covenants: "All peoples have the right

of self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

“All peoples have the right of self-determination”, all but indigenous peoples since they were then not deemed peoples by international law. In 1989, when the International Labour Organization came to adopt a Convention concerning Indigenous and Tribal Peoples in Independent Countries, it stated that “The use of the term peoples in this Convention shall not be construed as having any implication as regards the rights which may attach to the term under international law” (Art. 1.3). All peoples are peoples except for indigenous peoples.

Cultural rights as everybody’s rights and not only minorities’ rights come always at the end in the list of human rights, after civil, political, economic and social rights. Nonetheless, since the right to self-determination –a right to political, economic, social, and cultural self-determination– is affirmed as a human right, the right to one’s own culture does come at the very beginning for non-indigenous peoples. The right to self-determination is the right to one’s own culture, phrased as the right to cultural self-determination, a right that has been historically granted to everybody but indigenous peoples. This collective right turns out to be a foundation, a shield, and a guarantee for the individuals’ human rights that immediately follow in the Human Rights Covenants.

According to the right to self-determination, peoples’ cultures cannot be guaranteed in political arrangements based on cultures, official or not, that obviously differ from the groups’ cultures, from the cultures of the so-called minorities, indigenous or not. This is why the right to self-determination stands as a founding principle of both international decolonization and individuals’ human rights. Notice that, before and after decolonization, non-indigenous people do not need to be entitled to a specific right to their own culture because they are entitled to the right to self-determination including the right to cultural self-determination.

Here lies the important difference between peoples and minorities’ rights in the existing international law. Members of minorities have a right to their own culture guaranteed by a State with a different culture, in contrast to non-indigenous and mainstream peoples. Therefore, indigenous representatives voiced their opposition to being reduced to minority regimes before the United Nations itself and other international forums. By doing so, they have contributed to the development of an

international instrument of indigenous rights, and more particularly to the drafting of a Declaration on the Rights of Indigenous Peoples.

In 2006, the Human Rights Commission was promoted to the category of Human Rights Council, no longer a subsidiary body of the Economic and Social Council. In its first session, the Council adopted the draft of the Declaration on the Rights of Indigenous Peoples. In 2007, after some minor changes were negotiated with indigenous representatives, , as the whole draft had been, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples. The Declaration uses the term *peoples* in the same sense as the shared Article 1 of the two Human Rights Covenants. At last, all peoples are all peoples. Period.

Briefly put, it may be said that the Declaration on the Rights of Indigenous Peoples grants indigenous peoples' full peoples' status. The declaration finally upholds indigenous peoples' right to cultural self-determination as a collective requirement and expression of the individuals' right to his or her culture: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (Art. 3); "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture" (Art. 8.1).

In the Draft Declaration, the affirmation of the right to cultural self-determination and the specific right to one's own culture via the right not to be subjected to its destruction was strengthened by the explicit outlawing of cultural genocide. Since the cultural kind of genocide is not a crime described by international law, the reference was finally cut out. It made sense. The final version still keeps the core meaning: "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."

The right to one's own culture is not an exclusive right of indigenous peoples or rather it ought not to be. Quite the opposite, all peoples should enjoy human rights on an equal footing. Why do indigenous peoples need a specific affirmation of this right? By now we know. Indigenous peoples had not been recognized as peoples and therefore indigenous individuals have not shared human rights on an equal footing. This is why their rights need to be explicitly added to the rights that the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights upheld for all peoples and persons.

Indigenous peoples had been excluded from the phrase *all peoples* as well as indigenous individuals from the phrase *all the people*. Now it is time to make amends for the delay in order to guarantee equality. It should not have been necessary to make a special declaration for indigenous people regarding what is covered in generic terms, without mentioning exclusions. Yet the fact is that the 2007 Declaration is necessary because the burden of colonialism in international law has hindered equality even after decolonization.

The Declaration on the Rights of Indigenous Peoples does not confer rights to indigenous people that non-indigenous people lack. It might even appear to have been the opposite. In prior existing international law, as we have seen, indigenous peoples in particular, and persons belonging to minorities in general, enjoy the right to their own cultures, a right which thus specifically is not included in the human rights instruments for non-indigenous people or persons who are not members of a minority. In reality it is not that this right to one's own culture has not existed for these other people, the non-indigenous people, since the Universal Declaration of Human Rights, even so before the Covenants, but rather that it was an inferred right, just for them, for non-indigenous and mainstream people in their respective polities, not for minorities or for indigenous peoples. Human rights law is still somehow burdened with the impairing consequences of colonial history.

The appearance of reverse discrimination or positive action in favor of indigenous people and persons belonging to minorities through recognizing their right to their own culture has covered up the persistence of a profound discrimination against them. Non-indigenous people enjoy a right to their own culture that does not need to specifically be affirmed by international law because it is implicitly guaranteed by the State that identifies with their culture.

There is no need to affirm this specific right to one's own culture for non-indigenous people, while, for indigenous people, the Declaration on their rights includes about thirty explicit references to their cultures. The general right to one's own culture does exist with no need to specifically uphold it for those groups that are fortunate enough to live in a State that shares their culture. States still tend to protect and promote the cultures they identify with, and therefore the right of persons to the enjoyment of that culture. This is then the true reason why such an essential right as the right to one's own culture has not been specifically recognized until now as a human

right. It is the end result of the fact that international rule of law is still founded on States' powers rather than people's rights, at the expense of minorities and the like.

Thanks very much for your time and attention. Thanks in advance for your comments and questions.

REFERENCES:

Alfredsson, Gudmundur, and Stavropoulou, Maria, eds. (2002), *Justice Pending: Indigenous Peoples and Other Good Causes. Essays in Honour of Erica-Irene A. Daes*, Springer Verlag.

Anaya, S. James (2004), *Indigenous Peoples in International Law*, updated ed., Oxford University Press.

Clavero, Bartolomé (2008), *Genocide or Ethnocide, 1933-2007: How to Make, Unmake and Remake Law with Words*, Giuffrè Editore.

Geertz, Clifford (1965), *The Impact of the Concept of Culture on the Concept of Man*, in John R. Platt, ed., *New Views of the Nature of Man*, University of Chicago Press, 93-118; collected in C. Geertz, *The Interpretation of Cultures: Selected Essays*, Basic Books, 1973, 33-54.

Ghanea, Nazila, and Xanthaki, Alexandra, eds. (2005), *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry*, Brill Academic Publishers.

Hadjiioannou, Marina (2005), *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples under International Law*, 8 CHAPMAN L. REV., 201-228.

Keal, Paul (2003), *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society*, Cambridge University Press.

Morsink, Johannes (1999), *Cultural Genocide, the Universal Declaration, and Minority Rights*, 21 HUM. RTS. Q., 1009-1060.

Musgrave, Thomas D. (1997), *Self-Determination and National Minorities*, Oxford University Press.

Simpson, Tony (1997), *Indigenous Heritage and Self-Determination: The Cultural and Intellectual Property Rights of Indigenous Peoples*, International Work Group for Indigenous Affairs.

Thornberry, Patrick (2002), *Indigenous Peoples and Human Rights*, Manchester University Press.

van Krieken, Robert (2002), *Reshaping Civilization: Liberalism between Assimilation and Cultural Genocide*, 29-2 AMSTERDAMS SOCIOLOGISCH TIJDSCHRIFT, 1-38.

Xanthaki, Alexandra (2007), *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge University Press.