CHAPTER 6

The Safeguarding of Collective Cultural Rights through the Evolutionary Interpretation of Human Rights Treaties and Their Translation into Principles of Customary International Law

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1 Introduction

As is well known, international human rights treaties, both at the ‘universal’ and regional levels, are centred on an understanding of human rights as prerogatives generally recognized in favour of individuals. In this respect, the only exceptions to this approach are represented by the right of self-determination of peoples, as enshrined in common Article 1 of the two 1966 Covenants on human rights,1 and by a few rights of a collective character included in the African Charter on Human and Peoples’ Rights (ACHPR).2 Such an approach is the result of the Western point of view of human rights, the view which prevailed at the time when human rights standards began to be elaborated and transfused into international legal instruments. In reality, this is a minority point of view, which not only is at odds with the perception of human rights prevailing in the rest of the world, but today is no longer shared even by many Western human rights thinkers and institutions. In terms of positive law, however, the fact remains that international instruments do not devote the necessary attention to collective rights, which therefore enjoy a level of protection which is far below, if even comparable, to that enjoyed by individual rights, especially civil and political rights.

Fortunately, in contemporary times the approach of the international community is progressively shifting toward a different attitude, characterized by a growing attentiveness toward collective rights, based on the awareness of their


decisive role in ensuring the realization of human beings’ aspirations, which is the ultimate purpose of human rights. The adoption, in 2007, of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)³ and its nearly universal support⁴ constitute formidable evidence of this new approach.⁵ At the same time, although it remains true that human rights treaties are not adequately equipped – in terms of the provisions included in their texts – to fulfil the goal of properly safeguarding collective rights, this deficiency is today being at least partially overcome by the evolutionary approach followed by international human rights monitoring bodies, particularly the Human Rights Committee and other UN Committees, as well as, at the regional level, the Inter-American Court of Human Rights and the African Commission on Human and Peoples’ Rights. The most significant aspect of this practice is the fact that these bodies have proven capable to extend the scope of certain provisions concerning individual rights to cover collective cultural rights as well. As will be explained below in this chapter, the significance of the said practice goes beyond the context of international treaty law, also providing evidence of opinio juris supporting the conclusion that the core collective cultural rights have today developed into principles of customary international law.

At this preliminary stage, it is important to emphasize that the natural source of collective rights is culture. Indeed, the ‘community’ is the expression of a complex of elements which characterize its peculiarity and make it different from any other group. These elements are countless in character – e.g. anthropological, linguistic, social, political, ethnological, economic, etc. – but as a whole form the cultural identity of the community. As a consequence, it is exactly the cultural element which represents the mainspring determining the expectations to be fulfilled in order for a community to realize itself, both as a unique entity and as a congregation of people. The legal tools serving the purpose of allowing both individuals and groups to realize their expectations are actually human rights, and the expectations of groups, as determined by their cultural specificity, give rise to collective rights, which normally take the form of cultural rights. The practice of relevant international bodies which will be examined below (with no pretence of exhaustiveness, due to the limited space available) confirms this assumption. It follows, among other things, that most

⁴ The UNDRIP was adopted with 143 votes in favour, 4 votes against, and 11 abstentions. Subsequently, all the four states originally voting against (Australia, Canada, New Zealand and United States) and two of the abstaining countries (Colombia and Samoa) officially endorsed the Declaration.
⁵ See Chapter 5 by Kamrul Hossain in this volume.