

# **The Right of Access to and Enjoyment of Cultural Heritage**

## **A Link Between the Protection of Cultural Heritage and the Exercise of the Right to Participate in Cultural Life**

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**Abstract** The present paper argues that the right of access to and enjoyment of CH is an emerging right under international law and can play a pivotal role in linking the protection of human rights, in particular the one to take part in cultural life, to the safeguard of CH. It will analyze the provisions of the international legal instruments which make reference to the concepts of access to and enjoyment of CH, the practice of the international monitoring bodies and human right courts which have played an important role in the definition of the right of access to and enjoyment of CH, and it will briefly examine the practice of some States.

**Summary** 1 Introduction. – 2 The Protection of CH in Relation to Human Rights. – 3 The Right to Participate in Cultural Life in Relation to CH. – 4 The Right of Access to and Enjoyment of CH. – 5 The Practice of the International Human Rights Courts and Treaty Bodies with Regard to the Right of Access to and Enjoyment of CH and Some Examples of State Practice. – 6 Individual Communications to the CESCR as a Way to Monitor the Implementation of the Right to Take Part in Cultural Life. – 7 Conclusions.

**Keywords** Access. Cultural heritage. Right to participate in cultural life.

### **1 Introduction**

The present work aims to show that the right of access to and enjoyment of CH is an emerging right under international law and can play a pivotal role in linking the protection of human rights, in particular the one to take part in cultural life, to the safeguard of CH.

The paper will provide, first of all, an analysis of the provisions of the international legal instruments which make reference to the concepts of access to and enjoyment of CH, such as the CoE Faro Convention and the ICESCR, read through the interpretation given by the CESCR General

Comment no. 21 on the right of everyone to take part in cultural life.<sup>1</sup> It will then examine the practice of the international monitoring bodies, such as the UN HRCO, and human right courts, especially the ICtHR, which have played an important role in the definition of the right of access to and enjoyment of CH, in particular for what concerns indigenous peoples. Furthermore, some examples of State practice related to the protection of the right of access to and enjoyment of CH, which demonstrate that such right has been increasingly recognized by domestic legal systems, will be briefly illustrated.

In the last paragraph, it will be explored how the individual communications system under the 2009 Optional Protocol to the ICESCR represents a way to monitor the conduct of States in case of alleged violation of the right of access to and enjoyment of CH as a component of the right to participate in cultural life.

## 2 The Protection of CH in Relation to Human Rights

Throughout the past six decades, a well-developed body of international law instruments has been set up in order to regulate the protection of CH. These instruments, in most of the cases developed within the framework of UNESCO, cover an extensive range of aspects related to heritage, including its protection during armed conflicts, the prohibition of the illicit circulation of cultural objects, the protection of underwater and ICH.<sup>2</sup>

Yet, some international legal instruments have only recently incorporated a human rights approach to CH. In this regard, the 2003 UNESCO Declaration states that:

CH is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights.<sup>3</sup>

Additionally, the Declaration emphasizes that other norms linked to human rights can be violated in the case of intentional destruction of CH.<sup>4</sup>

1 UN CESCR, General comment no. 21, *Right of everyone to take part in cultural life*. Art. 15(1)(a) of the CESCR, 21 December 2009, E/C.12/GC/21.

2 See, *inter alia*, 1954 Hague Convention, and its two Protocols; 1970 UNESCO Convention; 1972 UNESCO Convention; 2001 UNESCO Convention; 2003 UNESCO Convention.

3 Recital 4 of the Preamble.

4 In applying this Declaration, "States recognize the need to respect international rules related to the criminalization of gross violations of human rights and international hu-

This statement underlines the acknowledgement of the existence of a link between protection of CH and human rights.

While other international legal instruments, such as the 1954 Hague Convention or the 1972 UNESCO Convention, insisted on the importance of CH for mankind or humanity, the 2003 UNESCO Convention has adopted a more community-based concept of heritage. For the Convention:

[t]he ICH means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their CH.<sup>5</sup>

The 2003 UNESCO Convention has thus included in the definition of heritage valid within its purposes a description that validates the value that CH has for communities, groups and even individuals. This is, indeed, inextricably linked to the concept of ICH, which revolves around the importance of the process of creation and transmission from generation to generation and is intimately related to its so-called ‘source communities’.

The same article of the Convention underlines another aspect of the relationship between intangible CH and human rights. The Convention considers and thus recognizes protection solely to such intangible heritage that is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals. This provision is fundamental, since it sets forth possible limitations to the enjoyment of CH.<sup>6</sup>

However, the legal instrument that more extensively recognizes a relation between CH and human rights is the Faro Convention. The Convention underlines the need to put people and human values at the centre of an enlarged and cross-disciplinary concept of CH.<sup>7</sup> In art. 4 the Convention states that the Parties to the Convention agree to:

recognise that rights relating to CH are inherent in the right to participate in cultural life, as defined in the Universal Declaration of Human Rights.

manitarian law, in particular, when intentional destruction of cultural heritage is linked to those violations” (art. 9).

5 Art. 2(1) of the Convention.

6 Other human rights issues related to CH include, among others, the extent to which individuals and communities participate in the identification, selection, interpretation, preservation and safeguarding, the possible limitations to the right and how to resolve conflict and competing interests over CH.

7 Para. 2 of the Preamble of the Convention.

Interestingly, the Convention, instead of setting out a unique and autonomous right, identifies a plurality of rights relating to CH. These rights are, among others, those to benefit from CH and to contribute towards its enrichment,<sup>8</sup> to participate in the process of identification, study, interpretation, protection, conservation and presentation of the CH<sup>9</sup> and to have access to it.<sup>10</sup>

Analysing this process of cross-fertilization between human rights and international CH law, the UN Independent Expert in the Field of Cultural Rights,<sup>11</sup> Farida Shaheed, stated that:

a shift has taken place from the preservation/safeguard of cultural heritage as such, based on its outstanding value for humanity, to the protection of cultural heritage as being of crucial value for individuals and communities in relation to their cultural identity.<sup>12</sup>

As a result of these evolutions, the various intersections between CH and human rights have been the object of extensive analyses by many legal scholars (Vrdoljak 2013; Blake 2011).

One of the main issues that emerge from these investigations is whether an autonomous right to CH could be considered as existing under international law. The answer to this question is central to providing content for cultural rights, in particular for the right to take part in cultural life, as enshrined by the ICESCR at its art. 15(1)(a) and by the UDHR at its art. 27(1).<sup>13</sup> In addition, the recognition of the existence of such a right could entail the possibility to monitor the conduct of State Parties in relation to the implementation of this right through the mechanisms offered by international law, such as, as it will be further explained, the 2009 Optional Protocol to the ICESCR.

At international level, there is a tendency towards recognizing the im-

8 Art. 4(a).

9 Art. 12(a)-(b).

10 Arts. 12 (d) and 14. See, on this point, Zagato 2015.

11 The HRco, through resolution 10/23, decided to establish, for a period of three years, a new special procedure titled "independent expert in the field of cultural rights". The mandate was extended in 2012 for a period of three years, conferring to the current mandate holder the status of Special Rapporteur in the field of cultural rights (resolution 19/6). This mandate was further extended in 2015 for a period of three years through resolution 28/9 of 10 April.

12 'Report on the Right of Access to CH, UN Doc. A/HRC/17/38.

13 The UDHR mentions the right to participate in cultural life. However, as the General Comment underlines in para. 14, the terms 'to participate' and 'to take part' have the same meaning and are used interchangeably in other international and regional instruments.

portance of the right(s) to CH. One of the most significant steps in this regard was the adoption of a binding legal instrument, such as the above-mentioned Faro Convention, which explicitly recognizes certain 'rights' related to CH and to 'heritage communities'.

However, despite the fact that a regional treaty identifies the existence of such rights, their universal value remains questionable. In those States which ratified the Faro Convention some rights to CH can be considered as existing, though not enforceable,<sup>14</sup> while this cannot be assumed with regards to other States.

None of the UNESCO Conventions on CH contain a provision which protects the right to CH *per se*. Furthermore, the only provisions which have reached the status of customary law are those which prohibit the intentional destruction of heritage - if not in case of imperative military necessity<sup>15</sup> - or other specific acts taking place during armed conflict; and, for some authors, those protecting the cultural rights of specific groups, in particular of indigenous peoples (Milligan 2008).<sup>16</sup> However, these provisions do not cover all the other aspects associated to the rights to CH, such as, for instance, that of participation in the process of study, interpretation, protection, conservation and presentation of the CH or that of access to heritage of society at large.

### 3 The Right to Participate in Cultural Life in Relation to CH

If a norm which explicitly recognizes a right to CH as such cannot be identified, as underlined by the Independent Expert,<sup>17</sup> one cannot disregard the interpretation of art. 15(1)(a) of the ICESCR provided by the CESCR General Comment no. 21 on the right of everyone to take part in cultural life.<sup>18</sup>

Art. 15(1)(a) of the ICESCR states that the States Parties recognize the right of everyone to take part in cultural life. Para. 16 of the General Comment suggests that there are some necessary conditions for the full

<sup>14</sup> See art. 6(c) of the Faro Convention.

<sup>15</sup> For the definition of imperative military necessity see art. 4(2) of the 1954 Hague Convention and art. 6 of its Second Protocol.

<sup>16</sup> Some authors have argued that States have the obligation to protect CH also in time of peace: Francioni, Lenzerini 2003. For an overview on this point see Francioni 2011. Some authors have investigated the possibility that other norms have reached the status of customary international law; see, on this point, Zagato 2015.

<sup>17</sup> Para. 21 of the Report.

<sup>18</sup> UN CESCR, General comment no. 21, *Right of everyone to take part in cultural life*. Art. 15(1)(a) of the Covenant on Economic, Social and Cultural Rights, 21 December 2009, E/C.12/GC/21.

realization of this right on the basis of equality and non-discrimination. The first of these conditions is that of the 'availability' of cultural goods and services, including elements of both tangible and intangible CH.<sup>19</sup>

The Comment specifies another aspect related to the right of everyone to take part in cultural life – as well as to the other rights enshrined in the ICESCR – which is the set of obligations States parties need to comply with. These obligations are:

- a. the obligation to 'respect': it requires States parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life. It includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group;
- b. the obligation to 'protect': it requires States parties to take steps to prevent third parties from interfering in the right to take part in cultural life;
- c. the obligation to 'fulfill': it requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in art. 15(1)(a), of the Covenant.<sup>20</sup>

The Comment underlines how, in many instances, the obligations to respect and to protect freedoms, CH and diversity are interconnected.<sup>21</sup> Consequently, the obligation to protect is to be understood as requiring States to take measures to prevent third parties from interfering in the exercise of rights. In addition, it is reaffirmed that States parties are obliged to respect and protect CH in all its forms – in times of war and peace, and natural disasters.

The General Comment continues stating that CH must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures. Such ob-

<sup>19</sup> Availability is defined as: "the presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries, museums, theatres, cinemas and sports stadiums; literature, including folklore, and the arts in all forms; the shared open spaces essential to cultural interaction, such as parks, squares, avenues and streets; nature's gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity; intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as well as values, which make up identity and contribute to the cultural diversity of individuals and communities."

<sup>20</sup> See General Comments no. 13 (1990), paras. 46 and 47, no. 14 (2000), para. 33, no. 17 (2005), para. 28 and no. 18 (2005), para. 22. See also the Limburg Principles on the Implementation of the ICESCR, para. 6.

<sup>21</sup> Para. 50 of the General Comment no. 21.

ligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others.<sup>22</sup>

As suggested by these considerations of the Committee, States' obligations related to the right to take part in cultural life imply the respect and protection of CH in all its forms. In other words, although the General Comment does not explicitly mention a right to CH, it identifies the preservation and transmission of such heritage as a *conditio sine qua non* for exercising the right to take part in cultural life.

#### 4 The Right of Access to and Enjoyment of CH

The Independent Expert in the field of cultural rights, nominated in accordance with HRCo Resolution 10/23, drafted the 'Report on access to and enjoyment of cultural heritage' in 2011.

From the very outset of the Report, it is specified that considering the access to and enjoyment of CH as a human right is a necessary and complementary approach to the preservation/safeguard of CH, since it obliges to take into account the rights of individuals and communities in relation to such object or manifestation and, in particular, to connect CH with its source of production.

The Report of the Independent Expert clearly states that the right of access to and enjoyment of CH forms part of international human rights law, finding its legal basis in the right to take part in cultural life.<sup>23</sup> Other legal bases of this right are identified with the right of members of minorities to enjoy their own culture and with the right of indigenous peoples to self-determination and to maintain, control, protect and develop CH. However, the latter refer only to specific communities, such as minority groups and indigenous peoples.

It must be borne in mind, nevertheless, that the right of access to and enjoyment of CH is set forth by a Report, which is not, in itself, a primary legal source. On the other hand, General Comment no. 21- an authoritative source of interpretation of a binding legal instrument, such as the ICESCR - considers the preservation and transmission of heritage necessary in relation to the right to take part in cultural life. In this framework, the Report of the Independent Expert helps define and understand the relation between the protection of CH and the right to participate in cultural life. In particular, it shows that the concepts of access and enjoyment are fundamental in order to understand the right to participate in cultural life in relation to CH.

22 UNESCO Declaration on Cultural Diversity, art. 7.

23 Para. 78 of the Report.

According to the Independent Expert, access to and enjoyment of CH are interdependent concepts.<sup>24</sup> They convey an ability to, *inter alia*, “know, understand, enter, visit, make use of, maintain, exchange and develop CH, as well as to benefit from the CH and creations of others”, without political, religious, economic or physical encumbrances. Individuals and communities cannot be seen as mere beneficiaries or users of CH. The Independent Expert stresses that effective participation in decision-making processes relating to CH is a key element of these concepts.<sup>25</sup>

Previously to the drafting of the Report, General Comment No. 21 had already elaborated on the concept of access, as a component of the right to take part in cultural life.<sup>26</sup> More specifically, it stated that:

Access covers in particular the right of everyone – alone, in association with others, or as a community – to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the CH and the creation of other individuals and communities.<sup>27</sup>

The concept of access has been developed in detail by the CESCR.<sup>28</sup> Applied to CH, the following must be ensured: a) ‘physical access’ to CH, which may be complemented by access through information technologies; (b) ‘economic access’, which means that access should be affordable to all; (c) ‘information access’, which refers to the right to seek, receive and impart information on CH, without borders; and d) ‘access to decision making and monitoring procedures’, including administrative and judicial procedures and remedies.

According to the Report of the Independent Expert, all - including in-

24 Para. 58 of the Report.

25 This approach is reflected in the UNESCO Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It (1976), which defines, access to culture as “concrete opportunities available to everyone, in particular through the creation of appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property”.

26 The other two components are participation in and contribution to cultural life.

27 Para. 51 of the Report.

28 Access is part of the so-called 4A scheme (availability, accessibility, acceptability and adaptability) which is systematically used by the CESCR in its General Comments.



dividuals and groups, the majority and minorities, citizens and migrants – have the right to access and enjoy CH. As stressed by General comment no. 21, the right to take part in cultural life may be exercised alone, in association with others, or as a community. Therefore, according to these sources, the right of access to and enjoyment of CH must be considered both as an individual and a collective human right.

The Independent Expert underlines that varying degrees of access and enjoyment may be recognized, taking into consideration the diverse interests of individuals and groups according to their relationship with specific CHs. Distinctions should be made between: a) originators or ‘source communities’, communities that consider themselves as the custodians/owners of a specific CH, people who are keeping CH alive and/or have taken responsibility for it; b) individuals and communities, including local communities, who consider the CH in question an integral part of the life of the community, but may not be actively involved in its maintenance; c) scientists and artists; and d) the general public accessing the CH of others.

This distinction has important implications for States, notably when establishing consultation and participation procedures, which should ensure, in particular, the active involvement of source and local communities.<sup>29</sup>

It is important to note that some references to the concepts of access to and enjoyment of CH can also be found in several international instruments. The abovementioned Faro Convention explicitly recognizes the right of access to CH and links it to democratic participation.<sup>30</sup> The 2006 Charter for African Cultural Renaissance, at its Article 15, calls on States to “create an enabling environment to enhance the access and participation of all in culture”. Furthermore, the 2000 ASEAN Declaration on CH, apart from referring to the human rights dimension of cultural heritage, mentions the need to ensure that traditional communities have access, protection and rights of ownership to their own CH.<sup>31</sup> Both of them are re-

29 Para. 62 of the Report.

30 According to art. 12 of the Convention, the Parties undertake to:

“a) encourage everyone to participate in:

- the process of identification, study, interpretation, protection, conservation and presentation of the CH;
- public reflection and debate on the opportunities and challenges which the CH represents;

b) take into consideration the value attached by each heritage community to the CH with which it identifies;

c) recognise the role of voluntary organisations both as partners in activities and as constructive critics of CH policies;

d) take steps to improve access to the heritage, especially among young people and the disadvantaged, in order to raise awareness about its value, the need to maintain and preserve it, and the benefits which may be derived from it”.

31 Art. 9 of the Declaration.

gional instruments with non-binding force. However, they demonstrate the increasing importance of the concepts of access to and enjoyment of CH.

## 5 The Practice of the International Human Rights Courts and Treaty Bodies with Regard to the Right of Access to and Enjoyment of CH and Some Examples of State Practice

Some references to the concepts of access to and enjoyment of CH can also be found in the practice of the international treaty bodies and human rights courts. A consistent body of jurisprudence, especially of the IACTHR regards indigenous peoples and their particular relation to CH, which is strictly linked to their ancestral lands. Other judgments, such as those of the ECtHR which will be presented further below, have touched upon issues connected to the right of access to and enjoyment of CH.

One of the most ground-breaking case in relation to indigenous peoples and their culture has been the UN HRC *Lubicon Lake Band v. Canada*.<sup>32</sup>

In this occasion, the HRC stated that:

historical inequities[...] and certain more recent developments[...] threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 [of the ICCPR] so long as they continue.<sup>33</sup>

While, like in this case, the rights of indigenous peoples have sometimes been protected through the rights of minorities, the IACTHR has developed a body of case-law about indigenous people's CH, which includes elements that can be related to the right of access to and enjoyment of CH.

In general, the Court has shown a tendency to address indigenous people's cultural rights by taking into account the vital link between indigenous communities and their ancestral lands, as well as the recognition of their right of collective property on those territories.<sup>34</sup>

The inextricable relation between access to ancestral land and to CH in its broadest sense is clearly dealt with by the *Awatitzi* case.

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis

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32 Communication no. 167/1984, 26 March 1990.

33 Para. 33 of the Communication.

34 In particular, the Court interpreted art. 21 of the American Convention - which protects right to property - in a fairly broad sense, affirming that this provision "protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property".

of their cultures, their spiritual life, their integrity, and their economic survival.<sup>35</sup>

In other words, guaranteeing access to the ancestral territories, due to the link between CH and land, is necessary to guarantee, also, indigenous peoples' access to and enjoyment of CH.

In the *Yakye Axa Community*, the Court concluded that any denial of the enjoyment or exercise of the territorial rights of indigenous peoples is detrimental to values that are very representative for the members of said peoples, who are at risk of losing or suffering irreparable damage to their cultural identity and life and to the CH to be passed on to future generations.<sup>36</sup>

The *Saramaka People v. Suriname* and *Kichwa Indigenous People of Sarayaku v. Ecuador* cases defined the concept of effective participation by the members of indigenous communities in decision-making process, which should be considered one of the most fundamental aspects concerning access and enjoyment of CH.<sup>37</sup>

It shall be borne in mind that, in all the cases presented above, the concepts of access to and enjoyment of CH have been investigated in relation to indigenous peoples, representing a particular group of certain societies. Therefore, if the definition of such concepts has been pivotal for the recognition of the rights of indigenous peoples to their CH- and for the development of a human rights perspective on CH in general - this is cannot be entirely applicable to other situations.

Despite of the exclusion of cultural rights from the ECHR, the ECtHR has dealt with the topic of the rights to CH or, more specifically, with issues related to the right of access to and enjoyment of CH.

Unlike the IACtHR, in cases concerning indigenous peoples, the ECtHR has failed to guarantee the basic rights of access to and enjoyment of

35 *Awaz Tingni Indigenous Community of Mayagna v. the State of Nicaragua*, Inter-Am Court HR, Series C, No. 79, 2001, Para. 149.

36 *Yakye Axa v. Paraguay*, Int-Am Ct. HR, Series C, No. 125, 2005, Para. 135.

37 *Saramaka People v. Suriname*, Int-Am Ct HR 2007. Series C, No. 172, Para. 187; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Int-Am Ct HR 2012, Series C, No. 245, Paras. 165-6. It is interesting to note that the jurisprudence of the IACtHR on this point has been recalled by the ACHPR, for instance in the *Endorois case (Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Case No. 276/2003): "human rights went beyond the duty not to destroy or weaken minority groups, but required respect for, and protection of, "their religious and CH essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues". The Commission recalled one of its statements about art. 17(2). This provision was held to require governments: "to take measures aimed at the conservation, development and diffusion of culture, such as promoting cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions; promoting awareness and enjoyment of CH of national ethnic groups and minorities and of indigenous sectors of the population" (paras. 140-2).

CH.<sup>38</sup> The Court has, instead, embraced an economic approach to ancestral lands, without taking into account the particular value which these territories have for indigenous peoples, thus failing in guaranteeing, also, their basic cultural rights (Francioni 2011, 12).

However, the Court has dealt with issues related to access to and enjoyment of CH also in other occasions. For instance, the judgment *Akdaş v. Turkey*<sup>39</sup> concerned the sentencing of a publisher to a heavy fine for the publication in Turkish of an erotic novel by Guillaume Apollinaire and seizure of all the copies of the book. The Court enshrined the concept of a European literary heritage and set out, in this regard, various criteria for the assessment of the value of a literary work.<sup>40</sup> What is interesting from the perspective of the right of access to CH is that the Court concluded that the public of a given language – in this case Turkish – could not be prevented from having access to a work that is part of such a heritage.<sup>41</sup>

In the case of *Beyeler v. Italy*<sup>42</sup> the ECtHR recognized that, in relation to works of art lawfully on its territory and belonging to the CH of all nations, it is legitimate for a State to take measures designed to facilitate wide public access to them, in the general interest of universal culture.<sup>43</sup> The Court referred to the concept of ‘universal culture’ and ‘CH of all nations’ and linked it to the right of the public at large to have access to it.

In *Debelianovi v. Bulgaria*<sup>44</sup> the applicants had obtained a court order for the return of a house that had belonged to their father and had been turned into a museum in 1956 after expropriation. The National Assembly introduced a moratorium on restitution laws with regard to properties classified as national cultural monuments. Although the Court found a violation of the right to property, on the ground that the situation had lasted for more than 12 years and the applicants had obtained no compensation, it held that the aim of the moratorium was to ensure the preservation of national heritage sites. The Court referred to the Faro Convention and the importance of access to CH.

Besides, with regard to States practice, it should be underlined that the

38 See, inter alia, *Hingitq 53 and Others v. Denmark* (No. 18584/04, ECtHR 2006-I).

39 No. 41056/04, 16 February 2010.

40 These elements are: the author’s international reputation; the date of the first publication; a large number of countries and languages in which publication had taken place.

41 European Court of Human Rights, Research Division, Cultural Rights in the case law of the European Court of Human Rights, available at: [http://www.echr.coe.int/Documents/Research\\_report\\_cultural\\_rights\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf), 8. (2017-12-15).

42 [GC], No. 33202/96, ECtHR 2000-I.

43 Para. 113 of the Judgment.

44 No. 61951/00, 29 March 2007.

right of access to and enjoyment of CH have been increasingly recognized by several domestic legal systems.

Apart from the fact that many national constitutions set forth the obligation for the State to protect and promote CH, some legal systems guarantee the involvement of individuals and communities, groups and individuals in the process of identification and classification of CH. A number of States go even further, providing the participation of the public at large in CH identification processes.<sup>45</sup>

Another important aspect – which will require further analysis – is that of remedies in case of alleged violations of the right of access to and enjoyment of CH. Just to name a few, as underlined by the Independent Expert, in Burkina Faso, citizens may commence proceedings or petition against acts endangering public heritage.<sup>46</sup> Complaints in case of denial of access to CH may be lodged before the Ministry of Culture in Spain, and the courts in Mauritius.

Complaints can also be lodged with the Ombudsman of Portugal in case of lack of participation of concerned communities in the determination of protected cultural landscapes. In Canada, indigenous peoples may also seek redress.<sup>47</sup>

## **6 Individual Communications to the CESCR as a Way to Monitor the Implementation of the Right to Take Part in Cultural Life**

With regard to enforcement measures, it is interesting to focus on the system of individual communications established by the Optional Protocol to the ICESCR. This instrument, if ratified by a State, allows individuals to submit to the CESCR communications in cases of alleged violations of economic, social and cultural rights recognized by the Covenant. It is, indeed, a monitoring mechanism that plays a function of control and that does not lead to any coercive measure in the event that the state is held liable for infringement, in line with the tradition of the treaty bodies of the UN. However, this instrument permits to monitor the conduct of the State Parties in relation, among others, to the right to take part in cultural life.

If a communication regarding the violation of the right to participate in cultural life would ever be submitted to the Committee, the latter should take into account also the obligations of the States related to the right of access to and enjoyment of CH, following the indications contained in General Comment no. 21 and in the Report of the Independent Expert.

<sup>45</sup> Para. 52 of the Report.

<sup>46</sup> Para. 57 of the Report.

<sup>47</sup> Para. 58 of the Report.

In this way, the conduct of the States would be monitored also in those cases in which the exercise of the right of access to and enjoyment of CH is deemed to have been denied.

It is not the purpose of the present work to present the different aspects related to the admissibility and the consideration of an individual communication by the Committee in case of alleged violation of the right of access to and enjoyment of CH. Important aspects concern, for instance, the exhaustion of domestic remedies<sup>48</sup> or the definition of the concept of *clear disadvantage* in relation to the right of access to and enjoyment of CH.<sup>49</sup>

However, the profile that appears to be more problematic for appreciation by the Committee is that of the examination of the conduct of a State. In fact, the Committee would have to consider, in many cases, the lack of intervention by a State, whose appreciation is certainly not easy.<sup>50</sup>

## 7 Conclusions

The concepts of access to and enjoyment of CH, in all the aspects identified by the Report of the Independent Expert and by General Comment no. 21, affirm their significance in the contemporary legal systems. This is shown, as seen above, not only by international treaties, but also by the judgments of the international courts and, to a certain extent, by States practice.

Indeed, these concepts represent fundamental components of the right to take part in cultural life, in the view of guaranteeing the respect the human rights of individuals and communities for which a certain CH is valuable. The General Comment and the Report of the Independent Expert represent authoritative sources of interpretation of these concepts.

The definition of the content of the right to take part in cultural life is of particular importance after the entry into force of the Optional Protocol to the ICESCR in 2013, which allows to file individual communications to the Committee in case of alleged violations of economic, social and cultural rights. In this regard, there are some aspects of the individual communi-

48 Art. 3 of the Protocol.

49 Art. 4 of the Protocol.

50 In a statement to its thirty-eighth session, the Committee listed several criteria that it will apply when evaluating whether steps that states have taken to progressively achieve full implementation of rights contained in the ICESCR are reasonable. These include, among others: "a. The extent to which the measures taken were deliberate, concrete, and targeted towards the fulfilment of economic, social, and cultural rights; [...] c. Whether the state party's decision (not) to allocate available resources was in accordance with international human rights standards. Committee on Economic, Social and Cultural Rights, 'Statement - An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' Under an Optional Protocol To The Covenant'" (UN doc. E/C.12/2007/1, 10 May 2007).

cations filed in case of violation of the right of access to and enjoyment of CH which will be interesting to explore, in particular how the CESCR will determine whether a measure affecting CH adopted by a State could constitute a violation of art. 15 of the Covenant.

## Bibliography

- Blake, Janet (2011). "Taking a Human Rights Approach to Cultural Heritage Protection". *Heritage and Society*, 4(1), 199-238.
- Francioni, Francesco (2011). "The Human Dimension of International Cultural Heritage Law: An Introduction", *The European Journal of International Law*, 22(1), 9-16.
- Francioni, Francesco; Lenzerini, Federico (2003). "The Destruction of the Buddhas of Bamiyan and International Law". *The European Journal of International Law*, 22(1), 619-651.
- Milligan, Ashlyn (2008). "Targeting Cultural Property: The Role of International Law". *Journal of Public & International Affairs*, 19, 91 ff.
- Scovazzi, Tullio; Nafziger, James (eds.) (2008). *The Cultural Heritage of Mankind*. Leiden; Boston: Martinus Nijhoff Publishers.
- Silverman, Helaine; Ruggles, Fairchild D. (eds.) (2007). *Cultural Heritage and Human Rights*. New York: Springer.
- Stamatopoulou, Elissavet (2007). *Cultural Rights in International Law*. Boston; Leiden: Martinus Nijhoff Publishers.
- Vrdoljak, Ana (2013). *The Cultural Dimension of Human Rights*. Oxford: Oxford University Press.
- Zagato, Lauso (2011). "La protezione dell'identità culturale dei popoli indigeni come oggetto di una norma di diritto internazionale generale?" *Thule. Rivista Italiana Di Studi Americanistici*, 26/27-28/29, 165-195.
- Zagato, Lauso (2015). "The Notion of 'Heritage Community' in the Council of Europe's Faro Convention. Its Impact on the European Legal Framework". Adell Nicolas; Bendix Regina; Bortolotto Chiara; Tauschek Markus (eds.), *Between Imagined Communities and Communities of Practice. Participation, Territory, and the Making of Heritage*. Göttingen: UniversitätVerlag Göttingen, 141-168.

