

## **THE RIGHT OF ACCESS TO CULTURE: AN EFFECTIVE HUMAN RIGHT FOR THE ESTABLISHMENT OF CONSISTENT CULTURAL POLICIES IN EUROPE IN THE CONTEXT OF THE ECONOMIC CRISIS?\***

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**SUMMARY.- 1. Introduction. 2. The traditional disregard for cultural rights. 3. International legal advances in clarifying the content of the right “to take part in cultural life”. 4. The importance of measuring cultural rights and cultural policies by means of indicators. 5. Monitoring cultural rights obligations in the context of the economic crisis: Is it possible? 6. Improving the justiciability of cultural rights at the international level. 7. Concluding remarks.**

### **ABSTRACT**

*This article explores the ways in which the enjoyment of cultural human rights is developing nowadays. The content of these rights needs to be clarified in order to render the existence of consistent and durable cultural policies possible. Both General comment No. 21 on “the Right of everyone to take part in cultural life” (United Nations Committee on Economic, Social and Cultural Rights, 2009) and the appointment of the first Independent Expert on cultural rights (Council of Human Rights, 2009) offer tools for determining the content of the right of access to culture as an independent right. The author takes into account the guidelines put forward by the Committee on Economic,*

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*Social and Cultural Rights in May 2012 regarding the measures adopted by States in the context of the economic and financial crisis and the effects of these on European cultural policies.*

**Key words:** European cultural policies; cultural rights; Committee on Economic Social and Cultural Rights; economic crisis; Independent Expert of United Nations in the field of cultural rights.

## 1. INTRODUCTION

Cultural rights and cultural policies are naturally connected. When States design and implement their cultural policies they must respect and promote cultural rights. Moreover, in a democratic society one of the aims of public cultural policies must be the promotion of cultural rights. The advantages of taking a *cultural rights perspective* in designing cultural policies are evident: As Annamari Laaksonen notes, “the right to participate in cultural life does not then depend on (sometimes changeable) political will but there is a legal structure with obligations (to protect, promote and fulfill the rights).” However, both the practice and the research in those fields remain quite isolated: “cultural managers, artists and activists ... sometimes fail to understand the importance of strong legislative bases.” (LAAKSONEN, A., 2010).

It should be borne in mind that cultural rights are human rights. For decades cultural rights have been considered “a neglected category of human rights” (SYMONIDES, J., 1998). In this sense, Professor Jesús Prieto use the expression the “prodigal son of human rights” to refer to the right of access to culture. (PRIETO DE PEDRO, J., 2008). Some of the reasons for such a consideration are the following: First, cultural rights are “traditionally” less justiciable than civil and political rights. Secondly, a legal definition of the content of cultural rights has been difficult to develop. Finally, one cannot forget the traditional reluctance of States to recognize some of these cultural rights, in which they have seen a risk to their integrity.

Fortunately, nowadays the situation is different. Two developments within the United Nations system are increasingly helping to determine the content of cultural rights, giving guidelines for a human rights approach to cultural policies. Such is the case with General comment No. 21 on “the Right of everyone to take part in cultural life”, put forward in 2009 by the Committee on Economic, Social and Cultural Rights (CESCR) and with the work of the first United Nations Independent Expert on cultural rights, appointed in the same year. As will be explained below, the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by the General Assembly of the United Nations in 2008 is important. These three tools mean a step forward in strengthening and determining the content of cultural rights. They provide States with guidelines setting out how to be consistent with their obligations in respect of cultural rights. European countries, though different from each other, share the need to face a structural financial crisis (BONET, L.; DONATO, F., 2011:5), with consequences for the sustainability of cultural policies and the guarantee of cultural rights. Whereas the impact of the crisis on cultural policies has been widely pointed out, its consequences for cultural rights are for the most part neglected. Besides, there is little awareness within civil society, beyond artists and cultural managers, of the consequences for cultural policies of the measures adopted in face of the crisis. As Bonet and Donato pointed out with regard to the reaction to the spending cuts affecting culture, “only few citizens have taken part” in “campaigns and street demonstrations organized in a few big cities,” “whereas there had been a greater participation in the campaigns and protests against cuts to other public services, such as health.” (BONET, L.; DONATO, F., 2011:7)

The Chairperson of the CESCR has fortunately drafted *a letter to States Parties in the context of the economic and financial crisis* in order to remind them of their binding obligations in respect of economic, social and cultural rights. Likewise, the Committee’s Concluding Observations on the Spanish report have referred extensively to the impact of the austerity measures taken by the Spanish government. The Concluding Observations seriously recommend that Spain respect a human rights approach in the economic measures taken in order to address the crisis. However, and in spite of the moral and legal authority of the documents emanating from the United Nations human rights bodies, it seems that the guarantee of cultural rights, as well as of economic and social rights, is not among the priorities of European governments when designing their strategies in the context of the economic crisis. The tragic risk, which seems to be neglected by political

decision-makers, is that possibilities for returning to the basic standards of human rights in a near future are considerably reduced. Similarly, the European Institutions do not seem to be seriously committed to an economic social and cultural rights approach in the design of policies to face the economic crisis. One problem in the field of cultural rights and cultural policies is the difficulty of measuring these rights in light of the traditional lack of useful indicators. Here, too, things are fortunately changing.

This article presents an international human rights law approach to the development of cultural policies in Europe in the context of the current economic crisis.

## 2. THE TRADITIONAL DISREGARD FOR CULTURAL RIGHTS

Though the Universal Declaration on Human Rights (1948) refers to Civil and Political Rights as well as to Economic, Social and Cultural Rights, all of them being tools for the protection and promotion human dignity, historical and political factors have given rise to an artificial distinction between the first and the second group of rights. The translation of the Universal Declaration on Human Rights into binding instruments was possible only at the expense of the above-mentioned separation of Human Rights in two different Treaties: The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966 (VILLÁN DURÁN., 2009: 17, 18).

### *The question of the legal character of cultural rights*

Civil and political rights imply “*immediate obligations*” in international law. By contrast, economic, social and cultural rights obligations “*are ... progressive*”<sup>1</sup>; and it is precisely this progressive nature which has given rise to numerous problems in interpreting the scope of ESCR” (GÓMEZ ISA, F., 2011: 2). However, as the CESCR states in its General Comment No. 3, “while the Covenant provides for progressive

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<sup>1</sup> Article 2.1 of the International Covenant on Economic, Social and Cultural Rights states that “each State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant ...”.

realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.” It continues by stating that “any deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”

As Gómez Isa points out “this leads to the introduction of a key element when assessing the compatibility or not of retrogressive measures in the context of the ICESCR: *priorities*. A state must recall its international ESCR obligations when undertaking social spending cuts, by ensuring that priority budget areas are not affected.” As this author explains, “perhaps the most important consequence of the debate on public spending priorities is that when the state intends to introduce retrogressive norms or public policies, the burden of proof is inverted; it is the state’s responsibility to prove the need for the proposed measures and that they are justified within the totality of rights recognized in the ICESCR.” Besides, “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party”<sup>2</sup> (GÓMEZ ISA, F., 2011: 5-7) General Comment No. 3 applies to cultural rights as well as to economic and social rights. It shows how ESCR involve specific obligations on the part of the States.

### ***Particular problems regarding cultural rights***

The specific nature of cultural rights has not helped their institutionalization. First, there are problems linked to the determination of the content of cultural rights, since finding a legal definition of “culture” has not been an easy task (NIEC, H.,1998:1), given that this concept is “fluid and changing” (STAMATOPOULOU, E., 2011:3). Moreover, the debate on the tension between universal human rights and cultural relativism, which used to arise in connection with the discussions on cultural rights, has long been invoked as one of the reasons for the neglect of cultural rights (Id.)

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<sup>2</sup> Moreover, as the Committee states in its General Comment No. 3, “in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”

The uses of culture in the Cold War context (BOURGUI, A.; COLIN, J-P; WEISS., P., 1988:14-22), in a way that is very far from the cultural rights approach, as well as the disregard for the capacity of culture to promote development, have both played a decisive role in the neglect of cultural rights. As a result, cultural rights were wrongly understood “as a luxury, as something that comes after bread and water, as an item only for societies at a certain stage of development” (STAMATOPOULOU, E., 2011:3). Finally, one must take into account the reluctance of States to deal with cultural rights, due mainly to their fear that some cultural rights might break up the unity of the nation-state and its territorial integrity. (Id.:4)<sup>3</sup>

Cultural rights are recognized in the International Covenant of Economic, Social and Cultural Rights (ICESCR) in article 15, which establishes that “the States Parties to the present Covenant recognize the right of everyone: (a) to take part in cultural life; (b) too enjoy the benefits of scientific progress and its applications; (c) too benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Some cultural rights are recognized as well within the framework of civil and political rights instruments.<sup>4</sup> Here I will refer only to the right “to take part in cultural life” under the terms of article 15.1.a) of the ICESCR.

### **3. INTERNATIONAL LEGAL ADVANCES IN CLARIFYING THE CONTENT OF THE RIGHT “TO TAKE PART IN CULTURAL LIFE”**

General Comment (GC) No. 21 of the CESCR put forward in 2009 represents a very useful tool for going into greater depth in determining the content of the right to take part in cultural life. The GC arrived after a very long trajectory, which began in 1992 when a study was prepared by the former Committee member Mr. Samba Cor Konate of Senegal.

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<sup>3</sup> However, and despite the above-mentioned problems, which used to lead to qualifying cultural rights as “undeveloped rights,” it is important to note that there is now a long tradition of in-depth academic research on the conceptualization and institutionalization of cultural rights (MARCHÁN ROMERO, J., 2009: 14).

<sup>4</sup> See for this purpose, the document of the Council of Europe titled *European Court of Human Rights, Cultural Rights in the case-law of the European Court of Human Rights*. 2011, which follows the approach mentioned. Federico Lenzerini gives some international examples in his work *Intangible Cultural Heritage: The Living Culture of Peoples* (LENZERINI, F., 2011: 114-118).

The main contributions of the GC to the clarification of the content of the right to take part in cultural life are the following:

1. The confirmation of the anthropological approach to the concept of culture. As the General Comment's Rapporteur, Jaime Marchán, points out, article 15 of the ICESCR is the only one of all the articles in the Covenant that contains the word "life." The anthropological concept of culture finds its best legal expression in the Mexico City Declaration on Cultural Policies (1982), which states that "in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs." The GC is based on this orientation, and considers that culture covers, *inter alia* "ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives". It continues by recognizing that "culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities" (GC, point 13).

2. Cultural rights cover individual rights as well as collective rights. As the Committee states, "cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such (GC, point 9)". The recognition of both individual and collective cultural rights is strengthened by the clarification that "participation covers in particular the right of everyone — alone, or in association with others as a community — to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice (GC, point 15.a)."<sup>5</sup>

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<sup>5</sup> GC, point 37. In any case, as Elsa Stamatopoulou points out, "the Committee has struck a wise *balance between individual rights and collective or group rights*, although it uses the term *community* more comfortably rather than the former terms. Presumably the Committee used this word as less politically charged and sensitive for states". (STAMATOPOULOU, E., 2011:15)

But the definitive basis for this conclusion lies in the clear recognition of indigenous cultural rights by the GC when it states that “ indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures ... States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights”. (PINESCHI, L., 2012: 36-39)

3. Regarding the universalism-cultural relativism debate<sup>6</sup>, the Committee states clearly, using the same wording of article 4 of the Universal Declaration on Cultural Diversity that “no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.” Thus negative *cultural*<sup>7</sup> practices that violate human rights standards cannot be protected by article 15.1 a) of the Covenant. .

4. *Citizen participation in the process of making cultural policies*: The GC states that the right of everyone to take part in cultural life is supported by “the right to take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights under article 15, paragraph 1 (a)” (GC, point 49.e). This statement makes a valuable contribution. If one focuses specifically on the field of cultural heritage, it must be borne in mind that “individuals and communities cannot be seen as mere beneficiaries or users of cultural heritage. Access and enjoyment also imply contributing to the identification, interpretation and development of cultural heritage, as well as to the design and implementation of preservation/safeguard policies and programs.” (STAMATOPOULOU, E., 2011:25) However, indeterminacy as to who will decide on the “importance” of the decision-making process that may have an

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<sup>6</sup> By cultural relativism, I mean here, following Diane Ayton-Shenker, “the assertion that human values, far from being universal, vary a great deal according to different cultural perspectives.” As Ayton-Shenker remarks, “some would apply this relativism to the promotion, protection, interpretation and application of human rights which could be interpreted differently within different cultural, ethnic and religious traditions. In other words, according to this view, human rights are culturally relative rather than universal. Taken to its extreme, this relativism would pose a dangerous threat to the effectiveness of international law and the international system of human rights that has been painstakingly constructed over the decades.” (AYTON-SHENKER, D., 1995)

<sup>7</sup> The *cultural* character of the negative practices mentioned must be examined carefully, since their cultural dimension is not always clear or proven.



impact on cultural life in terms of the GC has rightly been seen as a weakness of the text. (PINESCHI, L., 2012: 46.) In any case, the statement on the GC is valuable since it can contribute to “fluent, non-bureaucratic and participatory” decision-making processes, which, according to Bonet and Donato, are a key factor for “successfully overcoming the crisis.” (BONET, L.; DONATO, F., 2011:9). I will return to this issue later in this article

In addition to the GC of the CESCR, the “Independent Expert in the field of cultural rights” (IE) established by the Human Rights Council constitutes an advance in the field of cultural rights.<sup>8</sup> The IE Ms. Farida Shaheed has contributed greatly to the determination of the content of cultural rights. Among other tasks, she is asked to “identify best practices in the promotion and protection of cultural rights at the local, national, regional and international levels and identify possible obstacles to the promotion and protection of cultural rights, and to submit proposals and/or recommendations to the Council on possible actions in that regard.”<sup>9</sup>

She has paid particular attention to measures to ensure access to cultural heritage (which includes tangible heritage, intangible heritage and natural heritage). This access to cultural heritage is included in the right to take part in cultural life, under the terms of article 15.1 a) of the ICESCR. The Independent Expert began “a constructive dialogue and cooperation with all stakeholders, including States, National Human Rights Institutions, Non-Governmental Organizations, human rights and cultural institutes and other stakeholders on the recognition, access and protection of cultural heritage”.<sup>10</sup> As it noted by Stamatopoulou, this working method “given the novelty of the mandate and the topic...is needed and appreciated”. (STAMATOPOULOU, E., 2011:24). Ms. Farida Shaheed launched a questionnaire on access to cultural heritage among the above-mentioned institutions. In 2011 her first annual report was published. This report “investigates the extent to which the right of access to and enjoyment of cultural heritage forms part of international human rights law... the independent expert explores the concept of cultural heritage from the perspective of human rights and presents a

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<sup>8</sup> Resolution 10/23 of 26 March 2009.

<sup>9</sup>Special Rapporteur in the field of cultural rights. Introduction. Available at <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/SRCulturalRightsIndex.aspx>

<sup>10</sup>“Questionnaire on access to cultural heritage.” Available at <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/CulturalHeritage.aspx>

non-exhaustive list of human rights issues related to cultural heritage.”<sup>11</sup> “The report further contains an analysis of the right of access to and enjoyment of cultural heritage, in particular regarding its normative content, related State obligations and possible limitations. The report’s final section contains conclusions and recommendations.”<sup>12</sup> As will be pointed out later, the identification of States’ obligations is a very useful tool for determining the level of justiciability of a given human right.<sup>13</sup>

#### 4. THE IMPORTANCE OF MEASURING CULTURAL RIGHTS AND CULTURAL POLICIES BY MEANS OF INDICATORS<sup>14</sup>

As Gómez Isa notes, “in the area of ESCR, the ability to accurately measure compliance by states requires a huge amount of data analyzed to a high level of statistical sophistication; this type of data is rarely available in the regular reports that states present to the Committee [on ESCR]”... There is still a long way to go before these indicators become a tool that can effectively monitor the degree of compliance of social and economic rights by states...”The lack of data on ESCR means that courts are reluctant to tackle the assessment of violations of these rights” (GÓMEZ ISA, F., 2011: 8).<sup>15</sup>

States must make efforts to recompile and systematize information since, as Christian Curtis remarks, they do have a lot of information in terms of indicators of public policies (CURTIS, C., 2009, 469).

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<sup>11</sup> For a comprehensive analysis of the relation between cultural heritage and human rights see FRANCONI, F., *Culture, Heritage and Human Rights: An Introduction*, 2009. 1.16.

<sup>12</sup> Statement by Ms. Farida Shaheed, the Independent Expert in the field of cultural rights, to the Human Rights Council at its 17th session, 31 May 2011. Available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11312&LangID=E>  
The Report of the Independent Expert in the field of cultural rights is available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/04/PDF/G1112204.pdf?OpenElement>

<sup>13</sup> As Laura Pineschi notes, following Professor O. De Schutter (PINESCHI, L., 2012:40)

<sup>14</sup> Cultural indicators are oriented to practice: They stimulate political dialogue and offer monitoring tools. In this sense, cultural indicators differ from data, which are useful for the research and analysis of economists and sociologists. Cultural indicators can help politicians to focus on priorities. FUKUDA PARR, (2007), pp. 88 and 83.

<sup>15</sup> Even if the topic of the use of indicators in human rights monitoring mechanisms seems to be a new one, the judge on the International Court of Justice, Augusto Cançado Trindade, has long ago pointed out their necessity, in order to complement the traditional way of monitoring the accomplishment of human rights obligations. (“Investigación aplicada en el IIDH”, available at [http://www.iidh.ed.cr/multic/default\\_12.aspx?contenidoid=22dd2913-8455-4acb-bdd6-ccefc3abf10d&Portal=IIDH](http://www.iidh.ed.cr/multic/default_12.aspx?contenidoid=22dd2913-8455-4acb-bdd6-ccefc3abf10d&Portal=IIDH)).

In any case, there are very important developments in the field of cultural policies, as is the case of the Compendium of the Council of Europe (on “Cultural Policies and Trends in Europe”). The article “Finding Ways to Measure the Cultural Dimension of Human Rights and Development” by Yvonne Donders and Annamari Laaksonen contains excellent ideas for developing cultural indicators. With regard to the design of cultural policies and their measurement, these authors insist on the importance of human cultural rights indicators. . “Contrary to development indicators, human rights indicators are based on international legal standards, implying that human rights indicators can hold States accountable.” (DONDEERS, Y; LAAKSONEN, A., 2009: 6)<sup>16</sup> All this suggests that the legal structure of cultural rights constitutes a useful tool in order to create cultural indicators and to develop cultural policies. In the other hand, cultural policies indicators are necessary for monitoring cultural human rights. Fortunately, data transformed into indicators in the field of culture are developing quite quickly.<sup>17</sup>

It is very positive that the GC of the CESCR states that “in their national strategies and policies, States parties should identify appropriate indicators and benchmarks, including disaggregated statistics and time frames that allow them to monitor effectively the implementation of the right of everyone to take part in cultural life and also to assess progress towards the full realization of this right”. (GC, point 71)

## **5. MONITORING CULTURAL RIGHTS OBLIGATIONS IN THE CONTEXT OF THE ECONOMIC CRISIS: IS IT POSSIBLE?**

A recent article in the *Washington Post* reports that the local government of Venice has been confronted with a “painful and somewhat desperate decision:” putting

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<sup>16</sup> Economic, social and cultural rights, “has been explored through the so-called 4A scheme, reflecting *availability, accessibility, acceptability* and *adaptability*.” These components, which later evolved into *Availability, accessibility and quality*, are useful tools for developing cultural policy indicators. (DONDEERS, Y; LAAKSONEN, A., 2009:5-6) In the European context, the human rights perspective on policy-making is an essential element of the CultureWatchEurope Platform (Council of Europe). See [http://www.coe.int/t/dg4/cultureheritage/cwe/default\\_en.asp](http://www.coe.int/t/dg4/cultureheritage/cwe/default_en.asp)

<sup>17</sup> See in this regard the work of UNESCO, which resulted, in an important measure, from the application of the Convention on Cultural diversity. For example, the UNESCO Culture for Development Indicator Suite, (available at <http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/programmes/culture-for-development-indicators/>) or the work for the measuring cultural diversity of the UNESCO Institute of Statistics (UIS) at <http://www.uis.unesco.org/culture/Pages/cultural-diversity.aspx>.

the Palazzo Manfrin up for sale for \$20.5 million. The reason: “the priority of the Government to save the structure.”<sup>18</sup> UNESCO culture chief Francesco Bandarin refers to “certain conditions” that in his opinion “must be met,” “such as respecting the dignity of the monuments and informing the public of how the money will be spent” in order to make possible to qualify the decision as an acceptable measure.” (*Washington Post*, (July 5, 2012) It is urgent that conditions such as the ones proposed by Mr. Francesco Bandarin be translated into law. Procedural aspects are essential for the protection of human rights. In relation to the procedural aspects of the right to cultural heritage, in her annual report Ms Farida Shaheed states that “access to and enjoyment of cultural *heritage imply contributing to the identification, interpretation and development of cultural heritage, as well as to the design and implementation of preservation/safeguard policies and programs. Effective participation in decision-making processes relating to cultural heritage is a key element of these concepts.* (Annual Report of the IE, 2011, point 58) The participation of civil society in the decision-making process, already established by the GC of the CESCR, seems essential in the context of the economic crisis.

The field of “cultural industries” is suffering as well from the consequences of the economic crisis for cultural rights. In line with the UNESCO Convention on Cultural Diversity, the GC establishes the condition of “availability” as necessary for “the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination”. Availability is defined by the GC 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,...” It also calls for “accessibility” which “consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination.” (GC, point 16). Accessibility could also be understood as “affordability” (DONDEERS, Y; LAAKSONEN, A., 2009: 6). Therefore, human rights standards require that States design their economic and cultural policies in such a way that people can enjoy a level of “affordability” of cultural goods and services. Even if the measures taken in response to the economic crisis may affect cultural rights, they must respect a minimum level of “affordability” of cultural products, in order that

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<sup>18</sup> Cuts affecting the cultural sector are increasing, as we can see in the “Map of cultural cuts” published in the *Guardian*.

States may be in a position to respect the core obligation of article 15.1.a) of the ICESCR.<sup>19</sup>

Specifically, in relation to the impact on human rights of measures responding to the crisis, the CESCR published a letter in which, while realizing “that some adjustments in the implementation of some [of the] Covenant rights are at times inevitable,” it insists that “States Parties, however, should not act in breach of their obligations under the Covenant”. The Statement establishes “that any proposed policy change or adjustment” “has to meet the following requirements: “first, the policy [must be] a temporary measure covering only the period of crisis; second, the policy [must be] necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights; third, the policy [must not be] discriminatory and [must]comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of disadvantaged and marginalized individuals and groups are not disproportionately affected; fourth, the policies must identify the minimum core content of rights or a social protection floor, as developed by the International Labour Organization, and ensures the protection of this core content at all times”. (May 2012, Letter from CESCR Chairperson to States Parties in the context of the economic and financial crisis)The question of how one must understand the temporary character of the measures “responding to the period of crisis” required by the Committee must be answered broadly enough to ensure that this temporary character refers to the effects of the measure as well, and not only to the measure itself.

Furthermore, during its 48th Session (30 April - 18 May 2012), when reviewing the periodic reports by States (as well as the “parallel reports” by civil society), the Committee was informed of the impact of austerity measures on economic, social and cultural rights. In its concluding observation for Spain, the Committee “recommends that

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<sup>19</sup> Besides, the GC states in the section on specific legal obligations that “the right of everyone to take part in cultural life, like the other rights enshrined in the Covenant, imposes three types or levels of obligations on States parties: (a) the obligation to respect”; which 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) To enjoy freedom of opinion, freedom of expression in the language or languages of their choice, and the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind;”...It continues by saying that “This implies the right of all persons to have access to, and to participate in, varied information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning”. (GC, point 40.b).

the State party ensure that all the austerity measures adopted reflect the minimum core content of all the Covenant rights and that it take all appropriate measures to protect that core content under any circumstances, especially for disadvantaged and marginalized individuals and groups. In that regard, the Committee recommends that the State party compile disaggregated statistical information with a view to identifying the individuals and groups affected and that it increase the effectiveness of its efforts to protect their economic, social and cultural rights.” (CESCR, June 2012, point 8)

The most important contribution of these documents lies in the insistence of the Committee on the requirement of respecting the minimum core content of the ESCR affected by the austerity policies. This insistence on the transparency of austerity policies in human rights terms is essential, since the Committee asks for a prior ESCR impact study of the austerity policies, which is also required by the Committee in its appeal for “disaggregated statistical information”. The Committee recommends that Spain review “the reforms adopted in the context of the current economic and financial crisis to ensure that all the austerity measures introduced uphold the level of the protection attained in the realm of economic social and cultural rights and that, in all cases, such measures are temporary and proportionate and do not negatively impinge on economic, social and cultural rights.” (CESCR, June 2012, point 17).

Regarding cultural rights in particular, the Committee expresses its concern that, “in the context of the economic and financial crisis, budget cuts are a threat to the maintenance and development of creative and research capacity in the State party, as well as to opportunities for all individuals and communities to have effective access to take part in cultural life (art. 15)”. The Committee recommends “that the State party strengthen all currently existing measures and adopt any additional ones necessary to ensure the fullest possible enjoyment of the cultural rights enumerated in article 15 of the Covenant”. (CESCR, June 2012, point 17)

## **6. IMPROVING THE JUSTICIABILITY OF CULTURAL RIGHTS AT THE INTERNATIONAL LEVEL**

A problem for the protection of ESCR is the lack of possibility “of appealing to domestic courts in cases of [violations of these rights] if it exists at all, as one of the hurdles facing ESCR is their lack of justiciability in many countries” (GÓMEZ ISA, F., 2011: 8).

At the international level, an important binding instrument was adopted on 10 December 2008: The Optional Protocol to the Covenant on Economic Social and Cultural Rights (OP).<sup>20</sup> Until the OP entered into force<sup>21</sup>, the only way in which the ESCR Committee could monitor States Parties’ obligations was by its review of the “regular reports on how the rights are being implemented”. There was no opportunity to examine individual complaints. This will henceforth be possible thanks to the adoption of the OP. This OP confers competence on the Committee to receive and consider communications. In its article 2 the OP establishes that “communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party”. According to Christian Curtis, the wide range of hypotheses is justified by the fact that ESCR can suffer violations of both an individual and a collective character. He expressly refers to violations of the right to cultural heritage as an example of the collective violations of ESCR (CURTIS, C., 2009: 39).

As Laura Pineschi points out, this competence of the Committee offers advantages in the monitoring of “arbitrary decision-making by States”. In her words, “the assessment of the diligence exercised by a State party as regards an allegation of the infringement of these procedural duties would be an easier task for the ESCR Committee if examined in the context of a complaint made under the Optional Protocol rather than in the context of the periodic report States. In the first case, the Committee can assess the conduct of States in the light of concrete allegations and grievances, while under the periodic reporting procedure it can only make an assessment in the abstract.” (PINESCHI, L., 2012: 46).

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<sup>20</sup> See also point 71 of the IE report.

<sup>21</sup> After the ratification of the OP by Uruguay in February, the OP entered into force in May. Spain has also ratified the OP.

Moreover, specific austerity measures with effects on the right to heritage, or more generally on cultural rights, could thus be identified by the CESCR.

## 7. CONCLUDING REMARKS

The time when cultural rights were considered “under-development rights” seems to be ending. As Elsa Stamatopoulou notes, “the wording of international human rights instruments in terms of cultural rights may be elliptic, non-systematic or unclear - in short, imperfect - but a careful examination of international legal texts, the jurisprudence and other case law of international bodies and international and national practice reveals the normative elements of cultural human rights” (STAMATOPOULOU, E., 2011: 27). All the contributions of the United Nations institutions analyzed in this article have been essential for these normative advances. However, one may be justified in being disappointed when assessing the scarce attention given by European Union institutions to the threat to ESCR posed by the austerity measures adopted by many States.<sup>22</sup>

It is important that “non-governmental organizations ... become familiar with the new developments and the potential that this analytical work of the UN monitoring bodies has unleashed, and [that they] use their work and knowledge to submit information and cooperate with CESCR and the Independent Expert”. (STAMATOPOULOU, E., 2011: 30). In this sense it would be very useful to reactivate the “Strategic Litigation Initiative in Support of the OP-ICESCR,” taking into account the cultural rights perspective.<sup>23</sup>

Last but not least, it should be noted that the UN mechanisms must be combined with preventive measures, since these mechanisms can only identify cultural rights violations once they have occurred. Cultural lawyers and economists specialized in the field of cultural policies should work together to carry out this task.

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<sup>22</sup> Far from the severity of the Committee on ESCR’s recommendations, the requirements suggested by the European Union Agency for Fundamental Rights are very mild, as a working paper elaborated by this Agency shows when it states that “the balance of payments support was provided by the EU under conditions that may pose risks to fundamental rights: in particular, the requirements for large and at times rapid reductions in fiscal deficits ... such conditions *could be supported with a strong, clear and transparent justification.*” (EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, 2010: 46)

<sup>23</sup> See <http://www.escr-net.org/docs/i/1367841>



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