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Cultural rights in the Case- Law of the International Court of Justice

Abstract: One of the most remarkable developments of the new millennium has been the expansion of debates on culture at the highest levels of the international community's decision-making processes. This development has necessarily had an impact on cultural rights empowerment, including enhancing their justiciability. Substantial progress has been made both at a regional and international level. Yet, not all thresholds have been reached. The International Court of Justice ('ICJ') has never explicitly addressed cultural rights in its case-law. Despite its 'multicultural' composition, it is only with great difficulty that the Court examines questions related to culture. However, a thorough examination of the jurisprudence of the ICJ reveals that opportunities to take cultural rights seriously have arisen more than once. Recent judgments of the Court reveal the emergence of a certain trend calling for a 'culturally sensitive' understanding of legal issues brought to the Hague. The present paper submits that this trend is beneficial not only for the protection of cultural rights, but also for the maintenance of human and cultural diversity, as well as for the survival and livelihood of indigenous peoples. In light of the urgent worldwide need for peace, addressing culture as a legal issue before the ICJ, in accordance with articles 36 and 60 of its statute, may be a fruitful pathway for the Court to follow in order to resolve international disputes.

Key words: *cultural rights; cultural diversity; intangible cultural heritage; collective claims; indigenous rights*

I. INTRODUCTION

The enlargement of the concept of 'culture' in the beginning of the 1990s and the strengthening of minority and indigenous peoples' rights in the new millennium, along with the growth of UNESCO activities and NGOs' advocacy, have all significantly contributed to the empowerment of cultural rights. The 1993 Vienna Declaration proclaimed, among other things, that 'international human rights law has established individual and group rights relating to the civil, cultural, economic, political and social spheres';¹ the 2005 UNESCO Convention was the first UN binding instrument giving teeth to both the concepts of cultural diversity and intercultural dialogue;² the 2005 World Summit Outcome resolution has highlighted the importance of 'respect and understanding for religious and cultural

¹ Vienna Declaration, A/CONF.157/23 12 July 1993, at 1.

² Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, in force 18 March 2007, in UNESCO, Records of the General Conference, 33rd session, Paris, 3-21 October 2005, (2 vols, 2005), vol.I, at 83, art.1(c)(d)(e).

diversity throughout the world’;³ and the 2007 Fribourg Declaration considered that ‘respect for diversity and cultural rights is a crucial factor in the legitimacy and consistency of sustainable development based upon the indivisibility of human rights’.⁴

This ‘cultural rights movement’ has necessarily had an effect on cultural rights’ adjudication – and justiciability. Hence, both the statute of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) and the Rome Statute have integrated provisions related to cultural heritage;⁵ cultural issues such as policies of cultural assimilation and cultural genocide have been examined on several occasions in the context of the war in Yugoslavia by *ad hoc* international tribunals;⁶ and regional human rights bodies, such as the Inter-American Court,⁷ the European Court,⁸ and more recently, the African Court,⁹ have all had the chance to address issues related to cultural identity and group rights, regardless explicit inclusion -exclusion in the case of the European Court- of such rights in their mandate. As for the ICJ, however, things are less clear.

Two preliminary observations seem crucial in this respect. First, the role of the ICJ as the ultimate dispute resolution mechanism has evolved in many ways as to include human rights.¹⁰ As noted by the former President of the Court, Rosalyn Higgins, the passage of time and the change of judicial culture more generally, along with the fact that a number of Judges with human rights related backgrounds are members the Court, may be some of the reasons for this change.¹¹ Second, examining whether and to what extent the ICJ may

³ See 2005 *World Summit Outcome*, UN Resolution 60/1 of 24 October 2005, para 14; see also e.g. *Promotion of Religious and Cultural Understanding, Harmony and Cooperation*, UN Res. 60/11, 3 November 2005, para. 4.

⁴ Fribourg Declaration on Cultural Rights, 7 May 2007, preamble, para. 6.

⁵ Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), art. 3 (d) and ICTY’s Rules of Procedure and Evidence; Rome Statute of the International Criminal Court (ICC), arts. 8.2 (b)(ix) and 8.2 (e)(iv).

⁶ Cultural issues have been examined in a number of cases before the ICTY regarding the looting and destruction of non-Serb cultural and religious institutions, treasures and monuments, see e.g. *Gotovina* (IT06—90-T); *Tadić* (IT - 94-1-T); *Miodrag Jokić* (IT-01-42/1) ‘Dubrovnik’; *Mladic* (IT-09-92-T); *Kordić & Čerkez* (IT-95-14/2) ‘Lašva Valley’.

⁷ See generally Jo Pasqualucci, ‘International indigenous land rights: a Critique of the Jurisprudence of the Inter- American Court of human rights in the light of the United Nations Declaration on The Rights Of Indigenous Peoples’, (2009) 27 *Wisconsin International Law Journal* 51; A.Xanthaki, ‘Indigenous Cultural rights in International Law’, (2000) 2 *European Journal of International Law* 343.

⁸ See generally J.Ringelheim, ‘Ethnic Categories in European Human Rights Law’ (2011) *Ethnic and Racial Studies* 1; see also, J.Ringelheim, *Diversité culturelle et droits de l’homme: la protection des minorités par la Convention européenne des droits de l’homme* (Bruylant 2006), at 353–354 (in French).

⁹ See e.g. the *Endorois Welfare Council v. Kenya*, 4 February 2010 case, Communication No. 276/2003; see also D.Shelton, ‘Self-determination in regional human rights law: from Kosovo to Cameroon’, (2011)105 *American Journal of International Law* 60, at 77–80.

¹⁰ R.Higgins, ‘Human Rights in the International Court of Justice’, (2007) 20 *LJIL* 745, at 746. Cf also, B.Simma, ‘Mainstreaming Human Rights: The Contribution of the International Court of Justice’, (2012) 16 *Journal of International Dispute Settlement* 7, and also G.Zyberi, ‘The Development and Interpretation of International Human Rights and Humanitarian Law Rules and Principles through the Case- Law of the International Court of Justice’ (2007) 25 *Netherlands Quarterly of Human Rights* 117.

¹¹ Higgins, *supra* note 10. Apart from Judges with ‘human rights backgrounds’, such as Rosalyn Higgins

consider cultural rights depends largely on the meaning and scope that one gives to these rights.

The present paper submits that there is a recent tendency within the Court not only to address human rights, but further, to do so from a perspective that involves their cultural dimension. As it will be demonstrated further, the Court has already touched upon questions of culture in its case-law, including issues related to the right to a cultural identity, cultural heritage and cultural genocide. Despite the fact that it may not necessarily be the most appropriate forum to consider, or implement, cultural rights, this ‘culturally sensitive’ approach may be beneficial for the consolidation of minority and indigenous peoples’ rights, particularly in the context of territorial and boundary disputes.

2. THE COMPETENCE OF THE COURT TO CONSIDER CULTURAL RIGHTS

Prima facie, one should wonder whether the World Court is actually competent to address cultural rights. In fact, the examination of claims related to culture has a long history in international adjudication. The ICJ’s predecessor, the Permanent Court of International Justice (PCIJ) has had the chance to address cultural claims in all the cases it dealt with minority rights, particularly, claims related to language, religion and education. For instance, in the judgment on the *Rights Of Minorities In Upper Silesia* (1923) regarding the Polish minority schools of Upper Silesia, the PCIJ observed, *inter alia*, that each individual should have the right to choose whether they belong to a minority or not, and also that parents and teachers should *a priori* have the right to choose the language and education methods of the pupils or children for which they are legally responsible.¹² A few years later, in the *Greco-Bulgarian communities* (1930), it pointed to the right of a minority to maintain and preserve their own traditions,¹³ while, much more substantially, in the well-known advisory opinion

herself, who was the first woman who joined the Court, and the German Judge Bruno Simma, former member of the Human Rights Committee, the jurisprudence of the Court is forged by the experiences of a number of Judges with ‘culturally sensitive’ backgrounds’. The Brazilian Judge and former president of the Inter-American Court, Antonio Cançado Trindade, who recently joined the Court has been a major inspirational force in the understanding of the interrelation between the individual and the international justice, and the former UNESCO the Somali Judge Abdulqawi Ahmed Yusuf, who joined the Court in 2009, was prior his appointment a Legal Adviser and Director of the Office of International Standards and Legal Affairs at the UNESCO for 8years (March 2001-January 2009). In the past, the Sri Lankan Judge Weeramantry, had substantially contributed in the understanding of the plurality of legal systems in international law through its separate opinions, while the Indian Judge Singh, who had been involved in the revision of the 1954 Hague convention for the protection of the cultural property in case of armed conflict, was also a member of the UNESCO Commission for India.

¹² PCIJ, *Rights of minorities in Upper Silesia (Minority Schools)*, Judgment of 26 April 1928 (series A, no. 15). Fourth Annual Report of the PCIJ (15 June 1927—15 June 1928), Series E, No. 4, pp. 210–214, reprinted in : Summaries of Judgments, Advisory opinions and orders of the Permanent Court of International Justice, available at http://untreaty.un.org/cod/PCIJsummaries/documents/english/PCIJ_FinalText.pdf>, 141, at 145.

¹³ PCIJ, *Greco-Bulgarian communities*, Advisory opinion of 31 July 1930 (series B, no. 17), Seventh Annual Report of the Permanent Court of International Justice, (15 June 1930—15 June 1931), Series E, No. 7, reprinted in: Summaries of Judgments, *supra* note 12, at 204: ‘The criterion for determining what is a community [...] is the existence of a group of persons [...] having a race, religion, language and traditions of their own, and united by this identity of race, religion, language and traditions in a sentiment of solidarity with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and up-bringing of their children in accordance with the spirit and traditions of their race and mutually assisting each other’.

on the *Minority Schools in Albania* (1935),¹⁴ it explored further the idea of the interrelation between minority cultural and identity. In that case, regarding the religious and educational autonomy enjoyed by the Greek communities of Albania, the PCIJ did not only observe that the idea underlying the minority treaties was the need to ensure *de facto* equality for minorities,¹⁵ and to allow them to maintain their cultural specificities through a special minority regime;¹⁶ it further pointed to the need to maintain cultural diversity, namely, ‘to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority and satisfying the ensuing special needs’.¹⁷

Contrary to the PCIJ, there is no explicit mandate for the ICJ to examine claims related to minority treaties,¹⁸ neither, *a fortiori*, to cultural rights. On the one hand, the only ‘collectivities’ that have *locus standi* before the Court are States,¹⁹ which recognize the Court’s compulsory jurisdiction.²⁰ Collective entities, such as minorities, indigenous peoples or any other groups of individuals are excluded from access to litigation. On the other hand, the jurisdiction of the Court is limited by the jurisdictional basis of one dispute or the other.²¹ Under the present interpretation of the ICJ statute, an *actio popularis* (in the sense of a right granted to any individual, or group of individuals, or collectivities, to take a legal action to the Court in vindication of a public interest) is not allowed.²² Yet, nothing in the letter and spirit of article 36(1) of the ICJ statute excludes ‘culture’ from the Court’s competence.²³ To

¹⁴ PCIJ, *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, (series A/B, no. 64), Eleventh Annual Report of the Permanent Court of International Justice, (15 June 1934—15 June 1935), Series E, No. 11, pp. 245–254, reprinted in Summaries of Judgments, *supra* note 12, at 351. See also, Andrzej Jakubowski, ‘Key issues in the relationship between the world heritage convention and climate change regulation’ in Silvia Borelli and Federico Lenzerini, *Cultural heritage, cultural rights, cultural diversity: new developments in international law* (Martinus Nijhoff, 2012) 382.

¹⁵ *Ibid.*, para. 351. According to the Court, ‘equality in fact supplements equality in law; it excludes a merely formal equality’.

¹⁶ *Ibid.* In the wording of the Court, this principle was ‘the grant to minorities of suitable means for the preservation of their racial peculiarities, their traditions and their characteristics’.

¹⁷ *Ibid.*

¹⁸ This has also been clarified by the ICJ since the 1970s; see This has also been clarified by the ICJ since the 1970s; see *South West Africa*, Second Phase, Judgment, I.C.J. Reports 1966, at 39–41, paras. 66–9.

¹⁹ ICJ Statute, art.34, para.1.

²⁰ *Ibid.*, art.35, para.1.

²¹ C.Greenwood, ‘Recent developments in International Law and the role of the International Court of Justice’, Lecture at the London School of Economics(LSE), 29 July 2010.

²² *Ibid.* See also on this point the South West Africa cases, *supra* note 18, para.88 : ‘although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the ‘general principles of law’ referred to in Article 38, paragraph 1 (c), of its Statute.’

²³ ICJ statute, art.36, para.1 provides that ‘the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force’.

the contrary, the Court may deal with any sort of legal disputes between States, as well as with the interpretation of any United Nations treaty, including therefore disputes and treaties dealing with culture and cultural rights. The ICJ may also deliver advisory opinions at the request of UN organs on any issue, including therefore issues of a cultural interest.²⁴ UN agencies are also entitled to request advisory opinions, although, until now, only one relevant case exists, regarding an individual's appointment by the UNESCO.²⁵

3. THE PROTECTION OF CULTURAL IDENTITIES AND THE EMERGENCE OF THE ICJ 'HUMAN APPROACH'

Cultural rights are perhaps the most controversial category of human rights. At least until the early 1990s, they were perceived as an 'under-developed' category of human rights.²⁶ Yet, a number of initiatives over the last decade,²⁷ pivoting around the right to take part in cultural life,²⁸ have substantially empowered cultural rights and extended their scope, highlighting their normative content. These initiatives, along with the affirmation of the principle of indivisibility of human rights, have entailed a *largo sensu* perception of cultural rights. Thus, there should be no doubt today that the right to a cultural identity and a people's right to a tangible or intangible heritage, along with the freedom to choose one's culture, should be considered *par excellence* cultural rights. Several other rights such as the right to non-discrimination may also be considered as such, especially when brought forward as group rights.

3.1. RECOGNITION OF CULTURAL RIGHTS JUSTICIABLE CHARACTER IN THE CASE – LAW OF THE ICJ

The advisory opinion regarding the *Palestinian Wall* case (2004)²⁹ was one of the

²⁴ According to article 96, para. 2 of the UN Charter, the General Assembly may authorize the specialized agencies to request advisory opinions on legal questions arising within the scope of their activities.

²⁵ See *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956. See also generally, Abdulqawi Yusuf(ed.), *Standard-setting in UNESCO* (2007) Vol.1.

²⁶ See e.g. J.Symonides, 'Cultural Rights', in J.Symonides (ed.), *Human Rights, Concept and Standards* (2000), 175, 175–227; J.Symonides, 'Cultural Rights: A Neglected Category of Human Rights' (1998) 158 *International Social Science Journal*, 559, and more generally, P.Meyer- Bisch, *Les droits culturels, une catégorie sous-développée des droits de l'homme* (Editions Universitaires de Fribourg, 1993).

²⁷ See e.g. *supra* notes 1–4, and generally, E.Stamatopoulou, *Cultural Rights in International Law: Article 27 of the UDHR and Beyond* (Martinus Nijhoff, 2007). See also M.Bidault, *La protection internationale des droits culturels* (Bruylant, 2010).

²⁸ This right is recognised in article 27 (1) of the Universal Declaration of Human Rights, in article 15 (1) (a) of the *International Covenant for Economic, Social and Cultural Rights* (ICESCR), as well as a number of other instruments. See in this respect, UN Committee on Economic, Social and Cultural Rights, General comment No. 21, 'The Right of everyone to take part in cultural life', 21 December 2009, E/C.12/GC/21, para 3, and A.Yupsanis, 'The Meaning of 'Culture' in Article 15 (1)(a) of the ICESCR – Positive Aspects of CESCR's General Comment No. 21 for the Safeguarding of Minority Cultures', (2012) 55 *GYIL* 345; see also, E. Stamatopoulou, 'The right to take part in cultural life, Article 15 (1) (a) of the ICESCR', ESRC Committee, E/C.12/40/9, 9 May 2008, p. 3.

²⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Rec. 136.

opportunities the Court had to recognise cultural rights' justiciability. Certainly the Court did not go as far as to discuss the dramatic situation in the Holy Land in its entirety, neither the right of the Palestinian people to their cultural identity. Yet, while making a number of valuable legal observations, the members of the Court did seize the opportunity to refer specifically to the ICESCR³⁰ and the *Convention on the Rights of the Child* (CRC), and justify their applicability in the occupied territories.³¹ Hence, not only did it find the settlements built by Israel unlawful;³² it also suggested that Israel is bound to comply with its obligations under international humanitarian law and international human rights law, including those created by the ICESCR.³³ The Court equally observed that some of the obligations that Israel has to comply with may be of an *erga omnes* character³⁴ and noted that the construction of the wall would impede the exercise of the Palestinian people's rights to work, to health, to education and to an adequate standard of living.³⁵ In the Court's view, the ICESCR would be then violated.³⁶

The Advisory Opinion is significant, however, for an additional reason, namely the fact that its *rationale* allows perceiving certain cultural 'nuances' in rights traditionally perceived as civil and political, or social rights. Hence, on the one hand, the members of the Court made reference to the report of the Special Committee for the Palestinian people, whose members delineated the right to property and the right to agriculture by reference to practices related to 'olive trees, fruit trees, water wells, citrus grows and hothouses upsands'.³⁷ On the other hand, they referred to the reports of the UN Special Rapporteur for the right to food and the Special Rapporteur on the situation of human rights in the Palestinian territories, which, again, point out that 'many fruit and olive trees had been destroyed in the course of building the barrier'.³⁸ A right to a cultural identity was not mentioned in the text of the Opinion.

³⁰ Ibid., at 192, para.130, regarding the right to work (Arts. 6 and 7 of the ICESCR); protection and assistance accorded to the family and to children and young persons (Art. 10 of the ICESCR); the right to an adequate standard of living, including adequate food, clothing and housing; and the right 'to be free from hunger' (Art. 11 of the ICESCR); the right to health (Art. 12 of the ICESCR); the right to education (Arts. 13 and 14 of the ICESCR).

³¹ Ibid. at 192, para.130, referring to articles 16, 24, 27 and 28 of the CRC.

³² Ibid, at 174–5, paras. 95–96, finding the Fourth Geneva Convention applicable in the Occupied Palestinian Territories.

³³ Ibid. at 181 -193, paras. 114-137. See also F. Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) *Human Rights Law Review* 11, 15, fn. 53.

³⁴ Ibid. at 199, para. 155.

³⁵ Ibid. at 181, para.112, invoking especially article 14 of the ICESCR on the right to education, which provides for transitional measures.

³⁶ Ibid, at 180, para. 112. According to the Court, the Covenant applies not only to the territories over which a State party has sovereignty, but also to ones over which that State exercises territorial jurisdiction, even though it contains no provision on its scope of application.

³⁷ Ibid. at 159, para.133, citing the Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories AI5131311, 22 August 2003, para. 26.

³⁸ Citing UN Doc. EICN.41200416, 8 September 2003, para. 9 and the Report by the Special Rapporteur of the United Nations Commission on Human Rights, Jean Ziegler, "The Right to Food", Addendum, Mission to the Occupied Palestinian Territories, EICN.41 2004110Add.2, 31 October 2003, para. 49.

Nevertheless, such references are precisely the type of elements that allow for human rights' cultural dimension to emerge.

3.2. THE EMERGENCE OF THE RIGHT TO A CULTURAL IDENTITY AND THE RIGHT TO INTANGIBLE HERITAGE IN THE CASE- LAW OF THE ICJ

Despite the fact that cultural rights are generally 'understood to include the right to a cultural identity',³⁹ a right to a cultural identity as such is not explicitly enshrined in human rights instruments. However, this right can be presumed from the specific features of the right to take part in cultural life,⁴⁰ as well as from the nature of the legal obligations imposed on States by the ICESCR, and other relevant instruments.⁴¹ It goes without a say that the protection of intangible cultural heritage is a key aspect of the right to a cultural identity, since it 'provides [both 'communities and groups'] with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity', as highlighted in the relevant 2003 UNESCO Convention.⁴²

3.2.1. A CUSTOMARY RIGHT TO SUBSTANTIVE FISHING

The *Navigational rights* case (2010),⁴³ opposing Costa Rica and Nicaragua, was an opportunity for the Court to consider the needs of the individuals affected by an interstate dispute, including their right to an intangible cultural heritage. In this case the Court was asked to interpret the navigational *régime* of the San Juan River, in light of a 1858 Treaty fixing the boundary between the two States on the Costa Rican bank. Costa Rica's memorial focused on the riparians' relationship with the river, invoking *inter alia* the detention and seizure of the riparians' belongings associated with fishing, and requesting the Court to recognize that Nicaragua violated 'the obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes'.⁴⁴ The Court found itself unavoidably confronted to the question of the riparian population's needs and way of life.⁴⁵ The members of the Court

³⁹ F.Coomans, 'Economic, social and cultural rights' (1995), SIM Special no.16, Reports commissioned by the Advisory Committee on Human Rights and Foreign Policy of the Netherlands, p.4, para 4.

⁴⁰ See Stamatopoulou, *supra* note 28; General Comment No. 21, *supra* note 28, paras 49–50 and 51 *in fine*; also, Y.Donders, 'Towards a Right to Cultural Identity?', School of Human Rights Research Series, Vol.15, 2002.

⁴¹ For example, the free exercise of one's cultural identity, and the right to be taught about one's own culture can be deduced by articles 6 (b) and 7 (b) of the Fribourg Declaration, cited *supra* note 4. See General Comment No. 21, *supra* note 28, para 49.

⁴² UNESCO Convention for the safeguarding of the intangible cultural heritage (Paris, 17 October 2003), art.3.

⁴³ *Dispute Regarding Navigational And Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009.

⁴⁴ Memorial of Costa Rica, Vol 1, 29 August 2006, para.1.07-1.08, 5.142 *et seq.*

⁴⁵ Due to the absence of jurisdictional basis, not all issues related to the way of life of the riparian communities were examined (e.g. the fact that the inhabitants of the boards of the river 'commonly used and still uses the river for travel for the purpose of meeting the essential needs of everyday life which require expeditious transportation, such as transport to and from school or for medical care'. See paras. 74–76 of the Judgement and also Greenwood, *supra* note 21.

examined specifically Costa Rica's claims about these communities' fishing habits, and attributing significant importance to the fact that it was substantive, i.e. not commercial.⁴⁶ In fact, the Court noted that fishing was the riparian communities' customary right that should be respected by Nicaragua,⁴⁷ and this, without actually examining whether the two prerequisites for the formation of customary law existed (i.e. practice and *opinio iuris*)⁴⁸ and without even minding that the disturbance of the fishing activities had occurred 'post-date the filing of the Application'.⁴⁹ The members of the Court further pointed to the 'special relationship' between the riparians and the river: *their* relationship with the river, and the damage that *they* would suffer.⁵⁰ The parties must be presumed' says the Court, 'in view of the historical background to the conclusion of [the 1858] Treaty [...] to have intended to preserve for the Costa Ricans living on that bank a minimal right of navigation for the purposes of continuing to live a normal life in the villages along the river'.⁵¹

Apart from the obvious benefit of this judgment for the riparian communities of the San Juan river as ultimate beneficiaries of the Judgment, the case may have a further impact, as the judgment reminds human rights law phraseology, and specifically, indigenous cultural rights' protection. It is the Human Rights Committee members who have first observed that 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples' and that 'this right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law';⁵² and it is the Declaration on the Rights of Indigenous Peoples ('UNDRIP') that proclaims that 'indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional

⁴⁶ *Navigational And Related Rights*, *supra* note 43, at 265, para.141: 'The Court recalls that the Parties are agreed that all that is in dispute is fishing by Costa Rican riparians for subsistence purposes. There is no question of commercial or sport fishing'.

⁴⁷ *Ibid.*, at 262–264, paras. 134-136.

⁴⁸ See, M. Milanovic, 'The ICJ and Evolutionary Treaty Interpretation' (2009) *European Journal of International Law: Talk!* (14 July 2009) < <http://www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation/>> accessed 28 July 2013.

⁴⁹ *Navigational And Related Rights*, *supra* note 43, at 264, para.137: 'the Court notes that the alleged interferences by Nicaragua with the claimed right of subsistence fishing post-date the filing of the Application'.

⁵⁰ *Ibid.* at 264, para.137: '[...] the Court considers that in the circumstances of this case, given the relationship between the riparians and the river and the terms of the Application, there is a sufficiently close connection between the claim relating to subsistence fishing and the Application, in which Costa Rica, in addition to the 1858 Treaty, invoked other applicable rules and principles of international law'.

⁵¹ *Ibid.* at 246, para.79.

⁵² General Comment No. 23: The rights of minorities (Art. 27): 04/08/1994, CCPR/C/21/Rev.1/Add.5, Para.7. Cultural rights being group rights have also been implied by the Committee in other cases, starting with the *Lubikon Lake Band* case, as well as the *Kitok* case where 'the HRC reaffirmed this wide understanding of culture'; see A.Xanthaki, 'Multiculturalism and International Law; discussing international standards' *Human Rights Quarterly* (2010) at 27. Furthermore, the understanding of an indigenous cultural identity in particular is a central, if not the main, aspect, of a people's right to self-determination and indeed to a people's *existence*. According to the UN Charter, this right is also the prerequisite for the maintenance of peaceful and friendly relations among nations, as well for their international cultural cooperation, whereas, article 22 of the African Charter, all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

ownership or other traditional occupation or use [...]'.⁵³ It is equally interesting to note that the breach of Nicaragua's obligations under the *Navigational rights* judgment was taken into account in the subsequent case adjudicated by the World Court related to the activities of Nicaragua on the border of Costa Rica, with respect to the construction of a canal across Costa Rican territory and the dredging works of the San Juan River.⁵⁴ In this second case, the Court, again, considered the benefit of the riparian communities, ordering provisional measures in order to suspend Nicaragua's dredging programme, on the basis of the relation between the damage caused and 'the risk that the rights which might be adjudged on the merits to belong to Costa Rica'.⁵⁵

3.2.2. THE PROTECTION OF A NOMADIC WAY OF LIFE

The 'culturally sensitive' approach appears to be much more consolidated in the *Frontier dispute* case,⁵⁶ opposing Burkina Faso and Niger. The judgment has a lot of merit, both for the protection of the nomadic cultural identity and for introducing culture explicitly into ICJ jurisprudence. One of the main issues of this case was that the boundary line, as defined in the pre-colonial period, raised serious problems for the Bellah people who lived in the Logomaten area. The latter were nomads 'who were accustomed to travelling within a unitary area, which was now divided into two separate colonies' and who 'in order to retain their customary transhumant routes, or even to cultivate their croplands which overlapped the boundary, they had to pass from one Colony to the other'.⁵⁷ As a response to this claim, the Court considered the question of the protection of the nomadic population without differentiating between the two Parties of the dispute, encouraging the parties to maintain their friendly relationships and develop them further. The *rationale* behind these observations was that '[h]aving determined the course of the frontier between the two countries [...], as the Parties requested of it, the Court expresses its wish that each Party, in exercising its authority over the portion of the territory under its sovereignty, should have due regard to the needs of the populations concerned, in particular those of the nomadic or semi-nomadic populations, and to the necessity to overcome difficulties that may arise for them because of the frontier'.⁵⁸ Furthermore, the Court noted that 'the co-operation that has already been established on a regional and bilateral basis between the Parties in this regard, in particular under Chapter III of the 1987 Protocol of Agreement [by which the two Governments agreed to mark out their common boundary], and encourages them to develop it further'.⁵⁹ Judge Bennouna, in his declaration to the Court, highlighted the shortcomings of the traditional approach towards state delimitation, based on the principle of *uti possidetis*, noting that this approach has not always made it possible to achieve peace. In the words of the Judge: 'the focus should perhaps be on the essence of the issue, because the frontier, as predicated on the Westphalian model, is far removed from the cultural heritage of this

⁵³ UN Declaration on the Rights of Indigenous Peoples, GA 61/295, art. 26, para.2.

⁵⁴ *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)*, Request for the indication of provisional measures, Order, 8 March 2011, para.1.

⁵⁵ *Ibid.* paras. 61–64.

⁵⁶ *Frontier Dispute (Burkina Faso/Niger)*, Judgment, 16 April 2013.

⁵⁷ *Frontier Dispute (Burkina Faso/Niger)*, Memorial of the Republic of Niger, April 2011, at 40, para.2.5.

⁵⁸ *Frontier Dispute (Burkina Faso/Niger)*, *supra* note 56, para.112.

⁵⁹ *Ibid.*, para.112.

region of the world. In the framework of a good-neighbourliness relation, it is for the Parties to rediscover this heritage by deepening, as encouraged by the Court, their co-operation'. The culturally sensitive approach has been celebrated by Judge Cançado Trindade, who dedicated a chapter of his concurring opinion discussing the 'human factor' impact on settling frontier disputes. The former President of the Inter-American Court explained in fact that 'the ICJ now sees that people and territory go together', that 'nomads have *their* history and their *modus vivendi*, projected in time immemorial' and that, ultimately, in his perception, 'even in the determination of frontiers in regions inhabited by human groups of such dense cultural features, one should not simply draw entirely and admittedly 'artificial' lines, overlooking the human element', because 'the centrality, in [his] view, is of human beings'.⁶⁰ These broadminded visions of international law have been developed further by the same Judge in other cases, including the *Kosovo advisory opinion* (2010)⁶¹ and the recent judgement regarding *Request for interpretation of the judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* (2013).⁶² In the former, he investigated the idea of a 'people-centered outlook in contemporary international law', while in the latter, he underlined once more the connection between a territory and the people who live on this territory,⁶³ noting in particular that that 'in situations of the kind, one cannot consider the territory making abstraction of the local populations (and their cultural and spiritual heritage)', who, in his view, 'constitute the most precious component of statehood'.⁶⁴

3.2.3. THE EVOLUTION OF THE COURT'S APPROACH REGARDING PEOPLES' RIGHTS

This evolving approach of the ICJ vis-à-vis cultural rights is by no means granted. Indigenous peoples rights and the right to self-determination have been both issues raised by the parties at many occasions.⁶⁵ Yet, even when brought forward by the parties of an inter-State dispute,⁶⁶ never had the Court examined in detail such claims. The Court in fact has provided a solid basis of cultural aspects of the right to self-determination only in the context of colonial occupation, as it had been demonstrated in the *Namibia*⁶⁷ and *Western*

⁶⁰ Judge Antonio Cançado-Trindade, separate opinion, Chapter IX. The human factor and frontiers.

⁶¹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010. Judge Antonio Cançado-Trindade, particularly Chapter XII and Chapter XIII. See also, *infra*, notes 106-110.

⁶² *Request for interpretation of the judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* Judgment, I.C.J. Reports 2013 (11 November 2013). See *infra*, notes 114-119.

⁶³ *Ibid.*, Separate Opinion of Judge Cançado Trindade, paras. 30-33.

⁶⁴ *Ibid.*, para. 31, referring also to A.A. Cançado Trindade, *International Law for Humankind; Towards a New Jus Gentium*, 2nd ed., The Hague, Nijhoff/The Hague Academy of International Law, 2013.

⁶⁵ See generally, G.Zyberi, 'Self-determination through the lens of the International Court of Justice' (2009) 56 (3) *Netherlands International Law Review* 429; A.Cassese, 'The International Court of Justice and the Right of Peoples to Self-Determination' in *Fifty years of the International Court of Justice, Essays in Honour of Sir Robert Jennings* (CUP 1996) at 351.

⁶⁶ E.g. the *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, at 554, in which Mali had extensively referred to indigenous Logomaten people's presence in the disputed area.

⁶⁷ *Namibia*, Advisory opinion, I.C.J. Reports 1950, para.131. In this case, the people of Namibia are recognized, *inter alia*, as a *cultural entity*, even though, no further explanations are given as to the meaning of this identity.

*Sabara*⁶⁸ advisory opinions. It is only in the beginning of the 1990s that a traditional way of life may be taken as having an impact on the sort of an inter-State dispute. As an example, one may bring the case concerning the *Kasikili/Sedudu island* (1999).⁶⁹ In this case, the Court had been charged with the task to determine Chobe river's main navigational channel, on the basis of a 1890 Anglo-German Treaty (which situated this channel on the boundary line between Botswana and Namibia), and further, to determine the sovereignty claim over the Kasikili/Sedudu island. The identification of the *thabweg* on the Caprivi strip being particularly difficult due to the fluvial geomorphology and the flow of the watercourse, the Court considered another element as being crucial for the sort of the dispute: the Masubia tribesmen intermittent presence on the Kasikili/Sedudu island ('Kasikili' in Botswana and 'Sedudu' in Namibian dialects).⁷⁰ The Court interestingly observed that the Masubia people had the habit of growing crops on the island, benefitting from a certain autonomy, and that 'it [was] not uncommon for the inhabitants of border regions in Africa to traverse [State] borders for purposes of agriculture and grazing, without raising concern on the part of the authorities on either side of the border'.⁷¹ However, back then, the Court had not gone as far as to consider the territorial claim depending on the Masubia peoples' interest, neither had it affirmed that the beneficiaries of a boundary dispute between two States may be a people, nor even a group of individuals.

4. IS THE COURT AN APPROPRIATE FORUM TO CONSIDER CULTURAL RIGHTS ?

The assumption that the Court is competent to examine issues related to culture– and that it has implicitly done so in several cases, as demonstrated above – does not necessarily mean that it is the most appropriate forum for cultural rights adjudication.

A first set-back is that, in the case of an inter-state dispute, a State is necessarily vowed to advance its own interests. It is therefore more likely to promote the right to a 'cultural identity' when this cultural identity is the dominant cultural identity. This is particularly visible in the case of States that identify as nation-States, or States, which benefit from a certain ethnic and cultural homogeneity. Cultural claims may then be brought forward as interests of a State in its whole - and *ad hoc* judges have been particularly active in reminding this to the Court- underlying the association between 'cultural' and 'national' claims. One could consider here the *Application of the Interim Accord* case (2011), regarding Macedonia's

⁶⁸ *Western Sahara*, Advisory Opinion of 16 October 1975, para.152. In this case, the Mauritanian entity (i.e. the indigenous Sahrawi people, living in Western Sahara already prior the Spanish colonisation and Morocco occupation) is identified by its distinguishable nomadic *way of life*.

⁶⁹ *Kasikili/Sedudu Island (Botswana v Namibia) Judgement*, I.C.J. Reports 1999, at 1094, para.74. One of Namibia's arguments *in casu* was the fact that the Masubia people had been occupying Eastern Caprivi from the beginning of the colonial period, highlighting that '[t]he Masubia of the Caprivi Strip have used and occupied Kasikili Island as a part of their lands and their lives'.

⁷⁰ Specifically, whether the long-standing, unopposed, presence of Masubia tribespeople on Kasikili/Sedudu Island constituted subsequent practice in the application of the [1890] treaty'. The Court replied in the negative.

⁷¹ *Kasikili/Sedudu Island*, *supra* note 69, para.74: 'It is, moreover, not uncommon for the inhabitants of border regions in Africa to traverse such borders for purposes of agriculture and grazing, without raising concern on the part of the authorities on either side of the border'.

admission to the NATO (Greece objected to Macedonia's entrance to the NATO for the time that FYROM would use of the name 'Macedonia').⁷² The Greek *ad hoc* judge pointed to the link between the name and the State's national and cultural identity: 'the issue of the name, which represents an obstacle with significant political and cultural consequences not only to the FYROM's admission to specific international organizations, but also to bilateral relations'.⁷³ The Judge, further, suggested that 'it is important to recall here that, immediately after its independence, the new State embarked upon a series of actions with irredentist aims and acts contesting the Greek [historical and] cultural heritage, which were considered unacceptable by Greece'.⁷⁴

Another illustration of such situation is the *Land and maritime boundary between Cameroon and Nigeria* (2002)⁷⁵ regarding sovereignty over the Bakassi Peninsula and the lake Chad. Apart from their obvious economic interest of the disputed areas due to its oil-rich soil, the latter was also home to a large number of indigenous peoples, such as the Mio and the Calabar (Obong) people.⁷⁶ The Nigeria's memorial to the Court made extensive reference to the indigenous peoples living in Nigeria— including their separate system of education, their distinguishable religious and civic organization and the maintenance of traditional substantive agriculture and fishing activities. Among the components of the historical consolidation of its title over the disputed areas, it cited not only 'the attitude and affiliations of the population of Darak and the other Lake Chad villages' but also, 'the existence of historical links with Nigeria in the area, and in particular the maintenance of the system of traditional chiefs' and 'the exercise of authority by the traditional chiefs, which is claimed to be still an important element within the State structure of modern Nigeria[...]'.⁷⁷ The only allusion to the inhabitants of the land (i.e. the indigenous peoples who lived in the region under Nigerian control) was therefore made indirectly,⁷⁸ something which has been heavily criticized by Nigerian authorities.⁷⁹

⁷² *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, I.C.J. Reports 2011, at 644.

⁷³ *Ibid.*, dissenting opinion of Judge *ad hoc* Prof. Roucouas, at 729, para.23.

⁷⁴ Yet, the majority of the Court did not seem to be persuaded about Greece's objection, i.e. that the applicant's admission to the NATO was taken for the purpose of achieving the cessation of FYROM's use of the symbol, at 689–690, para.156–157.

⁷⁵ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, at 303.

⁷⁶ *Ibid.*, at 315, para.21.

⁷⁷ See e.g. Nigeria's Counter-Memorial of the Federal Republic of Nigeria, Volume 1 Bakassi (Chapters 1–11), 1999, at 21 *et seq.*, 80 *et seq.* and 425 *et seq.*

⁷⁸ *Land and Maritime Boundary*, *supra* note 75, at 405, Para.205 (Nigeria's Counter-Memorial cited by the Court). As the Court noted, 'in sub-Saharan Africa [...] treaties termed "treaties of protection" were entered into not with States, but rather with important indigenous rulers exercising local rule over identifiable areas of territory'.

⁷⁹ See the voices for a review of the matter by the ICJ according to article 61 of the ICJ statute; see e.g. John Austin Unachukwu, 'ICJ judgment on Bakassi: The 'fresh facts'', 9 Oct 2012, <thenationonlineng.net/new/law/icj-judgment-on-bakassi-the-fresh-facts/>. Indigenous peoples do not have access neither as third parties intervening, in virtue of article 62 of the ICJ statute, which provides that '1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to

Likewise, in the *Territorial Dispute* case (1994)⁸⁰, regarding the decennial (1973-1987) dispute between Qaddafi-led Libya and Hissene Habré-led Chad over the Aozou Strip, State interests played a substantial role. Libya extensively referred to indigenous peoples' presence in the area, dedicating several pages of its memorial to the indigenous tribes of the Tibesti Region, and highlighting the control it had over indigenous tribes since the beginning of the century, as indicated in a number of maps submitted to the Court.⁸¹ Additionally, it specifically referred to the religious and cultural identity of these tribes, noting the importance of the names, identity, origin and location of the various tribal groups and indigenous peoples, and their cultural and religious (Islamic) ties with Libya. Yet, again, in this case, it seemed unnecessary for the Court to consider indigenous peoples rights, i.e. the title inherited from indigenous peoples in application of the principle of *uti possidetis juris*,⁸² as it had been claimed by Libya.⁸³

Another setback for the Court to consider cultural rights is that the Court cannot extent its jurisdiction beyond the jurisdictional basis of the dispute. Until now, a solid basis for examination of cultural claims has never been explicitly provided. The way that the ICJ dealt with the question of cultural genocide in 2007 in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case⁸⁴ may be an illustration of this remark. Bosnia-Herzegovina specifically claimed that the Bosnian Serb forces 'attempted to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property' and that the destruction of such heritage was 'an essential part of the policy of ethnic purification' indented to wipe out the traces of [the] very existence of the Bosnian Muslims'.⁸⁵ Yet, the Court did not go as far as to recognize the existence of a cultural genocide, highlighting, precisely, that the Sixth Committee's *travaux préparatoires* of the Genocide Convention did not include cultural genocide in the list of punishable acts.⁸⁶ The *ad hoc* Bosnian Judge's view is more interesting in this respect, his arguments going way beyond the text of the Genocide Convention. This Judge explained in fact that the '[Bosnian] Muslim identity is not merely a religious identity, but rather refers to a group of persons sharing a particular culture, language and traditional way of life'.⁸⁷ Observing that the

decide upon this request.'

⁸⁰ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 3 February 1994, I.C.J. Reports 1994, at 6. The two parties brought the dispute to the Court after they failed to respect the relevant Peaceful Settlement agreement.

⁸¹ Memorial submitted by the Great Socialist People's Libyan Arab Jamahiriya, Vol. 1, 26 August 1991, 38-54.

⁸² *Territorial Dispute*, *supra* note 80, at 38, para.75.

⁸³ *Ibid.*, at 232, Para.5.145 *et seq.*

⁸⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, at 43.

⁸⁵ *Ibid.* at 176, para.320 and 182, para.335.

⁸⁶ *Ibid.*, at 146-147, para.344: 'However, in the Court's view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group'.

⁸⁷ *Ibid.*, dissenting opinion of Judge Ahmed Mahiou (*ad hoc* judge appointed by Bosnia and Herzegovina), at 387, para.74.

destruction of cultural monuments is one of the elements that may point to the existence of this specific intent, or a broader plan entailing a policy of genocide',⁸⁸ and by reference to the ICTY Chamber judgements,⁸⁹ Judge Mahiou made the link between cultural rights, cultural heritage, genocide and ethnic cleansing.⁹⁰ The *ad hoc* Serbian Judge, on the other hand, admitted that the duty to avoid genocide, from a criminal law perspective, 'implies a totality of actions in the social, legal, economic, political and cultural spheres aimed at eliminating the real causes of genocidal pathology'.⁹¹ However, he also noted that there was never any intent to include 'cultural genocide' in the Genocide Convention.⁹²

Similarly, in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,⁹³ Croatia claimed before the ICJ that the looting and destruction of its cultural property amounted to a breach of the Genocide Convention,⁹⁴ highlighting in particular that genocide 'may not only be committed through physical destruction of a group, but also through destruction of a group's cultural identity'.⁹⁵ The return of its cultural property, which, according to Croatia, fell within the scope of the Genocide Convention,⁹⁶ was therefore a central part of its application. Although several of these concerns have been transferred to the ICTY,⁹⁷ since Croatia first lodged its application to the ICJ, it is certain that the Court will be confronted to these issues again when considering the merits of the case in the future.

Even in the context of treaty interpretation, the ICJ jurisdiction is, again, restricted and largely dependent on the provisions of the specific Convention in question. An illustration

⁸⁸ Ibid., at 431, para. 84.

⁸⁹ Ibid. at 477, para. 91, referring particularly to ICTY Trial Chambers judgments in the Krstić and Blagojević *et al.* cases regarding the massacre in Srebrenica: 'is true that the decisions reached on the merits by the ICTY in genocide cases are not numerous, but there are a great many findings of fact and of law concerning the commission of crimes against humanity, murder, rape, forcible displacement and the destruction of mosques and other traces of Muslim culture, and when these findings are taken cumulatively, they point to the existence of a broader plan entailing a policy of genocide [...]'.
⁹⁰ Ibid., at 513, separate opinion of Judge Milenko Kreća (*ad hoc* judge appointed by Serbia and Montenegro), para.86: 'ethnic purification is seldom an isolated act of forcible displacement, for it is generally accompanied by murder, rape, torture and other acts of violence and the destruction of the religious and cultural heritage in order to wipe out all trace of the ousted ethnic group'.

⁹¹ Ibid., at 539, para.113.
⁹² Ibid., at 513, para.35.

⁹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412

⁹⁴ Ibid., paras 21.1 and 21.2(c), as well as 142. See also the Written statement of the Republic of Croatia of its observations and submissions on the preliminary objections raised by the Federal Republic of Yugoslavia (Serbia and Montenegro), Vol.I, 29 April 2003, at 42–44 regarding the 'missing cultural property'.

⁹⁵ Ibid., para 45.
⁹⁶ Ibid., para 45. See also, the Application instituting proceedings filed in the registry of the Court on 2 July 1999 (Croatia v. Yugoslavia), para.12 *in fine*, and para.17, regarding the '1,821 cultural monuments were destroyed or damaged, including about 651 in the area of Dubrovnik-Neretva County and about 356 in the area of Osijek-Baranja County' and the '19 park cultural monuments were damaged'.

⁹⁷ See *supra* note 6.

of this observation is a case brought before the Court in virtue of the International Convention on the Elimination Of All Forms Of Racial Discrimination (ICERD) – the only such case brought, until now, before the Court, the *Case concerning application of the International Convention on the Elimination Of All Forms Of Racial Discrimination* (2011),⁹⁸ regarding the treatment of the Georgian ethnic minorities living in Russia. Interestingly, the claim brought forward by Georgia, based upon Articles 2(1), 3 and 5 of the ICERD, was based on a *large sensu* interpretation of racial discrimination, which included ‘the negation and even obliteration of culture, religion, or language’.⁹⁹ Hence, Georgia, in its extensive memorial submitted to the Court, denounced not only the Russian policies of racial hatred and segregation, aiming at creating ‘ethnically pure territories aligned with the Russian Federation’,¹⁰⁰ but also, the destruction of the ‘Georgian culture and identity by discriminatory legislation and other means’,¹⁰¹ as part of the ethnic cleansing operated in Abkhazia and South Ossetia. Additionally, Georgia refers to the destruction of its minority cultural heritage,¹⁰² and negates the existence of strong ethnic, historic and cultural links in the two regions, which could, eventually, contribute to the integration of the minorities to the Russian territory.¹⁰³ It is unfortunate that the Court rejected the claim on the basis of lack of competence, as this case would have provided an excellent opportunity for the Court to discuss both minority rights and the right to non-discrimination, both key features for the maintenance of cultural diversity.

5. THE PROTECTION OF CULTURAL HERITAGE AND THE MAINTENANCE OF CULTURAL DIVERSITY IN THE CASE-LAW OF THE COURT

Despite the positive observations regarding the culturally sensitive understanding of legal issues examined by the Court, as described in sections 3.1 and 3.2 of our paper, a lack of attention to the protection of cultural heritage and to the need for the peaceful coexistence of cultures, including the preservation of cultural diversity, is still evident in the Court’s case

⁹⁸ *Case concerning application of the International Convention on the Elimination Of All Forms Of Racial Discrimination (Georgia v. Russian federation)*, Preliminary objections, 1 April 2011. The claims were relevant to disputes, which arose 1992 and 2008 and the application of Georgia was lodged on the basis of a breach of articles 2 (1) (a), 2 (1) (b), 2 (1) (d), 3 and 5 of the Covenant.

⁹⁹ Memorial of Georgia, Vol.1, 2 December 2009, para. 9.10.

¹⁰⁰ Ibid. 1.3 and 2.31, with respect to the attempts of Russia ‘to change or to uphold a changed demographic composition of an area against the will of the original inhabitants’.

¹⁰¹ Ibid., paras. 2.40-2.41. According to Georgia, ‘The destruction of culture and identity is equally impermissible and is prohibited by Articles 2(1)(a), 2(1)(b) and 2(1)(d), among others. Although Article 5 does not specifically guarantee the equal enjoyment of the right to culture or identity as such, that right is embraced within a number of the other rights that are specifically mentioned, including: the right to freedom of thought, conscience and religion (Art. 5(d)(vii)); the right to freedom of opinion and expression (Art. 5(d)(viii)); and the right to equal participation in cultural activities (Art. 5(e)(vi))’.

¹⁰² Ibid, para. 3.83, referring to the case of the destruction of cultural monuments in two villages of the Eredvi municipality.

¹⁰³ Ibid., para 6.74, referring to Abkhazia’s *de facto* Foreign Minister, Sergei Shamba speech, according to whom ‘[t]he only obstacle to the integration of South Ossetia [into Georgia] is a separatist regime that basically consists of elements from security services from neighbouring Russia that have no historical, ethnic or cultural links to the territory’.

law in a number of contexts.

First, in relation to discussions regarding the prohibition of racial and cultural segregation. Policies of *apartheid* have been condemned by the ICJ in the past, in the context of the *South Africa* cases: the observations of the former Judge of the Court Tanaka, for instance, pointing out that *apartheid* is not in conformity with the objectives of the colonial rule, namely ‘the promotion of well-being and social progress of the inhabitants’,¹⁰⁴ have been a most known example of such denunciation.¹⁰⁵ Yet, in more recent cases, such approach is not self-evident. For instance, in the *Palestinian Wall* opinion,¹⁰⁶ despite its commendable observations, the Court failed to address the question of the wall as a symbol of *apartheid*. Likewise, in the context of the Kosovo opinion delivered in 2010,¹⁰⁷ regarding the legitimacy of the Kosovo declaration of independence, the Court did not address the question of cultural and religious heritage of Kosovo, neither the cultural aspects of the Kosovar people’s right to self-determination, or questions related to cultural diversity, even though these were important points raised by the Republic of Kosovo before the Court,¹⁰⁸ and part of the rounds of negotiations held.¹⁰⁹ In its analysis of the right to self-determination, and in light of the radically different views expressed during the proceedings, the Court refrained from mentioning the Kosovar people’s right to cultural identity, even though it went so far as to accept that the principle of self-determination has developed sufficiently in recent years in a way as to create a right to independence.¹¹⁰ The absence of jurisdictional basis may have been another reason for the Court strictly contenting itself in pronouncing on the permissibility of a unilateral declaration of independence in international law, rather than analysing the cultural aspects of the right to self-determination.

Second, while examining the question of environmental damage, such as the *Nuclear tests* case (1974),¹¹¹ and more recently, the *Pulp mills* case (2010)¹¹². In these cases, environment claims

¹⁰⁴ Judge Tanaka, dissenting opinion, at 285 *et seq.*

¹⁰⁵ *South West Africa cases*, *supra* note 18, para. 17.

¹⁰⁶ See *supra* notes 29-36 and accompanying text.

¹⁰⁷ *Kosovo* opinion, *supra* note 61, at 403, para.75.

¹⁰⁸ Including of the ‘reconfiguration process’ of the UN interim administration, see, e.g. the further written contribution of the Republic of Kosovo, 17 July 2009, paras. 3.35, with regard to the violation of the constitutionally protected right ‘to preserve, foster and express their cultural, linguistic and other peculiarities’, and 4.36-4.39, referring to the cultural aspects of common art.1(1) of the ICCPR and the ICCPR, to the Vienna Declaration cited also *supra* note I, as well as to the Canadian Supreme Court Judgement, *Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.), para. 138.

¹⁰⁹ *Kosovo opinion*, *supra* note 61, para.67, referring to Reports of the Secretary-General on the UN Interim Administration Mission in Kosovo, providing *inter alia* for the preservation and protection of cultural and religious heritage. Issues related to cultural rights, were raised only in the separate opinion of Judge Cançado Trindade (in Ch.VII, and also paras.164–165, referring to IACHR cases and the Durban Declaration), as well as the dissenting opinion of Judge Yusuf (in para 15., through a small reference to the *Secession of Quebec case*).

¹¹⁰ *Ibid.*, paras. 79-83.

¹¹¹ *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, at 457.

¹¹² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, regarding the construction of polluting pulp factories on the River Uruguay.

have not been brought forward as cultural claims. Yet, the protection of the environment may have important cultural aspects, both in relation to the maintenance of human diversity and the principle of sustainable development, as well as the problems of pollution, deforestation and threats to biodiversity, which may endanger all inhabitants of the regions in question, and be a threat for indigenous peoples survival.

Third, in the context of discussions regarding the preservation of a universal cultural heritage as *humanity's* right. Even though the universal cultural heritage seems to be established in theory,¹¹³ it is only a minority of Judges of the World Court who embrace this globalist approach.¹¹⁴ An example of the absence of a generalized discussion on the relationship between universal heritage and the prohibition of segregation and cultural diversity is the order for provisional measures in the case concerning the re-examination of the 1962 judgement concerning the Temple of Preah Vihear (2011).¹¹⁵ In this case, it is again only Judge Cançado Trindade who, once more expressed a 'culturally sensitive' opinion highlighting that 'cultural and spiritual heritage appears more closely related to a human context, rather than to the traditional State-centric context'.¹¹⁶

The subsequent judgment of the Court, however, rendered in 2013, certainly paves the way for more optimistic perspectives. Apart from its importance for the links between a people and a territory, as discussed earlier in this paper,¹¹⁷ the judgement is also a beacon of hope for the judicial enforcement of the international protection afforded to cultural heritage. In fact, contrary to the order, the judgement pays increased attention to the cultural significance of the Temple Preah Vihear. In line with the spirit of the UNESCO World Heritage Convention, the judgement points to the need of cooperation between the two States and the international community in the protection of the site as a world heritage, including under article 6 of the UNESCO Convention.¹¹⁸ The specific point on cultural cooperation, which has not been disputed by either of the *ad hoc* judges,¹¹⁹ has been further elaborated in Judge

¹¹³ E.g. F.Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction', (2011) 22 *European Journal of International Law* 9, arguing that the elevation of attacks against cultural property may attend the legal status of international crimes, especially war crimes and crimes against humanity, triggering the international community responsibility.

¹¹⁴ See e.g. Judge Weeramantry's dissenting opinion in the *Advisory opinion on the legality of the use of nuclear weapons*, 8 July 1996, paras. 243–245 and 467.

¹¹⁵ *Request for interpretation of the judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* request for the indication of provisional measures, 2011 I.C.J. 151, TT 1-3 (18 July 2011), regarding sovereignty over the temple and the 'vicinity' [of the Temple] on Cambodian territory. In the 1962 Judgement, the Court had declared that the Temple of Preah Vihear, situated on the hill of Phnom Trap, was under Cambodian sovereignty, going on to observe that only Thailand was under the obligation to retreat its military forces.

¹¹⁶ *Ibid.*, Separate Opinion of Judge Cançado Trindade, para. 74.

¹¹⁷ See *Temple of Preah Vihear* case (judgement), *supra* note 62.

¹¹⁸ *Ibid.*, at para 106. The judgement in fact explicitly mentions that 'the Temple of Preah Vihear is a site of religious and cultural significance for the peoples of the region [...] listed by UNESCO as a world heritage site' and that 'under Article 6 of the World Heritage Convention, to which both States are parties, Cambodia and Thailand must co-operate between themselves and with the international community in the protection of the site as a world heritage'.

¹¹⁹ *Ibid.*, declaration of Judges Guillaume and Cot (in French).

Cançado Trindade's separate opinion: ' [...] a case of territorial sovereignty to be exercised by the State concerned, in cooperation with the other State concerned, as parties to the World Heritage Convention, for the preservation of the Temple at issue as part of the world heritage (reckoned as such in the UNESCO List), to the (cultural) benefit of humankind'.¹²⁰

6. CONCLUSION

The ICJ, at least until the 1990s, has held a rather conservative approach towards culture, avoiding discussions on group rights - with the exception, perhaps, of the opinions issued in the period of the decolonisation process and the subsequent proclamation of the peoples' right to self-determination. The Court's history, mandate and limited jurisdiction are all valid reasons for this approach. It is therefore most noteworthy that a culturally sensitive understanding of human rights may be visible in the Court's recent case law, and particularly in the judgments of the *Navigational Rights* (2010), the *Frontier Dispute* (2013) and the *Preah Vihear* (2013) cases. As for the prohibition of segregation, however, our conclusions cannot be equally positive. The need to preserve cultural and human diversity and the interaction among cultures, both precious prerequisites to establish these 'peaceful and friendly relations among nations', so much cherished by the UN Charter,¹²¹ are still not given sufficient attention by the ICJ. This said, the present challenge for the World Court in clarifying the meaning of culture is twofold. First, to indicate how best to understand a cultural identity in the context of international disputes, with regard to claims underlying the peoples' rights to self-determination, as well as territorial and boundary disputes. Second, to determine the extent to which culture can play a role in international law in managing both inter-State and intra-State cultural diversity. The institution of proceedings by Bolivia against Chile,¹²² regarding sovereign access to the Pacific Ocean coast, which is home for a number of indigenous peoples, may be the challenge for the Court in this direction.

¹²⁰ Ibid., Separate Opinion of Judge Cançado Trindade, para. 12.

¹²¹ The UN Charter stipulates *inter alia* that 'developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples is among the purposes and principles of the Charter of the United Nations'.

¹²² 'Bolivia institutes proceedings against Chile with regard to a dispute concerning the obligation of Chile to negotiate the sovereign access of Bolivia to the Pacific Ocean', ICJ Press release, No. 2013/11, 24 April 2013.